

The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

DIANNE L. KELLEY, et al.,

Plaintiffs,

v.

MICROSOFT CORPORATION, a Washington  
corporation,

Defendant.

No. C 07-475 MJP

MICROSOFT'S REPLY IN  
SUPPORT OF ITS MOTION FOR  
SUMMARY JUDGMENT

*Re-noted on Motion Calendar:*  
December 19, 2008

**ORAL ARGUMENT  
REQUESTED**

**Redacted Per Court's Order [Dkt. 305]**

SUMMARY JUDGMENT REPLY  
(No. C 07-475 MJP)

DWT 12244695v1 0025936-000689

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## I. SUMMARY OF REPLY

Microsoft’s summary judgment motion focuses on the two issues the Court identified when it certified this case as a class action: (1) whether Windows Vista Home Basic “can fairly be called ‘[Windows] Vista,’” and (2) whether the Windows Vista Capable (“WVC”) program “inflated demand market-wide for [WVC] PCs” and thereby increased prices. Order [Dkt. 128] 22:3-6. Plaintiffs do not raise a genuine issue of fact on either one.

*First*, Plaintiffs concede that Microsoft created Windows Vista Home Basic as part of an integrated Windows Vista development effort. As a technical matter, then, Windows Vista Home Basic “can fairly be called ‘[Windows] Vista.’” That should end this case. The law gives Microsoft the right to define its software products, to license its software in different editions, to determine what features each edition will include, and to charge more for premium features—a dispositive legal point that Plaintiffs do not contest. (Their technical expert even calls this sort of software version differentiation “common practice.”) Faced with this, Plaintiffs revert to arguing that Microsoft deceived consumers by naming software “Windows Vista” that did not include Microsoft’s Windows Aero feature. But the Court ruled that this case could not proceed on such a deception theory. In any event, *all* of the evidence shows that Microsoft (as well as the press, OEMs, and retailers) differentiated the Windows Vista editions and told the public that Windows Vista Home Basic would not run Windows Aero. Plaintiffs point to no contrary evidence.

*Second*, Plaintiffs submit no evidence sufficient to support a verdict that unfair or deceptive conduct by Microsoft “artificially” inflated demand for and prices of all non-Premium Ready but WVC PCs. On Plaintiffs’ evidence, the jury could only guess whether the WVC program caused demand or price inflation for all non-Premium Ready PCs. Under settled law, Plaintiffs cannot take this case (which their experts absurdly value at \$8 billion) to trial without giving the jury sufficient evidence to do more than speculate on causation.

1                                   **II.       WINDOWS VISTA HOME BASIC IS WINDOWS VISTA**

2                   **A.       Plaintiffs Do Not Dispute That Microsoft Developed Windows Vista Home**  
3                   **Basic within the Family of Windows Vista Editions.**

4                   From the perspective of computer code and development, a jury could only conclude  
5                   that Windows Vista Home Basic fairly belongs within the Windows Vista family. Plaintiffs  
6                   admit that Microsoft developed both Windows Vista Home Basic and the edition they now  
7                   want to run, Windows Vista Home Premium, at the same time, with the same team, using the  
8                   same source code. Wallent Decl. [Dkt. 210] ¶ 10; Muzzey Decl. [Dkt. 257] ¶¶ 4, 6-7. The  
9                   fact that Microsoft developed different editions of Windows Vista hardly suggests that they  
10                  followed different development paths. As Plaintiffs’ technical expert, Ronald Alepin,  
11                  explains: “Vendors that sell different versions of the same software with certain selected  
12                  functions disabled *will develop the entire product*, test the entire product and then test the  
13                  reduced function versions.” Alepin Decl. [Dkt. 279] ¶ 12, n.8, 6:24-25 (emphasis added).  
14                  Mr. Alepin calls this “common practice.” *Id.* ¶ 12, 6:13-16. Consistent with Mr. Alepin’s  
15                  testimony, Windows Vista Home Basic has a variety of enhanced features that distinguish all  
16                  Windows Vista editions from Windows XP, including search, security, reliability, and  
17                  efficiency. Muzzey Decl. ¶ 11, Ex. 2. Although Mr. Alepin disputes the importance of some  
18                  features, Alepin Decl. [Dkt. 279] ¶¶ 14-15, 7:12-23, he admits that all editions share them.

19                  This should end the case. Even Plaintiffs tacitly concede that Microsoft has the right  
20                  to define its software products, to license different editions, to determine what features each  
21                  edition will include, and to charge more for premium features. Other software companies  
22                  follow this “common practice.” *See id.* ¶ 12, 6:13. Similarly, car manufacturers produce both  
23                  entry-level and luxury editions of the same model. *See Rummage Supp. SJ Decl. ¶ 2 & Ex. A*  
24                  (describing differentiation of Toyota Camry and Chevrolet Silverado models). But the fact  
25                  that Toyota markets the V6 engine, leather interior, in-dash information center, and high-end  
26                  sound system of the Camry XLE does not forbid it from selling a less expensive entry-level  
27                  Camry with cloth seats, a standard dash, and a basic stereo system. Nor does any legal  
                    principle suggest that Toyota may not “fairly” call its entry-level Camry a “Camry”—even if

1 its ads show the luxury edition—particularly when it, the press, and its dealers disclose the  
2 standard features of each Camry model.

3 The fact that Plaintiffs make so much of what Mr. Alepin calls “eye candy,” *see*  
4 Alepin Report [Dkt. 279, Ex. A] at 13, ¶ 18, shows only that many PC users want Windows  
5 Aero and are willing to pay more for it as a premium feature in a premium edition. But that  
6 does not mean Microsoft acted “unfairly” when it designated Windows Vista Home Basic as  
7 its less expensive, basic edition of Windows Vista.

8 **B. Microsoft Never Publicly Defined Windows Vista around the Aero User**  
9 **Interface during the Class Period.**

10 Rather than address the undisputed fact that Microsoft developed Windows Vista  
11 Home Basic as an integral part of the Windows Vista family, Plaintiffs present an 18-page  
12 play-by-play of the WVC program’s implementation. But Plaintiffs seem unable to decide  
13 exactly what they think Microsoft did wrong in that process. They attack Microsoft for not  
14 following a consultant’s March 2006 advice to adopt a second WVC logo that would identify  
15 PCs capable of running Windows Aero, Opp. 7:18-8:4; but they also complain that the  
16 Premium Ready designation (which in fact identified the PCs that could run Windows Aero)  
17 “muddied the waters by creating two different levels of Vista-readiness,” *id.* 11:4-5. They  
18 complain that Microsoft did not explain Windows Vista and Windows Aero in April and May  
19 2006, before WVC PCs filled the retail sales channel, Opp. 2:2-9; but they then urge that  
20 explanations to consumers were futile, *id.* 9:15-10:2. They argue that Microsoft misled the  
21 public into thinking “Aero” was a core feature of Windows Vista, Opp. 13:1-2; but they  
22 complain “there was no public information on what Aero was,” *id.* 12:20-23.

23 Leaving aside these contradictions, Microsoft understands Plaintiffs to argue that  
24 Microsoft defined Windows Vista around Windows Aero and thus “misled” the class when it  
25 allowed OEMs to label PCs as WVC if they could be upgraded only to Windows Vista Home  
26 Basic. But this argument just repackages the “deception” claims that the Court held Plaintiffs  
27 could not maintain. The Court should reject it without addressing it on its merits.

1 Even on the merits, Plaintiffs still offer no evidence from which a jury could conclude  
2 that Microsoft defined Windows Vista to the class as depending on Windows Aero or told the  
3 class that Windows Vista Home Basic could run Windows Aero. They rely on internal  
4 Microsoft discussions the class never saw; third-party commentary that did not emanate from  
5 Microsoft; Windows Vista advertising that came *after* the end of the WVC period, i.e., after  
6 class members bought their WVC PCs; and Plaintiffs' expert's conclusory assertion that  
7 Windows Vista Home Basic is not "fairly" called "Windows Vista," Alepin Decl. [Dkt. 279]  
8 ¶ 6. In contrast, Microsoft has shown (and Plaintiffs seem to admit) that it widely  
9 disseminated information about the features available—and unavailable—in each Windows  
10 Vista edition. Even assuming the Court looks beyond the integrated development of  
11 Windows Vista Home Basic, Plaintiffs have raised no triable issue of fact.

12 **1. Microsoft Publicly Defined Windows Aero as a Premium Feature**  
13 **Available Only in Premium Editions of Windows Vista.**

14 During the WVC program, Microsoft, OEMs, retailers, and the press explained  
15 repeatedly that consumers should buy "Premium Ready" computers if they wanted to run  
16 Windows Vista's premium features, including its new "user experience," Windows Aero.

17 For even better experiences that come with the premium editions of  
18 Windows Vista, including the Windows Aero user experience, *ask for*  
19 *Windows Vista Premium Ready PCs.*

20 Tindall Decl. [Dkt. 93] ¶ 4 & Exs. B, C, D (emphasis added).

21 Not all Windows® Vista™ features are available for use on all  
22 Windows® Vista™ Capable PCs. ... Some features available in  
23 premium editions of Windows® Vista™ -- like the new Windows®  
24 Aero™ user interface -- require advanced or additional hardware.

25 Rummage Class Decl. [Dkt. 99] ¶ 3 & Ex. B at 63. Microsoft provided the Court with a  
26 wealth of illustrative material disseminated *during the class period* in which retailers, OEMs,  
27 and the press emphasized that if PC buyers bought a PC with Windows XP preinstalled but  
wanted to be able to run Windows Aero if they upgraded to Windows Vista, they needed to  
buy Premium Ready PCs. *See, e.g.,* Riquelmy Decl. [Dkt. 102] ¶¶ 5-7 & Exs. 5-8 (Dell);  
Chim Decl. [Dkt. 97] ¶¶ 4-11 & Ex. 1-8 (Hewlett Packard); Rummage Class Decl. [Dkt. 99] ¶

1 3 & Ex. B (other OEMs); Rummage Class Decl. [Dkt. 99], Ex. A at 9 & 16 (Consumer  
2 Reports), 23 (NY Times), 25 (PC World).

3 Plaintiffs ignore this evidence. Despite Microsoft's challenge in its Motion, 6:24-26,  
4 Plaintiffs still do not point to a single advertisement suggesting to class members that every  
5 WVC PC would support Windows Aero. In particular, Mr. Alepin does not point to a single  
6 piece of promotional material to support his naked opinion that Windows Vista Home Basic  
7 cannot "fairly" be called Windows Vista. Alepin Decl. ¶ 6.

8 In the rare instances when Plaintiffs mention Microsoft promotional material that class  
9 members might have seen, they mislead the Court. Indeed, their Opposition opens by  
10 declaring that Microsoft "promoted one feature of Vista above all others" and quoting a  
11 description of the "elegant' new Aero 'user interface.'" Opp. 1:6 (quoting Tindall Decl.  
12 [Dkt. 93], Ex. D). But Plaintiffs omit the accompanying asterisk that points to this cautionary  
13 note: "These Windows Vista features may require advanced or additional hardware. For  
14 details, go to [www.windowsvista.com/getready](http://www.windowsvista.com/getready)." Tindall Decl. [Dkt. 93], Ex. D. The "Get  
15 Ready" Web site explained what "Windows Vista Capable" meant, described Windows Aero  
16 (contrary to Plaintiffs' claim that no explanation was available), and made clear that only  
17 premium editions, *not* Windows Vista Home Basic, have Windows Aero. See Therrien Decl.  
18 [Dkt. 94], Exs. A, B, C. Further, the quoted words come from a chart that compares the  
19 different Windows Vista editions and shows that Windows Vista Home Basic does not  
20 include Windows Aero—but premium editions do. Tindall Decl. [Dkt. 93], Ex. D.

21 Lacking any evidence from the period when class members bought their PCs,  
22 Plaintiffs resort to arguments about advertisements and articles *after* Windows Vista's  
23 release. Opp. 13-16. But Plaintiffs know that the 30-second "Wow!" television ads,  
24 submitted to the Court on a DVD, never ran during the WVC period and therefore could not  
25 define what "Windows Vista Capable" or "Windows Vista Home Basic" meant to a class  
26 member making a decision as to what PC to buy. Similarly, "Windows Vista: The Official  
27 Magazine" (a) ran after the WVC program ended and therefore could not have misled the

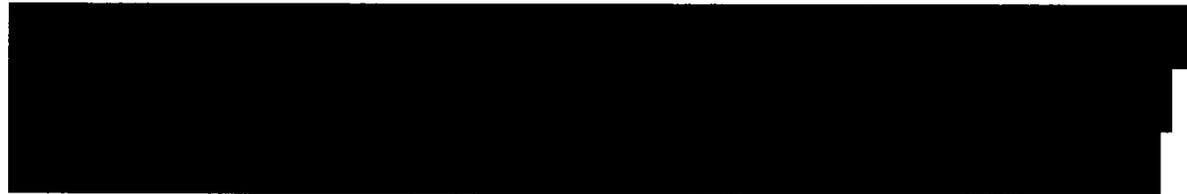
1 class, and (b) did not reflect the views of Microsoft, which had no role in its content, *see*  
2 Rummage Supp. SJ Decl., Ex. B (Phillips Dep. 42:19-43:16). Finally, Microsoft conducted  
3 the so-called “Mojave Experiment” in 2008; it sheds no light on whether Microsoft defined all  
4 Windows Vista editions as including Windows Aero during the WVC program.

5 **2. Microsoft’s Internal Discussions Did Not Define Windows Vista for**  
6 **Class Members.**

7 Plaintiffs continue to trumpet internal Microsoft documents debating modifications to  
8 the WVC program. But no matter what positions employees took internally, the law gives  
9 Microsoft the right to offer whatever software products it chooses, with whatever features it  
10 decides to include. Internal e-mails do not provide evidence sufficient for a jury to find that  
11 Microsoft *publicly* defined Windows Vista around Windows Aero during the WVC program.

12 Further, Plaintiffs misrepresent the internal documents they cite:

13 *The White Paper.* Plaintiffs make much of a “White Paper” from August 2005 in  
14 which some Microsoft employees proposed that Microsoft not call Windows Vista Home  
15 Basic “Windows Vista.” Opp. 2-4. But the White Paper gives a more balanced assessment  
16 than Plaintiffs portray. It expressed concern that *removing* the Windows Vista name from  
17 Windows Vista Home Basic could create “customer confusion” because customers might  
18 think “a new PC with Home Basic did not come with the latest [operating system]” when in  
19 fact it did. Tilden Decl., Ex. A (MS-KELL 53373). And what Plaintiffs cite as an argument  
20 *for* removing the “Vista” name from Windows Vista Home Basic actually was an argument  
21 *against* doing so: when the White Paper cautioned that “customers will not likely understand  
22 or be able to articulate whether or not Home Basic and Vista Premium products are the same  
23 product or different,” it was warning about potential confusion if Microsoft *did not* give  
24 Windows Vista Home Basic the “Vista” name. Opp. 6:7-9 (quoting MS-KELL 53374).



1 [REDACTED]  
2 The White Paper reflects a responsible internal discussion about how to present a  
3 software product to the public. It does not suggest that Microsoft ever told class members that  
4 Windows Vista always meant Windows Aero.

5 **WDDM.** Plaintiffs rehash their partial summary judgment argument as to WDDM.  
6 Microsoft has explained why its decision to make WDDM support recommended rather than  
7 required was not actionable. Opp. to WDDM Motion [Dkt. 212]. (In so doing, Microsoft  
8 showed that most improvements in Windows Vista do not require WDDM, *see* Wallent Decl.  
9 [Dkt. 210]; recent testimony shows that Intel tested its 915 chipset and found that it ran  
10 Windows Vista well. *See* Rummage Supp. SJ Decl., Ex. C (James Dep. 41:5-24; 123:1-22.))  
11 Here, Plaintiffs' WDDM claims cannot raise an issue of fact because (a) five of the six  
12 plaintiffs bought PCs that would support WDDM, as they concede, *see* Wallent Decl. [Dkt.  
13 210] ¶ 19, and (b) the Court did not certify a class to pursue WDDM claims, which raise  
14 individual issues concerning PC usage and affect only a fraction of the class members.

15 **Revised WVC Program Materials.** Plaintiffs quote Jim Allchin's e-mail calling one  
16 draft of a WVC marketing plan a "terrible plan" and wrongly tell the Court that "[t]his  
17 'terrible' plan is exactly what Microsoft proceeded to do"—as if employees ignored  
18 Microsoft's Co-President for Platform Products and Services. Opp. 8:9-21. But after Mr.  
19 Allchin sent his message, Microsoft *did* change the plan. *See* Rummage Dec. [Dkt. 256], Ex.  
20 H (Allchin Dep. 122:15-123:25) (team "did a bunch of stuff" after e-mail). It introduced the  
21 "Premium Ready" designation, which made it easier for end-users to identify PCs that could  
22 run Windows Aero, and it required OEMs to emphasize that not all versions of Windows  
23 Vista would run premium features, such as Windows Aero. Mullaney-Sundlie Decl. [Dkt.  
24 88], Ex. E; Totton Decl. ¶ 5. In short, Microsoft, OEMs, and retailers did not implement the  
25 WVC marketing program as it existed when Mr. Allchin commented. Totton Decl. ¶ 6.

26 **C. The Market Has Not Rejected Windows Vista Home Basic.**

27 Based on a misreading of one report concerning purchases of packaged versions of

1 Windows Vista, Plaintiffs make the sweeping assertion that “the market rejected Home Basic  
2 as a version of Vista.” Opp. 16:19-23. But this report deals only with *forecasts* based on data  
3 fewer than 60 days after the Windows Vista launch and only with packaged software  
4 available in retail stores, not the OEM versions that account for the vast majority of Windows  
5 licenses. See Griffith Dep. [Dkt. 154] 251-52; see also *id.* [Dkt. 152] 135:2-136:7. In fact,  
6 through November 2008, Microsoft sold [REDACTED] licenses for Windows Vista Home Basic,  
7 accounting for [REDACTED] of the total licenses for the four Windows Vista editions sold to  
8 consumers and small businesses. Moline SJ Decl. ¶ 5. (Windows Vista Ultimate accounts for  
9 about [REDACTED] of licenses sold; Windows Vista Business accounts for about [REDACTED]; and Windows  
10 Vista Home Premium accounts for about [REDACTED]. *Id.*)

11 These figures show that a substantial portion of the market sees value in an entry-level  
12 edition of Windows Vista without Windows Aero, while some see value in other editions.  
13 Microsoft has the right to deliver a low-cost Windows Vista edition to that market segment.

14 **D. The Court Should Grant Summary Judgment on This Record.**

15 Plaintiffs have raised no genuine issue of material fact whether Windows Vista Home  
16 Basic, licensed [REDACTED] times, may be fairly called Windows Vista. Microsoft created  
17 Windows Vista Home Basic to make Windows Vista’s improvements affordable and widely  
18 available. It put premium features into more expensive Windows Vista editions, and it  
19 disclosed the differences among the Windows Vista editions. Plaintiffs do not deny *any* of  
20 this. Plaintiffs bought entry-level PCs that function well and are capable of running the entry-  
21 level edition of Windows Vista, if upgraded. They simply chose not to spend the extra money  
22 for the memory or graphics capabilities that would have allowed them to run a premium  
23 Windows Vista edition. *E.g.*, Rummage Supp. SJ Decl., Ex. D (Hall Dep. 98:23-24) (chose  
24 not to “buy a gig of RAM” “[b]ecause it wasn’t as good of a value”).

25 Based on this record, no reasonable fact finder could determine that Microsoft violated  
26 the law when it included Windows Vista Home Basic within its Windows Vista family. As a  
27 result, the Court should enter judgment as a matter of law on Plaintiffs’ CPA claim, *Indoor*

1 *Billboard/Washington, Inc. v. Integra Telecom of Washington, Inc.*, 162 Wn.2d 59, 75 (2007)  
2 (court may resolve “unfair and deceptive” element as a matter of law), and on Plaintiffs’  
3 unjust enrichment claim. *See Lynch v. Deaconess Medical Ctr.*, 113 Wn.2d 162, 166 (1989)  
4 (summary judgment where “benefit” retained by defendant was amount owed by plaintiff).

5 **III. PLAINTIFFS CANNOT PROVE PRICE INFLATION WITH THE EVIDENCE**  
6 **THEY OFFER**

7 Plaintiffs bear the burden of coming forward with evidence sufficient to support a  
8 verdict that Microsoft’s allegedly unfair or deceptive conduct (1) artificially increased  
9 demand for all WVC PCs that were not Premium Ready, and (2) artificially inflated prices for  
10 all non-Premium Ready PCs. “To survive summary judgment, the plaintiff’s showing of  
11 proximate cause must be based on more than mere conjecture or speculation.” *Pepper v. JC*  
12 *Penney Corp., Inc.*, 2008 WL 4614268, at \*4 (W.D. Wash. Oct. 16, 2008) (Coughenour, J.)  
13 (quoting *Miller v. Likins*, 109 Wn. App. 140, 145 (2001)). A showing of causation is  
14 speculative “when, from a consideration of all the facts, it is as likely that [the injury]  
15 happened from one cause as another.” *Pepper*, 2008 WL 4614268, at \*4 (citation omitted).  
16 “If there is nothing more tangible to proceed upon than two or more conjectural theories under  
17 one or more of which a defendant would be liable and under one or more of which a plaintiff  
18 would not be entitled to recover, a jury will not be permitted to conjecture how the accident  
19 occurred.” *Id.* (quoting *Marshall v. Bally’s Pacwest, Inc.*, 94 Wn. App. 372, 379 (1999)).

20 As explained in Microsoft’s Reply in Support of its Motion for Decertification [Dkt.  
21 287], Plaintiffs present only speculation about both demand and prices.

22 **A. Plaintiffs Presented No Evidence to Support a Judgment with Respect to**  
23 **Demand Inflation as to All Non-Premium Ready PCs.**

24 As Microsoft explained in its Motion for Summary Judgment, Dr. Leffler’s analysis  
25 did not try to account for the many factors that could influence demand for WVC but not  
26 Premium Ready PCs, including product features, advertising, sales promotions, rebates and  
27 discounts, economic conditions, consumer preferences, and price. SJ Motion [Dkt. 253] 19:5-

9. Further, Plaintiffs made no effort to assess the impact on demand of the aspects of the

1 WVC program they do not challenge or to separate the impact of the WVC program on  
2 demand for Premium Ready PCs (which are not at issue) from non-Premium Ready PCs. *Id.*

3 19:23-27. ( [REDACTED]

4 [REDACTED] See Totton Decl. ¶ 11; Tilden Decl., Ex. A (MS-KELL

5 52498) ( [REDACTED] ) (Opp. 19:12-13).<sup>1</sup>

6 Plaintiffs' Opposition and Dr. Leffler's new two-page declaration make no effort to  
7 rectify these deficiencies by distinguishing among and assessing these impacts. Because that  
8 leaves the jury to speculate about causation, Microsoft is entitled to summary judgment.

9 *Pepper*, 2008 WL 4614268, at \*4 (granting summary judgment where plaintiff could not  
10 distinguish between plausible causes of injury); *McLaughlin v. Am. Tobacco, Inc.*, 522 F. 3d  
11 215, 229-30 (2d Cir. 2008); *In re Omnicom Group, Inc., Sec. Litig.*, 541 F. Supp. 2d 546, 554  
12 (S.D.N.Y. 2008); *Gordon Partners v. Blumenthal*, 2007 WL 1438753 (S.D.N.Y. 2007).

13 **B. Plaintiffs Presented No Evidence to Support a Judgment with Respect to**  
14 **Price Inflation as to All Non-Premium Ready PCs.**

15 As explained in Microsoft's Decertification Reply [Dkt. 287], Plaintiffs submitted no  
16 evidence of an actual price increase for any WVC but not Premium Ready PC—much less  
17 quantified that increase. Instead, Plaintiffs ask the Court to allow them to show causation for  
18 one alleged harm (price inflation) and then claim damages based on a separate harm for which  
19 the Court ruled they cannot prove causation on a class basis (deception or benefit of the  
20 bargain injury). The Court should reject that sleight of hand.

21 Plaintiffs seek a remedy that would give them a Premium Ready PC even though they  
22 paid for a non-Premium Ready PC. But because Premium Ready PCs had more hardware,  
23 more memory, and better graphics, they cost more—as Plaintiffs admit. *See, e.g.*, Rummage  
24 Supp. SJ Decl., Ex. D (Hall Dep. 99:9-14); *id.* Ex. E (Schroder Dep. 60:4-17) (“If you want  
25 more expensive features, you have to pay for it”). Thus, despite Plaintiffs' claim that they

26 <sup>1</sup> Plaintiffs refer to Microsoft's “Customer Feedback” from the Windows XP logo program, Opp.  
27 18:15-21, but that presentation deals with consumer reaction to logos (such as the “Designed for  
Windows XP” logo) that identify the operating system that the OEM *installed* on a PC. It says  
nothing about how consumers might react (let alone how they *did* react) if they saw a logo stating  
what the PC could run, if upgraded.

1 want only “what they paid for,” Decert. Opp. 20:22-24, they *really* want something they did  
2 *not* pay for, i.e., a more expensive Premium Ready PC that they chose not to buy at the time.  
3 *See, e.g.,* Rummage Supp. SJ Decl., Ex. D (Hall Dep. 98:23-24) (decided not to “buy a gig of  
4 RAM” “[b]ecause it wasn’t as good of a value.”). To give class members free upgrades to  
5 Premium Ready PCs would provide a windfall to millions because no one can know who  
6 among the class (a) intended to upgrade to Windows Vista (as the Court knows, only a small  
7 percentage upgrade), or (b) wanted a Premium Ready PC, or (c) would have chosen to pay  
8 more for a Premium Ready PC just so they could run Windows Aero.<sup>2</sup>

9 Plaintiffs also overreach in seeking to recover as “unjust enrichment” *all* of  
10 Microsoft’s revenue from Windows XP licenses and Express Upgrade licenses attributable to  
11 all non-Premium Ready WVC PCs. As to the claim for Windows XP license revenue,  
12 Plaintiffs do not contend that class members would have refused to buy Windows XP PCs at  
13 all; they thus ask the Court to award money they would have paid anyway. As to the claim  
14 for Express Upgrade revenue, Plaintiffs seek money that they did not pay, because OEMs  
15 often subsidized that expense, as they did for all four of the “Express Upgrade” plaintiffs. *See*  
16 Mot. for SJ [Dkt. 253] 23:20-24:18; Opp. to Mot. for Express Upgrade Subclass [Dkt. 208]  
17 3:21-4:18. Even Dr. Leffler appears to understand the absurdity of Plaintiffs’ demand, which  
18 has no basis in the law or common sense. *See* Leffler Dep. [Dkt. 256, 259, 288] 26:11-22;  
19 209:16-210:15; 211:8-212:20.

#### 20 IV. MOTIONS TO STRIKE

21 ***Muzzey Declaration.*** Plaintiffs complain that Microsoft’s Initial Disclosures did not  
22 identify Mr. Muzzey by name. Opp. 24:6-12. But Microsoft told Plaintiffs that it might call  
23 “engineers from its Windows Client Product Group to testify concerning the features of the  
24 Windows Vista editions, the ... configurations required or recommended to implement those

25 <sup>2</sup> If Plaintiffs truly sought to recover only “what they paid for” in the form of the Windows Vista  
26 capability they supposedly expected, they would seek the difference between (a) the extra amount that  
27 they would have had to pay to buy a Premium Ready PC when they bought a WVC PC and (b) the  
additional cost to upgrade the PC today. If the incremental cost for a Premium Ready PC exceeded  
the upgrade cost, then they would have lost nothing. But Plaintiffs have not done this analysis—  
presumably because they know it would result in small damage figures and require individual proof.

1 features, and the Windows Vista Capable and Express Upgrade programs.” Tilden Decl., Ex.  
2 AA ¶ 1. Mr. Muzzey fits that description. Unlike a witness to an event whose knowledge  
3 could never be tapped without disclosure, Mr. Muzzey describes facts known to scores of  
4 Microsoft employees. Microsoft therefore properly identified him by category. If Plaintiffs  
5 wanted to know what Microsoft’s engineers might say on this topic, they could have added it  
6 to the 30 topics for which they required Microsoft to produce witnesses under Rule 30(b)(6).  
7 *See Rummage Supp. SJ Decl., Exs. F, G (30(b)(6) deposition notices).* They did not do so.

8 In any event, the Muzzey Declaration speaks to an issue on which Plaintiffs bear the  
9 burden of proof. If the Court were to strike the Muzzey Declaration, Plaintiffs still would  
10 have a complete dearth of proof on a point crucial to their case, i.e., whether Windows Vista  
11 Home Basic belongs in the Windows Vista family as a technical matter.

12 ***Dell Letter.*** Microsoft agrees that it cannot offer an unsworn letter from Dell’s  
13 counsel to prove the truth of Dell’s assertion that no price inflation occurred. *See Opp. 24:15-*  
14 *18.* But Microsoft actually offered the letter in support of its Decertification Motion (not this  
15 motion) and only to show that Plaintiffs subpoenaed documents from OEMs in search of  
16 evidence of price inflation and came up empty. *See Decert. Motion [Dkt. 252] 7:6-17.*

17 ***Windows Vista Home Basic Survey.*** Microsoft agrees the Court should not consider  
18 for its truth the article from technology writer Ed Bott—even though it surveys only publicly  
19 available data to show what types of PCs come with Windows Vista Home Basic preinstalled.  
20 *Opp. 24:13-15.* It is enough to say that Microsoft issued [REDACTED] licenses for Windows  
21 Vista Home Basic; to note that Dell’s promotions for small business PCs continue to feature  
22 PCs with Windows Vista Home Basic, *see Rummage Supp. SJ Decl., Ex. H;* and to ask why  
23 neither Dr. Leffler nor Mr. Alepin bothered to collect data similar to Mr. Bott’s.

## 24 V. CONCLUSION

25 Plaintiffs ask for more than \$8 billion in damages. To take a case of this magnitude to  
26 trial, they must rely on more than speculation and snippets from internal documents. The  
27 Court should grant Microsoft’s motion and dismiss Plaintiffs’ claims.

1 DATED this 19th day of December, 2008.

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1 CERTIFICATE OF SERVICE

2 I hereby certify that on December 19, 2008, I electronically filed the foregoing Reply  
3 in Support of Microsoft's Motion for Summary Judgment with the Clerk of the Court using  
4 the CM/ECF system which will send notification of such filing to the following:

5 Jeffrey I. Tilden: jtilden@gordontilden.com  
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9 I have also served this sealed document by email, per agreement with counsel.

10 DATED this 19th day of December, 2008.

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