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7 UNITED STATES DISTRICT COURT
8 FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

9 EMMA ALVARADO, on behalf of
10 herself and on behalf of all others
similarly situated,

11 Plaintiff,

12 vs.

13 MICROSOFT CORPORATION, a
14 Washington corporation,
15 and DOES 1 through 100, inclusive,

16 Defendants.
17

Case No. C 09-_____

CLASS ACTION COMPLAINT FOR:

- (1) VIOLATION OF THE WASHINGTON
UNFAIR BUSINESS PRACTICES
ACT;
(2) VIOLATION OF THE WASHINGTON
CONSUMER PROTECTION ACT;
AND
(3) DECLARATORY RELIEF UNDER
THE DECLARATORY JUDGMENT
ACT.

18 DEMAND FOR JURY TRIAL

19 Plaintiff Emma Alvarado (“Plaintiff”) makes all allegations in this Complaint based
20 upon information and belief, except those allegations that pertain to Plaintiff, which are based
21 on personal knowledge. Plaintiff’s information and belief are based upon, *inter alia*,
22 Plaintiff’s own investigation and the investigation conducted by Plaintiff’s attorneys. Each
23 allegation in this complaint either has evidentiary support or is likely to have evidentiary
24 support after a reasonable opportunity for further investigation or discovery.

25 **NATURE OF THE ACTION**

26 Plaintiff brings this complaint individually on behalf of herself and on behalf of a class
27 of persons similarly situated against defendant Microsoft Corporation (“Microsoft”) pursuant

1 to, *inter alia*, the Washington Unfair Business Practices Act, the Washington Consumer
2 Protection Act and the Declaratory Judgment Act. Plaintiff seeks to: (a) recover treble
3 damages for injuries which Plaintiff and the members of the class have sustained as a result of
4 the wrongful actions and conduct of Microsoft as described herein, (b) require Microsoft to
5 disgorge and restore all monies wrongfully obtained by it; and (c) enjoin Microsoft from
6 continuing to engage in the wrongful conduct alleged herein.

7 **JURISDICTION AND VENUE**

8 1. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(a) because
9 Microsoft resides in this judicial district.

10 2. This Court has jurisdiction over the claims alleged in this action because
11 Microsoft transacts substantial business within, and is subject to personal jurisdiction in, this
12 judicial district, and because a substantial part of the events giving rise to the claims asserted
13 herein took place in this judicial district. The anti-competitive acts described herein have a
14 direct effect on consumers nationwide, including those residing within the State of
15 Washington, who purchased computers with the Windows Vista operating system (“Vista”),
16 and Microsoft’s illegal conduct, as alleged herein, has resulted in substantial restraint of trade
17 in the State of Washington.

18 3. Jurisdiction is specifically conferred on this Court by various federal statutes
19 including, but not limited to, 28 U.S.C. § 1332(d), as amended by the CLASS ACTION FAIRNESS
20 ACT OF 2005, because Plaintiff and numerous other members of the proposed class are citizens
21 of states other than the State of Washington and because the amount in controversy exceeds
22 \$5,000,000.

23 **PLAINTIFF**

24 4. Plaintiff is a resident of the County of Los Angeles in the State of California.
25 On June 20, 2008, Plaintiff purchased a personal computer with a pre-installed Windows Vista
26 Business operating system from Lenovo Group Limited, for her own personal use and not for
27 resale. At the time of her purchase, Plaintiff was required to pay an additional \$59.25 in order

1 to “downgrade” her operating system to Windows XP® Professional. Plaintiff brings this
2 action as an aggrieved party individually in her own right and as a representative of all other
3 persons similarly situated.

4 **DEFENDANTS**

5 5. Microsoft is the world’s largest seller of operating systems for personal
6 computers (“PC”). Microsoft is a corporation organized and existing under the laws of the
7 State of Washington, licensed to do and doing business within and throughout the State of
8 Washington, with its corporate headquarters located in Redmond, Washington, at 1 Microsoft
9 Way, Redmond, Washington 98052.

10 6. The true names and capacities of the defendants sued herein as Does 1 through
11 100, inclusive, (“the Doe Defendants”) are unknown to Plaintiff, who therefore sues these
12 defendants by such fictitious names. Plaintiff will amend this complaint to allege the true
13 names and capacities of the Doe Defendants at such time as they have been ascertained. The
14 Doe Defendants are the persons, firms and corporations who have participated with Microsoft
15 in the wrongdoings complained of and have performed acts and made statements in
16 furtherance thereof. The Doe Defendants acted as co-conspirators and aided and abetted, or
17 participated with, Microsoft in the commission of the wrongful acts alleged herein or
18 otherwise caused the damages suffered by Plaintiff and the other members of the class.

19 7. As used herein, the term “Defendants” shall mean and refer to Microsoft and
20 the Doe Defendants together.

21 **ALLEGATIONS OF CONCERTED ACTION**

22 8. At all relevant times mentioned herein, Defendants pursued a common course
23 of conduct, acted in concert and conspired with one another to accomplish the offenses
24 complained of herein, and have performed acts and made statements in furtherance thereof. In
25 addition to the wrongful conduct alleged herein as giving rise to the primary liability,
26 Defendants further aided and abetted and knowingly assisted each other in perpetuating the
27 wrongdoing complained of herein.

1 9. Whenever in this complaint reference is made to any act, deed or transaction of
2 any corporation, the allegation means that the corporation engaged in the act, deed or
3 transaction by or through its officers, directors, agents, employees or representatives while
4 they were actively engaged in the management direction, control, or transaction of the
5 corporation's ordinary business or affairs.

6 **CLASS ACTION ALLEGATIONS**

7 10. Plaintiff brings this action as a class action pursuant to Rule 23 of the Federal
8 Rules of Civil Procedure on behalf of a class ("the Class") defined as follows:

9 All persons who are residents of the United States of America
10 and who purchased a computer with the Windows Vista
11 operating system for their own use and not for resale at any time
12 during the four years preceding the date of filing of this
13 complaint and paid to downgrade to the Windows XP operating
14 system.

15 Excluded from the Class are Defendants, their officers, directors, employees,
16 subsidiaries, divisions, units, and affiliates as well as any judge, justice or judicial office
17 assigned to hear any proceeding in relation to this case.

18 11. Although the precise number of members of the Class is unknown to Plaintiff at
19 this time and can only be determined by appropriate discovery, Plaintiff is informed and
20 believes, based upon the nature of the trade and commerce involved, that the Class of persons
21 affected by the actions and conduct of Defendants is so numerous, consisting of many
22 thousands of people, that joinder of all members of the Class is impracticable.

23 12. Plaintiff will fairly and adequately represent and protect the interests of the
24 members of the Class ("Class member(s)"), as required by Rule 23(a)(4). Plaintiff is an
25 adequate representative of the Class, as she has no interests that are adverse to other Class
26 members' interests. Plaintiff is committed to the vigorous prosecution of this action and, to
27 that end, Plaintiff has retained counsel who are competent and experienced in handling class
28 action litigation on behalf of consumers.

1 13. Plaintiff's claims are typical of the claims of the other Class members, as
2 required by Rule 23(a)(3), because Plaintiff and each Class member purchased computers with
3 Windows Vista and paid fees to downgrade to Windows XP.

4 14. Common questions of law and fact exist as to all Class members, as required by
5 Rule 23(a)(2), and predominate over any individual questions.

6 15. The common questions include, but are not limited to, the following:

- 7 a. whether Defendants' actions and conduct violate state antitrust law;
- 8 b. the nature of Defendants' actions and conduct;
- 9 c. the effect of Defendants' actions on trade and commerce within the
10 United States; and
- 11 d. the type and pattern of damages sustained by Plaintiff and the Class as a
12 result of the wrongful action and conduct of Defendants.

13 16. A class action is superior to other available methods for the fair and efficient
14 adjudication of the claims asserted in this action under Rule 23(b)(3) because:

- 15 a. the expense and burden of individual litigation make it economically
16 unfeasible for Class members to seek redress for their "negative value"
17 claims other than through the procedure of a class action;
- 18 b. if separate actions were to be brought individually by each Class
19 member, the resulting duplicity of lawsuits would cause undue hardship
20 and expense to the Court and the litigants by necessitating multiple trials
21 of similar factual issues;
- 22 c. prosecuting separate individual actions would create a risk of
23 inconsistent adjudications of similar factual issues; and
- 24 d. absent a class action, Defendants likely would retain the benefits of their
25 wrongdoing, and there would be a failure of justice.

26 17. In the alternative, this action is certifiable under the provisions of
27 Rules 23(b)(1) and/or 23(b)(2) because:

- 1 a. prosecuting separate actions by individual Class members would create
2 a risk of inconsistent or varying adjudications with respect to individual
3 class members that would establish incompatible standards of conduct
4 for Defendants;
- 5 b. prosecuting separate actions by individual Class members would create
6 a risk of adjudications with respect to them that would, as a practical
7 matter, be dispositive of the interests of the other Class members not
8 parties to the adjudications, or substantially impair or impede their
9 ability to protect their interests; and
- 10 c. Defendants have acted or refused to act on grounds generally applicable
11 to the Class, thereby making appropriate final injunctive relief or
12 corresponding declaratory relief with respect to the Class, and
13 necessitating that any such relief be extended to Class members on a
14 mandatory, class-wide basis.

15 18. Plaintiff is aware of no difficulty that will be encountered in the management of
16 this litigation that should preclude its certification as a class action.

17 19. Class members' names and addresses are available from Defendants' records.
18 Notice can be provided to Class members via first class mail or otherwise, using techniques
19 and a form of notice similar to those customarily used in class actions arising under federal
20 law.

21 20. Plaintiff has incurred, and during the pendency of this action will incur,
22 attorneys' fees and expenses. Such attorneys' fees and expenses are necessary for prosecuting
23 this action and will result in a benefit to the Class.

24 **NATURE OF DEFENDANTS' ANTI-COMPETITIVE ACTIVITIES**

25 21. On or about January 31, 2007, Microsoft publicly released the first version of
26 the Windows Vista operating system.

1 22. Microsoft licenses its Windows operating systems to original equipment
2 manufacturers (“OEMs”) of PCs, such as Lenovo, IBM and Dell Computer Corporation.
3 OEMs typically install the Vista operating system (“Vista”) onto their PCs and sell the PCs to
4 consumers for a single price that includes the pre-installed Vista operating system. As the sole
5 licensor of Windows Vista, Microsoft enjoys vast power over OEMs which it has used and
6 continues to use to stifle competition.

7 23. Since the introduction of Vista, Microsoft has effectively eliminated
8 competition in the operating system PC market and created a monopoly position for itself in
9 that market. Currently, there is no operating system software for Intel-compatible PC’s that a
10 significant percentage of consumers could substitute for Vista without incurring substantial
11 costs.

12 24. Microsoft has used its power to coerce OEMs, internet access providers
13 (“IAPs”) and others into agreeing to restrictive and anti-competitive licensing terms for its
14 Windows XP operating system in order to stifle competition in the market. Microsoft did so in
15 order to maintain, protect, and extend its market power in operating systems software into the
16 next generation of personal computing, to lessen competition, to promote Vista and to enhance
17 its monopoly position.

18 25. Consumers have encountered numerous problems using the Vista operating
19 system, and these problems have been widely publicized in various media outlets. As a result,
20 many consumers would prefer to purchase a new computer pre-installed with the Windows XP
21 operating system or at least *not* pre-installed with the Vista operating system. However,
22 Microsoft has used its market power to take advantage of consumer demand for the Windows
23 XP operating system by requiring consumers to purchase computers pre-installed with the
24 Vista operating system and to pay additional sums to “downgrade” to the Windows XP
25 operating system.

26 26. Initially, Microsoft made this “downgrade” option available to consumers at the
27 cost of \$104.00 and for a limited period of time, until June 30, 2008. Subsequently, Microsoft

1 extended the time period until January 31, 2009, and, more recently, extended the time period
2 until July 31, 2009. These extensions were likely due to the tremendous profits that Microsoft
3 has reaped from its “downgrade” option. To date, nearly one in three consumers purchasing a
4 new computer has paid to downgrade the operating system from Vista to Windows XP.

5 **EFFECT ON TRADE AND COMMERCE**

6 27. As alleged herein, Defendants have engaged in predatory and anti-competitive
7 activities in order to secure a monopoly position in the market for licensing of Intel-compatible
8 PC operating systems software (“the Relevant Market”).

9 28. The Relevant Market is worth more than \$50 billion annually in the U.S. alone.
10 As of October 2008, Microsoft controls approximately 90% of the Relevant Market. On
11 July 18, 2007, Microsoft announced that it had sold more than 180 million Vista licenses
12 which would equate to gross sales revenues of between \$30 and \$60 billion dollars from Vista
13 licenses. However, these figures are believed to include Vista licenses that are downgraded to
14 Windows XP.

15 29. Defendants willfully acquired monopoly power and have maintained such
16 monopoly control over the Relevant Market by suppressing competition in the Intel-
17 compatible PC operating-systems-software market through restrictive and exclusionary
18 conduct. Defendants suppressed competition with the specific intent of acquiring and
19 obtaining such monopoly power.

20 30. Plaintiff and other members of the Class have suffered injury to their property
21 as a result of Defendants’ monopoly power and anti-competitive activities because they have
22 been, and continue to be, forced to purchase Vista rather than alternative operating systems
23 software.

24 31. Plaintiff and other members of the Class also have suffered injury to their
25 business and property as a result of Defendants’ monopoly power and anti-competitive
26 activities because they have been, and continue to be, forced to pay supra-competitive prices
27 for Windows XP: that is, they have been forced to pay substantially more to acquire the

1 Windows XP operating system than they would have to pay in a competitive marketplace in
2 which there were available alternative operating systems.

3 **FIRST CLAIM FOR RELIEF**

4 (For Violations of the *Washington Unfair Business Practices Act*)

5 32. Plaintiff repeats and incorporates herein by reference, as though set forth at
6 length, the allegations contained in paragraphs 1 through 31 inclusive, above.

7 33. Beginning at a time presently unknown to Plaintiff, and continuing through the
8 present, Defendants entered into and operated a continuing unlawful trust in restraint of trade
9 and commerce. This trust consisted of a continuing combination, agreement, conspiracy,
10 and/or understanding between and among Defendants, OEMs, IAPs, and others with respect to
11 the licensing and sale of the Windows Vista operating system within the State of Washington
12 and throughout the United States.

13 34. The unlawful trust has had the following effects, among others:

14 a. competition in the sale of Intel-compatible PC operating systems
15 software has been suppressed, restrained, and/or eliminated;

16 b. prices of the Windows Vista operating system have been fixed,
17 maintained and stabilized at supra-competitive levels;

18 c. prices of the Windows XP operating system have been fixed,
19 maintained and stabilized at supra-competitive levels and customers have been forced to
20 purchase the most expensive version of this program in order to “downgrade” from the
21 Windows Vista operating system; and

22 d. Microsoft prohibited its OEM's (Dell/HP/Sony, etc.) from selling new
23 computers with Windows XP operating system pre-installed.

24 35. The conduct of Defendants as alleged herein constitutes a violation of the
25 *Washington Unfair Business Practices Act*.

26 36. As a direct and proximate result of the anti-competitive practices described
27 herein, Plaintiff and the members of the Class have been injured in their business or property

1 within the meaning of Section 19.86.090 of the *Washington Unfair Business Practices Act*
2 because they have been forced to purchase Vista rather than alternative operating systems
3 software and have been required to pay additional amounts of money to “downgrade” to the
4 Windows XP operating system.

5 37. Unless Defendants are enjoined from continuing to engage in this unlawful
6 trust, Plaintiff and other members of the Class will continue to be injured and damaged by
7 Defendants’ anti-competitive activities.

8 38. As a result of Defendants’ acts or practices, pursuant to RCW 19.86.090,
9 Plaintiff and the Class are entitled to recover treble damages, reasonable attorneys’ fees, and
10 costs of suit.

11 **SECOND CLAIM FOR RELIEF**

12 (Violations of the *Washington Consumer Protection Act*)

13 39. Plaintiff repeats and incorporates herein by reference, as though set forth at
14 length, the allegations contained in paragraphs 1 through 31 inclusive, above.

15 40. By engaging in the above-described acts and practices, Defendants have
16 committed one or more violations of the *Washington Consumer Protection Act* Washington
17 Revised Code, Section 19.86.010, *et seq.*

18 41. Defendants’ acts or practices repeatedly occurred in the conduct of Defendants’
19 trade or business as part of a pattern or generalized course of conduct, and were capable of
20 deceiving a substantial portion of the public.

21 42. The acts and practices of Defendants are unfair, even if not unlawful, because
22 they have resulted in the general public having to pay supra-competitive prices for the
23 Windows XP operating systems software.

24 43. The acts and practices of Defendants are unlawful because they violate, *inter*
25 *alia*, *Washington Business Practices Act*, Section 19.86.090.

26 44. Defendants’ acts and practices are continuing in nature.
27

1 45. As a direct and proximate result of Defendants’ acts or practices, Plaintiff and
2 the Class have suffered actual damages in that Plaintiff and Class members have been forced
3 to purchase Vista rather than alternative operating systems software and have been required to
4 pay additional amounts of money to “downgrade” to the Windows XP operating system.

5 46. Defendants’ repeated acts or practices have affected numerous consumers both
6 prior to and arising out of the transactions involving Plaintiff. Further, Defendants’ acts or
7 practices continue to pose a real and substantial potential for repetition causing additional
8 injury likely to affect a substantial number of consumers.

9 47. Unless Defendants are enjoined from continuing to engage in these unfair and
10 unlawful business practices, Plaintiff and other members of the Class will continue to be
11 injured and damaged by Defendants’ unfair competition.

12 48. As a result of Defendants’ acts or practices, pursuant to RCW 19.86.090,
13 Plaintiff and the Class are entitled to recover treble damages, reasonable attorneys’ fees, and
14 costs of suit.

15 **THIRD CLAIM FOR RELIEF**

16 (Declaratory Relief Under the Declaratory Judgment Act, 28 U.S.C. §2201 *et seq.*)

17 49. Plaintiff repeats and incorporates herein by reference, as though set forth at
18 length, the allegations contained in paragraphs 1 through 31 inclusive, above.

19 50. An actual controversy has arisen and now exists between Plaintiff and other
20 members of the Class, on one hand, and Defendants, on the other hand, concerning their
21 respective rights and duties in that Plaintiff and the other members of the Class contend that
22 Defendants’ activities alleged herein are anti-competitive and have resulted in a restraint of
23 trade while Defendants contend that their actions are lawful and proper in all respects.

24 51. A judicial declaration is necessary and appropriate at this time under the
25 circumstances presented, in order that Plaintiff and the other members of the Class may
26 ascertain their rights and duties with respect to the activities of Defendants alleged herein.

27

1 **PRAYER FOR RELIEF**

2 WHEREFORE, Plaintiff, on behalf of herself and the Class defined herein, prays for
3 judgment and relief as follows:

4 **ON THE FIRST CLAIM FOR RELIEF**

5 1. That Plaintiff be awarded compensatory damages in an amount according to
6 proof at trial;

7 2. That the damages awarded be trebled pursuant to the *Washington Unfair*
8 *Business Practices Act* Section 19.86.090;

9 3. That Defendants be permanently enjoined and restrained from engaging the
10 anti-competitive actives alleged herein; and

11 4. That Plaintiff be awarded her reasonable attorney's fees, together with her costs
12 of suit, pursuant to the *Washington Unfair Business Practices Act* Section 19.86.090.

13 **ON THE SECOND CLAIM FOR RELIEF**

14 5. That Plaintiff be awarded compensatory damages in an amount according to
15 proof at trial;

16 6. That the damages awarded be trebled pursuant to the *Washington Unfair*
17 *Business Practices Act* Section 19.86.090;

18 7. That Defendants be permanently enjoined and restrained from engaging in the
19 unfair and unlawful business practices alleged herein; and

20 8. That Plaintiff be awarded her reasonable attorneys' fees, together with her costs
21 of suit, pursuant to the *Washington Unfair Business Practices Act* Section 19.86.090.

22 **ON THE THIRD CLAIM FOR RELIEF**

23 9. That this Court declare that the activities of Defendants as alleged herein are
24 unfair and unlawful and result in an illegal restraint on trade.

25 **ON ALL CLAIMS FOR RELIEF**

26 10. That Plaintiff and the Class be awarded reasonable attorneys' fees, expenses
27 and costs of suit; and

1 11. That Plaintiff and the Class be granted such other and further relief as the Court
2 deems just and proper.

3 Dated: February 11, 2009

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