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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DIANNE L. KELLEY, et al.,)
)
Plaintiffs,)
)
v.)
)
MICROSOFT CORPORATION, a Washington)
Corporation,)
)
Defendant.)

No. C07-0475 MJP
PLAINTIFFS' MOTION FOR PARTIAL
SUMMARY JUDGMENT RE: WDDM
CLASS ACTION
NOTE ON MOTION CALENDAR:
October 17, 2008

Filed Under Seal

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I. INTRODUCTION

Plaintiffs seek partial summary judgment that one particular aspect of Microsoft's Windows Vista Capable program was an "unfair or deceptive act or practice" under the Washington Consumer Protection Act, chapter 19.86 RCW ("CPA"). Up until January 30, 2006, one of the "fundamental"—in Microsoft's words—elements of the new Vista operating system was the "Windows Device Driver Model" ("WDDM")¹ or "LDDM" for Vista's codename Longhorn). In the months before going public with the Windows Vista Capable program, which was designed to maintain sales of PCs loaded with XP before Vista was launched, Microsoft *dropped* WDDM capability as a requirement for promoting a PC as being "Vista Capable." Yet, the day Vista was launched, and in accordance with its plan at the time WDDM was dropped, Microsoft *reinstated* the WDDM requirement. The documents demonstrate beyond any reasonable doubt the reasons why Microsoft temporarily dropped the WDDM requirement: (1) to help itself by nearly doubling the number of PCs that would qualify for the Vista Capable designation, and (2) to help Intel sell millions of chipsets by calling them "Vista Capable" even though they could never support WDDM.

In the spring of 2006, Jim Allchin was Microsoft's Co-President of Platform Products & Services. He reported to CEO Steve Ballmer. When Mr. Allchin was briefed on the proposition that Microsoft was going to drop WDDM as a requirement of Windows Vista capability, his initial reaction was to protect, not deceive, Microsoft's customers:

I'm sorry to say that I think this plan is terrible and it will have to be changed.

I believe we are going to be misleading customers with the Capable program. OEMs will say a machine is Capable and customers will believe that it will run all

¹ WDDM is the same as WVDDM or LDDM, the latter referring to the codename for Vista, "Longhorn" or "LH."

1 the core Vista features. The fact that aero won't be there EVER for many of these
2 machines is misleading to customers.

3 On top of that the fact that this has no relationship (i.e., is not the same as)
4 Windows Vista Basic is just very strange.

5 We need to meet on this. Please set this up ASAP. We need something simpler
6 in my view. I know we don't want to hurt the OEMs, *but end-customers must be
7 the top priority. We must avoid confusion. It is wrong for customers. And we
8 probably will have to change your current plans.*

9 Thanks,

10 jim

11 Declaration of Ian S. Birk ("Birk Decl."), Ex. A (MS-KELL 87853) (emphasis added). Within
12 the next 5 hours, Microsoft executives added at least 5 emails to this thread that Microsoft claims
13 are attorney-client privileged. The Windows Vista Capable program, however, was *not* changed.
14 The result was that Microsoft certified millions of PCs as being "Vista Capable" when these
15 same PCs did not meet the minimum requirements for Vista either before January 30, 2006, or
16 on the day Vista was launched.

17 Plaintiffs seek partial summary judgment that this conduct was an unfair or deceptive act
18 or practice under the first element of plaintiffs' CPA claims. Determination of whether
19 additional aspects of the Windows Vista Capable program were also unfair or deceptive, as
20 plaintiffs contend, as well as determination of the remaining elements of plaintiffs' CPA claims,
21 are properly reserved for trial.

22 II. TIMELINE

23 April 25-27, 2005: WinHEC 2005: Microsoft's annual
24 Windows design conference, at which Bill
25 Gates announces that WDDM will be a
26 Vista requirement.

1 December 21, 2005: Microsoft circulates the first version of the
2 Windows Vista Capable OEM Marketing
3 Bulletin, in which WDDM is a
4 requirement.
5
6 January 20, 2006: Intel complains because the Windows Vista
7 Capable program is going to start too soon
8 for Intel to liquidate non-capable hardware
9 to the unsuspecting public.
10
11 January 31, 2006: Microsoft drops the WDDM requirement
12 for the Windows Vista Capable logo.
13
14 April 1, 2006: Millions of non-WDDM PCs hit store
15 shelves with “Vista Capable” logos.
16
17 January 30, 2007: Microsoft launches Vista, and WDDM is
18 immediately reinstated as a Vista
19 requirement.
20
21 Present: Microsoft denies doing anything wrong.
22

23 III. STATEMENT OF FACTS

24 A. WDDM

25 1. Video Circuitry

26 Since the PC was introduced in 1981, it has included separate circuitry to handle the
video display function. Alepin Decl. ¶ 4. The graphics controller inside the PC is the most
complex and powerful hardware component other than the CPU (Central Processing Unit). *Id.*
The graphics adapter device driver architecture employed in Windows XP was called the XPDM
– XP Driver Model. *Id.* In an effort to improve the reliability, performance, functionality and
appearance of its next generation operating system, Microsoft developed a new architecture
called WDDM or Windows Device Driver Model. *Id.*

2. Vista Video: WDDM

At Microsoft’s annual Windows design conference “WinHEC” in April 2005, Microsoft
formally announced to the OEMs that WDDM would be a requirement for Vista. Birk Decl., Ex.

1 A (MS-KELL 18482, 48128-29, 51050-52, 77578). The decision to require WDDM was based
2 on a “ton of feedback & negotiation with Intel, HP & Dell.” *Id.* (MS-KELL 46565). Microsoft
3 executives Will Poole and Mike Sievert agreed to the plan because it “set[] a bar around driver
4 stability” among other reasons. *Id.*

5
6 By WinHEC 2005, Microsoft was already preparing a “Ready PC” campaign in advance
7 of the Vista launch. *Id.* (MS-KELL 77574-78). The “Ready PC” (later dubbed “Vista Capable”)
8 program was meant to identify PCs pre-loaded with XP before the new Vista operating system
9 came out as being “ready” for the new Vista operating system when it would later launch. *Id.*
10 (MS-KELL 77574-75). According to Microsoft CEO Steve Ballmer, Microsoft relied on the
11 Ready PC program in advance of Vista to avoid sales slowdowns. *See* Birk Decl., Ex. B.

12
13 **3. WDDM Was “Fundamental” to Vista.**

14 Internally, Microsoft viewed WDDM as one of the foundational underpinnings of Vista.
15 In the first draft of a “Q&A” on the Vista “Ready PC” program, dated June 17, 2005, Microsoft
16 explained the WDDM requirement as follows:

17 LDDM is Longhorn Display Driver Model that improves stability over current XP
18 display drivers. Since we want to make sure customers get a good, reliable
19 experience with their Windows, LDDM support will be a *core requirement* for
Longhorn.

20 *Id.* (MS-KELL 57590) (emphasis added). On August 9, 2005, Rajesh Srinivasan, one of the
21 Microsoft employees primarily responsible for what would become the Vista Capable program,
22 Birk Decl., Ex C (Croft Dep.) at 41:4-12, circulated an email on the issue of the timing of the
23 anticipated Ready PC program based on the fact that few PCs in the anticipated market would
24 meet minimum Vista requirements. Birk Decl., Ex. A (MS-KELL 48888). Mr. Srinivasan
25 recommended delaying the program precisely to maintain the WDDM requirement:
26

1 OEM push back to announcing the program in Jan 06 is primarily due to concerns
2 that less than 30% of PCs qualify for Ready program in Spring 06. The main
3 driver for this is the WDDM (formerly LDDM) requirement for GPU [Graphics
4 Processor Unit]. *We need to have this requirement as it is fundamental to user
5 experience, stability, quality, productivity, performance, etc. . . .*

6 *Id.* (MS-KELL 48889) (emphasis added). The original Vista Capable OEM Marketing Bulletin
7 therefore required WDDM for the “Vista Capable” designation. *Id.* (MS-KELL 75).

8 **4. Vista Would Be Coming Out in Two Tiers.**

9 Even at this early stage, Microsoft was sensitive to the fact that Vista would be coming
10 out in two tiers—what was then called “standard” for the version of Vista without Aero, and
11 “premium” for the versions of Vista that would run Vista’s new signature Aero user interface.

12 *See id.* (MS-KELL 46207-08). Therefore, Microsoft wanted to ensure that the Ready PC
13 requirements would be, at a minimum, equivalent to the requirements for the “standard” Vista
14 version at launch; as a consequence, WDDM was required:

15 Ready PCs requirements are aligned with Vista standard logo where it makes
16 sense—

- 17 • E.g., graphics driver is one of the biggest differences between DFW XP
18 [Designed for Windows XP] and DFW Vista standard logo criteria. So
19 ready PC requires LDDM support for graphics (Vista standard logo
20 criteria.)

21 *Id.* (MS-KELL 46207).

22 **5. At the Time, Both Tiers Required WDDM.**

23 There was no shortage of agreement within Microsoft that the requirements for a
24 “Ready” (later “Capable”) designation, at a minimum, should align to the requirements for the
25 lower tier of Vista. *See id.* (MS-KELL 46451) (if “ready PC” does not meet standard criteria,
26

1 and will not even come close to premium criteria, “That’s just bad.”)² When Microsoft was
2 considering communicating Ready PC requirements that differed from the requirements for the
3 lower tier of Vista (which even then included WDDM), Microsoft employee Scott Herrboldt
4 noted, “I have not yet seen a reasonable argument against the notion that a product marketed as
5 ‘Vista Ready’ should be eligible for the Vista Logo once Vista ships”—which is precisely the
6 opposite of what Microsoft would end up doing. *Id.* (MS-KELL 86912, 87696). Referring to
7 WDDM, Microsoft Director of Marketing Mark Croft confirmed at that time:

8
9 we are holding onto the graphics driver as the most tangible aspect of Vista. The
10 most visible aspect. So we have that as a mandatory requirement.

11 *Id.* (MS-KELL 86911). Mr. Herrboldt in turn explained the rationale:

12 We want customers to feel comfortable buying a Vista Ready PC as a [sic]
13 investment that has some life in it – I can buy now and later upgrade to Vista. My
14 only question, which remains unanswered, is what guarantees do we make to the
15 customer in Vista Ready? . . . *I worry that there will be Vista Ready PCs that
16 aren’t ready to run Vista when it comes out. This seems so simple to me...*

17 *Id.* (emphasis added).

18 Microsoft adopted the WDDM requirement even in the face of risk that some of the
19 market would not be able to support it. Microsoft employee Chris Jones explained that
20 Microsoft faced this risk with Intel all along:

21 When we set out to do LDDM we knew that we needed a high performance
22 graphics part. We told Intel that their part would need work and this was a
23 constant risk. I am amazed we are even close to getting it working on Calistoga
24 [an Intel chipset]. I know this causes friction with Intel but you just can’t do the
25 stuff we want to do on their part – *it is crappy for graphics.*

26 ² Plaintiffs contend, but are not currently seeking summary judgment on the issue, that it was unfair and deceptive that the “Capable” PCs were unable to run the premium experiences of Vista.

1 *Id.* (MS-KELL 48233) (emphasis added). Later in the same email thread, Mr. Jones expressed
2 the rationale for requiring WDDM, in spite of possible low market share: “[y]ou would not get
3 compositing and performance without it.” *Id.* (MS-KELL 48232).

4 **6. WDDM Benefits**

5 Consistent with Microsoft’s internal assessment of the importance of WDDM, plaintiffs’
6 expert Ronald Alepin also concludes, “WDDM’s key benefits were beyond the improved visual
7 effects. WDDM enabled Microsoft to provide a more stable, robust environment with
8 significantly fewer crashes.” Alepin Decl. ¶ 5.

- 9 • WDDM provided crash protection against the notorious “blue screen of death”
10 crashes, 20 percent of which were due to failures in graphics drivers according to
11 internal Microsoft research. *Id.* ¶ 6.
- 12 • WDDM included a “GPU scheduler” to prioritize graphics operations and
13 improve performance when moving windows on the desktop and when playing
14 back video content while connected to an external high-definition video source.
15 *Id.*
- 16 • WDDM increased security by ensuring that one application could not gain access
17 to information in another application through the video subsystem. *Id.*
- 18 • WDDM provided an improved plug-and-play option for connecting PCs to
19 external televisions and monitors. *Id.*
- 20 • WDDM introduced a new power-saving feature called “hybrid sleep,” which
21 allowed the operating system to save the contents of memory to disk and preserve
22 the contents with low power while shutting down the rest of the system. This
23 allowed the user to return and have an “instant on” feature. *Id.*

- 1 • WDDM included a new set of “Application Programming Interfaces” that could
2 be used by developers to build new applications for Vista, positioning WDDM as
3 a platform for the future evolution of the Windows-based PC. *Id.*

4 **B. Three OEMs Ask For WDDM Waivers, and Microsoft Refuses.**

5 **1. Dell**

6 On June 24, 2005, Dell was expecting a “grace period” on the WDDM requirement:

7 I was hoping to get your latest thoughts around the LDDM requirement that I
8 brought up a couple of weeks ago. Dell is still looking for guidance on our plan
9 and will be hoping that we will have a decision made by the meeting.

10 The reason they are pushing so hard is that they have a number of economy class
11 systems that will have the Intel Alviso/Grantsdale chipset which is not LDDM
12 compliant. They will be shipping this until Intel has their rev about 6 – 9 months
13 after LH’s current ship window. Dell knows that not having Windows Logo is a
14 bad thing, but since this is an industry issue, are expecting some sort of grace
15 period.

16 *Id.* (MS-KELL 46468). The answer was swift:

17 We have discussed this with the graphics team. We will be holding the line on
18 LDDM for Standard Logo. ***LDDM is fundamental to stability*** and graphics is
19 one of the primary contributors to OCA.

20 *Id.* (MS-KELL 46467) (emphasis added). Microsoft’s internal reasoning was as follows:

21 1) It is critical to Microsoft’s success with Longhorn that our customers are truly
22 delighted with LH as an operating system and it is seen to be stable, reliable, and
23 experientially different than Windows XP.

24 2) Two key elements (stability and reliability) are dependent on many device
25 drivers, but ***our data shows that customers are significantly impacted by the
26 stability of the display drivers, and the LDDM architecture in LH is explicitly
27 designed to address that customer issue.***

28 3) LDDM has been POR [plan of record] for many months, and it has been
29 clearly articulated and Intel has received all of the briefings and Microsoft has
30 been more than accommodating to address issues created by Intel’s unique video
31 architectural implementation.

1 4) Intel made an experienced business decision as to which chipset they would
2 provide resources toward for implementing an LDDM driver.

3 5) Dell has at least three potential ways to solve their problem

4 a. Ask Microsoft to grant an exception (*impact: bad customer experience,*
5 *defeats LH customer benefit pillars*)

6 b. Ask Intel to accelerate their pricing waterfall for Calistoga [a chipset] for
7 implementation on LH parts, perhaps even limiting the value line Calistoga to
8 equivalent Alviso [another chipset] levels.

9 c. Go with an alternate discrete graphics provider that has an LDDM driver[.]

10 I would ask Dell to consider other options – *compromising the customer*
11 *commitments of stability and reliability for LH does not benefit the customer or*
12 *MS or Dell in the long run.*

13 *Id.* (MS-KELL 46466) (emphasis added). Another Microsoft employee echoed:

14 we NEED to hold the line here. LDDM == LOGO. no LDDM, no LOGO.

15 *Id.* (MS-KELL 46465).

16 2. Sony

17 In December 2005 Microsoft internally discussed a potential waiver for Sony of the
18 WDDM requirement for Ultra-Portable PCs (“UPPCs”). *See id.* (MS-KELL 77167-70).

19 Microsoft again refused a waiver. *Id.* (MS-KELL 48799-801, 45942). The rationale for not
20 waiving WDDM included:

21 Customer benefits and OEM support benefits from WDDM:

- 22 • *WDDM enhances graphics stability – as graphics drivers account for*
23 *~35-50% of all Windows crashes.*

24 * * *

25 Graphics team’s stance:

- 26 • At the end of the day, *graphics is the biggest change we are making in*
Vista over XP. WDDM is fundamental to enable these improvements.
Graphics team has been hardcore about not relaxing the WDDM bar, due
to the reasons above.

1 *Id.* (MS-KELL 48800) (emphasis added). Microsoft executive Mike Sievert responded that he
2 was “on board.” *Id.* (MS-KELL 48799).

3 **3. Fujitsu**

4 On January 26, 2006, Fujitsu asked for a WDDM waiver, and Microsoft again refused:

5 [T]oday, Fujitsu wanted us to allow an exception for WDDM for two of their
6 UPPCs that they think will represent 10-15% of their mobile PC volume. They
7 have decided to go with 915GMS on their new 8.9” screen UPPCs for April – Sep
8 models. I told them no to this request . . .

9 *Id.* (MS-KELL 46017).

10 **C. Microsoft Drops the WDDM Requirement.**

11 **1. Intel 915 Chipsets Will Not Support Vista.**

12 Microsoft knew by at least August 2005 that the widely-used Intel “915” chipset
13 “definitely won’t qualify for the logo.” *Id.* (MS-KELL 75470). That same month, Intel
14 published an internet link “positioning 915 GM as optimum for Windows Vista on Mobile PCs,”
15 which Microsoft internally viewed as “misleading” and “egregious” at the time. *Id.* (MS-KELL
16 56797, 56867). Microsoft noted that the 915 chipset “should not even be in the list of
17 recommended hardware for Windows Vista,” and that 915 graphics were more comparable to the
18 **2001** Windows XP technology:

19 Since the 915 chipset offers an Windows-XP comparable graphical user
20 experience in terms of feature, stability and performance, I would prefer that Intel
21 refer to the experience of its 915GM and 915GMS chipsets as **Windows XP-**
22 **comparable.**

23 *Id.* (MS-KELL 56868) (emphasis original). Around the same time, Microsoft posted a statement
24 on its website that it was unclear which chipsets would fully support Vista, but that “the higher
25 end of the chipset choices from [Intel competitors] NVIDIA or ATI is probably indicative of the
26 range.” *Id.* (MS-KELL 48485). That led a third-party to run the headline: “Microsoft Advises to

1 Avoid Integrated Graphics Cores for Windows Vista.” *Id.* The headline struck directly at Intel,
2 whose chipsets featured integrated graphics processors, rather than discrete graphics processors
3 which were generally more powerful. *See* Alepin Decl., ¶ 7.

4 In the aftermath of the publication of the Microsoft and Intel links, Microsoft employees
5 internally viewed Intel as “intentionally” trying to “hide the ball” on the inability of its 915
6 chipsets to run WDDM. *Id.* (MS-KELL 58320, 48482). “Technically” the Microsoft article was
7 “accurate” about integrated graphics. *Id.* (MS-KELL 48482). As one Microsoft employee put it:

8
9 The right thing to do for the customer here is to provide guidance on the known
10 quantities, and specify that we are confident that the cards that are presently in the
11 builds will have WVDDM drivers (for the ones that do) and mention that others
are still under development.

12 *Id.* (MS-KELL 58321). At the time, Mr. Poole simply assigned responsibility for the
13 “escalation” (Microsoft’s term for sending issues up the corporate ladder) that would be required
14 “if Intel still can’t handle the truth.” *Id.* (MS-KELL 48482).

15 2. Intel Asks to Delay the Vista Capable Program.

16 In January 2006, Microsoft changed the start date for the Vista Capable program:

- 17 • We published 2 dates in December to OEMs & told Retailers at CES:
 - 18 ○ 1st June: Marketing Start date – when active promotions can start
 - 19 wold-wide, or ad start date
 - 20 ○ 1st May: Capable PC availability – the first date when systems
 - 21 could start appearing in stores – to allow for channel loading
- 22 • We then **updated** 1st May back to 1st April in the middle of last week –
23 based on strong Retail and OEM feedback after CES & pressure for
24 immediate clarification due to the timing of retail sorting decisions for
Spring refresh and the subsequent lead time back in OEM factories.
 - 25 ○ Turns out 1st May fell badly for several OEMs and most Retailers
 - 26 – right in middle of cycle

1 *Id.* (MS-KELL 75288) (emphasis original). The change of the date for in-store shelving led Intel
2 to ask that Microsoft delay the overall program start date until June 1st, with Intel executive
3 Renee James writing Mr. Poole on January 20, 2006:

4 Will,

5 * * *

6 One thing that came out yesterday is that your team has the retailers in the US
7 putting Vista Ready stickers on the shelf April 1st vs. the June 1st date we thought
8 we had agreed.

9 As a result, we are not going to have supply and chipsets aligned such that the
10 SKUs are ready for April 1st and now we are having discussions that we may
11 have cancellations and returns b/c OEMs have to go to non-Intel CSets [chipsets]
12 to get Vista Ready as our schedule is post the date they would need stocking
13 machines.

14 We believe this will cause material business issues and would ask again that we
15 relax the retailers back to June.

16 Thank you for your attention here,

17 Renee

18 *Id.* (MS-KELL 75291). Three days later, Ms. James again wrote to Mr. Poole in an email whose
19 subject was "CONFIDENTIAL":

20 Will,

21 *I would prefer not to have this discussion on email.*

22 * * *

23 Needless to say, when we agreed on the June 1st date and asked you specifically
24 to hold to that day for stickering in the channel, we knew our ramp rates and
25 ability to ship vista ready parts. An April 1st date in retail means a significant
26 change in terms of our ability to meet demand with Vista ready parts and in short
will cost us significant business. ***While I do not want to discuss volume and \$\$
on email, it is material to our business, and we do not understand Microsoft's
motivation to change the previously agreed upon date.***

1 *Id.* (MS-KELL 48377) (emphasis added). Microsoft internally considered its response, with Bob
2 Aoki advising Mr. Poole on January 24, 2006:

3 Intel told me this afternoon the revenue impact is #X *billions* and has already
4 been raised to Paul O [Intel CEO Paul Otellini] who is awaiting our response.

5 My two cents. *The real issue is Intel does not have parts to support the April*
6 *timeframe.* Specifically, Callistoga [sic] which is Intel's notebook graphics
7 chipset. We have known for along [sic] time that Callistoga [sic] will not be meet
8 [sic] glass specifications and Intel is trying to move their business to notebooks
9 that have high profit margins. Intel's desktop is not a problem, as they have
10 processors and industry third party support of glass support (e.g., AT, nVidia).

11 *Id.* (MS-KELL 48310) (emphasis added). On January 25, 2006, Mr. Poole communicated
12 Microsoft's decision to leave the dates as they were. *Id.* (MS-KELL 75436-37).

13 **D. Microsoft Answers Intel's Concern by Dropping WDDM – Temporarily.**

14 **1. Intel's Problem with the Osborne Effect**

15 Microsoft's "decision" not to delay the Vista Capable program did not end the matter.

16 On January 27, 2006, Ms. James again wrote to Mr. Poole:

17 Will,

18 I know you are offsite. I left a longish VM [voicemail] on Paul's feedback to us
19 last night – that which he wants to share with Steve [Ballmer].

20 * * *

21 [Paul] doesn't understand why the date changed and we don't accept it is just
22 "labels on boxes" as the implication is these machines will be made to work some
23 day and nobody has done any test or validation, and we do not think the potential
24 liability of a consumer claim is a good idea. Our parts are not tested, not
25 validated. NO OEMs based on Intel can make this claim – with even our new
26 CSets that should support vista. We don't believe there is a stable configuration
data at this point. We could not articulate why April 1st made any sense to the
industry from a platform perspective with no SW [software] yet, nor could we
explain why Marketing in June was so critical given the Osborne³ potential
between June in November. *He thinks you really don't understand that almost*

³ The phenomenon of consumer purchase delays awaiting the release of products incorporating new technology is well known in the PC industry and is referred to as the "Osborne Effect."

1 *all of our mobile SKUs for the next 5 months are with Centrino with Alviso and*
2 *therefore NEVER Vista ready – and Mobile is a huge portion of retail and*
3 *growing.*

4 *Id.* (MS-KELL 48294) (emphasis added). Mr. Poole circulated the issues within Microsoft:

5 Got a vmail from Renee. . . . Here's what I heard (followed by my commentary):

6 * * *

- 7 • Many Intel parts in market will NOT be able to be upgraded to Vista
8 (really? I think they are confused, but correct me if I'm wrong – they will
9 be able to run XPDM on Alviso and other current chips, right?)
- 10 • Paul is concerned about liability – what if he promises it will run vista but
11 can't (*vista running on an XPDM on existing Intel parts is our problem,*
not his, right??)
- 12 • Paul is worried about *osborning the market.*

13 *Id.* (MS-KELL 48249-50) (emphasis added). Mr. Aoki responded:

14 My two cents (off-the-record) to you:

15 Basically from Intel's point of view, the longer they sell non-glass capable
16 integrated graphics, that is an outdated (osborned) part that OEMs won't want to
17 handle as it's not glass capable. Frankly Intel should have thought of this 3 years
18 ago.

19 * * *

20 The "Osborning" FUD that Paul is referring to is: **announcing a product too far**
21 **in advance such that it kills current product sales.**

22 * * *

23 [baoki] [responding to the concern about liability:] valid concern. While it is Msft
24 responsibility to get it to work...it's Intel's responsibility to provide accurate
25 platform information to it's [sic] customer base.

26 *Id.*

Again Microsoft considered its response. Mr. Poole expressed concern, "no reasin [sic]
the 915 can't be 'ready', right?" *Id.* (MS-KELL 48425). Given that the 915 chipset would not
run WDDM, however, Microsoft now considered an extraordinary response: drop the WDDM

1 requirement for the Vista Capable designation, so that the 915 chipset would qualify. On
2 January 28, 2006, Mr. Srinivasan analyzed the revenue implications to Intel:

3 Assuming April and May [2006] represent 33% each of the quarter, Intel 915
4 based motherboard volume for these two months is 3M

5 Motherboard pricing: \$100 (we don't know this, Bob may know)

6 CPU price: \$100

7 So, Intel's exposure is $3M \times 200 = \$600M$ for April and May.

8 The bigger deal is that they will continue to lose share due to 50% 915GM share
9 even after June. Retailers are looking for 80+% notebooks to be Vista Capable
10 and thus shift business to AMD.

11 Intel will continue to see loss in market share due to this decision.

12 Here is how their potential costs could get into billions.

13 **Bottomline:**

14 They bundled everything into motherboard, but now with 915 not being WDDM
15 capable, their strategy of bundling is backfiring a bit.

16 **Solution:**

17 Instead of paying us or asking us to drop WDDM requirement, Intel is better off
18 encouraging OEMs to use ATI and NVIDIA based integrated notebook chipsets
19 on its motherboards – thus limiting impact on CPU and motherboard Customer
20 will get WDDM benefits as well on Vista Capable PCs.

21 *Id.* (MS-KELL 48950). With increased license sales from a greater number of "Vista Capable"
22 PCs, Microsoft too stood to profit from the decision.

23 **2. January 30, 2006: Microsoft Drops WDDM Requirement and Embraces
24 Intel 915 Chipset**

25 Two days later, and just four days after Microsoft had refused the same request made by
26 Fujitsu, Mr. Poole advised Intel that Microsoft would now drop the WDDM requirement for the
Vista Capable logo so that the 915 chipset would qualify. The exchange was as follows:

Renee,

1 * * *

2 915 systems absolutely WILL be able to run Windows Vista. They will not run
3 Glass. *They will not get some other benefits that come with WDDM drivers that*
4 *cannot be ported to them.*

5 *Id.* (MS-KELL 48316) (emphasis added). Ms. James did a verbal double-take:

6 Sorry,

7 Another comment...after re-reading.

8 We are seriously confused. We believed that 915 is NOT vista ready as it will
9 never have WDDM drivers. We believed your Vista ready requirements doc said
10 it had to be WDDM drivers to qualify for the program sticker. It is
11 Grantsdale/Alviso in mobile. Are you saying that these parts qualify for Vista
12 Ready logo?

13 *Id.* (MS-KELL 48315-16). Mr. Poole wrote back that it was simply a matter of “separat[ing] the
14 “Vista Capable” logo requirements from the “concept” of being able to “run Vista”:

15 *We need to separate what the “Vista Capable” logo requirements are from the*
16 *concept of being able to run Vista.* That is my point in #1. Lots (many tens of
17 millions) of systems that will NOT have WDDM, absolutely WILL be able to run
18 Windows Vista. The POR is that although the 915 is upgradeable to Vista, it
19 would not qualify for a Vista Capable logo, nor for a basic “designed for
20 Windows Visa” [sic] logo once we launch.

21 *Id.* (MS-KELL 48315) (emphasis added). Ms. James’ reacted with surprise, for, as she
22 explained, the whole point of asking to delay the Vista Capable program was to gain the extra 30
23 days of sales during which the bulk of computers would not be Vista Capable:

24 Will,

25 * * *

26 I am told, that all of the value segment and all of the mainstream will not be Vista
Capable prior to July – I will ask again for a % of the business to give you the
order of magnitude.

This is why the OEMs are having issues with us and the timing of the program –
they don’t want to be stuck with a bunch of inventory that isn’t even Vista
Capable with WDDM – when you start marketing. This is not new news. We
have known this issue for 9 mo. That is why teams worked hard for months to

1 agree on June knowing that we could make it 30 days without the bulk being
2 capable.

3 *Id.* By the end of the day Ms. James wrote to Mr. Poole, “thank you for your commitment to
4 embrace 915.” Even the CEO’s exchanged pleasantries, as Ms. James noted to Mr. Poole, “Paul
5 did send a note to Steve [Ballmer] thanking him for listening and making these changes (I know
6 you did it. ☺).” *Id.* (MS-KELL 74381). The next day, January 31, 2006, Microsoft formally
7 announced that WDDM was no longer a requirement for the Vista Capable logo. *Id.* (MS-KELL
8 89, 99307-10). Internally, Intel described the dropping of the WDDM requirement as
9 “unbelievable news.” *Id.*, Ex. E. In alerting ATI, Intel’s competitor, Microsoft stressed that the
10 change was “short term.” *Id.*, Ex. A (MS-KELL 85008).

11
12 WDDM had been a requirement “since inception over 18 months ago.” *Id.* (MS-KELL
13 86802). Mike Ybarra stated:

14 This kind of shit drives me crazy Chris. We have pushed the UI in Vista so hard
15 in the last 18 months and we get our OEMs to go with higher end chipsets and
16 graphics parts on existing PC’s to really drive the experience for consumers and at
17 the last minute we cave to Intel and give 915 and other chipsets a backdoor into
18 the programs.

19 I hate the idea of a consumer upgrading a PC that we have marked as “Vista
20 Capable” and not getting the great UI experience.

21 *Id.* (MS-KELL 82934). As Mark Croft put it, “If we give on these then the Logo does not
22 ‘mean’ anything. I think that *pulling out WDDM is a bad decision for customers.*” *Id.* (MS-
23 KELL 87628) (emphasis added). Mr. Srinivasan explained the effect of the decision:

24 Intel 915 and 915GM will also now qualify for “Windows Vista Capable[”] per
25 the change in Windows Vista Capable marketing program last week. However,
26 these will not support WDDM and *will not offer any graphics stability or
performance improvements over Windows XP, nor will they support any of the
visual quality/productivity/style improvements over Windows XP. These also
will NOT qualify for Designed for Windows Vista logos.*

Id. (MS-KELL 48905) (emphasis added).

1 Even after Microsoft had dropped the WDDM requirement, some within Microsoft
2 continued to advocate reversing course. Dropping WDDM gave Intel a “huge bone,” and
3 guaranteed “that the majority of people who will buy a Vista Capable PC and who actually do
4 the upgrade will never get Aero.” *Id.* (MS-KELL 69687). Similarly: “Regarding the 915 – I
5 really wish we hadn’t capitulated on this. A 915 system will never, every [sic] run Aero – saying
6 it is ‘Vista Capable’ when this means ‘aero’ is just disingenuous.” *Id.* (MS-KELL 69686).

7
8 **E. OEMs React with Joy (Sony), Confusion (Dell), and Outrage (HP).**

9 **1. Sony**

10 As Microsoft was working on its official announcement on the afternoon of January 31,
11 2006, Sony employees exchanged the following, noting Sony’s “collaboration” with Intel:

12 I just received a call from [Microsoft employee] John Goodsill. Microsoft has
13 officially waived the WDDM requirement for the Vista-capable program . . .

14 This is major positive news for Sony! With collaboration from Intel, our efforts
15 to get Microsoft to change their Vista-capable policy has worked. Microsoft will
16 be sending an official email tonite [sic] or tomorrow announcing this change.

17 VAIO PM’s: let’s discuss the implications of this very quickly with Tokyo VBD
18 to optimize opportunities.

19 *Id.*, Ex. D (KELLEY 16).

20 **2. Dell**

21 As a result of Microsoft’s decision to drop WDDM from the requirements for the “Vista
22 Capable” logo, while retaining the WDDM requirement for the “Vista” logo effective on the date
23 of Vista’s launch, whether a PC was “Vista Capable” depended on when one asked the question.
24 Dell noted the fact that the day *before* the Vista launch, it could label product as being “Vista
25 Capable,” but *on or after* the Vista launch, the same product would have to be labeled as designed
26 for Windows XP, because it would not qualify for a Vista logo:

1 I dug through my archives and found this from Stephanie Ybarra⁴...

2 A follow – up question...if a customer purchases XP Home/Pro during the 12
3 months after Vista Launch – do we use the XP label or the Vista Capable label?

4 Depends. Windows Vista Capable PCs *that do not meet the criteria for the*
5 *Windows Vista logo* program may continue to be distributed with the Windows
6 Vista Capable logo through the end of life (obsolescence) of these systems.
7 Windows Vista Capable PCs that do meet the Windows Vista requirements would
8 need to ship with Windows XP stickers.

9 *Clear as mud, right?*

10 *Id.* (MS-KELL 18052) (emphasis added). The 915-based systems would *never* qualify for a
11 Vista logo. *Id.* (MS-KELL 75884).

12 3. Hewlett-Packard

13 In contrast to other OEMs and Intel, HP had made a large investment in WDDM
14 technology, and found itself without a competitive low-end product in the newly expanded Vista
15 Capable universe. The day Microsoft went public with the change, Intel leaked it to HP first:

16 FYI – Greg Taylor (HP SE) told me now that:

- 17 • HP already learned from Intel that MS is changing the requirements for
18 Capable.
- 19 • HP has made extra investments at additional cost to change their products
20 towards ATI/nVidia graphics due to uncertainty around Intel 945.
- 21 • HP execs were assured by Jim Allchin and Will Poole in Dec @ 7 on 7,
22 that WDDM will be required as part of Capable, so HP can continue with
23 its plan to switch their products away from Intel 945.
- 24 • HP is not going to be happy with this change and Greg requests that either
25 Jim or Will inform them so they would not escalate.

26 *Id.* (MS-KELL 86799). The next day Mr. Poole sent an email formally advising HP that WDDM
was being dropped from the Vista Capable program—already spinning the true reason why:

⁴ Microsoft's contact for Dell.

1 It's important to understand that while we made this change to accommodate the
2 need for simplicity and clarity around which systems can "run" Windows Vista,
based on significant feedback from retail, press, and others.

3 We strongly believe that the investment that HP has made in supporting the
4 Windows Display Drive[r] Model (WDDM) on your planned systems is crucial to
5 success with Windows Vista, and that this investment will differentiate you from
others who have not made it.

6 *Id.* (MS-KELL 48992). HP did not believe the revisionist explanation of what really went on
7 with Intel:

8 Your decision to relax the requirement means that our competitors can go to
9 market with processors/chipsets that are not WDDM compliant but yet can still
10 carry the Vista Capable label. This just doesn't make sense to us and for you to
11 do this without even talking to us is totally unacceptable. . . . it's not very often
12 you get pulled out of a meeting by a group of engineers who feel they have had
13 the rug pulled from underneath them so that any competitive advantage we may
have had in the marketplace is taken away ***enabling any Tom, Dick or Harry
with a PC containing a non compliant processor/chipset to play at the same
table. It begs the question when is a PC really Vista capable.***

14 As I said in my note to Jim and Kevin it appears ***you have bowed to pressure
15 from a partner who would have been embarrassed in the April timeframe
16 because their line up was not completely compliant. That same partner called
me Monday to enlist my help in applying pressure to you to get this decision
made, what were they thinking?***

17 *Id.* (MS-KELL 48991) (emphasis added). HP later asked Microsoft to agree to fund an
18 additional \$7 million marketing effort for Vista in light of HP's \$6.8 million investment in
19 technology that was ***truly*** Vista Capable. *Id.* (MS-KELL 87500). HP raised the matter with Mr.
20 Allchin too, who described himself as "beyond being upset." *Id.* (MS-KELL 99306). Mr.
21 Ballmer, who described Mr. Allchin as "apoplectic," *Id.* (MS-KELL 48476), responded simply,
22 and too late, that he "better get [Will Poole] under control." *Id.* (MS-KELL 99306).

23
24 In short, Microsoft temporarily lent the Vista name and the "Vista Capable" designation
25 to PCs that were ***not capable*** of supporting what Microsoft had called a "core requirement,"
26 "fundamental to user experience, stability, quality, productivity, performance," the "biggest

1 change over XP,” its “customer commitments of stability and reliability.” PCs without WDDM
2 were not able to upgrade even to Windows Vista Home Basic, as Microsoft defined the hardware
3 requirements for Home Basic effective on the day it was launched.

4 **IV. LEGAL ANALYSIS**

5 **A. Microsoft Has Committed An Unfair And Deceptive Practice As A Matter of Law.**

6 **1. The Statute**

7 RCW 19.86.020 prohibits unfair and deceptive acts. The statute reads:

8
9 Unfair methods of competition and unfair or deceptive acts or practices in the
10 conduct of any trade or commerce are hereby declared unlawful.

11 **2. The Purpose: To Protect the Public**

12 RCW 19.86.920 provides as follows:

13 The legislature hereby declares that the purpose of this act is to complement the
14 body of federal law governing restraints of trade, unfair competition and unfair,
15 deceptive, and fraudulent acts or practices in order to protect the public To
16 this end this act shall be liberally construed that its beneficial purposes may be
17 served.

18 This motion addresses the first element of a CPA claim, which requires a plaintiff to
19 show an unfair or deceptive act or practice. *Hangman Ridge Training Stables v. Safeco Title Ins.*
20 *Co.*, 105 Wn.2d 778, 784-85, 719 P.2d 531 (1986); WPI 310.01.

21 **3. The Standard – Capacity to Deceive.**

22 For over 30 years, Washington courts have been protecting the public by determining that
23 unfair and deceptive practices, which have the capacity to deceive the public, be declared illegal.
24 It is the capacity to deceive, rather than actual deception, which is important. In *State v. Ralph*
25 *Williams’ N.W. Chrysler Plymouth*, 87 Wn.2d 298, 553 P.2d 423 (1976), a case involving
26 deceptive advertising practices in the automobile sales industry, the court held:

1 A claimant need not prove consumer reliance to establish an unfair or deceptive
2 practice. The claimant must prove that the conduct has the capacity or tendency
3 to deceive.

4 87 Wn.2d at 317. That standard remains the same today. See *Indoor Billboard/Washington, Inc.*
5 *v. Integra Telecom of Washington, Inc.*, 162 Wn.2d 59, 75, 170 P.3d 10 (2007).

6 **4. Whether an Act is Unfair or Deceptive is a Question of Law.**

7 In *Indoor Billboard*, the Washington Supreme Court held that “whether the conduct
8 constitutes an unfair or deceptive act can be decided by this court as a question of law” where
9 there is no dispute about what the parties did. 162 Wn. 2d at 75 (quotation omitted). In this
10 case, there is no dispute. The evidence concerning Microsoft’s lowering the bar to eliminate
11 WDDM as a requirement of Windows Vista capability is taken almost entirely from Microsoft’s
12 own documents. The reasons are readily apparent, i.e., that Microsoft’s primary supplier, Intel,
13 and its primary OEM customers, would otherwise have been saddled with a huge inventory of
14 unsold 915 chipsets and unsold PCs containing chipsets that could not run Vista, and
15 significantly fewer PCs would qualify for Microsoft’s Windows Vista Capable program.

16 **B. Washington Cases Routinely Find Less Egregious Conduct Unfair or Deceptive.**

17 The Consumer Protection Act prohibits unfair *or* deceptive conduct. Washington courts
18 have had no trouble determining that conduct, even conduct significantly less egregious than
19 Microsoft’s here, violates the CPA. In *Indoor Billboard*, 162 Wn.2d 59, 170 P.3d 10 (2007),
20 local exchange carriers assessed pre-subscribed interexchange carrier surcharges (PICC charges)
21 regardless of whether customers had pre-subscribed to an interexchange carrier. Like Microsoft
22 in this case, Integra Telecom, the defendant, engaged in corporate double speak in order to mask
23 the fact that these charges were not “federally mandated” or otherwise regulated by the
24 government. *Id.*, 152 Wn.2d at 66-67.

1 In *Dwyer v. J.I. Kislak Mortgage Corp.*, 103 Wn. App. 542, 13 P.3d 240 (2000), the
2 court held that a mortgage company's practice of including fax charges on mortgage payoff
3 statements without further explanation deceived customers into thinking they had to pay the
4 charge before the mortgage would be paid off. The court had no trouble finding that this
5 practice was unfair and deceptive as a matter of law.
6

7 In *Griffith v. Centex Real Estate Corp.*, 93 Wn. App. 202, 969 P.2d 486 (1998), the court
8 determined that allegations of failure to disclose known defects in cedar siding—leading to
9 cracking, warping and mildewing—would, if true, constitute unfair and deceptive practices as a
10 matter of law.

11 In *Travis v. Washington Horse Breeders Assoc., Inc.*, 111 Wn.2d 396, 759 P.2d 418
12 (1988), advertising a racehorse as “a fine athlete” and “in very good condition” was deceptive as
13 a matter of law when the horse had never been given a physical examination and, in fact, was
14 unsound.
15

16 We believe the Court can readily determine that marketing PCs without WDDM as
17 “Vista Capable” is both unfair and deceptive (only one is necessary) because WDDM was a
18 “core requirement” (MS-KELL 57590) of Vista capability both before the change to
19 accommodate Intel and after the Vista launch in January of 2007. WDDM was “fundamental to
20 stability.” (MS-KELL 46467.) The impact without it was a “bad customer experience.” (MS-
21 KELL 46466.) And the 915 chipsets that could not run WDDM “should not even be in the list
22 of recommended hardware for Windows Vista.” (MS-KELL 56868.)
23

24 The documents in this case readily establish exactly what plaintiffs have been contending
25 all along: Microsoft was concerned about “Osborning”—the rapid evaporation of sales after a
26 new product is announced. In conjunction with its customers and suppliers, it lowered the bar so

1 that millions of in-channel computers with 915 chipsets, that were known not to be Vista
2 Capable, magically became so—but only until the launch when, just as magically, they again
3 became unqualified to carry a Vista logo.

4 V. CONCLUSION

5 The reasons for lowering the bar on WDDM were to clear out a huge inventory of both
6 existing computers and Intel 915 chipsets, and to increase the number of PCs that would qualify
7 for the Vista Capable program. Immediately after the launch of Windows Vista, WDDM was
8 again required. If it had been generally known that “Vista Capable” PCs were not truly “Vista
9 Capable,” demand for the in-channel computers, the 915 chipsets, and the XP licenses associated
10 with those PCs would have been “Osborned.” Microsoft chose to withhold from the public all
11 information about the fact that WDDM—the key component of Vista capability both before
12 January 30, 2006 and after the launch of Vista in July of 2007—was removed as a requirement in
13 order to increase the demand for PCs that were, if the truth had been told, soon to be obsolete.
14

15 DATED this 25th day of September, 2008.

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17
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CERTIFICATE OF SERVICE

I hereby certify that on September 25, 2008, 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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