

The Honorable Marsha J. Pechman

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DIANNE L. KELLEY, et al.,)	
)	No. C07-0475 MJP
Plaintiffs,)	
)	PLAINTIFFS' MOTION FOR TRIAL
v.)	CONTINUANCE
)	
MICROSOFT CORPORATION, a Washington)	<u>CLASS ACTION</u>
Corporation ,)	
)	NOTED ON MOTION CALENDAR:
Defendant.)	Monday, March 9, 2009
)	

I. MOTION

Plaintiffs move for a continuance of the trial date (currently April 13, 2009) to accommodate two matters:

1. Consideration of plaintiffs' contemporaneously-filed Motion for Narrowed Class Certification; and
2. If applicable, dissemination of class notice in the event the Court concludes narrowed class certification is appropriate.

II. ARGUMENT

A. The Law

Plaintiffs recognize that continuing the trial date is disfavored. Indeed, in this case, plaintiffs themselves look on the prospect of a trial continuance with disfavor, and expect the

1 Court and the defendant to do so as well. We understand Microsoft opposes a continuance.
2 However, plaintiffs believe a continuance is the appropriate course under the circumstances.

3 Whether to continue the trial date is matter addressed to the trial court's discretion.
4 Perhaps no case enunciates this point more forcefully than *Northern Indiana Public Serv. Co. v.*
5 *Carbon County Coal Co.*, 799 F.2d 265 (7th Cir. 1986). In *Northern Indiana*, two months into
6 the case, the trial court set it for trial only two months later. 799 F.2d at 268. Even though the
7 amount in controversy exceeded \$180 million, the Seventh Circuit held that the trial court was
8 within its discretion in denying a continuance. *Id.* at 269. The court distilled the case law on
9 continuances to the following criterion for determining whether a continuance is appropriate:
10

11 the existence of changed circumstances to which a party cannot reasonably
12 be expected to adjust without an extension of time.

13 *Id.* Plaintiffs can find no fault with this rule.

14 **B. Grounds for Continuance**

15 In this case, the Court has decertified what was a nationwide class action so that it is now
16 an action on behalf of six individual plaintiffs. Although plaintiffs are ready for trial, and do not
17 seek more time to re-open discovery, plaintiffs believe that this change in the circumstances of
18 the case leads to one thing that the Court should consider before trial: whether the Court should
19 order a more narrowed certification than it was previously asked to consider in connection with
20 defendant's Motion for Decertification.
21

22 Limited examination of the merits of plaintiffs' Motion for Narrowed Class Certification
23 is appropriate to this motion. The Court formerly certified a class consisting of all purchasers of
24 Windows Vista Capable PCs but permitted proof of proximate cause only through price inflation.
25 The Court rejected plaintiffs' proof of price inflation, but ruled that plaintiffs had nevertheless
26 presented issues for trial warranting denial of Microsoft's summary judgment motion. As

1 detailed in plaintiffs' Motion for Narrowed Class Certification, plaintiffs believe they can
2 establish proximate cause on a classwide basis through means common to two narrowed classes
3 that were not common to the entire formerly-certified class .

4 Plaintiffs believe that the analysis as to these narrowed classes, and specifically to the proposed
5 proof of proximate cause, is materially different from the analysis that pertained to the larger
6 class and is consistent with the Court's prior rulings on class certification issues. First, plaintiffs
7 maintain that purchasers in Microsoft's Express Upgrade Guarantee program who requested a
8 Vista upgrade can establish proximate cause (indeed, actual classwide reliance) by virtue of their
9 affirmative participation in Microsoft's program and request for the Vista upgrade. Second,
10 plaintiffs maintain that purchasers of Vista Capable PCs that lacked support for the Windows
11 Display Driver Model ("WDDM"), which plaintiffs contend is an essential requirement for
12 Vista, have a pure omission claim against Microsoft. We believe this omission class claim on
13 WDDM, like the Express Upgrade Guarantee class claim, does not implicate the Court's prior
14 concerns about individual proximate cause issues following *Indoor Billboard/Washington, Inc. v.*
15 *Integra Telecom of Wash., Inc.*, 162 Wn.2d 59, 170 P.3d 10 (2007). Further, we do not believe
16 the Court's prior rulings foreclose these claims because they were not common to the entire
17 formerly-certified class. As discussed in plaintiffs' Motion for Narrowed Class Certification,
18 distinct legal principles apply to class certification of claims such as these. For purposes of a
19 continuance, the Court need not conclude that narrowed class certification should be granted; the
20 Court need only conclude that it should be considered.

21 22 23 24 **III. CONCLUSION**

25 It will take some time to brief and rule on these issues—more than is available with the
26 existing trial date—but plaintiffs believe it would be worthwhile to take the time.

1 Unquestionably, whether a case is proceeding as an individual, or as a class, action is pertinent to
2 a party's trial preparation and settlement position. Judicial economy would be promoted by
3 devoting the efforts the parties have already gone to in this case to resolution of such class claims
4 as may in fact be possible. Finally, the parties have been diligent in this case in completing
5 discovery on time and preparing for the existing trial date. Plaintiffs therefore seek a
6 continuance of the trial date and related deadlines, but only for as long as is necessary for
7 consideration of narrowed class certification and, if necessary, class notice.
8

9 DATED this 26th day of February, 2009.

10 KELLER ROHRBACK L.L.P.

11
12 By /s/ Ian S. Birk

13 William C. Smart, WSBA #8192

14 Ian S. Birk, WSBA #31431

15 Attorneys for Plaintiffs

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19 Jeffrey I. Tilden, WSBA #12219

20 Jeffrey M. Thomas, WSBA 21175

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22 Attorneys for Plaintiffs
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CERTIFICATE OF SERVICE

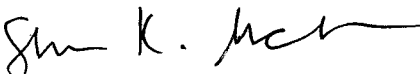
I hereby certify that on February 26, 2009, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following.

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