

The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DIANNE KELLEY, et al.,)	Case No. C07-0475 MJP
)	
Plaintiffs,)	ORDER GRANTING
v.)	DEFENDANT'S MOTION FOR
)	CLASS DECERTIFICATION AND
MICROSOFT CORPORATION, a Washington)	DENYING DEFENDANT'S
corporation,)	MOTION FOR SUMMARY
)	JUDGMENT
Defendant.)	
)	
)	

This matter comes before the Court on Defendant's motions for class decertification and summary judgment. (Dkt. Nos. 252, 253.) The Court has considered the motions, the responses (Dkt. Nos. 266, 267), the replies (Dkt. Nos. 287, 292), and all other pertinent documents in the record. In addition, the Court has considered the parties' presentations at oral argument on January 22, 2009. For the reasons set forth below, the Court GRANTS Defendant's motion to decertify Plaintiffs' class and DENIES Defendant's motion for summary judgment.

Background

Plaintiffs challenge various aspects of Microsoft's marketing of its Windows Vista ("Vista") operating system. (Dkt. No. 139, Third Amended Compl. [hereinafter "Compl."] ¶ 1.2.) In early 2006, nearly a year before releasing Vista, Microsoft authorized original equipment manufacturers ("OEMs") to place a sticker on personal computers ("PCs") indicating they were "Windows Vista Capable" ("WVC" or "Vista Capable") PCs. (Compl. ¶ 4.3.) At the time, the computers manufactured by OEMs were sold with Windows XP, Vista's predecessor. Plaintiffs allege that a large number of PCs labeled WVC can only operate "Windows Home Basic" ("Basic"), which lacks certain core features of Vista. Plaintiffs further challenge Microsoft's "Express Upgrade Guarantee Program," which allowed customers purchasing WVC PCs to upgrade from Windows XP to Vista for little to no cost. (Compl. ¶ 4.5.) Plaintiffs complain that some customers participating in Express Upgrade were only able to transition to Basic.

Microsoft released four versions of Vista: Basic, Premium, Business, and Ultimate. Plaintiffs purchased computers that had "Vista Capable" labels, but did not have "Premium Ready" labels. Vista Capable PCs that did not have the "Premium Ready" designation could generally only run Basic. Plaintiffs allege that Basic cannot fairly be called "The Real Vista." (Compl. ¶ 4.4.) Plaintiffs complain that Basic lacks the Aero graphics interface Microsoft used to promote Vista. (Dkt. No. 267 at 1.) Other technical distinctions between Basic and Premium include a file backup system, the media center, DVD-making capability, and tablet-PC capability. (See Dkt No. 253 at 7-8.) Defendant responds that Basic provides customers with a number of benefits over XP and is a part of the Vista line. (Id. at 7-8; Dkt. No. 292 at 5.) Moreover, Defendant points to its own marketing materials and argue that the distinctions

1 between levels of Vista were made clear throughout the Vista Capable campaign. (Dkt. No.
2 253 at 9-10; Tindall Decl., Exs. B, C, D.)

3 Plaintiffs initially asserted four causes of action; however, they voluntarily dismissed
4 their breach of contract claim and the Court dismissed their Magnusson-Moss Warranty Act
5 Claim. (See Dkt. Nos. 29, 39.) Plaintiffs moved for class certification on their remaining
6 two causes of action: (1) a claim under Washington Consumer Protection Act (“CPA”) or
7 other state consumer protection acts and (2) a claim for unjust enrichment. (Dkt. No. 65.) On
8 February 22, 2008, after determining that Washington law applied to this dispute, this Court
9 certified a class comprised of:
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11 All persons and entities residing in the United States who purchased a personal
12 computer certified by Microsoft as “Windows Vista Capable” and not also
13 bearing the “Premium Ready” designation.

14 Excluded from this class are: (a) Defendant, any entity in which defendant has
15 a controlling interest or which has a controlling interest in defendant; (b)
16 Defendant's employees, agents, predecessors, successors or assigns; and (c) the
17 judge and staff to whom this case is assigned, and any member of the judge's
18 immediate family.

19 Kelley v. Microsoft Corp. 251 F.R.D. 544, 560 (W.D. Wash. 2008). In analyzing whether
20 common issues of law and fact predominate over individual issues, the Court limited
21 Plaintiffs’ theory of causation. Id. at 557-60. With respect to Plaintiffs’ CPA claims, the
22 Court determined that class treatment was inappropriate for a deception-based theory of
23 causation. Instead, the Court allowed the class to proceed under a “price inflation” theory of
24 causation where Plaintiffs would demonstrate a CPA violation by showing:

25 Microsoft artificially inflated demand for computers only capable of running
26 Vista Home Basic, causing Plaintiffs to pay more for those PCs than they
27 would have without the ‘Windows Vista Capable’ campaign.

Id. at 558. Similarly, the Court ruled that “Plaintiffs may maintain an unjust enrichment claim

1 on the theory that Microsoft's marketing campaign artificially inflated the demand for and
2 price of 'Windows Vista Capable' PCs." Id. at 559 (further noting that common issues
3 predominated as to whether Defendant retained a benefit, whether Defendant knew of that
4 benefit, and whether Plaintiffs paid more than they should have for WVC PCs).

5 For the purpose of these motions, the main development since this Court certified the
6 class has been the exchange of expert reports. (See e.g. Leffler Decl.; Allepin Decl.) With
7 discovery now complete, Defendant asks the Court to decertify the class and grant summary
8 judgment because Plaintiffs have failed to develop their price inflation theory and, therefore,
9 have no viable method of proving class-wide causation. (Dkt. No. 252 at 1.) Much of
10 Defendant's argument rests on its deconstruction of the analysis presented by Dr. Keith
11 Leffler, Plaintiffs' expert. (See Leffler Decl.) Furthermore, Defendant contends summary
12 judgment is appropriate on the issue of whether Basic can fairly be called "Vista." (See Dkt.
13 No. 253 at 15.)
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15 Discussion

16 Because Defendant's motions are two sides of the same coin, the Court believes it is
17 appropriate to analyze both simultaneously. First, the Court will describe the standards for
18 class decertification and summary judgment. Next, the Court will analyze Defendant's
19 arguments within the context of Plaintiffs' substantive claims.
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21 I. Class Decertification

22 Under Fed. R. Civ. P. 23, a district court may revisit its decision to certify a class in
23 order to address developments that arise during the course of litigation. Dukes v. Wal-Mart,
24 Inc., 509 F.3d 1168, 1176 (9th Cir. 2007); see also Gen. Tel. Co. of Sw. v. Falcon, 457 U.S.
25 147, 160 (1982) ("Even after a certification order is entered, the judge remains free to modify
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1 it in light of subsequent developments in the litigation.”). A court’s power to revisit
2 certification is “a vital ingredient in the flexibility of courts to realize the full potential
3 benefits from the judicious use of the class action device.” 3 Alba Conte & Herbert Newberg,
4 Newberg on Class Actions § 7:47 (4th ed. 2002).

5 Defendant’s motion focuses on the predominance requirement of Fed. R. Civ. P.
6 23(b)(3). Rule 23(b)(3) classes must demonstrate that “the questions of law or fact common
7 to the members of the class predominate over any questions affecting only individual
8 members.” If individual issues predominate, the economy and efficiency rationale for class
9 treatment is absent. See Zinser v. Accufix Research Institute, Inc., 253 F.3d 1180, 1189 (9th
10 Cir. 2001) (quoting 7A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal
11 Practice and Procedure, § 1778 at 535-39 (2d ed. 1986)). Courts have recognized that
12 consumer fraud cases may present unique considerations when determining predominance.
13 See 5 James W. Moore, et al., Moore’s Federal Practice § 23.45[5][b] (3rd ed. 1997)
14 (collecting cases). Moreover, other courts have decertified classes when it becomes apparent
15 that the predominance factor can no longer be satisfied. Marlo v. United Parcel Service, Inc.,
16 251 F.R.D. 476, 485-87 (C.D. Cal. 2008) (decertification appropriate where plaintiffs’ proof
17 was limited to individual testimony and a single company policy that could not “support
18 extrapolation from individual experiences to class-wide judgment . . .”). As the Court details
19 below, decertification is appropriate in this matter because Plaintiffs cannot demonstrate that
20 common questions of law and fact predominate over individualized concerns.
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23 II. Summary Judgment Standard

24 Summary judgment is not warranted if a material issue of fact exists for trial. Warren
25 v. City of Carlsbad, 58 F.3d 439, 441 (9th Cir. 1995), cert. denied, 516 U.S. 1171 (1996).
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1 The underlying facts are viewed in the light most favorable to the party opposing the motion.
2 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). “Summary
3 judgment will not lie if . . . the evidence is such that a reasonable jury could return a verdict
4 for the nonmoving party.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The
5 party moving for summary judgment has the burden to show initially the absence of a genuine
6 issue concerning any material fact. Adickes v. S.H. Kress & Co., 398 U.S. 144, 159 (1970).
7 However, once the moving party has met its initial burden, the burden shifts to the nonmoving
8 party to establish the existence of an issue of fact regarding an element essential to that
9 party’s case, and on which that party will bear the burden of proof at trial. Celotex Corp. v.
10 Catrett, 477 U.S. 317, 323-24 (1986). To discharge this burden, the nonmoving party cannot
11 rely on its pleadings, but instead must have evidence showing that there is a genuine issue for
12 trial. Id. at 324.
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14 III. Consumer Protection Act

15 To prevail on a CPA claim, a plaintiff must show: (1) that the defendant engaged in an
16 unfair or deceptive act; (2) that the act occurred in the conduct of the defendant’s trade; (3)
17 that the practice affected the public interest; (4) that the plaintiff was injured; and, (5) that the
18 defendant’s act or practice was the proximate cause of the plaintiff’s injury. Washington
19 Pattern Instruction (hereinafter “WPI”) 310.01; see also Hangman Ridge Training Stables,
20 Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 787-93 (1986). The parties’ arguments in the
21 present motions focus the deception and causation elements.
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23 a. Unfair or Deceptive Act

24 Though the CPA does not define “unfair or deceptive act,” Washington courts have
25 determined that, for a plaintiff to prove that a defendant committed an unfair or deceptive act,
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1 it is sufficient to show that the act or practice “had the capacity to deceive a substantial
2 portion of the public.” Hangman Ridge, 105 Wn.2d at 785; see also WPI 310.08. “The
3 purpose of the capacity-to-deceive test is to deter deceptive conduct before injury occurs.”
4 Sing v. John L. Scott, Inc., 134 Wn.2d 24, 30 (1997). The Court may only decide whether an
5 act was unfair or deceptive as a matter of law where “there is no dispute about what the
6 parties did.” Indoor Billboard v. Integra Telecom of Washington, Inc., 162 Wn.2d 59, 75
7 (2007).

8 Microsoft argues in its motion for summary judgment that it did “not portray
9 ‘Windows Vista’ in such a way that it would make it unfair to include Windows Vista Home
10 Basic in the Windows Vista family.” (Dkt. No. 253 at 20.) In support, Microsoft details the
11 technical development of Vista and points to its own WVC marketing materials cataloguing
12 the distinctions between Basic and Premium. (Id. at 6-10.) Microsoft concedes it had “robust
13 internal” discussions analyzing the coordination between Vista requirements and OEM
14 hardware limitations, but insists that “[w]hat matters is what the company tells the public
15 about the product it chooses to market.” (Dkt. No. 253 at 20.) In response, Plaintiffs point to
16 statements from Microsoft executives, including Jim Allchin who e-mailed his colleagues:
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18 I believe we are going to be misleading customers with the Capable Program.
19 OEMs will say a machine is Capable and customers will believe that it will run
20 core Vista features.

21 (Tilden Decl., Ex. A, MS-KELL 87386.)

22 Simply put, Microsoft’s argument misses the issue. The question is not whether Basic
23 can be called “Vista” based on computer code similarity or whether Microsoft as a software
24 developer has the right to offer multiple permutations of its product; it is whether Microsoft’s
25 use of the “Vista Capable” designation had the capacity to deceive. See Hangman Ridge, 105
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1 Wn.2d at 785. In this sense, Microsoft's internal communications raise a serious question
2 about whether customers were likely to be deceived by the WVC campaign. Summary
3 judgment is inappropriate on this issue. Microsoft's motion for decertification is silent on this
4 element of Plaintiffs' CPA claim.

5 b. Causation

6 To establish CPA causation, a plaintiff must show that the deceptive act was a cause
7 which "in direct sequence . . . produce[d] the injury complained of and without which such
8 injury would not have happened." WPI 310.07; see also Indoor Billboard, 162 Wn.2d at 84
9 ("plaintiff must establish that, but for the defendant's unfair or deceptive practice, the plaintiff
10 would not have suffered an injury."). In Indoor Billboard, the Washington Supreme Court
11 held that, in CPA cases where a defendant is accused of making affirmative
12 misrepresentations of fact, a plaintiff must establish that the misrepresentation was a
13 proximate cause of the injury. 162 Wn.2d at 83-84 (rejecting plaintiff's argument that it only
14 needed to demonstrate a causal link between the unfair practice and the injury). In so doing,
15 the Court expressly adopted the proximate cause instruction set forth in the pattern instruction
16 for general negligence claims. Id. at 84 (citing WPI 15.01); see also WPI 310.07 at Comment
17 (comparing WPI 310.07 to WPI 15.01).
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20 Because of Indoor Billboard, this Court found that a deception-based theory of
21 causation would:

22 necessarily require the trier of fact . . . to determine whether individual class
23 members were actually deceived and whether they would have purchased their
24 PCs but for Microsoft's marketing of them as "Windows Vista Capable."

25 Kelley, 251 F.R.D. at 558 (listing individualized questions of fact). Plaintiffs had, however,
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articulated “price inflation” as another theory to demonstrate class-wide causation.¹

Recognizing that other courts had rejected similar theories of causation, the Court noted the absence of Washington CPA cases addressing the theory. Id. at 558-59. The Court found that common issues could predominate as to “whether Vista Home Basic, in truth, can be called ‘Vista’ and whether Microsoft’s ‘Windows Vista Capable’ marketing campaign inflated demand market-wide” for WVC PCs. Id. The Court found class treatment was appropriate on the theory that:

Plaintiffs paid more than they would have for their PCs had Microsoft’s ‘Windows Vista Capable’ marketing campaign not created artificial demand for and/or increased prices of PCs only capable of running Vista Home Basic.

Id. at 560.

Microsoft’s decertification motion argues that Plaintiffs have failed to develop proof of any class-wide demand or price effect based on the WVC campaign.

i. Demand Effects

Because Plaintiffs’ price inflation theory is novel in the context of consumer protection claims, Defendant analogizes to other areas of the law where a plaintiff may establish causation by demonstrating an artificial increase in demand. (Dkt. No. 252 at 16.) In McLaughlin v. American Tobacco Company, the Second Circuit reversed certification of a class of plaintiffs asserting civil RICO claims against tobacco companies for their marketing and branding of “light” cigarettes. 522 F.3d 215, 220 (2d Cir. 2008). As part of their burden, plaintiffs had to demonstrate they suffered an economic loss and that factors other than the

¹ The Court notes that Plaintiffs now label the theory “price maintenance.” (Dkt. No. 267 at 7.) The Court does not believe there is any substantive difference between an attempt to artificially inflate a falling price and an attempt to maintain price in the face of falling demand. For consistency’s sake, the Court retains the “price inflation” label used in the Order granting certification.

1 defendant's deception were not intervening direct causes of the loss. Id. at 226. Because the
2 McLaughlin plaintiffs could not isolate the shift in demand caused by deceptive "light"
3 labeling on cigarettes, common issues could not predominate on the issue of reliance. Id. at
4 227. Defendant also cites In re New Motor Vehicles Canadian Export Antitrust Litig., 522
5 F.3d. 6 (1st Cir. 2008), where the First Circuit reversed in part the certification of a class of
6 automobile purchasers asserting antitrust violations against car manufacturers. The appellate
7 court found that the district court had failed to complete a sufficiently searching analysis of
8 predominance where the plaintiffs' expert, despite having completed regression analysis, had
9 failed to isolate the price impact caused by impermissible actions from the impact caused by
10 permissible actions. Id. at 28. Without specifically distinguishing the impact of the offensive
11 conduct, plaintiffs could not maintain class treatment in the "'but-for' world" theory. Id. at
12 27. Microsoft argues that Plaintiffs' evidence falls short of the standard set forth in either
13 McLaughlin or New Motor Vehicles.

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15 Plaintiffs' evidence fails to establish class-wide causation because it does not attempt
16 identify a specific shift in the demand for Vista Capable PCs. Dr. Leffler did not attempt any
17 regression analysis, much less an econometric analysis of the impact of "Vista Capable" on
18 demand. (Rummage Decl., Ex. I at 30:23-25, 31:6-14 (hereinafter "Leffler Dep.")). Dr.
19 Leffler concedes he could "not think of a way that one could quantify in the needed way the
20 number . . . of individuals who—who would not have bought a Vista Capable but not
21 Premium Ready but for the program." (Leffler Dep. at 30:24-25, 31:1-3) (emphasis added)
22 Without a sense of the number of consumers who changed their purchases as a result of
23 WVC, Dr. Leffler did not "have the variable that does the change in demand." (Id. at 31:12-
24 13.) Instead, Dr. Leffler offers exclusively testimonial evidence in support of his conclusion
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1 that WVC artificially increased demand. (See Leffler Decl., Ex. A at ¶ 15.) Citing internal
2 Microsoft documents that describe the goals of the WVC campaign, Dr. Leffler asserts there
3 is “clear evidence that the Vista Capable Program increased demand for XP based PCs.” (Id.
4 at ¶¶ 15-17; see also Dkt. No. 267 at 13; MS-KELL 39, 25520.) The problem with Dr.
5 Leffler’s conclusion is that it merely assumes that Microsoft realized its goals. The Court
6 cannot apply an assumption as class-wide proof of causation.

7
8 Dr. Leffler also bases his demand-side conclusion on testimonial evidence from some
9 class members who claim they did not delay their PC purchases because of the WVC
10 program. (Leffler Decl., Ex. A at ¶ 15, n. 29.) The problem with relying on this testimonial
11 evidence is that it would extrapolate individual claims of “but for” causation to the entire
12 class. This is precisely the issue the Court intended to avoid by certifying a class based a
13 price inflation theory. See Kelley, 251 F.R.D. at 560.

14 In addition, Plaintiffs’ evidence is problematic because it fails to isolate Vista Capable
15 as a cause of a shift in demand in the market for non-Premium Ready PCs from other
16 potential demand factors. Dr. Leffler concedes that he could not—with the data available—
17 quantitatively isolate a demand effect in this dispute. (Leffler Dep. at 110:12-16.) This is
18 particularly concerning because Microsoft does not sell PCs; it sells the operating system
19 software pre-loaded on PCs sold by OEMs. It is therefore critical to Plaintiff’s theory of
20 proof to isolate Microsoft’s purportedly deceptive efforts to increase demand from promotions
21 OEMs had in the run up to the holiday season. (See Dkt. No. 252 at 20 (listing promotions
22 manufacturers and retailers use to boost sales).) For instance, named plaintiff Dianne Kelley
23 purchased her non-Premium Ready Dell laptop at a \$200.00 discount during a temporary day-
24 after-Thanksgiving promotion. (Rummage Class Decl., Ex. D at 38:9-18.) Dr. Leffler
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1 recognizes that OEMs and retailers use marketing to influence demand, but did not study the
2 efforts OEMs took during the class period. (Leffler Dep. at 142:14-19; 53:10-13, 54:6-12.)

3 As the New Motor Vehicles court observed, the failure to isolate the impact on demand from
4 the offensive conduct is critical for establishing “but for” causation. See 522 F.3d at 27. By
5 failing to observe any isolated demand effect, Plaintiffs cannot offer the trier of fact any
6 viable method for determining class-wide causation.

7 Plaintiffs attempt to distinguish New Motor Vehicles and McLaughlin on the strength
8 of the testimonial evidence in this case. (See Dkt. No. 267 at 25 (“We have smoking gun
9 documents. We have evidence of actual intent to commit a straight-over tackle tort.”).)

10 Plaintiffs do cite several documents where some Microsoft or OEM employees attribute
11 sustained PC sales to the WVC program. (See Tilden Decl., Ex. A, MS-KELL 92849 (e-mail
12 from Hewlett Packard employee) (“We’ve worked together [with OEMs] to make sure
13 holiday sales of XP devices remain strong, through . . . Vista Capable.”); see also MS-KELL
14 96313 (claiming the objective of the Express Upgrade program had been met).) While these
15 statements observe the correlation between Vista Capable and sustained sales, the excerpted
16 portions offer no context as to why or how the program succeeded. Moreover, none of these
17 descriptions isolate the impact of WVC in comparison to other factors, such as the OEMs’
18 holiday promotions. Plaintiffs’ failure to adequately describe Vista Capable’s impact on
19 demand precludes a class-wide determination of CPA causation.
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22 ii. Price Effects

23 Next, with respect to price effects, Microsoft argues that Plaintiffs cannot establish
24 predominance because Dr. Leffler cannot isolate any single price effect caused by Vista
25 Capable. In J.B.D.L. v. Wyeth-Ayerst Laboratories, Inc., 485 F.3d 880, 890 (6th Cir. 2007)
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1 (en banc), the Sixth Circuit analyzed the challenges of demonstrating class-wide causation in
2 the context of a Sherman Act claim against Wyeth. Plaintiffs there bore the burden of
3 demonstrating that Wyeth's injurious conduct "was directly related to an increase in the price"
4 of the product plaintiffs purchased. Id. at 888. The J.B.D.L. court analyzed an expert report
5 (also authored by Dr. Leffler) arguing, based on "'basic' economic principles," that Wyeth
6 achieved larger price increases than they would have absent the offensive conduct. Id. at
7 889-90. The court found that the report was defective because it did not "account for the
8 numerous alternative explanations" for the demonstrated pricing data. Id. at 890.

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10 In this case, Dr. Leffler states that regression analysis estimating the amount of price
11 inflation is impracticable. (See Leffler Dep. at 30:17-31:09.) Instead, relying on discussions
12 predating the Vista Capable campaign and deposition testimony from certain named
13 Plaintiffs, Dr. Leffler concludes that "fundamental and non-controversial economic
14 principles" imply an increase in price for non-Premium Ready PCs. (Leffler Decl., Ex. A at
15 ¶ 17.) It does not appear as if Dr. Leffler tested this assumption against any real pricing data
16 for PCs, nor did he survey consumers of non-Premium Ready PCs. (Leffler Dep. at 133:1-2,
17 137:2.) Dr. Leffler is certain that there was a "qualitative impact of the Vista Capable
18 Program on the price of these PCs," even if he cannot even estimate a "quantitative impact."
19 (Leffler Decl., Ex. A at ¶ 17, n. 34.) As in J.B.D.L., Dr. Leffler's analysis fails to provide an
20 actual analysis of price effects or isolate the impact of WVC in comparison to other variables.

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22 Viewing Plaintiffs' demand and price arguments as a whole, it is clear they rely on
23 anecdotal evidence to demonstrate class-wide causation. If the Court accepts Plaintiffs'
24 evidence, it runs the danger of violating the rationale of Indoor Billboard. See 162 Wn.2d at
25 84. The plaintiffs in Indoor Billboard wanted to enter evidence of their payment of a
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1 challenged fee as evidence they were deceived by the charge on their bill. Id. at 78. In this
2 matter, Plaintiffs offer evidence of an internal debate among Microsoft employees as evidence
3 that Vista Capable caused their injuries. Both types of evidence are based on presumptions
4 which cannot establish CPA causation. Plaintiffs have not shown that WVC was a cause in a
5 “direct sequence” sense because they have not isolated other potential price and demand
6 pressures. See WPI 310.07.

7 At this juncture, the Court believes the most appropriate remedy for Plaintiffs’ failure
8 to present evidence suggesting class-wide causation is decertification. Absent evidence of
9 class-wide price inflation, Plaintiffs cannot demonstrate that common questions predominate
10 over individual considerations. See Fed. R. Civ. P. 23(b)(3). Because it is now clear that
11 Plaintiffs must demonstrate causation through evidence of individual deception, they can no
12 longer rely on the economy and efficiency rationale for class treatment. See Zinser, 253 F.3d
13 at 1189; Kelley, 251 F.R.D. at 556. The Court does not, however, believe that Microsoft is
14 entitled to summary judgment on the issue. Pursuing their claims individually, Plaintiffs are
15 not bound by the price inflation theory of causation. While Defendant has demonstrated the
16 absence of evidence demonstrating class-wide causation, they have not demonstrated that no
17 material issue of fact exists for Plaintiffs’ individual claims. See Adickes, 398 U.S. at 159.

20 IV. CPA Damages

21 Microsoft further seeks decertification and summary judgment because of the type of
22 class-wide damages Plaintiffs seek. (See Dkt. No. 252 at 26.) Plaintiffs respond by observing
23 that courts have broad latitude in determining damages for CPA violations. (Dkt. No. 267 at
24 20 (citing Allen v. American Land Research, 95 Wn.2d 841, 845 (1981).) Because the Court
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1 has determined that class-wide treatment is not appropriate on the issue of causation, it need
2 not definitively determine the measure of damages in this case.

3 V. Unjust Enrichment

4 The elements of an unjust enrichment claim in Washington are: (1) a benefit conferred
5 on defendant by plaintiff; (2) appreciation or knowledge of that benefit; and, (3) that retention
6 of the benefit would be unjust under the circumstances. Ballie Commc'ns Ltd. v. Trend Bus.
7 Sys. Inc., 61 Wn.App. 151, 160 (1991). Even though unjust enrichment does not require
8 proof of causation, this Court observed:

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10 [i]f the inequity is that Microsoft deceived consumers, the trier of fact will
11 need to inquire whether Microsoft actually deceived consumers (an
12 individualized inquiry) to determine whether any benefit conferred on
13 Microsoft was unjust.

14 Kelley, 251 F.R.D. at 559. The Court determined that Plaintiffs could pursue a class-wide
15 unjust enrichment claim because the question of whether Microsoft received “a benefit
16 (increased or sustained XP license sales)” predominated. Id. at 559. In addition to the
17 shortcomings of Dr. Leffler’s price analysis detailed above, his calculations of unjust
18 enrichment focus on the total number of XP licenses sold on computers that lacked Premium
19 capability. (See Leffler Decl., Ex. A at ¶ 26 (“I have been asked by Plaintiffs’ counsel to
20 estimate the amount of revenue earned by Microsoft from the licensing of Windows XP on
21 Vista Capable but not Vista Premium Ready PCs sold to Plaintiffs.”).) This analysis is too
22 broad because it does not isolate the increased or sustained XP license sales from those sales
23 Defendant would have made without the Vista Capable program. Dr. Leffler’s estimations,
24 therefore, cannot address those issues which the Court stated predominate for the purposes of
25 class treatment. Plaintiffs cannot demonstrate that class-wide issues predominate on their
26 unjust enrichment claim. The Court believes decertification of Plaintiffs’ unjust enrichment
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claim is necessary.

VI. Motions to Strike

Plaintiffs' response to Microsoft's motion for summary judgment contains several motions to strike. (Dkt. No. 266 at 27.) The Court strikes the Muzzey Declaration. (Dkt. No. 257.) The Court also strikes Exhibit A of the Rummage Declaration (Dkt. No. 256-2) and the letter from Dell's counsel contained in Exhibit G of the Rummage Declaration. The Court has not considered any of these documents in reaching its decision.

Conclusion

Approximately one year ago, this Court certified a class in this matter and allowed Plaintiffs "to further develop their 'price inflation' theory." Kelley, 251 F.R.D. at 559. It is now apparent that class treatment is no longer appropriate. While the Court decertifies the class today, it is careful to note that this ruling makes no comment on the merits or veracity of Plaintiffs' individual CPA and unjust enrichment claims. Defendant is mistaken to equate Plaintiffs' failure to provide class-wide proof of causation with a failure to present an issue for trial. The Court orders as follows:

- 1 1. Defendant's motion for class decertification (Dkt. No. 252) is GRANTED; Plaintiffs
2 may only pursue their CPA and unjust enrichment claims individually.
- 3 2. Defendant's motion for summary judgment (Dkt. No. 253) is DENIED.
- 4 3. Plaintiffs' motion for subclass certification and designation of class counsel (Dkt. No.
5 184) is MOOT.
- 6 4. Plaintiffs' motion for approval of a class notice program (Dkt. No. 186) is MOOT.
- 7 5. Plaintiffs' motion to strike is GRANTED.

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9 It is SO ORDERED.

10 The Clerk is directed to send a copy of this order to all counsel of record.

11 Dated this 18th day of February, 2009.

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14 Marsha J. Pechman
15 United States District Judge
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