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Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

DIANNE L. KELLEY, KENNETH HANSEN,
JIM WALTERS, MATT MORALES,
RUSSELL HALL, and DON SCHRODER,
individually and on behalf of others similarly
situated,

Plaintiffs,

v.

MICROSOFT CORPORATION, a Washington
Corporation,

Defendant.

NO. C07-0475 MJP

PLAINTIFFS' REPLY IN SUPPORT
OF MOTION FOR CERTIFICATION
OF EXPRESS UPGRADE CLASS
*Filed With Redactions**

CLASS ACTION

NOTE ON MOTION CALENDAR:
Thursday, April 28, 2011

Oral Argument Granted [Dkt. 383]

** Filed With Redactions Pursuant to Dkt. No. 397
and Microsoft's Confidentiality Designations*

1 **1. Microsoft Ignores the Bases for the Ninth Circuit’s Reversal.**

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3 The Ninth Circuit would not have reversed had it found Microsoft’s causation position
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5 credible. Affirmance would have been easy (and correct) had the Ninth Circuit believed
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7 causation for the Express Upgrade class primarily raises individual issues that would overwhelm
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9 this litigation. However, the court determined common questions exist with respect to causation,
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11 and suggested other elements of the Express Upgrade class claims also raise common questions.
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13 The court did not have a developed record on other elements because the focus of the appeal was
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15 causation. It therefore remanded for a new predominance analysis so that *all* common issues
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17 (with respect to causation and all other elements) may be balanced with any individual issues.

18
19 Microsoft does not do what the Ninth Circuit held is required on remand. Microsoft
20
21 continues to focus on causation to the “near exclusion” of all other elements of the Express
22
23 Upgrade class claims. *Kelley v. Microsoft Corp.*, 395 Fed. Appx. 431, 432 (9th Cir. 2010). It
24
25 devotes less than one page of its 24-page brief to discuss other elements—and only mentions
26
27 two. It fails to address CPA unfair or deceptive act or practice, actual damages, treble damages,
28
29 the elements of unjust enrichment, unjust enrichment damages, and choice of law.¹ All of these
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31 topics raise common issues resolvable on a classwide basis. According to the Ninth Circuit
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33 opinion, they must factor into the balancing required on remand.

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35 **2. Conceding Elements of Plaintiffs’ Claims Does Not Make Them Any Less**
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37 **Relevant or Common.**

38 After four years of litigation, Microsoft now says “*many* of the common issues will be
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40 undisputed.” Def.’s Br. [Dkt. 388] at 17 (emphasis added). It uses the CPA elements of “trade
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42 or commerce” and “public interest” as “example[s].” *Id.* Microsoft argues that, because it has
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¹ Microsoft uses the words “deception” and “injury” in other places but the discussion pertains only to causation.

1 now purported to stipulate away common issues, “the trier of fact will spend little time
2 resolving” them. *Id.* Courts reject this tactical ploy to defeat predominance:
3
4

5 [B]ecause the predominance analysis tests whether the class is a “sufficiently
6 cohesive” unit, all factual or legal issues that are common to the class inform the
7 analysis. In turn, an issue is common to the class when it is susceptible to
8 generalized, class-wide proof. ***That the class-wide proof comes in the form of a
9 simple concession rather than contested evidence certainly shortens the time
10 that the court must spend adjudicating the issue, but it does nothing to alter the
11 fundamental cohesion of the proposed class, which is the central concern of the
12 predominance requirement.*** Similarly, the fact that an issue is conceded or
13 otherwise resolved does not mean that it ceases to be an “issue” for the purposes
14 of predominance analysis. ***Even resolved questions continue to implicate the
15 “common nucleus of operative facts and issues” with which the predominance
16 inquiry is concerned.*** Just as much as do contested issues, resolved issues bear
17 on the key question that the analysis seeks to answer: whether the class is a
18 legally coherent unit of representation by which absent class members may fairly
19 be bound.... ***Eliminating conceded issues from Rule 23(b)(3)'s predominance
20 calculus would undermine the goal of efficiency by requiring plaintiffs who
21 share a “commonality of the violation and the harm,” nonetheless to pursue
22 separate and potentially numerous actions because, ironically, liability is so
23 clear.*** Such a result also undermines the goal of uniformity by creating the risk of
24 inconsistent decisions through the repeated litigation of the same question[.]
25

26 *In re Nassau County Strip Search Cases*, 461 F.3d 219, 227-28 (2d Cir. 2006) (emphasis added;
27 citations omitted); *see also* 5 *Moore's Federal Practice* § 23.45[1] (3d ed. 2010) (same).
28
29

30 These principles supported a finding of predominance on remand from the Washington
31 Supreme Court's decision in *Indoor Billboard v. Integra Telecom of Washington, Inc.*, 162
32 Wn.2d 59 (2007). In *Indoor Billboard*, the Washington Supreme Court held that the defendant
33 committed an unfair or deceptive act or practice as a matter of law, and remanded for further
34 proceedings. *Id.* at 78, 87. Certifying the class on remand, the superior court held: “[t]hat this
35 issue has already been resolved by the Washington Supreme Court does not impair the
36 predominance of this central issue.” Appendix C to Pls.' Mot. [Dkt. 385] at 5:17-19.
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1 In short, the issues Microsoft concedes or which the Court has already resolved (such as
 2 choice of law²) *support* a finding of predominance. The concessions and choice of law ruling
 3 apply to all class members. They increase the efficiencies of classwide adjudication. Without
 4 class certification, Express Upgrade consumers effectively lack legal relief because recovery for
 5 any one class member is outweighed by the cost of litigating against the world's biggest software
 6 maker. *See also Strip Search Cases*, 461 F.3d at 229. To permit Microsoft to use its concessions
 7 to defeat certification would, in the Second Circuit's words, "work the perverse result" of letting
 8 Microsoft escape liability when its concessions increase the likelihood of liability. *Id.*

15
 16
 17 **3. The Predominating "Whether Home Basic Is Vista" Issue Does Not Depend**
 18 **on Class Members' Individual Perceptions About the Technology.**

19 The central issue here is whether Home Basic is Vista. Microsoft contends that proof of
 20 what Vista is can only be established by asking what individual class members "knew and
 21 expected from the Express Upgrade program." Def.'s Br. [Dkt. 388] at 18-19. However, Home
 22 Basic is Vista, or it is not. It is an objective, common inquiry, susceptible to classwide proof.
 23 Resolution involves assessing the technology, not individuals' subjective view of the technology.

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 26 **4. Ninth Circuit: This Case Is "Unlike" *Poulos*.**

27 Microsoft maintains that, despite reversal, the Ninth Circuit did not "quarrel" with its
 28 view that causation is an individual issue. Def.'s Br. [Dkt. 388] at 1; *see also id.* at 9
 29 (characterizing Ninth Circuit opinion as having "accepted" that causation presented "individual"
 30 issues and that "individual nature ... no longer is in dispute"). Microsoft goes so far as to say
 31 that "[t]he Ninth Circuit did not suggest that Plaintiffs can establish causation on their deception-
 32 based claims using common proof." *Id.* at 13. Yet that is precisely what the Ninth Circuit did

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 45 ² *See* Dkt. 128 at 4-11 (order granting Plaintiffs' motion for application of Washington law).

1 suggest. It recognized that causation raises at least “some” “common questions” because, *inter*
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3 *alia*, Microsoft’s misrepresentation of Vista capability is “fundamental” to what class members
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5 were seeking in the Express Upgrade promotion, i.e., Vista. *Kelley*, 395 Fed. Appx. at 432
6
7 (contrasting causation facts in *Poulos v. Ceasars World, Inc.*, 379 F.3d 654 (9th Cir. 2004)).
8

9 Microsoft misinterprets this holding. It argues that causation raises no common issues
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11 because an “operating system” has myriad features that may have motivated class members’
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13 purchasing decisions.³ Def.’s Br. [Dkt. 388] at 20. But the Ninth Circuit did not hold (or
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15 suggest) that the “operating system” itself does not include many features. Its holding referred to
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17 the undisputed fact that wanting to upgrade to Vista was the *only* reason motivating consumers
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19 to participate in Microsoft’s Express Upgrade promotion. This is why the Ninth Circuit
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21 explicitly held that this case is “unlike” *Poulos*, where myriad reasons motivate people to
22
23 gamble. *Kelley*, 395 Fed. Appx. at 432-33 (emphasis added).
24

25 5. No Class Member Could Have “Known the Truth.”

26
27 The Ninth Circuit also held that causation raises “common questions” “regarding the
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29 extent of the consumer education efforts that Microsoft allegedly controlled through its Windows
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31 Vista Capable marketing program.” *Id.* at 432. Microsoft turns this holding on its head. The
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33 issue is *not* whether any class member knew they would be upgraded only to Home Basic. The
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35 issue also is *not* whether any class member knew there were different versions of Vista. The
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37 issue is whether any class member reasonably could have understood—sight unseen—what Vista
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42 ³ Microsoft even argues that some class members participated in its Express Upgrade promotion merely “because
43 they like free things.” Def.’s Br. [Dkt. 388] at 21. This argument ignores the evidence. People participated in the
44 promotion to get Vista. Microsoft has conceded this point. Moreover, the cites to depositions on Page 21 of
45 Microsoft’s brief only support the fact that the upgrade for some plaintiffs was “free”—not that people upgrade
“because they like free things.”

1 was, or the differences between Home Basic and the other versions of Vista based on Microsoft's
 2 so-called "consumer education efforts." This is a common issue.
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5 Microsoft characterizes the causation test⁴ as requiring inquiry into what each class
 6 member knew about Vista and Home Basic before they participated in the Express Upgrade
 7 program. Microsoft posits there is no causation for anyone who bought a PC certified as Vista
 8 Capable and participated in Microsoft's Express Upgrade promotion with "full knowledge" of
 9 what Home Basic really was—and that the only way to know whether any consumer had "full
 10 knowledge" of Home Basic is to conduct "mini-trials." Yet Microsoft can point to no consumer
 11 who fits in this hypothetical category. We do not believe such a consumer exists:
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- 19 • All Express Upgrade class members purchased their "Vista Capable" PCs
 20 *before* the launch of Vista.
- 21
- 22 • They could not see, compare, or comprehend the differences between the real
 23 Vista and Home Basic until *after* the launch of Vista. Microsoft knew this.
 24
- 25 • Microsoft did not want these consumers to understand the differences
 26 between Home Basic and the real Vista during this time period for fear
 27 that pre-launch sales would be stalled if consumers "knew the truth."⁵
 28
- 29 • Class members did not, and could not, choose whether to receive Home
 30 Basic or the real Vista through Microsoft's Express Upgrade promotion.
 31 Microsoft dictated the upgrade path.
 32
- 33 • Express Upgrade class members undisputedly wanted Vista but received
 34 the "upgrade" Microsoft gave them. All received Home Basic.
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 39 ⁴ Microsoft argues that the Washington Supreme Court's unusual step of vacating an important published decision
 40 on CPA class action law (*Schnall v. AT&T Wireless*) "has no bearing here." Def.'s Br. [Dkt. 388] at 13. No one can
 41 predict what the forthcoming *Schnall* opinion will say, but it will most certainly be different than the opinion the
 42 Supreme Court vacated. Because the vacated opinion relied in large part on an *Indoor Billboard* causation analysis,
 there is good reason to be cautious about the weight of that authority here.

43
 44 ⁵ As Microsoft's General Manager of Windows Product Management, Brad Goldberg, stated: "Trying to 'educate'
 45 customers about features of an OS [operating system] that is not available ... may cause them to delay their purchase
 – *the exact opposite of what we [Microsoft] want to achieve.*" Dkt. 131 at 153.

1 There also is no logical reason for class members to have both bought a PC Microsoft certified as
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 3 "Vista Capable" and participated in Microsoft's Express Upgrade promotion "knowing the truth"
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 5 that they would not receive Vista. *See also Poulos*, 379 F.3d at 667-68 (classwide reliance
 6
 7 where class members' behavior has "single, logical explanation").
 8

9 **6. There's No Such Thing as a Free Lunch at Microsoft.**

10
 11 Microsoft suggests that causation is individualized because some Express Upgrade
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 13 participants received a "free" upgrade to Home Basic, whereas others paid a "reduced price."
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 15 However, it does not matter whether class members paid a separately-charged "reduced price"
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 17 for participating in the Express Upgrade promotion or paid for the upgrade as part of the overall
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 19 purchase price of the PC (what Microsoft refers to as a "free" upgrade). In both instances, the
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 21 consumer paid for participating in the Express Upgrade promotion. In both instances, Microsoft
 22
 23 received a \$█ royalty fee.⁶ Microsoft's 30(b)(6) designee Kathryn Griffith testified that, no
 24
 25 matter how the OEMs chose to pass along the charge to consumers: "*Microsoft ultimately*
 26
 27 *received the money.*"⁷ Dkt. 224 at 218-19:23-12 (emphasis added).
 28

29 DATED this 11th day of March, 2011.

30
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 32 **CORDELL LLP**

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40
 41 ⁶ See Dkt. 222 at MS-KELL 45660 (describing \$█ royalty fee paid to Microsoft for each Express Upgrade during
 42 class period); Dkt. 223 at MS-KELL 62332 (same; OEM Marketing Bulletin).

43 ⁷ Whether class members received a "free" or reduced-price "upgrade" also does not affect the commonality of their
 44 CPA actual damages. In both instances, each class member is entitled to the \$159 cost of a Home Premium upgrade
 45 (the least expensive Vista product fairly deemed "Vista").

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CERTIFICATE OF SERVICE

I hereby certify that on March 11, 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following.

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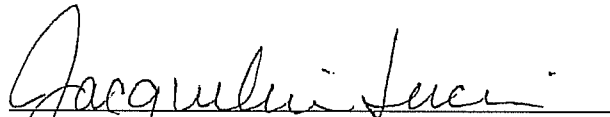
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