

No. 09-35699

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DIANNE L. KELLEY, KENNETH HANSEN, JIM WALTERS, MATT
MORALES, RUSSELL HALL, and DON SCHRODER,

Plaintiffs-Appellants,

v.

MICROSOFT CORPORATION,

Defendant-Appellee.

United States District Court for the
Western District of Washington at Seattle
District Court No. C07-0475 MJP
The Honorable Marsha J. Pechman

REPLY BRIEF OF APPELLANTS

**GORDON TILDEN THOMAS &
CORDELL LLP**

Jeffrey I. Tilden, WSBA #12219
Jeffrey M. Thomas, WSBA #21175
Mark A. Wilner, WSBA #31150
1001 Fourth Avenue, Suite 4000
Seattle, WA 98154-1007
(206) 467-6477
Attorneys for Plaintiffs-Appellants

KELLER ROHRBACK L.L.P.

William C. Smart, WSBA #8192
Ian S. Birk, WSBA #31431
1201 Third Avenue, Suite 3200
Seattle, WA 98101
(206) 623-1900
Attorneys for Plaintiffs-Appellants

FILED WITH REDACTIONS

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	ARGUMENT	2
A.	Whether Home Basic Is Fairly Called “Vista” Is a Common Issue.....	2
1.	The White Paper.....	3
2.	Vista Capable PCs Lack the Touchstone for Vista—WDDM Compatibility.	5
3.	Microsoft and Industry Insiders’ View of Home Basic	5
4.	Windows Vista: The Official Magazine.....	7
5.	Whether Home Basic Is Fairly “Vista” Represents a Core Question Resolvable Classwide.....	8
B.	Plaintiffs’ Express Upgrade Class Establishes Causation Through Classwide Evidence of Reliance.	10
1.	All Express Upgrade Members Participated in Microsoft’s Upgrade Program to Receive Vista.....	10
2.	Microsoft Misses the Point of <i>Poulos, Garner, Peterson, and Klay</i>	11
3.	<i>Indoor Billboard’s</i> Passive Conduct Justified Class Certification.	14
4.	<i>Schnall</i> Permits Classwide Evidence of Reliance to Establish Causation.....	15
5.	Microsoft’s Limited Pre-Vista-Launch “Education Efforts” Are a Smoke Screen.....	17

C.	The Reasonable Consumer Test Makes the WDDM Class’s Omission Claims Suitable for Class Treatment.....	19
1.	Plaintiffs Uncovered Microsoft’s Omissions Only After Substantial Discovery.....	19
2.	The Omission Claims Do Not “Turn On” the Vista Capable Sticker.	20
3.	Reliance and Causation May Be Proved Classwide When a Defendant Omits Material Information.....	21
4.	Omission Cases Apply an Objective Reasonable Person Test That Does Not Require Individualized Inquiries.....	24
5.	Microsoft’s Ostensible “Disclosures” Regarding WDDM Only Highlight its Omissions.	25
6.	Materiality of Microsoft’s WDDM Omissions Is a Common Issue.....	25
D.	The District Court’s Choice-of-Law Ruling Is Correct.....	27
1.	Washington Law Applies to Plaintiffs’ Claims.....	28
2.	<i>Schnall</i> Reinforces the District Court’s Choice-of-Law Ruling.....	31
III.	CONCLUSION.....	32

TABLE OF AUTHORITIES

Cases

<i>Affiliated Ute Citizens v. United States</i> , 406 U.S. 128 (1972)	24
<i>Blackie v. Barrack</i> , 524 F.2d 891 (9th Cir. 1975)	23-24
<i>Cope v. Metro. Life Ins. Co.</i> , 696 N.E.2d 1001 (Ohio 1998)	23
<i>Dukes v. Wal-Mart Stores, Inc.</i> , 2010 WL 1644259 (9th Cir. 2010)	1, 8-10
<i>Fluke Corp. v. Hartford Acc. & Indem. Co.</i> , 145 Wn.2d 137 (2001)	29
<i>Garner v. Healy</i> , 184 F.R.D. 598 (N.D. Ill. 1999)	11-12
<i>Gartin v. S&M NuTec LLC</i> , 245 F.R.D. 429 (C.D. Cal. 2007)	25
<i>Grays Harbor Adventist Christian School v. Carrier Corp.</i> , 242 F.R.D. 568 (W.D. Wash. 2007)	22, 24, 26
<i>Haberman v. WPPSS</i> , 109 Wn.2d 107 (1987)	30
<i>Indoor Billboard v. Integra Telecom of Wash., Inc.</i> , 162 Wn.2d 59 (2007)	14-15
<i>Johnson v. Spider Staging Corp.</i> , 87 Wn.2d 577 (1976)	28-29, 31
<i>Kelley v. Microsoft Corp.</i> , 251 F.R.D. 544 (W.D. Wash. 2008)	27-31
<i>Kelley v. Microsoft Corp.</i> , 2009 WL 413509 (W.D. Wash. Feb. 18, 2009)	11
<i>Klay v. Humana, Inc.</i> , 382 F.3d 1241 (11th Cir. 2004)	11-14
<i>McCormick v. Fund Am. Cos., Inc.</i> , 26 F.3d 869 (9th Cir. 1994)	27
<i>McLaughlin v. Am. Tobacco Co.</i> , 522 F.3d 215 (2d Cir. 2008)	13, 25

<i>Microsoft Corp. v. Manning</i> , 914 S.W.2d 602 (Tex. App. 1995).....	8
<i>Mills v. Elec. Auto-Lite Co.</i> , 396 U.S. 375 (1970)	24
<i>Oshana v. The Coca-Cola Co.</i> , 225 F.R.D. 575 (N.D. Ill. 2005).....	25
<i>Panag v. Farmers Ins. Co.</i> , 166 Wn.2d 27 (2009)	21
<i>Peterson v. H&R Block Tax Servs., Inc.</i> , 174 F.R.D. 78 (N.D. Ill. 1997).....	11-12, 16
<i>Poulos v. Caesars World, Inc.</i> , 379 F.3d 654 (9th Cir. 2004).....	11-12, 16, 25
<i>Schnall v. AT&T Wireless Servs., Inc.</i> , 168 Wn.2d 125 (2010)	<i>Passim</i>
<i>Thorogood v. Sears, Roebuck & Co.</i> , 547 F.3d 742 (7th Cir. 2008).....	24
<i>U-Haul Int'l, Inc. v. Jartran, Inc.</i> , 793 F.2d 1034 (9th Cir. 1986).....	23
<i>Yokoyama v. Midland Nat'l Life Ins. Co.</i> , 594 F.3d 1087 (9th Cir. 2010).....	21, 24, 32

Statutes

Haw. Rev. Stat. § 480-2(a).....	21
RCW 19.86.020.....	21

Rules

Fed. R. Civ. P. 23	1, 15
--------------------------	-------

Treatises

Restatement (Second) Conflicts of Laws § 145.....	30-31
---	-------

I. INTRODUCTION

Microsoft argues it did nothing wrong. Plaintiffs disagree, and the District Court denied Microsoft's summary judgment motion. But whether Microsoft did anything wrong is not the issue on this appeal. "Rule 23 gives neither party the right to turn the certification decision into a trial." *Dukes v. Wal-Mart Stores, Inc.*, 2010 WL 1644259, at *13 (9th Cir. 2010). At issue is whether Plaintiffs' two proposed narrowed classes raise sufficient common questions on causation warranting class certification. *Id.* They do.

Proposed Express Upgrade Class: Plaintiffs present classwide evidence of actual reliance on Microsoft's misrepresentations. Each class member undisputedly participated in Microsoft's Express Upgrade program to upgrade to Vista. This was the purpose for the program, and there is no other explanation for class members' common conduct. All class members, moreover, were similarly injured. They did not receive Vista.

Proposed WDDM Class: Plaintiffs present material omissions regarding PCs lacking WDDM compatibility. Microsoft, like the District Court, would apply a subjective test to inquire into the "personal idiosyncratic choices" of individual class members. Were this the law, no omission-based consumer fraud claim could ever be certified as a class action. It is not the law, as exemplified by recent decisions in this circuit. Courts apply a presumption of reliance when a

consumer fraud claim relies primarily on omissions. Causation is determined by the omission's materiality pursuant to an objective, reasonable consumer test. Individual class members' motivations are irrelevant.

Microsoft's merits-focused brief puts at issue a key question in this litigation: was it fair for Microsoft to palm-off Home Basic as "Vista"? As discussed below, this issue alone is an overriding, predominating common question that warrants class certification.

II. ARGUMENT

A. Whether Home Basic Is Fairly Called "Vista" Is a Common Issue.

Microsoft argues Home Basic really is a legitimate version of Vista. This question goes to the core of this lawsuit. It also represents an issue common to all class members. Resolution does not depend on what individual class members knew about Vista. Either Microsoft fairly characterized Home Basic as Vista, or it did not.

Microsoft's arguments go to its position on the merits. Microsoft argues Home Basic contains the "vast majority" of Vista's improvements over XP and that "all" Vista editions "deliver innovations in core operating system experiences." Answering Brief ("AB") 6, 9. Plaintiffs and their experts disagree. So does Microsoft's Windows Product Management Group, others within Microsoft, retailers, and OEMs. Plaintiffs' position is based on records prepared

when Microsoft made its decisions, documents generated upon industry reaction to those decisions, expert analysis, and the technology itself. Opening Brief (“OB”) 11-21. Microsoft’s position is largely based on after-the-fact justifications in lawyer-drafted declarations prepared during this litigation. The District Court’s decision did not address this fundamental common issue.

1. The White Paper

Microsoft insiders knew Home Basic was not fairly called “Vista” before Microsoft launched Vista. They studied this question. In its “Windows Vista Naming—Strategy Options & Recommendation,” Microsoft’s Windows Product Management Group recommended Home Basic “carry the Windows brand name *without* the Vista generation name.” FER 113 (emphasis added). In what became known as the “White Paper,” the group stated it was “confident in this recommendation.” *Id.* Restricting “Vista” to premium editions would “better align[] user product expectations to the high visibility innovations uniquely present in the Windows Vista premium versions.” *Id.* The recommendation *not* to call Home Basic “Vista” was “affirmed by a strong endorsement from top OEM partners.” *Id.* Dell told Microsoft it was “in alignment with containing the Vista name to outside the Home Basic sku’s[.]” FER 22.

The White Paper identified the Aero “user experience” and its components as the “[p]roductivity” differentiation between Home Basic and premium Vista

editions. The “[f]ull AERO user experience” included “‘glass’, animations, visual effects, rolodex, alt-tab & taskbar live thumbnail previews.” FER 114. The White Paper documented differentiation between Home Basic and premium Vista editions in “[f]undamental[]” respects including “[s]cheduled backup” and “data recovery across a network,” and “Encrypted File System.” *Id.* The White Paper also documented Home Basic’s deficiencies as compared to the premium Vista editions in areas of “CPU & Performance,” “Communications,” “Networking,” “Media/Entertainment,” and “Mobility.” *Id.*

Microsoft analyzed whether it should call Home Basic “Vista” according to nine factors—and concluded it should not. *Id.* In almost every case, the reasoning for not calling Home Basic “Vista” was to aid consumer clarity (to tell the truth); whereas, the reasoning for doing so was to aid Microsoft’s marketing (to sell more PCs). FER 115-118.

Despite the White Paper’s “confident” recommendation, Microsoft branded Home Basic as “Vista” and certified millions of PCs able to run only Home Basic as “Vista Capable.” Microsoft’s Windows Product Management Group was not the only internal criticism about Home Basic. Numerous employees within various departments questioned the 11th-hour decision to call Home Basic “Vista.” Senior management overruled them each time. OB 14-15 (citing ER).

2. Vista Capable PCs Lack the Touchstone for Vista—WDDM Compatibility.

Vista Capable PCs, upgradable only to Home Basic, lacked WDDM.

Vista's graphical features require WDDM. ER 135. Microsoft considered its WDDM-necessary Aero user interface "fundamental" to the "user experience." ER 475, 754. Microsoft insiders knew it was "critical." ER 370. They knew passing off Home Basic as Vista would result in a "bad experience" and "complete tragedy" for consumers (including those in the two classes sought herein). ER 478. OEMs and retailers chastised Microsoft for including Home Basic as part of the Vista line-up. OB 15-16 (citing ER).

WDDM was the touchstone for "Vista." OB 12 (citing ER). PCs lacking WDDM—Vista Capable PCs upgradable only to Home Basic—were less stable, crashed more, had decreased performance when running video and DVDs, were less secure, required more energy and power, and could not load new and improved software enhancements. ER 137-139. "Improvements" Microsoft identifies were either not improvements, had nothing to do with the operating system, or were already available from third-party vendors for free. ER 141-143.

3. Microsoft and Industry Insiders' View of Home Basic

Pre-launch, Microsoft acknowledged confidentially that the real consumer "experience" of Vista Home Basic would be only "at least equivalent to Windows

XP.” FER 329. As Microsoft employees observed (pre-launch), calling PCs upgradeable to Home Basic as capable of running “Vista” sets up customers “for a bad experience” and would be “a complete tragedy.” ER 478.

After Microsoft launched Vista, others described Home Basic as possibly “the most pointless edition of Windows that Microsoft has ever released.” FER 332. A Senior Corporate Vice President at Acer (“the world’s No. 4 branded PC vendor”) said consumers “won’t feel” the “new Vista experience” with Home Basic; “Premium is the real Vista.” FER 335-36.

Even Microsoft executives were duped by the company’s inclusion of Home Basic as “Vista.” In July 2006, then-Microsoft Senior Vice President Steven Sinofsky bought “an official Vista capable laptop” but “didn’t realize that Vista capable doesn’t necessarily have Aero stuff. Bummer.” FER 162. Despite Microsoft’s “information campaign,” Microsoft Vice President Mike Nash reported he “personally got burned” on a laptop he chose “because it had the vista logo.” ER 372. He was “pretty disappointed that it not only wouldn’t run [Aero] Glass, but more importantly ... Movie Maker.” *Id.* (“I now have a \$2100 email machine”).

OEMs and retailers criticized Home Basic. Wal-Mart wished Home Basic “was not even in the [product] line up.” ER 496. Microsoft acknowledged Wal-Mart’s “feedback has been consistent from all retailers around the world.” *Id.*

Office Depot “would have preferred MS not have a Home Basic. They see this Vista variant as selling down.” ER 498-99. Dell noted Home Basic was suitable for “[b]ooting the Operating System, without running application or games.” FER 13-14. Dell privately told Microsoft “the bar was set too low when Aero was dropped as a requirement for Vista Capable.” ER 354.

4. Windows Vista: The Official Magazine

Windows Vista: The Official Magazine acknowledged (post-launch¹) that Home Basic had none of the features that would interest consumers. These same features had led Microsoft’s Windows Product Management Group to recommend that Vista not include Home Basic. Part II.A.1 *supra*.

The magazine targeted consumers under a licensing contract with Microsoft. FER 213-215, 219. Microsoft and the publisher discussed “editorial strategy” and magazine topics including “how Vista is useful to the consumers” and “what features Vista would offer them.” FER 221-224. The premiere issue included a table of features “consumers would be interested in” based on knowledge “about consumers’ wishes” to differentiate Vista’s versions. FER 225-228. The table listed Home Basic as not “right for” anyone:

¹ After class members purchased their “Vista Capable” PCs.

Which Windows Vista is Right for Me?

VERSION	PRICE	AERO GLASS	MEDIA CENTER	MOBILITY CENTER	CONNECT TO XBOX 360	DRIVE ENCRYPTION	DOMAIN NETWORKING
Windows Vista Home Basic	\$200; \$100 upgrade						
Windows Vista Home Premium	\$240; \$160 upgrade	✓	✓	✓	✓		
Windows Vista Home Business	\$300; \$200 upgrade	✓		✓		✓	✓
Windows Vista Home Ultimate	\$400; \$260 upgrade	✓	✓	✓	✓	✓	✓

February 2007  Windows Vista Magazine 23

FER 239.

5. Whether Home Basic Is Fairly “Vista” Represents a Core Question Resolvable Classwide.

[F]or class certification to be proper ... Plaintiffs must raise questions that the district court concludes, after a rigorous analysis, are susceptible to common resolution at a later stage.

Dukes, 2010 WL 1644259, at *12. “One significant issue common to the class”

may warrant certification.² *Id.* at *20. Whether Home Basic can fairly be deemed

“Vista” is a “significant” question “susceptible to common resolution.” Microsoft

² Plaintiffs cited *Microsoft Corp. v. Manning*, 914 S.W.2d 602 (Tex. App. 1995), for a similar proposition. OB 32 (single common issue may warrant predominance). Instead of addressing the effect of this valid principal, Microsoft tries to distance itself from the *published* appellate decision by attaching *unpublished* letters and orders showing the trial court later decertified the class *sua sponte* for reasons unknown. *Manning*, and the proposition for which it is cited, remains good law. The published opinion certifying a nationwide consumer class action against Microsoft under the Washington CPA has been cited 118 times. FER 313-325.

may argue Home Basic is fairly Vista despite the substantial evidence uncovered showing otherwise. Still, the issue does not depend on, as Microsoft maintains, plaintiffs' individualized "perceptions." AB 33. Home Basic is fairly called Vista, or it is not.³

The facts regarding Home Basic's technology are more common to the proposed class members here than the alleged discriminatory policy is common to the Title VII class members in *Dukes*. As summarized by dissenting Chief Judge Kozinski:

[T]he half-million members of the majority's approved class held a multitude of jobs, at different levels of Wal-Mart's hierarchy, for variable lengths of time, in 3,400 stores, sprinkled across 50 states, with a kaleidoscope of supervisors (male and female), subject to a variety of regional policies that all differed depending on each class member's job, location and period of employment. Some thrived while others did poorly. They have little in common but their sex and this lawsuit.

Dukes, 2010 WL 1644259, at *62. Yet the court affirmed certification given the evidence the class was united by company-wide practices.

Here, class members are united because their Home Basic "upgrades" were to a product not truly part of the Vista family. A jury can resolve the "Home Basic

³ Microsoft seeks tactical advantage by arguing individual class members' "perception" of Home Basic as Vista is relevant. If this were individual litigation where predominance of common issues was not important, Microsoft would maintain a plaintiff's "perception" of the operating system is irrelevant.

is not Vista” issue by viewing the program itself, evaluating expert opinions, assessing numerous admissions by Microsoft and industry insiders, and comparing what Microsoft said about Home Basic before versus what it says now. In short, if *Dukes* is amenable to class certification, Plaintiffs’ proposed narrowed classes also must be.

B. Plaintiffs’ Express Upgrade Class Establishes Causation Through Classwide Evidence of Reliance.

1. All Express Upgrade Members Participated in Microsoft’s Upgrade Program to Receive Vista.

Microsoft summarizes Plaintiffs’ three-step argument as:

[1] everyone who participated in the Express Upgrade program wanted Windows Vista; [2] Windows Vista Home Basic is not “really Vista,” OB 34; ergo, [3] no one who ordered an Express Upgrade to Home Basic received what she expected.

AB 33. Microsoft does not dispute Step [1]. By purchasing a “Vista Capable” PC and taking the steps to participate in Microsoft’s Express Upgrade program, each proposed class member demonstrated a subjective desire to obtain Vista.

Microsoft’s defense depends on its view that Step [2] raises individual issues of class members’ “idiosyncratic perception of ‘the real Vista.’” AB 33. However, whatever “version” of Vista any Express Upgrade participant thought they might receive, none received Vista. This is a common issue. Part II.A *supra*.

Microsoft relies on the District Court's statement: "Plaintiffs who participated in the Express Upgrade Program knowing they would only upgrade to *Vista* Home Basic may not have suffered any injury at all." AB 2, ER 10 (emphasis added). Microsoft ignores Plaintiffs' fundamental contention (and the evidence⁴): Vista Home Basic is not actually Vista to begin with. Whether any individual class member "knew" they would upgrade to Vista Home Basic (or any other version), all undisputedly sought Vista. None received it. This is the "single, logical explanation" that causally links Microsoft's conduct to Express Upgrade class members' harm. *Poulos v. Caesars World, Inc.*, 379 F.3d 654, 667-68 (9th Cir. 2004) (discussing *Garner v. Healy*, 184 F.R.D. 598 (N.D. Ill. 1999), *Peterson v. H&R Block Tax Servs., Inc.*, 174 F.R.D. 78 (N.D. Ill. 1997)); *Klay v. Humana, Inc.*, 382 F.3d 1241, 1259 (11th Cir. 2004) (predominance met where circumstantial evidence and logical inferences show reliance classwide).

2. Microsoft Misses the Point of *Poulos*, *Garner*, *Peterson*, and *Klay*.

Microsoft erroneously argues Plaintiffs' summary of *Poulos* "amounts to wishful thinking." AB 36. *Poulos* states plaintiffs may prove classwide reliance (causation) through circumstantial evidence where a "single, logical explanation" exists for class members' behavior. *Poulos* summarized *Garner* and *Peterson* as

⁴ The Court denied Microsoft's motion for summary judgment on the issue. *Kelley v. Microsoft Corp.*, 2009 WL 413509, at *4 (W.D. Wash. Feb. 18, 2009).

examples of where courts, with other facts, had done this. *Poulos*'s facts did not permit a "single, logical explanation" for class members' behavior (gambling). They do here. There is a "single, logical explanation" for Express Upgrade participants' behavior: they wanted Vista.

These facts are analogous to *Garner*, *Peterson*, and *Klay*. In *Garner*, consumers purchased "car wax" that allegedly lacked wax. The certification defense, as here, centered on predominance. This Court quoted *Garner*:

The court quite sensibly concluded that "if Plaintiffs paid money for a 'wax,' but instead received a worthless 'non-wax' product, then issues of proximate cause would be relatively simple to resolve on a classwide basis."

Poulos, 379 F.3d at 669. Here, Express Upgrade class members paid for PCs Microsoft certified as "Vista Capable," then participated in Microsoft's upgrade program to receive Vista. Yet none received Vista. Like in *Garner*, they paid for Vista ("wax") but received a non-Vista ("non-wax") product.

Peterson involved a class of consumers who paid for tax refund services, none of which they were eligible to receive. This Court quoted *Peterson*:

It is inconceivable that the class members would rationally choose to pay a fee for a service they knew was unavailable.... The only logical explanation for such behavior is that the class members relied on [defendants'] representation that they could take advantage of [the service] by paying the requisite fee.

Id. It similarly is inconceivable that Express Upgrade participants would rationally choose to pay for Vista Capable PCs and attempt to upgrade to Vista if they knew they would never receive Vista. The “only logical explanation” for their behavior is they relied on Microsoft’s representations that their PCs could run Vista and would receive Vista after participating in Microsoft’s Express Upgrade program.⁵

Microsoft likewise distorts *Klay*. *Klay* holds that predominance is met where the fact-finder may find reliance classwide “through legitimate inferences based on the nature of the alleged misrepresentation at issue.” 382 F.3d at 1259. Although *Klay* involved a “variety of specific communications,” “all conveyed essentially the same message.” *Id.* at 1258. Here, regardless of Microsoft’s so-called consumer education effort, its Vista Capable certification and Express Upgrade promotions conveyed the same message: buy this PC and participate in our program, and you will receive Vista. The Eleventh Circuit held:

It does not strain credulity to conclude that each plaintiff, in entering into contracts with the defendants, relied upon the defendants’ representations and assumed they would be paid the amounts they were due.

⁵ This also is why Microsoft’s reliance on *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215 (2d Cir. 2008), is misplaced. There are neither “many factors” (AB 37) nor “varying motivations” (AB 38) for why Express Upgrade members bought Vista Capable PCs and participated in Microsoft’s Express Upgrade program. There only is one: they wanted Vista.

Id. at 1259. Here, it does not strain credulity to conclude each plaintiff, by buying a “Vista Capable” PC and participating in Microsoft’s upgrade program, relied on its representations and assumed they would receive Vista.

3. *Indoor Billboard’s* Passive Conduct Justified Class Certification.

Microsoft does not substantively respond to Plaintiffs’ discussion of *Indoor Billboard v. Integra Telecom of Wash., Inc.*, 162 Wn.2d 59 (2007). Instead, Microsoft calls Plaintiffs’ distinction between active and passive conduct “absurd.” AB 35. However, the distinction fits the key distinguishing features of *Indoor Billboard’s* facts and those here. In *Indoor Billboard*, plaintiffs targeted an improperly assessed sub-charge line-itemed on a utility bill as part of “Taxes and Surcharges.” *Id.* at 67. Some people may have passively paid the total amount and never saw the sub-charge, much less considered its impropriety. Express Upgrade plaintiffs took active steps in trying to get Vista. In addition to purchasing Vista Capable PCs, they filled out forms and provided evidence of their Vista Capable PC purchase to participate in Microsoft’s upgrade program.

Even the *Indoor Billboard* plaintiffs’ passive conduct warranted class certification. The Washington Supreme Court opinion did not review a class certification decision. It reversed summary judgment finding a fact issue for trial on consumer protection causation. On remand, however, the trial court certified a class, extensively discussing predominance and causation. FER 299-300.

Under Microsoft's view of *Indoor Billboard*, no consumer class could ever be certified. All would involve "myriad" issues in determining whether the defendant's conduct caused plaintiffs' injuries. The Washington Supreme Court rejected this "per se rule." *Indoor Billboard*, 162 Wn.2d at 83.

4. Schnall Permits Classwide Evidence of Reliance to Establish Causation.

Avoiding the real issue, Microsoft's position on *Schnall v. AT&T Wireless Servs., Inc.*, 168 Wn.2d 125 (2010), is that it must weigh against class certification because the Washington Supreme Court "cited the district court's causation analysis with approval." AB 30. But *Schnall* cited a *prior* class certification decision of the District Court (what Microsoft calls *Kelley I*). *Schnall* did not cite, or "approve," the District Court's decision denying narrowed class certification (what Microsoft calls *Kelley IV*). Only *Kelley IV* is on appeal. Plaintiffs proposed the two narrowed classes at issue in *Kelley IV* to avoid the causation concerns the District Court expressed in *Kelley I*. The proposed classes and key facts—and how substantive case law and Rule 23 jurisprudence impacts them—are different in *Kelley IV* than *Kelley I*. For Microsoft to simply say that *Schnall* "relies upon the district court" (AB 1) is misleading.

The real issue is whether predominance may be met by presenting common proof of individual reliance. The Washington Supreme Court understood this as

the law. The *Schnall* court remanded to determine whether common proof of individual reliance supported a Washington-only class. 168 Wn.2d at 147. Instead of addressing this issue, Microsoft focuses on a statement in *Schnall*: “where knowledge of the truth would defeat a claim of misrepresentation, that alleged misrepresentation has been eliminated as the ‘but for’ cause of the claimant’s injury.” *Id.* at 146. Microsoft argues no Express Upgrade participant would be injured if they “knew the truth” about Home Basic. AB 35. But there is no evidence of any such person. If they “knew the truth,” one could not explain why they participated in Microsoft’s Express Upgrade program. If they knew they would never receive Vista, why would they try to upgrade to Vista? Compare *Poulos*, 379 F.3d at 669 (quoting *Peterson*) (“inconceivable ... class members would rationally choose to pay a fee for a service they knew was unavailable.”).

Microsoft offers no answer to this question. A class action defendant can always *argue* some hypothetical customer would have purchased the product or service notwithstanding its unfair or deceptive conduct. However, when there is *no evidence* of any such customer, the argument should be rejected.⁶ The parties

⁶ Microsoft suggests Express Upgrade plaintiff Morales “knew what he was getting” because a website “explained” he would be entitled to receive Home Basic. AB 34. Again, Microsoft misses the point. Morales testified he “purchased a computer that was Vista capable but [he] did not receive a Vista capable computer.” FER 287. The other Express Upgrade plaintiffs share similar experiences. See, e.g., FER 277, 267.

have litigated this case for three-plus years. ER 610. Microsoft has never identified anyone who bought a Vista Capable PC, participated in its Express Upgrade, and yet did not care whether they received Vista.

5. Microsoft’s Limited Pre-Vista-Launch “Education Efforts” Are a Smoke Screen.

Microsoft tries to defend denial of narrowed class certification referring to information made available to consumers, as if someone would have bought a Vista Capable PC and tried to upgrade to Vista if they knew they would never receive Vista. The Vista Capable program period began *before* Microsoft launched Vista. There was no way consumers could comprehend what was, and was not, Vista.

Consumers also had no context for descriptions of Vista features because they purchased Vista Capable PCs before Microsoft unveiled Vista. Microsoft knew this was problematic for customer education—but beneficial for its profits. Microsoft doubted “informative materials” would assist consumers pre-launch because Aero was not yet public; consumers would lack “context” for Aero:

- Customers may not have any context from phrases like “Aero Glass or Windows Defender or Sideshow[.]” The average consumer would not know whether (s)he needs Aero-Glass or Windows Defender or not. Retail sales person cannot explain what Aero Glass is or what it will do for them four – six months prior to Vista launch.

* * *

- It is taking us incredibly long time to explain to OEMs the benefits and value prop of each feature/scenario. How can we communicate this to an end-user in a document, when vast majority of customers can't understand what an OS does for them?
- I do not see any benefit of providing such a list to customers, when they are in the store buying a PC, not an OS. *Trying to “educate” customers about features of an OS that is not available may very well confuse them and may cause them to delay their purchase – the exact opposite of what we want to see.*
- Less than 5% of customers typically upgrade OS. Let's not confuse the masses for the sake of providing clarity to “enthusiasts.”

FER 77 (emphasis added).

Microsoft planned “[m]inimal or no signage” about Vista in retail stores until days before Vista’s launch. FER 71. Microsoft implemented a Vista “ad embargo” until December 2006 and recommended that OEMs “not promote” Vista independently. FER 66. Microsoft’s “strategy” was to do “very little to drive demand and awareness for Windows Vista” to avoid anything “that would stall XP PC ... sales during the Holidays.” *Id.*; FER 56 (being “more forthright” about aligning “Vista Capable” with Home Basic was “probably good” for consumers, “but not necessarily good for sales channels” because it could “de-value” PCs). Microsoft did not want to educate consumers for fear it “may cause them to delay their purchase.” OB 18-19 (citing ER). This was contrary to its goal to maintain sales. OB 10 (same).

Moreover, Microsoft's "information materials" contained the misstatement that "[a]ll Windows Vista Capable PCs will run the core experiences of Windows Vista." AB 9, 10 (and cited SERs). Aero was a "core experience." FER 83, 101, 104, 180. Microsoft knew this would only become clear to consumers after launch. FER 77.

Microsoft's representations are also false as to PCs lacking WDDM. Microsoft identifies "core experiences" as "innovations in ... security, and reliability." OB 9. But these Vista fundamentals require WDDM. ER 267-68 ("crash protection"; "increased security"). Microsoft also falsely represented that Aero may require hardware upgrades. Intel 915 laptops lacking WDDM support could *never* be upgraded to run Aero. FER 180 ("misleading" as "aero won't be there EVER for many of these machines"; "wrong for customers"); FER 204-205. Microsoft never disclosed the deficiencies of PCs lacking WDDM.

C. The Reasonable Consumer Test Makes the WDDM Class's Omission Claims Suitable for Class Treatment.

1. Plaintiffs Uncovered Microsoft's Omissions Only After Substantial Discovery.

Microsoft asserts Plaintiffs rely on "sleight of hand" by attempting to "re-cast" claims as omissions after previously litigating them as misrepresentations. AB 43. This is wrong for two reasons. First, they were never previously litigated; they are claims of a new, distinct proposed class. Second, the omission claims

were discovered only during the course of this litigation after Microsoft revealed what it had previously never disclosed publicly.⁷ That is, by dropping the WDDM requirement for Vista Capable PCs—and doing so only during the Vista Capable program period—the PCs proposed class members purchased did not meet the requirements for running even Home Basic after Vista launched.

2. The Omission Claims Do Not “Turn On” the Vista Capable Sticker.

Microsoft does not dispute that a reliance presumption is warranted when the claim primarily alleges omissions. Microsoft, instead, argues the District Court correctly characterized the WDDM class claim as alleging misrepresentations based on Microsoft’s Vista Capable sticker. This is incorrect. The sticker itself makes no mention of WDDM, and consumers were not otherwise afforded meaningful disclosure about the impact from the lack of WDDM.

The District Court believed the sticker had significance to the proposed WDDM class claims because Plaintiffs refer to the sticker in the WDDM class definition. ER 15 (class definition “instructive”). However, the reference there is for a different, valid purpose: to identify WDDM class members. Microsoft calls

⁷ Even then, Microsoft produced most documents as “CONFIDENTIAL.” Only after litigating Microsoft’s “CONFIDENTIAL” designations was the information unsealed for public consumption. ER 628-66 (docket listing more than 15 decisions on sealing requests).

this “absurd” but does not explain why. Instead, Microsoft quotes the District Court opinion about why it believes deception caused by the sticker is necessary to the WDDM class members’ claims—rendering them, the argument goes, misrepresentation-based, not omission-based. AB 45. This is mistaken. A case primarily alleges omissions, even if the defendant makes other disclosures, when plaintiffs “base their lawsuit only on what [a defendant] did not disclose.” *Yokoyama v. Midland Nat’l Life Ins. Co.*, 594 F.3d 1087, 1093 (9th Cir. 2010). As to the WDDM class, the sticker helps identify class members, not evidence a misrepresentation. Microsoft’s efforts to confuse the narrowed WDDM class with the original, broader class should be rejected.

3. Reliance and Causation May Be Proved Classwide When a Defendant Omits Material Information.

Microsoft argues Plaintiffs misunderstand the presumption of reliance applicable in omission cases because the presumption, according to Microsoft, applies only in securities fraud cases. But this Court applied the presumption earlier this year in a Hawaii consumer fraud case.⁸ *Yokoyama*, 594 F.3d at 1092-

⁸ Plaintiffs cited *Yokoyama* repeatedly in their opening brief. Microsoft never addresses it. Both the Washington and Hawaii CPAs prohibit “unfair or deceptive acts or practices.” RCW 19.86.020; Haw. Rev. Stat. § 480-2(a). Courts have construed “deceptive” in both acts not to mean actual deception, but rather merely the capacity to deceive. *Panag v. Farmers Ins. Co.*, 166 Wn.2d 27, 47 (2009); *Yokoyama*, 594 F.3d at 1092.

93 (reversing denial of class certification as per se abuse of discretion). The Western District of Washington recently applied the presumption in a Washington consumer fraud case in particular:

One way to overcome the individual nature of reliance is through a presumption of reliance, otherwise common questions are unlikely to predominate over individual ones. *Binder [v. Gillespie]*, 184 F.3d [1059,] 1063 [(9th Cir. 1999)]. A presumption of reliance is appropriate in fraud cases such as this one, where Plaintiffs have *primarily* alleged omissions, even though the Plaintiffs allege a mix of misstatements and omissions. *Id.* at 1064. Proof of the omissions will *not* be based upon information each class member received about the furnaces, but on what Carrier allegedly concealed in light of what consumers reasonably expect. Thus, ***this rule appears applicable to the current CPA fraud claim, just as it was in the Securities and Bankruptcy cases in which it has already been applied.***

Grays Harbor Adventist Christian School v. Carrier Corp., 242 F.R.D. 568, 573 (W.D. Wash. 2007) (emphasis added) (granting class certification).

The Washington Supreme Court recently held omission cases are subject to “more generalized” proof of causation because “the lack of information [serves] as the common cause.” *Schnall*, 168 Wn.2d at 147. Although the Court did not use the phrase “presumption of reliance,” it reasoned that omission cases differ from misrepresentation cases and may be more amenable to classwide treatment because causation can be established by the lack of material information. *Id.* This

is consistent with this Court's presumption-of-reliance cases like *Blackie v. Barrack*, 524 F.2d 891 (9th Cir. 1975).⁹ OB 41-44 (summarizing cases).

It also appropriately fits with the WDDM class omission allegations. Microsoft implemented a deceptive marketing strategy that, through substantial time and expense, achieved its intended result: maintaining sales of "Vista Capable" PCs.

It is not easy to establish actual consumer deception through direct evidence. The expenditure ... of substantial funds in an effort to deceive consumers and influence their purchasing decisions justifies the existence of a presumption that consumers are, in fact, being deceived. *He who has attempted to deceive should not complain when required to bear the burden of rebutting a presumption that he succeeded.*

U-Haul Int'l, Inc. v. Jartran, Inc., 793 F.2d 1034, 1041 (9th Cir. 1986) (emphasis added) (applying reliance presumption to "palming off" consumer claim under Lanham Act).

⁹ This circuit is not without support elsewhere. Reversing denial of class certification of claims including consumer fraud, the Ohio Supreme Court held:

It is not necessary to establish inducement and reliance upon material omissions by direct evidence. When there is nondisclosure of a material fact, courts permit inferences or presumptions of inducement and reliance. Thus, cases involving common omissions across the entire class are generally certified as class actions, notwithstanding the need for each class member to prove these elements.

Cope v. Metro. Life Ins. Co., 696 N.E.2d 1001, 1008 (Ohio 1998).

4. Omission Cases Apply an Objective Reasonable Person Test That Does Not Require Individualized Inquiries.

There is no need to delve into “personal idiosyncratic choices” of any individual WDDM class member’s purchasing decision. AB 26. The test is an objective reasonable consumer test, not the subjective inquiry applied by the District Court. Proving materiality of Microsoft’s omissions is not based on individual choices any one class member made. It is based on the nature of what Microsoft concealed versus what a reasonable consumer would expect. *Grays Harbor*, 252 F.R.D. at 573; *see also Affiliated Ute Citizens v. United States*, 406 U.S. 128, 153-54 (1972); *Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 384-85 (1970); *Blackie*, 524 F.2d at 905-08; *Yokoyama*, 594 F.3d at 1093. As this Court recently stated:

These plaintiffs base their lawsuit only on what Midland did not disclose to them in its forms. The jury will not have to determine whether each plaintiff subjectively relied on the omissions, but will instead have to determine only whether those omissions were likely to deceive a reasonable person. This does not involve an individualized inquiry.

Yokoyama, 594 F.3d at 1093.

The cases Microsoft cites (primarily out-of-jurisdiction) that “consumer understanding and motivations” are relevant are affirmative misrepresentation, *not* omission, cases. *Thorogood v. Sears, Roebuck & Co.*, 547 F.3d 742, 743 (7th Cir.

2008) (affirmative misrepresentation claim that “stainless steel” dryer drums were deceptive); *McLaughlin*, 522 F.3d at 222-26 (affirmative misrepresentation claim that “Light” cigarettes were deceptive); *Poulos*, 379 F.3d at 665 (affirmative misrepresentation claim that “labeling” and “appearance” of computerized poker machines were deceptive); *Gartin v. S&M NuTec LLC*, 245 F.R.D. 429, 437-38 (C.D. Cal. 2007) (“various” alleged affirmative misrepresentations in common law fraud claim); *Oshana v. The Coca-Cola Co.*, 225 F.R.D. 575 (N.D. Ill. 2005) (“various representations” regarding ingredients of fountain diet Coke; misapplication of objective versus subjective test on materiality in any event).

5. Microsoft’s Ostensible “Disclosures” Regarding WDDM Only Highlight its Omissions.

Microsoft argues it and others “disclosed” the significance of WDDM. AB 47. It cites a handful of sources. Many are obscure and technical. Not a single one mentions any of the WDDM omissions that serve as the basis of the WDDM class claims. *Compare* OB 40-41 (listing omissions) *with* claimed “disclosures” (SER 51-52, 99, 170, 457, 441, 444, 447-50, 453, 462).

6. Materiality of Microsoft’s WDDM Omissions Is a Common Issue.

The objective materiality test is a common issue ripe for classwide adjudication because it focuses on what a reasonable consumer would expect to receive. Therefore, Microsoft’s attack on Plaintiff Dianne Kelley, as an

individual, is misplaced. Her individual motivations regarding why she purchased her PC are insignificant in assessing whether Microsoft's omissions would be material to a reasonable consumer.¹⁰ Ms. Kelley testified she only discovered being wronged by Microsoft after she had seen a PC operating a real version of Vista (one with WDDM) and could compare it to Home Basic—the only “version” to which her “Vista Capable” PC could upgrade. ER 516-19. Ms. Kelley's discovery of deception after-the-fact is typical in omission cases. For example, we doubt the *Grays Harbor* plaintiffs purchased furnaces they knew would fail prematurely; they only discovered the omitted defect after-the-fact.

Microsoft does not persuasively distinguish *Grays Harbor*. Microsoft acknowledges that, in cases such as *Grays Harbor*, courts apply materiality objectively as a common, classwide issue. AB 53 n.16. Microsoft agrees non-disclosure of a known defect that caused premature failure would be material to any purchaser—i.e., “across a class.” *Id.* Yet that is analogous to the WDDM class's omission claim. Microsoft failed to disclose a known defect (lack of WDDM) that caused premature failure (PCs' “obsolescence,” ER 751). Microsoft

¹⁰ Similarly misguided is Microsoft's argument that “determination of Ms. Kelley's individual claim would say nothing about the materiality of WDDM to other class members who bought PCs with different expectations.” AB 52. Materiality under the reasonable consumer test is not subjective as to each class member.

confidentially described these PCs as “old channel,” “end-of-life” computers (ER 415-16) that “will not offer any graphics stability or performance improvements over Windows XP, nor will they support any of the visual quality/productivity/style improvements over Windows XP” (ER 815). *See also* ER 137-139 (expert on deficiencies of Vista Capable PCs lacking WDDM).

Microsoft argues materiality on the merits when it asserts “only a tiny percentage” of WDDM class members would ever try to upgrade; therefore, the WDDM omissions must not be material. AB 51. Microsoft can try this argument on the jury. It applies classwide. Plaintiffs believe they have the better position. Whether a consumer initially intended to upgrade or not, Microsoft made the *permanent* choice for them. They cannot, and will never be able to, upgrade.¹¹

D. The District Court’s Choice-of-Law Ruling Is Correct.

The District Court ruled Washington law applies to Plaintiffs’ class claims, not the laws of the states in which class members reside. *Kelley v. Microsoft Corp.* (“*Kelley P*”), 251 F.R.D. 544, 553 (W.D. Wash. 2008). *Schnall* cited *Kelley*

¹¹ *McCormick v. Fund Am. Cos., Inc.*, 26 F.3d 869 (9th Cir. 1994), cited by Microsoft, sheds no light on whether materiality here may be resolved on a classwide basis. *McCormick* is individual securities fraud claim. It addressed materiality on summary judgment. The Court determined the plaintiff could not establish any alleged misstatements and omissions were material. The Court held “the disclosures were accurate, and the information was adequate for McCormick to act upon.” *Id.* at 884.

I with approval on this point. 168 Wn.2d at 132. Plaintiffs and Microsoft agree the District Court’s choice-of-law ruling is not before this Court.¹² Still, Microsoft complains this Court should not remand for nationwide class certification based on *Schnall*.

Microsoft misrepresents *Schnall*. Microsoft asserts *Schnall* “forecloses a nationwide CPA class” because the Washington “CPA only applies to claims brought by persons residing in Washington.” AB 55. The Washington Supreme Court actually held the CPA was limited to Washington residents “in the context of this case.” 168 Wn.2d at 143. The “context” in *Schnall* was that the various laws of the states of the plaintiffs’ *area codes* applied to their claims. *Id.* at 133. The context is different here.

1. Washington Law Applies to Plaintiffs’ Claims.

The District Court properly applied Washington law. Washington employs the “most significant relationship test” for choice of law. *Johnson v. Spider Staging Corp.*, 87 Wn.2d 577, 581 (1976) (following Restatement (Second) Conflict of Laws (“Rest.”)). Washington considers contacts with each relevant

¹² Microsoft nonetheless argues *Kelley I* is against the “weight of authority.” AB 56 n.17. It is not. Although some cases refuse to apply the law of the state in which a defendant is headquartered *for that reason alone*, that is not why Washington law applies here. The overwhelming weight of the contacts pertinent to the most-significant-relationship test point to Washington.

jurisdiction, and determines which are most significant and where they are found.

Id. The contacts are evaluated “according to their relative importance with respect to the particular issue.” *Fluke Corp. v. Hartford Acc. & Indem. Co.*, 145 Wn.2d 137, 149 (2001).

The record before the District Court established that the significant contacts relevant to Plaintiffs’ claims are with Washington. Microsoft is a Washington corporation, with headquarters in Washington. ER 323 ¶2.3, FER 305 ¶2.7. Microsoft selected Washington law in many contracts, including those with class members for its Vista Capable program:¹³

REDACTED

- “End-User License Agreements” governing proposed class members’ license to use XP on “Vista Capable” PCs. FER 349.

Microsoft has never disputed that it “developed and launched its allegedly deceptive promotional program” in Washington. *Kelley I*, 251 F.R.D. at 552 (quoted in *Schnall*, 168 Wn.2d at 132). The individuals responsible for the

program, and every witness Microsoft identified in its Initial Disclosures, worked from Washington. FER 371-374, 380 ¶ 2, 356, 366-367, 361.

In contrast, Microsoft pointed only to the state of each class member's computer purchase.

On this record, the District Court concluded:

Defendant created its allegedly deceptive and unfair marketing scheme in Washington. Defendant is incorporated, does business, and has its principal headquarters in Washington. One of the named plaintiffs is a Washington resident. Further, Defendant contractually required OEMs participating in the allegedly deceptive or unfair scheme to litigate under Washington law.

Kelley I, 251 F.R.D. at 550.

The District Court analyzed relevant contacts using choice-of-law principles from Restatement law. Washington is “where ‘the conduct causing the injury occurred,’” and “where Defendant resides and created the alleged unfair or deceptive marketing scheme.” *Id.* at 552 (quoting Rest. § 145(2)(b)). “[W]hen the place of injury can be said to be fortuitous ... as in the case of fraud and misrepresentation ... there may be little reason in logic or persuasiveness to say that one state rather than another is the place of injury.” *Id.* (quoting Rest. § 145

¹³ Contractual choice-of-law clauses are relevant contacts in tort claims even when they do not govern the claims. *Haberman v. WPPSS*, 109 Wn.2d 107, 159 (1987).

cmt. *e*). “In such a case, the state in which the fraudulent conduct arises has a stronger relationship to the action.” *Id.* “Where the defendant’s conduct causes harm in two or more states, the ‘place where the defendant’s conduct occurred will usually be given particular weight in determining the state of the applicable law.’” *Id.* (quoting Rest. § 145 cmt. *e*). Here, the place of injury is fortuitous, and Microsoft’s conduct occurred in Washington. *Id.* at 552-53.

The District Court went a step further and considered whether “‘some other state has a greater interest’” even if the contacts were evenly balanced. *Id.* at 553 (quoting *Johnson*, 87 Wn.2d at 582). Relying on black-letter law (Rest. § 145 cmt. *c*), the District Court determined Washington still has the greater interest because its CPA targets unfair practices “either originating from Washington businesses or harming Washington citizens.” *Id.*

2. *Schnall* Reinforces the District Court’s Choice-of-Law Ruling.

Schnall cited this analysis with approval. 168 Wn.2d at 132. In *Schnall*, unlike here, the proposed class claims were subject to a choice-of-law clause “mostly based on customers’ area codes.” *Id.* at 133. The customers chose the area code to be used such that they “selected which forum’s law would apply.” *Id.* *Schnall* never considered the contacts with Washington and other states, because it applied the general rule that choice-of-law clauses will be enforced absent a contrary public policy reason. *Id.* Thus, *Schnall* applied the laws of each state.

Schnall then considered potential “[e]xtraterritorial” application of the Washington CPA to non-residents who had selected non-Washington law. *Id.* at 142. The court concluded these non-resident claims “occurr[ed] *outside of* Washington.” *Id.* (emphasis added). The court never examined extraterritorial applicability of the CPA to non-residents with claims governed by Washington law because the defendants’ acts occurred *within* Washington.¹⁴ Nothing in *Schnall* forecloses a nationwide class unified by Washington law, as here.

III. CONCLUSION

The District Court abused its discretion because it denied narrowed class certification based primarily on legal error. *Yokoyama*, 594 F.3d at 1091. It erroneously concluded a consumer class may never demonstrate classwide reliance in misrepresentation claims, mischaracterized the WDDM class claim as misrepresentation-based, and failed to apply the objective test for causation in omission claims. This Court should reverse the District Court’s decision and remand the matter for further proceedings.

¹⁴ Under Microsoft’s “extraterritorial” position, this case would have to be litigated as 50 separate class actions, in 50 separate courts—all applying Washington law.

Respectfully submitted this 27th day of May, 2010.

GORDON TILDEN THOMAS & CORDELL LLP

By 

Jeffrey I. Tilden, WSBA #12219

Jeffrey M. Thomas, WSBA #21175

Mark A. Wilner, WSBA #31550

KELLER ROHRBACK L.L.P.

By 

William C. Smart, WSBA #8192

Ian S. Birk, WSBA #31431


Attorneys for Plaintiffs-Appellants

**CERTIFICATE OF COMPLIANCE WITH F.R.A.P. 32(a)(7)(C)
AND NINTH CIRCUIT RULE 32-1 FOR
CASE NUMBER 09-35699**

I certify that, pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached reply brief is proportionately spaced, has a typeface of 14 points or more, and contains 6,995 words.


Dated this 27th day of May, 2010.

**GORDON TILDEN THOMAS &
CORDELL LLP**

By: 

Jeffrey I. Tilden, WSBA #12219
Jeffrey M. Thomas, WSBA #21175
Mark A. Wilner, WSBA #31150
1001 Fourth Avenue, Suite 4000
Seattle, WA 98154-1007
(206) 467-6477
Attorneys for Plaintiffs-Appellants

KELLER ROHRBACK L.L.P.

By: 

William C. Smart, WSBA #8192
Ian S. Birk, WSBA #31431
1201 Third Avenue, Suite 3200
Seattle, WA 98101
(206) 623-1900
Attorneys for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on May 27, 2010, this original and 7 copies of REPLY BRIEF OF APPELLANTS were sent via Federal Express to:

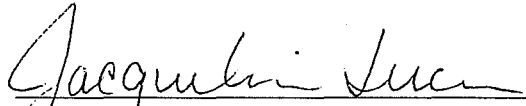
Office of the Clerk
United States Court of Appeals for the Ninth Circuit
95 Seventh Street
San Francisco, California 94103-1526

I also caused to be served via legal messenger/Federal Express one copy of REPLY BRIEF OF APPELLANTS to:

Stephen M. Rummage
Cassandra L. Kennan
Charles S. Wright
Davis Wright Tremaine LLP
1201 Third Avenue Suite 2200
Seattle, Washington 98101-3045
(Via Legal Messenger to be delivered on March 22, 2010)

Charles B. Casper
Montgomery, McCracken, Walker & Rhoads
123 South Broad Street
Philadelphia, PA 19109
(Via Federal Express)

Signed this 27th day of May, 2010.



Jacqueline Lucien, Legal Secretary