



A PROFESSIONAL ASSOCIATION  
ATTORNEYS AT LAW

1 William J. Maledon, Atty. No. 003670  
 Brett L. Dunkelman, Atty. No. 006740  
 2 OSBORN MALEDON, P.A.  
 2929 North Central Avenue  
 3 21st Floor  
 Phoenix, Arizona 85012-2793  
 4 (602) 640-9000  
 E-mail: wmaledon@omlaw.com  
 5 E-mail: bdunkelman@omlaw.com

the Phoenix Plaza  
 1st Floor  
 929 North Central Avenue  
 Phoenix, Arizona 85012-2793  
 P.O. Box 36379  
 Phoenix, Arizona 85067-6379  
 telephone 602.640.9000  
 facsimile 602.640.9050

6 Attorneys for Defendant

7 *Additional Counsel Listed on Signature Page*

8 UNITED STATES DISTRICT COURT  
 9 FOR THE DISTRICT OF ARIZONA  
 10

11 Daisy Mountain Fire District, on behalf of  
 itself and others similarly situated,

12 Plaintiff,

13 vs.

14 Microsoft Corporation,

15 Defendant.  
 16  
 17

No. \_\_\_\_\_

**NOTICE OF REMOVAL**

**(CLASS ACTION FAIRNESS  
 ACT)**

18 TO THE CLERK OF THE ABOVE-ENTITLED COURT AND TO ALL PARTIES  
 AND THEIR COUNSEL OF RECORD:  
 19

20 Defendant Microsoft Corporation ("Microsoft"), by its counsel, hereby gives  
 notice of its removal of Case No. CV2007-013118 from the Superior Court of the State  
 21 of Arizona, in and for Maricopa County, to this Court. This Court's removal  
 22 jurisdiction is invoked pursuant to 28 U.S.C. § 1441(a) and the Class Action Fairness  
 23 Act ("CAFA"), Pub. L. 109-2, 119 Stat. 4 (2005), codified at 28 U.S.C. § 1332(d) and  
 24 § 1453. As grounds for removal, Microsoft alleges as follows:  
 25  
 26  
 27  
 28

1 **I. THE COMPLAINT**

2 1. On July 24, 2007, Daisy Mountain Fire District filed the complaint in this  
3 action in the Superior Court of the State of Arizona, in and for Maricopa County.

4 Plaintiff's Complaint ("Compl.") is attached as **Exhibit A**.

5 2. Naming Microsoft as the sole defendant, plaintiff purports to represent  
6 two classes of similarly situated "government entities" in Arizona. (Compl. ¶ 40.) The  
7 first putative class is composed of Arizona government entities that have licensed  
8 certain of Microsoft's PC operating system software "indirectly" from Microsoft at any  
9 time during an undefined class period (the "PC operating systems class"). (*Id.*) The  
10 second putative class is composed of Arizona government entities that have licensed  
11 Microsoft Word, Microsoft Excel or Microsoft Office software "indirectly" from  
12 Microsoft at any time during an undefined class period (the "PC applications systems  
13 class"). (*Id.*)

14 3. On behalf of these putative classes of licensees of the relevant software,  
15 the complaint alleges that Microsoft has acted unlawfully to monopolize markets for  
16 "Intel-compatible PC operating system software," "Intel-compatible PC word  
17 processing software" and "Intel-compatible PC spreadsheet software" in violation of the  
18 Arizona Antitrust Act (A.R.S. § 44-1403). (Compl. ¶¶ 166-180.) The complaint alleges  
19 that, as a result, Microsoft "charged artificially inflated prices" and has "caused injury  
20 to the business and property" of the members of the two putative classes. (*Id.* ¶¶ 168,  
21 171, 174, 177 & 180.)

22 4. Plaintiff seeks to recover actual damages for itself and the pleaded classes  
23 of government entity indirect purchasers under the Arizona Antitrust Act. (*Id.* at p. 68.)  
24 Plaintiff also seeks "reasonable attorneys' fees" and "such other and further relief as the  
25 Court may deem just and proper." (*Id.*) The complaint does not specify the amount of  
26 damages plaintiff seeks, whether on behalf of named plaintiff or the putative classes as a  
27 whole.

1           5.       Plaintiff's complaint cites and relies on a case that was previously before  
2 the Superior Court of the State of Arizona, in and for Maricopa County -- *Friedman v.*  
3 *Microsoft*, CV2000-722 ("*Friedman*"). (*Id.* ¶¶ 21-24.) On January 2, 2003, the  
4 *Friedman* plaintiffs filed an Amended/Consolidated Class Action Complaint for  
5 Damages. The *Friedman* Amended/Consolidated Complaint defined two classes of  
6 indirect purchasers, a PC operating systems class and a PC applications systems class,  
7 and expressly excluded "governmental entities" from both class definitions. (*Friedman*  
8 Amend. Compl. ¶ 58 (attached as **Exhibit B**.) The *Friedman* Amended/Consolidated  
9 Complaint also asserted the same theories under the Arizona Antitrust Act as plaintiff  
10 does in this case and sought the same type of recovery from Microsoft.

11           6.       On February 5, 2003, the *Friedman* plaintiffs filed a motion to "certify the  
12 classes as now defined in the[ir] Amended Consolidated Complaint." (Plaintiffs'  
13 Motion to Certify Classes as Now Defined in Their Amended/Consolidated Class  
14 Action Complaint for Damages at p. 20) (attached as **Exhibit C**.) In an order dated  
15 May 12, 2003, the court granted the *Friedman* plaintiffs' motion to certify the classes  
16 "as [a]mended." (Minute Entry, May 12, 2003 (attached as **Exhibit D**.)

17           7.       On January 6, 2005, the court in *Friedman* approved the settlement of that  
18 action and certified a class for settlement purposes. (Compl. ¶ 23.) Again, the  
19 settlement class certified in *Friedman* expressly excluded plaintiff and the putative  
20 classes in this action. (*Id.* ¶ 24.)

21           8.       Pursuant to 28 U.S.C. § 1446(a), Microsoft has collected and attaches to  
22 this Notice a copy of the entire state-court file in this action. A copy of the summons,  
23 the certificate of arbitration, the acceptance of service and the state court notice of  
24 removal to federal court are attached as **Exhibit E**.<sup>1</sup> A copy of the docket sheet for the  
25 above-captioned case from the Superior Court of the State of Arizona, in and for  
26 Maricopa County, is attached as **Exhibit F**.

27  
28 <sup>1</sup> A copy of the complaint is already attached as Exhibit A.

1 **II. TIMELY NOTICE OF REMOVAL**

2 9. Plaintiff served Microsoft with a summons and a copy of the complaint by  
3 mail and Microsoft accepted service, per agreement with plaintiff, as of September 4,  
4 2007. Accordingly, pursuant to 28 U.S.C. § 1446(b), this Notice of Removal is timely  
5 filed within thirty (30) days of the receipt of the summons and complaint by the sole  
6 defendant in this action.

7 **III. JURISDICTION**

8 10. As alleged more fully below, this Court has original jurisdiction under  
9 CAFA over all claims brought by plaintiff, on behalf of itself and all members of the  
10 putative classes. Because plaintiff's action could have been filed in this Court,  
11 Microsoft may remove it pursuant to 28 U.S.C. § 1441(a).

12 11. CAFA was enacted to expand federal jurisdiction over purported class  
13 actions. It provides that a class action may be removed in accordance with 28 U.S.C.  
14 §1446 if: (a) membership in the putative class is not less than 100; (b) any member of  
15 the plaintiff class is a citizen of a foreign country or a state different from any  
16 defendant; and (c) the aggregate amount in controversy exceeds \$5 million. *See*  
17 28 U.S.C. §§ 1332(d), 1453(b).

18 **A. Class Size**

19 12. CAFA's first requirement -- that proposed class membership be no less  
20 than 100 (28 U.S.C. § 1332(d)(5)) -- is satisfied here. Because plaintiff alleges that  
21 "[e]ach Class is believed to number in the hundreds" (Compl. ¶ 41), the proposed  
22 membership in the classes is above 100.

23 **B. Diverse Citizenship**

24 13. CAFA's second requirement -- that any one member of the proposed class  
25 be a citizen of a state different from any defendant (28 U.S.C. § 1332(d)(2)) -- is also  
26 satisfied here.

27 14. Microsoft is a "citizen" of the State of Washington. 28 U.S.C. 1332(c)(1).  
28 Plaintiff concedes Microsoft is a corporation organized under the laws of the State of

1 Washington, the same state in which it has its principal place of business. (Compl.  
2 ¶ 27.)

3 15. The purported classes include Arizona counties. (*Id.* ¶ 40 (including, *inter*  
4 *alia*, “[a]ny Arizona state, or local government, or any of its subdivisions”).) Arizona  
5 counties are “citizens” of Arizona for diversity purposes under 28 U.S.C. § 1332.  
6 *Universal Sur. Co. v. Lescher & Mahoney, Architects & Eng’rs*, 340 F. Supp. 303, 306  
7 (D. Ariz. 1972) (cited with approval by *Moor v. County of Alameda*, 411 U.S. 693, 721  
8 n.54 (1973)). On that basis alone, the CAFA diversity requirement is satisfied.

9 16. Additionally, fire districts in Arizona are entities created by counties,  
10 rather than the state. *See* A.R.S. § 48-261 (2007); *see also Cal. Portland Cement Co. v.*  
11 *Picture Rocks Fire Dist.*, 692 P.2d 1019, 1023 (Ariz. Ct. App. 1984) (finding that fire  
12 districts are quasi-municipal corporations). Because counties are “citizens” of Arizona,  
13 and fire districts are created by counties, named plaintiff is therefore a “citizen” of  
14 Arizona for diversity purposes and is completely diverse from Microsoft, which is a  
15 citizen of Washington.

16 17. Accordingly, diversity of citizenship exists between at least one class  
17 member and the defendant. The minimal diversity of citizenship requirement is  
18 satisfied under CAFA. 28 U.S.C. § 1332(d)(2)(A).

### 19 **C. Amount in Controversy**

20 18. CAFA’s third requirement -- that the aggregate amount in controversy  
21 exceeds \$5 million, exclusive of interest and costs (28 U.S.C. § 1332(d)(2)) -- is  
22 satisfied as well. Although Microsoft disputes liability and damages, the damages  
23 plaintiff claims for itself and the putative classes exceed \$5 million.

24 19. “Plaintiff seeks to recover for damages sustained as result of th[e]  
25 conduct” alleged in the complaint. (Compl. ¶ 6.) Plaintiff also alleges that Microsoft’s  
26 unlawful conduct began in the “late-1980s.” (*Id.* ¶ 2.) Although claims under the  
27 Arizona Antitrust Act have a statute of limitations of four years (A.R.S. § 44-1410),  
28 plaintiff further alleges that “[c]lass members are state entities for the purpose of A.R.S.

1 § 12-510.” (Compl. ¶ 28.) Because section 12-510, if applicable, immunizes state  
2 entities from a statute of limitations defense in certain circumstances, plaintiff may  
3 claim damages for more than four years.

4 20. In addition to actual damages, plaintiff seeks “reasonable attorneys’ fees,”  
5 as well as any further relief the Court deems proper. (Compl. at p. 68.)

6 21. Class plaintiffs in *Friedman* -- who raised the same claims raised by  
7 plaintiff in this action on behalf of other indirect purchasers in Arizona -- submitted an  
8 expert damages report that was jointly authored by Professor Jeffrey MacKie Mason  
9 and Dr. Janet Netz. In that expert report, Drs. MacKie Mason and Netz excluded  
10 purchases by government entities in Arizona when calculating damages. To do so,  
11 Drs. MacKie Mason and Netz relied upon employment data from the U.S. Bureau of  
12 Labor Statistics to compute the percentage of Microsoft’s U.S.-based indirect sales that  
13 were licensed by government entities (federal, state and local) in Arizona. Using the  
14 same data source for this case, but removing purchases for the federal government<sup>2</sup> and  
15 using a time period of the last four years (even though plaintiff may incorrectly allege  
16 damages for a longer time period), Microsoft estimates that for the period of July 2003  
17 to the present: (a) the government PC operating systems class paid more than  
18 \$21.3 million to license over 323,000 copies of Microsoft operating systems software;  
19 and (b) the government PC applications systems class paid more than \$14.9 million to  
20 license over 126,000 copies of Microsoft applications software.

21 22. Plaintiff alleges that it and other class members paid “artificially inflated  
22 prices” for these purchases. (Compl. ¶¶ 168, 171, 174, 177 & 180.) In the *Friedman*  
23 case, Drs. MacKie Mason and Netz calculated the overcharge damages that indirect  
24 purchasers in Arizona claimed to have suffered as a result of Microsoft’s alleged  
25 anticompetitive conduct. For the period from May 18, 1994, through December 15,

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26 <sup>2</sup> The U.S. Bureau of Labor Statistics data source that Drs. MacKie Mason and  
27 Netz relied upon reported separate figures for federal, state and local governments in  
28 Arizona, making it easy to exclude federal government purchases from the calculation  
for this case.

1 2001, Professor MacKie Mason and Dr. Netz claimed average overcharges of  
2 67 percent for Microsoft PC operating systems, 50 percent for Microsoft Word,  
3 42 percent for Microsoft Excel and 62 percent for Microsoft Office. Based on  
4 Dr. MacKie Mason's and Netz's expert work in *Friedman*, the average alleged  
5 overcharge for all at-issue products for the time period covered in *Friedman* is  
6 65 percent.<sup>3</sup>

7 23. The aggregated amount of alleged damages that plaintiff seeks here  
8 (before attorneys' fees) is approximately \$23.6 million. This figure is based on  
9 multiplying the estimates of class purchases of the relevant software described in  
10 paragraph 21 above (\$21.3 million + \$14.9 million = \$36.2 million) by the 65 percent  
11 average overcharge alleged by Drs. MacKie Mason and Netz in the *Friedman* case.

12 24. The *Friedman* case settled before trial. As part of that settlement,  
13 Microsoft issued vouchers providing class plaintiffs \$15 for each purchase of Microsoft  
14 PC operating systems during the class period and \$9 for each purchase of Microsoft  
15 Word, Excel and Office during the class period. Applying those per-license settlement  
16 voucher amounts to the classes plaintiff seeks to represent in this case, the aggregated  
17 amount in controversy (before attorneys' fees) is more than \$5.9 million.

18 25. Using either the alleged overcharge percentages plaintiffs relied upon in  
19 the *Friedman* case or the per-license voucher amounts for which that case ultimately  
20 settled, and using a four-year statute of limitations (even though plaintiff may  
21 incorrectly seek damages for a longer time period), the amount in controversy exceeds  
22 \$5 million before factoring in the attorneys' fees that plaintiff also seeks. Therefore, the  
23 amount in controversy exceeds \$5 million (exclusive of interest and costs).

24  
25 <sup>3</sup> Similarly, class plaintiffs in *Kloth v. Microsoft Corp.*, MDL Docket No. 1332  
26 (D. Md.) -- a class action overcharge case against Microsoft covering the same  
27 products-at-issue, and in which plaintiff's counsel in this case were part of Plaintiffs'  
28 Executive Committee -- submitted an expert report claiming average overcharges of  
56 percent for Microsoft PC operating systems, 55 percent for Microsoft Word,  
62 percent for Microsoft Excel and 64 percent for Microsoft Office. The average  
alleged overcharge for all at-issue products in *Kloth* was 63 percent.

1           26.     Accordingly, this Court has original jurisdiction over plaintiff's claims  
2 under CAFA because: (a) purported class membership is at least 100; (b) there is  
3 complete diversity of citizenship between the parties; and (c) the aggregate amount in  
4 controversy exceeds \$5 million, exclusive of interest and costs.

5   \* \* \* \* \*

6           27.     Microsoft reserves the right to amend or supplement this Notice of  
7 Removal; to present evidence in support of its allegations by way of affidavits,  
8 declarations or oral testimony (*Singer v. State Farm Mut. Auto. Ins. Co.*, 116 F.3d 373,  
9 377 (9th Cir. 1997) (quoting *Allen v. R & H Oil & Gas Co.*, 63 F.3d 1326, 1338 (5th  
10 Cir. 1995)); *Momin v. Maggiemoo's Int'l, LLC*, 205 F. Supp. 2d 506, 510 (D. Md. 2002)  
11 (citing *Singer*)); and to present additional arguments in support of its right to remove  
12 this action.

13           28.     No admission of fact or liability is intended by this Notice of Removal,  
14 and all defenses, affirmative defenses and motions are reserved.

15           29.     Pursuant to 28 U.S.C. § 1446(d), Microsoft will promptly file a true and  
16 correct copy of this Notice of Removal with the Clerk of the Superior Court of the State  
17 of Arizona, in and for Maricopa County, and will serve copies of this Notice on counsel  
18 for plaintiff.

19           DATED this 14th day of September, 2007.

20   OSBORN MALEDON, P.A.

21  
22  
23           By     s/William J. Maledon  
24                     William J. Maledon  
25                     Brett L. Dunkelman  
26                     2929 North Central  
27                     Suite 2100  
28                     Phoenix, Arizona 85012-2794  
                    Attorneys for Defendant



1 **ADDITIONAL COUNSEL FOR DEFENDANT:**

2 Richard J. Wallis  
3 Steven J. Aeschbacher  
4 MICROSOFT CORPORATION  
5 One Microsoft Way  
6 Redmond, Washington 98052  
7 Telephone: (425) 706-8080

8 Robert A. Rosenfeld  
9 Jessica S. Pers  
10 HELLER EHRMAN LLP  
11 333 Bush Street  
12 San Francisco, California 94104  
13 Telephone: (415) 772-6000

14 **CERTIFICATE OF SERVICE**

15  I hereby certify that on September 14, 2007, I electronically transmitted the  
16 attached document to the Clerk's Office using the CM/ECF System for filing and  
17 transmittal of a Notice of Electronic Filing.

18  I hereby certify that on September 14, 2007, I served the attached document by  
19 mail on the following:

20 Mark D. Samson  
21 Gary A. Gotto  
22 Ron Kilgard  
23 Keller Rohrback, P.L.C.  
24 3101 N. Central Ave., Suite 1400  
25 Phoenix, Arizona 85012-2643

26 Louis DeRoon III  
27 DeRoon & Seyffer  
28 2929 N. 44th St., Suite 330  
Phoenix, Arizona 85018

Lynn L. Sarko  
Mark A. Griffin  
Raymond J. Farrow  
Keller Rohrback L.L.P.  
1201 Third Ave., Suite 3200  
Seattle, Washington 98101

Attorneys for Plaintiff

s/N. Ewing