1		The Honorable Marsha J. Pechman
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6	UNITED STATES D	NETDICT CALIDT
7	WESTERN DISTRICT AT SEA	OF WASHINGTON
8	DIANNE L. KELLEY, et al.,	No. C07-0475 MJP
9	) Plaintiffs, )	PLAINTIFFS' OPPOSITION TO
10	v. )	DEFENDANT'S MOTION FOR SUMMARY JUDGMENT
12	) MICROSOFT CORPORATION, a Washington	
13	Corporation, )	CLASS ACTION
4	Defendant. )	RE-NOTED ON MOTION CALENDAR: December 19, 2008
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20	* Filed with Redactions Pursuant to Docke	et No. 305 and Microsoft's Confidentiality
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#### I. INTRODUCTION

Microsoft launched Vista in January 2007. Vista came in four editions: Ultimate, Business, Home Premium, and Home Basic. Microsoft promoted Vista as "new" and "delightfully unexpected." It promoted one feature of Vista above all others: the new graphics comprising the "[e]legant" new Aero "user interface." Declaration of Mark Tindall (Nov. 19, 2007) [Dkt. 93], Ex. D (MS-KELL 15030). The three "premium" editions of Vista, Ultimate, Business, and Home Premium, ran Aero. The fourth edition, Home Basic, did not. Home Basic offered no graphics that were, compared to Windows XP, "new" or "delightfully unexpected." Microsoft's motion for summary judgment should be denied for two reasons:

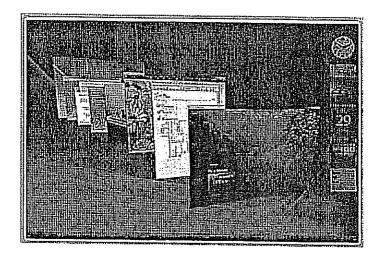
- First, it was unfair or deceptive to brand PCs as "Vista Capable" for ten
  months before Vista came out if they could run only Home Basic, instead
  of a premium edition.
- Second, Microsoft's decision to brand PCs as "Vista Capable" even though they could run only Home Basic had a common impact maintaing PC sales across the class.

Microsoft defined Vista around its new graphics. Microsoft witness Megan Wallent explained that Vista "will be the first OS from us where the graphics really matters from a daily driver (non-gamer) perspective." Declaration of Jeffrey I. Tilden, Ex. A (MS-KELL 46464). Internally Microsoft acknowledged, "graphics is the biggest change we are making in Vista over XP." *Id.* (MS-KELL 48800). "Windows Vista require[d] a step change in graphics hardware than XP to provide optimum performance." *Id.* (MS-KELL 17896). The next-generation graphics was "Aero," an acronym standing for "Authentic, Energetic, Reflective, Open," Declaration of Ronald S. Alepin ("Alepin SJ Decl.") ¶ 8. Microsoft's website today provides a screen shot of Windows Flip 3D, an Aero component in which translucent windows recede into three-dimensional space:

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Tilden Decl., Ex. B. This cascade of windows is the feature of the new version of the OS that is evoked by the definition of the word "vista":

vis·ta \ 'vista \ n -s [It, sight, view, fr. visto (past part. of vedere to see, fr. L vidēre), fr. L visus (past part. of vidēre to see) + It -to, past part. suffix (fr. L - tus)] 1 a: a more or less distant view through or along an avenue or opening (as between rows of trees): PROSPECT <garden . . . noted for its long  $\sim$ s of formal beds between lines of evergreens -Amer. Guide Series: Md.> <a \cdot opened among the dancers -Rebecca West> b: an extended view afforded by an architectural feature (as a corridor or opening in walls) <galleries extended into  $\sim$ s by mirrors> <\sigms s of stone passages with numbered doors -Christopher Isherwood> 2: an extensive mental view (as over a stretch of time or a series of events): a prospect opening out to thought <br/>before us an infinite \circ of human improvement -Times Lit. Supp.> <leading her memories down forgotten \sigms s -B.A.Williams>

*Id.*, Ex. C (Websters Third New International Dictionary at 2558). Acro is the *defining* feature of Vista. Home Basic lacks Acro.

Microsoft studied the precise question of whether Home Basic should be called "Vista." The recommendation of the Windows Product Management Group was that Home Basic should "carry the Windows brand name *without* the Vista generation name." *Id.*, Ex. A (MS-KELL 53369-70) (emphasis added) (email dated August 31, 2005, attaching "Windows Vista Naming – Strategy Options & Recommendation" ("White Paper")). In what became known as the White

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Paper, the group stated that it was "confident in this recommendation." *Id.* (MS-KELL 53370). Restricting the name "Vista" to the premium editions would, *inter alia*, "better align[] user product expectations to the high visibility innovations uniquely present in the Windows Vista premium versions." *Id.*<sup>1</sup>

The White Paper identified the Aero "user experience" and its components as the "[p]roductivity" differentiation between Home Basic and the premium editions of Vista. The "[f]ull AERO user experience" included "'glass', animations, visual effects, rolodex, alt-tab & taskbar live thumbnail previews." *Id.* (MS-KELL 53371). The White Paper documented differentiation between Home Basic and the premium editions of Vista in "[f]undamental[]" respects including "[s]cheduled backup" and "data recovery across a network," and "Encrypted File System." *Id.* The White Paper further documents Home Basic's deficiencies as compared to the premium editions of Vista 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.

Id. In almost every case, the reasoning for not calling Home Basic "Vista" was to aid consumer clarity, whereas the reasoning for doing so was to aid Microsoft's marketing. For example:

Factor;	Reasoning Not To Call Home Basic "Vista":	Reasoning <i>To Call</i> Home Basic "Vista":
Brand & Consumer Perception	Reduces likelihood customer will perceive advertising as "bait & switch" if ad highlights new, premium experiences; as long as customer	Positions Windows Vista as recommended line and Home Basic as de facto entry or in worst case "value" line. If perceive Home Basic as a stripped

<sup>&</sup>lt;sup>1</sup> The recommendation not to call Home Basic "Vista" was "affirmed by a strong endorsement from top OEM partners," *Id.* Dell told Microsoft that it was "in alignment with containing the Vista name to outside the Home Basic sku's[.]" *Id.* (MS-KELL 18800).

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	purchases 'Vista' PC, will likely get that experience.  Id. (MS-KELL 53372) (emphasis added).	down version could devalue Windows brand. Id.
Press/Analysts	Better alternative for keeping promise of Vista. Expectation has already been set at premium experience. Branding less-than-promised SKU with "Vista" would result in dissatisfied customers, confused partners, and critical press coverage. Id. (MS-KELL 53373) (emphasis added).	Press critical of Microsoft optimizing for technical elites. Reporter's personal biases create risk of outlets positioning Windows Vista as a great OS for the power user, but for rest of world Home Basic is good enough. <i>Id</i> .
Engineering	Currently plan minimal differentiation between basic and premium. Can be modified to provide for additional brand differentiation. <i>Id.</i> (MS-KELL 53375).	From 10' away in retail setting, desktop of "Vista"-based PC will look identical to "non-Vista"-based PC. Id.

In spite of 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."

#### II. STATEMENT OF FACTS

### A. The Creation of the Vista Capable Program

 The Vista Capable Program Was a Marketing Program Designed by Microsoft To Bolster PC Sales in the 10 Months Preceding Vista Release.

In April 2005, Microsoft was preparing a "Ready PC" campaign in advance of the Vista launch. *Id.* (MS-KELL 77574-78). The "Ready PC" (later "Vista Capable") program was designed to identify PCs pre-loaded with Windows XP before Vista came out as capable of running Vista. *Id.* (MS-KELL 77574-75). Whether the program was designed to maintain PC

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sales is a disputed fact. The official OEM Marketing Bulletin for the Vista Capable program identified the first goal of the program as being to "[m]aintain Microsoft® Windows® XP PC sales momentum prior to Windows Vista availability." *Id.* (MS-KELL 73).<sup>2</sup> In contrast, Microsoft seeks summary judgment based on the testimony of two executives, its former Co-President of Platform Products and Services Jim Allchin and Will Poole, who have testified that avoiding a drop off in sales was "[n]ot really" a goal of the program. *Id.*, Ex. D (Poole Dep.) at 37:17-39:14 (denying risk of stalling sales); *see also id.* at 39:25-40:8, 70:16-71:6 (disagreeing with "[m]id to low-level employee" Rajesh Srinivasan that avoiding stalling sales was goal of program); *id.*, Ex. E (Allchin Dep.) at 92:14-93:13 (maintaining XP PC sales momentum not goal of program). *See* Microsoft's Mot. for Summ. J. [Dkt. 253] ("SJ Mot.") at 4:7-16.

### 2. Microsoft Created Customer Confusion By Not Distinguishing Home Basic from Premium Editions of Vista.

"At its heart," the recommendation not to call Home Basic "Vista" was "about using naming to drive *clarity* around what customers should purchase." Tilden Decl., Ex. A (MS-KELL 53379) (emphasis added). Consistent with the recommendation not to call Home Basic "Vista," Microsoft recognized that including Home Basic in the Vista Capable program would set up customers for "dissatisfaction" because Home Basic "can't do the cool stuff that Windows Vista will be touting." *Id.* (MS-KELL 48905). As a result, Microsoft "originally [] wanted to set the capable bar around aero." *Id.* (MS-KELL 16845); *see also id.* (MS-KELL 17894) (as of August 2005 "Windows Vista name is reserved for premium SKUs"; referring to Home Basic as

<sup>&</sup>lt;sup>2</sup> Microsoft successfully moved to seal the OEM Marketing Bulletin because it is an official program document: "Microsoft created the OEM Marketing Bulletin... to explain in detail to its OEM partners the marketing strategy behind its "Windows Vista Capable" program and the specific steps and guidelines Microsoft had developed to implement that program." Microsoft's Response to Pls.' Mot. to Seal [Dkt. 75] at 7:18-21; see also Declaration of Nicholas J. Psyhogeos (Oct. 24, 2007) [Dkt. 76] 17, 18. Many other documents assert that the Vista Capable program was designed to maintain sales. See e.g. Tilden Decl., Ex. A (MS-KELL 46396 ("cause no harm in FY06"), 46480 ("It[']s about not stalling sales. Nothing else really matters.")).

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"Windows 2006," Microsoft "not diluting Windows Vista Ready program or messaging (has LDDM and provides Aero theme & premium experience)[.]"); (MS-KELL 30694) ("Vista Ready PC" should support "premium scenarios" or would be "just a souped up XP logo'ed system").

Microsoft knew that any confusion about whether Home Basic and Vista were the same or different products would give consumers a reason to delay PC purchases:

Customers will not likely understand or be able to articulate whether or not Home Basic and Vista Premium products are the same product or different. This may lead to confusion *und stalled sales*. A simple name may make them different but will not distinguish them from one another in a meaningful way.

Id. (MS-KELL 53374) (emphasis added). Thus, disregarding the recommendation not to call Home Basic "Vista," Microsoft in December 2005 allowed the "Vista Capable" designation to be used on PCs that would "not be able to run Aero." Id. (MS-KELL 86).

 Microsoft Diluted The Meaning of "Vista Capable" for Its Own Economic Self-Interest.

As briefed in Plaintiffs' Motion for Partial Summary Judgment Re: WDDM [Dkt. 163], Microsoft soon diluted the "Vista Capable" designation again. From the beginning of the "Vista Capable" program, Microsoft required that a PC support the new Vista display driver model, "WDDM," in order to be labeled "Vista Capable." Tilden Decl., Ex. A (MS-KELL 18482).<sup>3</sup> But Intel stood to lose revenue because its widely-used 915 chipset was not "Vista Capable." *Id.* (MS-KELL 75291). Therefore, Mr. Poole eliminated the WDDM requirement for a "Vista Capable" logo. *Id.* (MS-KELL 48315-16).<sup>4</sup> Microsoft immediately reinstated the WDDM requirement at the time of the Vista launch, with the anomalous result that PCs with deficient

<sup>&</sup>lt;sup>3</sup> See also id. (MS-KELL 48128-29, 48889, 51050-52, 57590, 77578, 86911 ("most tangible aspect of Vista.")).

<sup>&</sup>lt;sup>4</sup> Regarding Intel's expected revenue loss, see also id. (MS-KELL 48294, 48310, 48377, 48950). Regarding the decision to eliminate WDDM, see also id. (MS-KELL 19351 (relating "capable" to "fold type hardware,"), 87628 ("[i]f we give on these then the Logo does not 'mean' anything."), 48478 (Microsoft and Intel CEOs discuss on telephone)). Mr. Ballmer's deposition is noted for December 12, 2008.

915 chipsets could be called "Vista Capable" during the ten months leading up to the launch, but would not qualify for an actual "Vista" logo when Vista was released. *Id.* (MS-KELL 46207).<sup>5</sup>

Microsoft's decisions to dilute the meaning of "Vista Capable" were motivated by economic self-interest. In early 2006 Microsoft estimated that only 4% of PCs in January 2006 were capable of running a premium edition. *Id.* (MS-KELL 22117, 21978-79). The decision to eliminate the WDDM requirement for a "Vista Capable" designation was based on supporting Intel's revenues and Microsoft's sales. *See* n.5, *supra*. (When Mr. Poole watered down even the requirement for a "Premium Ready" designation, the reason was, "we clearly can't exclude 50 percent of pcs from premium logo." *Id.* (MS-KELL 48434).)

4. Microsoft Knew That Failing To Distinguish Home Basic from Premium Editions of Vista Would Cause Confusion.

## REDACTED

Microsoft's primary marketing advisor, Gartner, strongly recommended that Microsoft introduce a second logo to indicate "Aero Capable" PCs to dispel consumer confusion:

- There was some confusion regarding the Windows Vista Capable logo sticker. The analysts didn't understand the strategy, and felt that it would really confuse consumers, Mike commented, "Consumers won't understand the difference between Windows Vista Capable and Windows Vista Aero Capable" especially if they purchased a machine that wouldn't run Aero when Windows Vista ships.
- With regard to consumer users, the analysts voiced concern around the Windows Vista logos only being utilized after Windows Vista ships. "What happens now that I want to buy a PC for Christmas and it [my confusion about what PCs support Windows Aero] is another reason for me to delay that purchase into 2007?"

<sup>&</sup>lt;sup>5</sup> See also id. (MS-KELL 75884). "Vista Capable" PCs that lacked WDDM support in many cases cannot even be upgraded to run Aero or a premium edition. *Id.* (MS-KELL 48310-11, 69686-87, 87853).

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Analysts recommend a separate sticker to indicate "Aero Capable" machines.

Id. (MS-KELL 21206) (emphasis original).<sup>6</sup> Microsoft refused to establish an "Aero" logo (instead introducing an optional and less clear "Premium Ready" "designation") because it feared that the uncertainty of too much information would provide consumers with a reason to delay their purchases until after the Vista launch, thereby stalling sales. Id. (MS-KELL 27068).

On April 19, 2006, after the Vista Capable program was already under way, Mr. Allchin concluded the marketing plan was "terrible": "I believe we are going to be misleading customers with the Capable program." *Id.* (MS-KELL 87386). Microsoft explains Mr. Allchin's email by claiming that "[a]s a result" of his concern, SJ Mot. at 5:6-8 (emphasis added), Microsoft "created informative materials for consumers, OEMs, retailers, and the press." *Id.* at 5:10-11. But Mr. Allchin was responding to the plan that was already in place. Because he was "confused about capable, ready, etc.," Tilden Decl., Ex. A (MS-KELL 87388), he investigated the plan, which already included: working with OEMs on Aero messaging because many systems "may never get a WDDM driver"; hosting a web site to provide "user education"; and "point of sale" material describing "what Windows Vista features will not work (e.g. Windows AERO). *Id.* (MS-KELL 87387). This "terrible" plan is exactly what Microsoft proceeded to do.

<sup>•</sup> In the Enterprise, Gartner felt this segment needs a name/program they can use to understand whether they're getting Windows Aero, Enterprise will get the majority of their education from Microsoft, their website and Gartner.

See also id. (MS-KELL 17895 (Mr. Croft advocating against two-tier logo program due to complexity), 21203 (Gartner had "strong feedback" logo program confusing and felt Microsoft could stall market, "or 'worse, have someone buy a new machine for the holidays and be disappointed when it doesn't run Windows Aero.")).

### 5. Microsoft Confused Consumers Before Creating "Informative Materials."

Microsoft ignores that it started the Vista Capable program on April 1, 2006, before it issued any of the "informative materials" that it now claims dispelled the misleading nature of the "Vista Capable" designation. The press release announcing the program was not issued until May 18, 2006. Burk Decl. [Dkt. 91] ¶ 4 at 2:4-13. The amendment to the OEM logo license agreement requiring the "disclaimer" language was not issued until May 25, 2006. Mullaney-Sundlie Decl. [Dkt. 88] ¶ 4 at 3:15 & Ex. D. The "POP" or point-of-purchase materials supposedly explaining Vista's features were not sent until July 2006. Tindall Decl. [Dkt. 93] ¶ 4 at 2:23. Thus, purchasers of the 4.2 million "Vista Capable" PCs that were not Premium Ready that were sold in April and May 2006 did not have the guidance Microsoft so heavily relies on in its effort to secure summary judgment. Leffler Decl., Ex. A (Leffler Rpt.) ¶ 23 at 14 & Table 2.

6. Microsoft's "Informative Materials" Were Simply Designed to Give It the Cover of Plausible Deniability.

From early on Microsoft doubted that "informative materials" would assist consumers, because Aero was not yet public, and consumers would have no context for what Aero would be:

• 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.

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• Less than 5% of customers typically upgrade OS. Let's not confuse the masses for the sake of providing clarity to "enthusiasts."

Tilden Decl., Ex. A (MS-KELL 40315). Microsoft planned "[m]inimal or no signage about Windows Vista in the PC and software aisles" until days before launch. *Id.* (MS-KELL 27652). Microsoft implemented a Vista "ad embargo." *Id.* (MS-KELL 27068). Microsoft recommended that OEMs "should not promote Windows Vista" outside of the Windows Vista Capable, Express Upgrade, and logo programs. *Id.* Microsoft's "strategy" was to do "very little to drive demand and awareness for Windows Vista" so as not to do anything "that would stall XP PC... sales during the Holidays." *Id.*<sup>7</sup>

### 7. The Program Was So Confusing Even Microsoft Executives Did Not Understand the Differences Microsoft Asserts Should be Apparent.

The program did create confusion, even to Microsoft executives. In July 2006, then-Microsoft Senior Vice President Steven Sinofsky bought a laptop "so I would have an official Vista capable laptop," but Mr. Sinofsky "didn't realize that Vista capable doesn't necessarily have Aero stuff. Bummer." *Id.*, Ex. A (MS-KELL 64964). In spite of Microsoft's information campaign, Microsoft Vice President Mike Nash reported that he "personally got burned by the Intel 915 chipset issue," on a laptop that he chose "because it had the vista logo," and was "pretty disappointed that it [] wouldn't run [Aero] Glass." *Id.* (MS-KELL 19347). Mr. Croft testified, before corrected by Microsoft's lawyers, that "Vista Capable" means the ability to run "any" version of Vista. *Id.*, Ex. G (Croft Dep.) at 50:23-51:15, 68:8-69:15.

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<sup>&</sup>lt;sup>7</sup> See also id. (MS-KELL 25105 (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)); id., Ex. F (Intel 403DOC006211 (urging partners to avoid "Windows Vista SKU specific messaging")).

<sup>&</sup>lt;sup>8</sup> See also id., Ex. A (MS-KELL 16845 (Mr. Sinofsky writing "I was in bestbuy listening to people and can tell you this one did not come clear to customers. We set ourselves up.") (emphasis added), 19346-47 ("[w]e told Poole what would happen if he changed our position on 915.").

### 8. Press Coverage and Microsoft's Own Business Partners Reported That the Program Was Confusing.

Even the news articles Microsoft has offered with its papers routinely conclude that the Vista Capable program was simply *confusing*: "Microsoft [] really muddied the waters by creating two different levels of Vista-readiness." Declaration of Stephen M. Rummage (Oct. 14, 2008) [Dkt. 211] ¶ 2 & Ex. A at 6 ("a lot of buyers will find these logos more confusing than helpful."). Another article reported:

Those Aero requirements are not easily understood by buyers or computer salespeople, said Michael Cherry, an analyst at market research firm Directions on Microsoft. He said, for example, that he has no idea how much memory bandwidth his computer has. "I wouldn't even know how to begin to measure it."

Cherry said that Microsoft still has work to do to translate these requirements into something that is understandable to the average PC user.

"I don't want to be an electrical engineer to figure this out," he said.

Id. at 11.9 OEMs and retailers were extremely critical of the Vista Capable marketing materials, and so in many cases did not use them. Wal-Mart was "very vocal" in its dissatisfaction:

They are extremely disappointed in the fact that the standards were lowered and feel like customer confusion will ensue.

Tilden Decl., Ex. A (MS-KELL 40427). Microsoft acknowledged:

This feedback has been consistent from all retailers around the world. We should not let consumers or retailers have to decipher what windows Vista capable means. The question that consumers want answered is do I need Home Basic or Home Premium and what machines will they run on.

Id. Office Depot reported similar fear of confusion over Home Basic lacking "the major feature sets" of Vista, i.e., Aero:

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<sup>&</sup>lt;sup>9</sup> See also id. at 14 ("There's a lot of FUD (Fear, Uncertainty, Doubt) surrounding the system requirements." Even in December 2006, "[u] rather complex matrix of requirements determines the logo requirements of PCs and peripherals to ensure that all upgrades are capable of running well with Windows Vista." *Id.* at 18.

- We created confusion with Home vs Pro with XP launch.[10] Channel was looking forward to the next major OS release to make it better. Concerned that we made it more confusing not less. . . .
- Home Basic will not possess the major feature sets that MS is focusing on, such as Aero & 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 MS not have a Home Basic. They see this Vista variant as selling down.

Id. (MS-KELL 40447).11

9. Microsoft Hangs Its Hat on a "Disclaimer" That Was Tardily Issued and Would Never Be Understood By Most Consumers.

Finally, Microsoft's lawyers drafted a "disclaimer" on which it relies in arguing that it was not unfair or deceptive to brand Home Basic as "Vista." Microsoft issued the disclaimer on May 25, 2006, (nearly two months into the Vista Capable program), the official version of which reads:

Not all Windows Vista features are available for use on all Windows Vista Capable PCs. All Windows Vista Capable PCs will run the core experiences of Windows Vista, such as innovations in organizing and finding information, security, and reliability. Some features available in premium editions of Windows Vista – like the new Windows Aero<sup>TM</sup> user interface – require advanced or additional hardware. Check www.windowsvista.com/getready for details.

Mullaney Sundlie Decl. [Dkt. 88] ¶ 4 at 3:15 & Ex. D at 30. The disclaimer at once giveth and taketh away. While disclaiming some features, albeit at a time when there was no public information explaining what Aero was, Microsoft guarantees, "[a]ll Windows Vista Capable

When Microsoft released Windows XP, it did so in two editions, Home and Professional. Tilden Decl., Ex. H. However, the technical requirements for the two editions were nevertheless the same. *Id.* 

See also id. (MS-KELL 21867 (Toshiba warning printed disclaimer "could easily be set aside unread and/or lost"), 25076 (Best Buy, Costco, Micro Center, Office Max, Sam's Club, and Wal-Mart refusing point-of-purchase materials for back-to-school 2006), 27976-77 (Wal-Mart and Sam's Club refusing point-of-purchase until September, Wal-Mart had Hewlett Packard "not ship" Vista Capable PCs because promoting too soon confusing)).

PCs will run the *core experiences* of Windows Vista." *Id.* (emphasis added). But Aero was a "core experience." *See e.g.* Tilden Decl., Ex. A (MS-KELL 46464, 48800).

With respect to PCs lacking WDDM, the disclaimer is false in two more respects. *First*, the disclaimer identifies "core experiences" as "innovations in . . . security, and reliability." Mullaney Sundlie Decl. [Dkt. 88], Ex. D at 30. But aspects of security and reliability in Vista require WDDM. Alepin WDDM Decl. [Dkt. 170] ¶ 6 at 2:18-3:13 ("crash protection"; "increased security"). <sup>12</sup> *Second*, the disclaimer stated that Aero would require "advanced or additional hardware" – implying merely a need to upgrade, when in fact Intel 915 PCs lacking WDDM support could *never* be upgraded to run a premium edition. Tilden Decl., Ex. A (MS-KELL 87386) ("aero won't be there EVER for many of these machines); *id.*, Ex. I Srinivasan Dep. at 137:20-138:19. Microsoft never disclosed the deficiencies of a PC lacking WDDM.

### B. The Results of the Vista Capable Program

1. The "Cool Stuff" in the Real Vista - None of Which Is Included in Home Basic

On January 30, 2007, Microsoft launched Vista. Microsoft promoted Vista in a massive campaign (Microsoft refuses to produce its instructions to its advertising agency, San Francisco's McCann Erickson). See Tilden Decl., Ex. J. The advertisements show the Great Wall of China, the Apollo moon shot, Machu Picchu, and more. See e.g. id., Ex. K. The voice-over explains:

Every so often you experience something so new, so delightfully unexpected, that there's only one word for it, "wow." Introducing Windows Vista.

Id. Microsoft produced a spreadsheet identifying its advertising channels:

<sup>&</sup>lt;sup>12</sup> See also Declaration of Megan Wallent [Dkt. 210] 
¶ 13-14 at 4:23-24, 5:15-16 ("Some of the improved security features . . . require a graphics processor that supports WDDM").

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 National television advertisements during the Academy Awards, Brothers & Sisters, Desperate Housewives, Grey's Anatomy, Lost, CSI, Survivor, The Daily Show, Stephen Colbert, ER, Heroes, Law & Order, and others

- Regional television advertisements during the Grammy Awards and NCAA playoffs in 11 metropolitan markets, including New York City, Los Angeles, Chicago, Philadelphia, San Francisco, Dallas, Minneapolis-St. Paul, Miami, Austin, Washington D.C., and Houston
- Print advertisements in the Wall Street Journal, New York Times, Newsweek, US News & World Report, Business Week, Us Weekly, New Yorker, Rolling Stone, National Geographic, PC World, Wired, Smithsonian, Vanity Fair and others.

Id., Ex. L. Every television advertisement that Microsoft has produced was part of the Wow! campaign. In contrast to Wow!, when Microsoft explained the promise of "Vista Capable" to its industry partners after it had eliminated both Aero and the WDDM requirement, it did not refer to anything "new" or "delightfully unexpected"; rather, the base level of "Vista Capable" was tellingly explained as "at least equivalent to Windows XP." Id., Ex. A (MS-KELL 16814).

Microsoft also authorized UK-based Future Publishing Ltd. to publish "Windows Vista The Official Magazine." *Id.*, Ex. M (Phillips Dep.) at 5:11-14, 6:19-7:10 (Future Publishing Ltd. publishes magazine through U.S. subsidiary Future US, Inc. ("Future")). The magazine went on sale beginning in January 2007 to coincide with the Vista launch. *Id.* at 10:13-11:4. Future sold 58,732 copies of the first U.S. issue. *Id.* at 13:18-24. Under the contract with Microsoft, the magazine was to be directed to the consumer audience. *Id.* at 21:9-22:2. Microsoft and Future personnel met to discuss "editorial strategy," and discussed the topics of the magazine including specifically, "how Vista is useful to the consumers," and "explain[ing] to consumers what features Vista would offer them." *Id.* at 24:19-25:8, 31:24-32:23. In the first issue, Future prepared a table of features "that consumers would be interested in" based on its knowledge "about consumers' wishes" for the purpose of differentiating the versions of Vista. *Id.* at 34:20-

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37:1. Home Basic had *none* of the features Future determined would interest consumers, the first of which was Aero:

### Which Windows Vista is Right for Me?

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Id. at 34:20-24 & Phillips Ex. 2; Allchin Dep., Ex. 22. The features on the table correspond to the features Microsoft had discussed 18 months earlier in the White Paper recommending that Home Basic not be called Vista. Id., Ex. A (MS-KELL 53371). Dell advertized Home Basic as being suitable for "[b]ooting the Operating System, without running applications or games." Id. (MS-KELL 17392-93).

### 2. The Mojave Experiment: Microsoft Proves that the "Cool Stuff" in Vista Has Nothing To Do with Home Basic

After Vista was released, Microsoft performed the "Mojave Experiment," which Microsoft explains at www.mojaveexperiement.com as follows:

What do people think of Windows Vista when they don't know it's Windows Vista? To find out, we disguised it as "the next Microsoft Operating System" code-named "Mojave" so regular people who've never used Windows Vista could see what it can do – and decide for themselves.

Tilden Decl., Ex. N. Plaintiffs served discovery about the capabilities of the PCs Microsoft used to showcase Vista so that "94% of respondents" would rate "the new Operating System" "higher than they initially rated Windows Vista." *Id.* Microsoft admits:

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- In its "Mojave Experiment" commercials, Microsoft did *not* demonstrate the Vista operating system on computers running Vista Home Basic.
- Microsoft demonstrated the Vista operating system on computers with WDDM.
- Microsoft did not demonstrate the Vista operating system on computers that met the specification requirements for the "Vista Capable" designation but not the "Premium Ready" logo, and could not have done so.

*Id.*, Ex. O at 16:7-18:5. Once plaintiffs, like the Mojave test subjects, were able to "decide for themselves," they discovered that Home Basic is not the real Vista:

- Q. Do you know if Home Basic doesn't do any of those things, Vista Home Basic doesn't do any of those things?
- A. I don't think it runs the core where it says, "All Windows Vista capable PCs will run the core experiences of Windows Vista," I don't believe that it does that, because I think the core experiences of Windows Vista are the graphics improvements and that stuff. That's what I believed.

Id., Ex. P (Walters Dep.) at 46:2-7; 100:7-21 (emphasis added); see also id., Ex. Q (Kelley Dep.) at 10:23-11:11 (discovered PC would run only Basic).

3. Home Basic Failed to Live Up to the Expectations for Vista.

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Id., Ex. A (MS-KELL

The plaintiffs did precisely that, seeking PCs that would last. 13

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<sup>&</sup>lt;sup>13</sup> See id., Ex. Q (Kelley Dep.) at 35:2-7 ("state of the art" PC that would "last"); Ex. P (Walters Dep.) at 86:24-87:24 ("I said, 'You're going to love this. It's going to be able to run Vista as soon as it's out.'... it will take you right into college."); Ex. R (Hansen Dep.) at 35:4-10 (looking for "[u]pgradeability"); Ex. S (Morales Dep.) at 10:6-14 (believed Vista would be an "upgrade"); Ex. T (Hall Dep.) at 16:14-23 (looking for what was advertised as Vista); Ex. U (Schroder Dep.) at 49:15-50:3 (wanted PC capable of running XP successor).

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#### 4. The Home Basic Features that Microsoft Now Promotes Could Never Have Been Understood By Consumers During the Vista Capable Period.

In a last-ditch effort Microsoft offers the testimony of Brett A. Muzzey to establish that 93% of the code of Home Basic and the premium editions of Vista is the same. Muzzey Decl. [Dkt. 257] ¶3 at 2:21-22. But this ignores the very point Microsoft made in response to plaintiffs' WDDM motion: consumers care about features, not technical arcana. See e.g. Microsoft's Opp'n [Dkt. 212] at 2:21-23, 4:8-9, 5:7, 19:13-14. Key features – for example "save" and "print" in Microsoft Word, may involve very little code. Alepin SJ Decl. ¶ 12. Case in point - humans and chimpanzees have more DNA in common - 96% - than Home Basic and the premium editions of Vista. Tilden Decl., Ex. V. The capabilities of each are nevertheless distinct.

Mr. Muzzey then lists several features that he asserts distinguish Home Basic from Windows XP. But Muzzey does not discuss the importance of Aero. Mr. Alepin explains its significant advantages to the user in creating ease of use, and thus improving productivity. See Alepin SJ Decl. ¶¶ 7-8. In contrast, Mr. Muzzey focuses on minor, or alternatively available features. See id. ¶¶ 14-15. Microsoft did not promote these features in its Vista advertising, and none made it on to the table in the official magazine as a feature important to consumers.

#### 5. **Proximate Cause: Common Impact**

Microsoft hired Wharton professor Lorin M. Hitt, Ph.D., to analyze the Vista Capable program, and (contrary to the newly-contrived positions of Mr. Allchin and Mr. Poole) he

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able to run Vista, and I was buying this computer for my son so it could get him through his last bit of high school and continue on into college." *Id.*, Ex. P (Walters Dep.) at 56:17-22.14

### 6. The Vista Capable Program Worked: PC Sales Were Maintained.

The plaintiffs testified that they observed the Vista Capable program buoy PC prices. During the Vista Capable program, Mr. Hall worked in retail stores training sales personnel on HP products, and, after personally placing Vista Capable logos on PCs, Hall Dep. at 126:19-23, observed the effect of the program on PC prices. *Id.*, Ex. T (Hall Dep.) at 126:19-23, 127:3-21 ("the following week I would go in and the price would be higher"). Similarly, Mr. Morales observed the Vista Capable program buoy PC prices. *Id.*, Ex. S (Morales Dep.) at 39:6-21, 41:1-10 (similarly equipped PC without Vista Capable logo "\$50 cheaper").

After the Vista launch, Microsoft credited the Express Upgrade program with "keeping PC sales high" during the 2006 holiday season. *Id.*, Ex. A (MS-KELL 52500). Microsoft also acknowledged XP sales "at a discount" after Vista was released. *Id.* (MS-KELL 24864). Documents produced by retailer Office Max established that by March 2007, "[a]]] Discontinued PCs remaining from Holiday Cycle should now be gone from the [distribution centers] or on their way out." *Id.*, Ex. Y. The Office Max manager wrote, "[t]his may be the first time (at least in my 3 year tenure here) that we have been this clean on PCs with 0 back orders. . . . All this before taking any further mark-down on the product." *Id.* (emphasis added).

<sup>&</sup>lt;sup>14</sup> See also id, Ex. T (Hall Dep.) at 78:25-79:4 ("I was going to wait . . . but with the Vista upgrade sticker and the Vista upgrade program, it made me want to buy it even more"); Ex. R (Hansen Dep.) at 23:12-18 ("one of the criteria for selecting the laptop was something that would run the new operating system."); Ex. S (Morales Dep.) at 28:12-13 (bought "[b]ecause" PC was Vista Capable); Ex. U (Schroder Dep.) at 49:15-50:3

# 7. Plaintiffs' Position Is Supported by Credible Expert Testimony and Basic Principles of Economics.

Plaintiffs' expert economist, Professor Keith B. Leffler, explains that "[i]t is a well known feature of certain capital goods markets, including personal computers and other electronics goods, that a pending expected improvement in the technological capability of the products causes some consumers to delay purchase until products incorporating the new technology are available." Declaration of Keith B. Leffler, Ph.D., Ex. A (Leffler Rep.) at 7. The "Vista Capable" designation added value to PCs by reassuring consumers:

the typical consumer user is operating in a world of uncertainty with knowledge that there is a major forthcoming change in the basic thing that runs their PCs and they cannot know their future desire to — or need to switch — and, therefore be assured that an expenditure today — a fairly large expenditure for many people — to buy a piece of capital equipment, that that piece of capital equipment is technologically capable of converting to the new system is — is something that will have value.

Tilden Decl., Ex. Z (Leffler Dep.) at 47:4-14. Only a segment of the market must show higher demand for "Vista Capable" PCs for the entire market to experience artificial price maintenance.

Leffler Decl., Ex. B at 7. Thus,

strongly supports Professor Leffler's conclusions.

In addition, in 2006, a significant portion of "Vista Capable" PCs had Intel 915 chipsets lacking WDDM. *See id.* at 8. When Mr. Poole eliminated the WDDM requirement because of Intel's fear of lost sales, Intel was already "losing orders every day." Tilden Decl., Ex. A (MS-KELL 86803). However, Professor Leffler explained that the price of the 915 chipset did not decline. *Id.*, Ex. Z (Leffler Dep.) at 112:23-113:8. Microsoft itself referred to PCs capable of running only Home Basic as "old channel inventory" the day after Vista was launched. *Id.*, Ex. A (MS-KELL 24864-65). Mr. Poole described them as "bottom-of-the-barrel." *Id.*, Ex. D (Poole Dep.) at 190:23. This evidence confirms Professor Leffler's opinion that without the

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Vista Capable program, 915-based PCs would have been sold as "close-out PCs" at "mark downs," and not at "competitive price points." Leffler Decl., Ex. B at 8, 13.

### 8. Microsoft Abandons Its Own Expert's Theories.

Microsoft attacks Professor Leffler's opinions simply by "mixing up an econometric study and a quantification with — with an equally valid set of evidence concerning qualitative effects." Tilden Decl., Ex. Z (Leffler Dep.) at 120:6-8. Based on inapposite securities cases in which plaintiffs were required to prove reliance via the fraud-on-the-market theory, Microsoft asks the Court to disregard the common-sense and highly supported conclusion that the Vista Capable program maintained the prices of so-called "Vista Capable" PCs. See Pls.' Opp'n to Def.'s Mot. for Class Decert. at 13 et seq. (distinguishing fact of harm from measure of damages). Microsoft has abandoned any effort to defeat Professor Leffler's common sense conclusion based upon the avenue initially suggested by its own expert.

In arguing that a demand increase for Vista Capable PCs would not affect their price, Professor Hitt both contradicts Microsoft's own research and endorses the absurd conclusion that Microsoft's marketing made no difference. Professor Hitt can *not* agree the price of Vista Capable PCs would have declined even if Microsoft had promoted them as: "not Vista Capable," "Won't run AERO," "Won't Run Glass," "Not What Jim Allchin demonstrated at WinHEC 2005," "These weren't Vista Capable for three years but we changed our mind last week and now they are," "These are Vista Capable Now but won't be on February 2, 2007," "Contains the 915 chip which Intel is phasing out," or "Technical requirements were recently lowered to make this machine Vista Capable." Tilden Decl., Ex. W (Hitt Dep.) at 41:3-44:13.

Professor Hitt's opinions demonstrate simply a disagreement between the experts requiring trial. Refusing to accede to even basic principles, see id. at 102:24-105:12 (denying

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decline in price of pumpkins in the United States the day after Halloween), Professor Hitt argues that a demand increase for Vista Capable PCs would not cause a price increase on the ground that OEMs would simply increase supply. See Leffler Decl., Ex. B at 7. But Microsoft concedes Intel was not about to increase the supply of obsolete 915 chipsets, since it was attempting to shift to competitive next-generation chips as quickly as possible. Tilden Decl., Ex. D (Poole Dep.) at 153:18-155:7. In any event, a so-called "perfectly elastic supply" is a "textbook concept used for pedagogical reasons." Leffler Decl., Ex. B at 9 n.23.

#### III. ARGUMENT

A. The Jury Must Determine Whether the Vista Capable Program Had the Capacity to Deceive a Substantial Portion of the Public.

The Court has certified the plaintiff class as to two claims, first for violation of the Washington Consumer Protection Act, chapter 19.86 RCW ("CPA"), and second for unjust enrichment. Kelley v. Microsoft Corp., 251 F.R.D. 544, 559 (W.D. Wash. 2008). The elements of plaintiffs' claims are briefed in Pls.' Opp'n to Def.'s Mot. for Class Decert. at 11 et seq.

Under the CPA, whether a party has committed a particular act is a question of fact. Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc., 162 Wn.2d 59, 74-75, 170 P.3d 10 (2007); see also WPI 310.08 (instruction on "capacity to deceive"). Whether the CPA applies to a particular factual situation is question of law. Indoor Billboard, 162 Wn.2d at 75. When evidence supports "reasonably conflicting inferences," a jury trial is required. Southside Tabernacle v. Pentecostal Church of God, Pacific Northwest Dist., Inc., 32 Wn. App. 814, 824-25, 650 P.2d 231 (1982). The mass of evidence susceptible to conflicting inferences demonstrates a classic jury question on whether Home Basic was fairly called "Vista," for both plaintiffs' CPA and unjust enrichment claims. Microsoft's own recommendation not to call Home Basic "Vista," its internal admissions that PCs lacking defining features of Vista were

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allowed to be called "Vista Capable," and its omission of the deficiency of PCs lacking WDDM support, all support a jury reasonably concluding that Home Basic was not fairly "Vista."

### B. The Jury Must Determine Proximate Cause.

In *Indoor Billboard*, the court held that the traditional proximate cause standard (and not reliance) governs CPA claims. *Id.* at 84. The applicable jury instruction is WPI 310.07:

"Proximate cause" means a case which in direct sequence [unbroken by any new independent cause] produces the injury complained of and without which such injury would not have happened.

[There may be one or more proximate causes of an injury.]

"The issue of . . . proximate cause [is] generally not susceptible to summary judgment." *Ruff v. King County*, 125 Wn.2d 697, 703, 887 P.2d 886 (1995) (citing *LaPlante v. State*, 85 Wn.2d 154, 159, 531 P.2d 299 (1975)); *Hartley v. State*, 103 Wn.2d 768, 778, 698 P.2d 77 (1985).

The evidence supports the conclusion that Microsoft proximately caused class members to lose the benefit of the "Vista Capable" PCs they bought: Microsoft decided, against its own recommendation, to call Home Basic "Vista"; the design of the Vista Capable program was to maintain PC sales; Microsoft and its business partners all expected sales to decline without the program; Microsoft knew the program would confuse consumers; Microsoft was afraid of supplying too much information and stalling sales; Microsoft's "informative materials" only created more confusion at best and were false at worst; and there is direct testimony, after-the-fact-reports, and expert testimony that PC prices were in fact maintained. The class members, moreover, directly benefited Microsoft, whose revenue is directly based on PC sales.

Today Microsoft refers to "internal dialogue" and "spirited internal discussion," SJ Mot. at 4:20, 5:16, when forced to explain its foreknowledge that the Vista Capable program would confuse consumers. As to Mr. Poole's decision to eliminate the WDDM requirement, the person

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then in charge of the Vista Capable program is aware of no one else who supported that plan. Tilden Decl., Ex. I (Srinivasan Dep.) at 200:10-16. With respect to WDDM, Microsoft's "spirited internal discussion" made the sound of one hand clapping.

#### IV. MOTIONS TO STRIKE

- (1) Plaintiffs move to strike the Muzzey Declaration [Dkt. 257] pursuant to Rule 37(c). Microsoft never disclosed Mr. Muzzey as a witness pursuant to initial disclosures or interrogatory answers. See Tilden Decl., Exs. AA, BB (omitting Muzzey). Microsoft stated that it would supplement, but failed to do so. Id. First disclosing Mr. Muzzey six days after the discovery cutoff when moving for summary judgment is not harmless. Mr. Muzzey's testimony should therefore be stricken. See Baden Sports, Inc. v. Kabushiki Kaisha Molten, No. C06-210MJP, 2007 U.S. Dist. LEXIS 59862, at \*3 (W.D. Wash. Aug. 2, 2007).
- (2) Plaintiffs move to strike Rummage Decl., Ex. A [Dkt. 256-2] and part of Ex. G [Dkt. 256-3]. Exhibit A is a printout of a "blog entry" containing many levels of hearsay. Exhibit G includes a letter from Dell's counsel to plaintiffs' counsel purporting to represent Dell's belief. This evidence is unsworn and is hearsay. *See* Fed. R. Evid. 603, 801, 802. Exhibit A and this part of Exhibit G should therefore be stricken. *See Costanich v. Washington*, No. C05-0090MJP, 2008 U.S. Dist. LEXIS 36086, at \*19-20 (W.D. Wash, May 2, 2008).

#### V. CONCLUSION

Microsoft cannot rationally argue that Aero is not a core experience of Vista – and so far it has not tried. Microsoft's own admissions, third-party documents, plaintiffs' testimony, and plaintiffs' experts all support the common sense conclusion that branding PCs "Vista Capable" buoyed their prices, demonstrating a common impact across the class. Plaintiffs respectfully ask that Microsoft's motion for summary judgment be denied.

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1 DATED this 8th day of December, 2008. 2 KELLER ROHRBACK L.L.P. 3 4 By Is/ Ian S. Birk 5 William C. Smart, WSBA #8192 Ian S. Birk, WSBA #31431 б Attorneys for Plaintiff 7 GORDON TILDEN THOMAS & CORDELL L.L.P. 8 9 10 By /s/ Ian S. Birk for Jeffrey I. Tilden, WSBA #12219 11 Jeffrey M. Thomas, WSBA #21175 Mark A. Wilner, WSBA #31550 12 Attorneys for Plaintiff 13 14 15 16 17 18 19 20 21 22 23 24 25 26

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### 1 CERTIFICATE OF SERVICE 2 I hereby certify that on January 21, 2009, 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 3 following. 4 Counsel for Defendant Microsoft Corporation Counsel for Defendant Microsoft Corporation 5 - Admitted Pro Hac Vice Stephen M. Rummage, WSBA #11168 6 Cassandra L. Kinkead, WSBA #22845 Charles B. Casper Charles S. Wright, WSBA #31940 Montgomery, McCracken, Walker & Rhoads 7 Davis Wright Tremaine LLP 123 South Broad Street 1201 Third Avenue Suite 2200 Philadelphia, PA 19109 8 Seattle, Washington 98101-3045 ccasper@mmwr.com steverummage@dwt.com 9 cassandrakinkead@dwt.com charleswright@dwt.com 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25

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