

No. 08-80030

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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DIANNE L. KELLEY and KENNETH HANSEN, representing themselves and  
others similarly situated,

Plaintiffs-Respondents,

v.

MICROSOFT CORPORATION,

Defendant-Petitioner.

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Petition to Appeal Immediately from an Order Granting Class Certification  
By the United States District Court for the Western District of Washington,  
No. C07-475 MJP  
Honorable Marsha J. Pechman, United States District Judge

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**ANSWER TO PETITION FOR PERMISSION TO APPEAL**

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## I. INTRODUCTION

Plaintiffs Dianne Kelley and Kenneth Hansen respectfully request that Microsoft's Petition for Permission to Appeal be denied. The district court correctly ruled that Washington law governs plaintiffs' claims against Microsoft, and that common issues predominate with respect to plaintiffs' price-inflation-based claims under the Washington Consumer Protection Act, Wash. Rev. Code § 19.86.010 *et seq.* ("WCPA") and Washington unjust enrichment law. Microsoft fails to establish that the district court's order is "manifestly erroneous." *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 959 (9th Cir. 2005). State class action law has greater prominence in federal jurisprudence after passage of the Class Action Fairness Act, Pub. L. No. 109-2, 119 Stat. 14 (2005) ("CAFA"). However, because CAFA expanded only federal diversity jurisdiction, both choice of law and plaintiffs' substantive claims are governed by state law. Washington law, which Microsoft virtually ignores, supports the district court's discretionary class certification order.

## II. STATEMENT OF FACTS

### A. The Windows Vista Capable Program

Windows Vista is Microsoft's latest PC operating system and the successor to Windows XP. Long before Microsoft released Vista in January 2007, concern

was expressed that announcing its release would “kill[] sales” of existing XP PCs because only “few” such PCs would be capable of running the new operating system. Dkt. No. 131 at 134, 142.<sup>1</sup> The purpose of the Windows Vista Capable program was to maintain XP sales before the Vista launch. By designating PCs as “Windows Vista Capable,” Microsoft was able to portray such PCs as ones that would run the new operating system.

**B. Microsoft Gives the Vista Name to PCs Incapable of Running Vista.**

**1. The Vista Graphics Requirement**

In summer 2005, Microsoft considered Vista’s new graphics-intensive user interface “fundamental” to “customer experience.” *Id.* at 134. Internal comment described a PC incapable of supporting the new interface as “just a souped up XP logo’ed system.” *Id.* at 145. Microsoft knew that for a PC to be considered “Vista Ready” – a phrase later dropped in favor of “Vista Capable” – the PC had to support Microsoft’s Windows Display Driver Model, referred to within Microsoft as “WDDM” (or “LDDM,” a reference to Vista’s pre-launch code name “Longhorn”). *Id.* at 28, 29.

The WDDM requirement was originally the touchstone for using the Vista name. What would eventually be called “Windows Vista Home Basic” was, in

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<sup>1</sup> Citations to “Dkt.” are to the district court docket.

2005, identified with a non-Vista version of Windows called “Windows 2006,” and was to be sold bearing Microsoft’s XP logo. *Id.* at 4-8. That version of Windows was designed for two to three year-old PCs lacking WDDM capability. *Id.* at 35, 83. Microsoft reserved the Vista name for “premium” or WDDM-capable PCs. *Id.* at 5, 35. PC manufacturer Dell, among others, was “in alignment with containing the Vista name to outside . . . Home Basic.” *Id.* at 27.

**2. Microsoft Lowers the Bar for Vista Capability to Maintain Demand and Price.**

Microsoft belatedly discovered, however, that at the time of Vista’s expected launch only 4% of PCs in the market would be deemed “Vista Capable” under the then-current requirements. *Id.* at 59-60, 63. The widely used Intel 915 chipset did not support the graphics-intensive user interface. *Id.* at 4, 30, 68. As a result, Microsoft eliminated the WDDM requirement for the Vista Capable designation. *Id.* at 2, 30-32. Thus, despite having determined “18 months ago since inception” that PCs lacking WDDM capability would *not* be Vista Capable, Microsoft lowered the bar and stretched the Vista name to encompass what were essentially only “souped up” XP-based PCs. *Id.* at 45, 145. Microsoft acknowledged internally that the more PCs it could say were “Vista Capable,” the more that would be *sold* and *priced* as upgradeable to “Vista.” *Id.* at 100.

**C. Microsoft Stands Firm on Lowering the Bar for “Vista Capability” Despite Internal and External Outrage at “Selling Down.”**

After Microsoft lowered the bar for what would be considered Vista Capable, many within Microsoft had serious reservations with that decision. As one employee observed in March 2006:

Based on objective criteria that exist today for [Vista] capable even a piece of junk will qualify ☺ . . . For the sake of Vista customers, it will be a complete tragedy if we allowed it.

*Id.* at 137. Microsoft’s upper management overruled those internally who had objected to putting the Vista name on these non-Vista-capable PCs. Employees questioned whether marketing should “rethink” its decision:

Please give this some consideration; it would be a lot less costly to do the right thing for the customer now rather than spend dollars on the back end trying to fix the problem.

*Id.* at 156. One “passionate” plea to a senior executive advised:

I am passionate about this and believe this decision is a mistake. . . . These three things just don’t add up to me. We are allowing Intel to drive our consumer experience. The OEMs support our goals here and they’ve made graphics investments to drive the [user interface] experience with consumers. I don’t understand why we would cave on this when the potential to drive the full [user interface] experience is right in front of us.

*Id.* at 35. Although admitting “we really botched this,” the response simply was that it would be too “hard . . . to step in now and reverse everything.” *Id.*

In late-2005 / early-2006, Microsoft unveiled the Vista Capable program to OEMs and major retailers. They “consistently” reacted strongly and negatively. *Id.* at 155. For example, a Microsoft employee relayed the “vocal” complaints of Wal-Mart, the world’s largest retailer:

They are extremely disappointed in the fact that the standards [for Vista capability] were lowered and feel that customer confusion will ensue. They would like to see Microsoft reconsider the program and allow for use of 2 different logos; one that is strictly a Windows Vista Home Basic Capable, and the other Windows Vista Capable. They also went so far as to say that they wished that Windows Home Basic was not even in the [product] line up.

*Id.* A few weeks later, another Microsoft employee relayed Office Depot’s “feedback” on “sensitive Vista issues”:

Home Basic will not possess the major feature sets that MS is focusing on, such as Aero and Flip. Concerned that we advertise “Vista” with these features, but there will be cust[omer] dissatisfaction & returns when they buy Home Basic & don’t get those features.

They would have preferred that MS not have a Home Basic. They see this Vista variant as selling down.

*Id.* at 157-58.

The day after it launched Vista, Microsoft referred to Vista Capable PCs as what they really were: “old channel inventory” of XP PCs now being “liquidate[d]” “at a discount.” *Id.* at 74-75. In retrospect, at least one Microsoft

