

The Honorable Marsha J. Pechman

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DIANNE KELLEY and KENNETH HANSEN,)	No. C 07-475 MJP
)	
Plaintiffs,)	MICROSOFT’S RESPONSE TO
v.)	PLAINTIFFS’ MOTION TO SEAL
)	CERTAIN CONFIDENTIAL
MICROSOFT CORPORATION, a Washington)	DOCUMENTS MAKING THE
corporation,)	SHOWING REQUIRED BY CR
)	5(g)
Defendant.)	
)	<i>Note on Motion Calendar:</i>
)	October 29, 2007

On October 5, 2007, in accordance with the requirements of the Court’s Protective Order [Dkt. No. 57], Plaintiffs filed a Motion to Seal certain confidential materials that they submitted to the Court in support of their contemporaneously filed Motions for Class Certification and for the Application of Washington Law. [Dkt. No. 59] (“Plaintiffs’ Motion to Seal”). Plaintiffs’ Motion to Seal stated that they were submitting materials to the Court under seal that either (a) Microsoft Corporation (“Microsoft”) had designated “Confidential” or (b) contained excerpts from materials that Microsoft had designated “Confidential.” Specifically, Plaintiffs submitted the following confidential materials under seal:

- 1. Plaintiffs’ Motion for Application of Washington Law** [Dkt. No. 60], in which the following pages referred to or described excerpts from materials that Microsoft designated as confidential: 2:11, 2:13-16, 2:18-24, 3:12-20, and

14:15-16;¹

- 1 2. **Declaration of William C. Smart in Support of Plaintiffs’ Motion for the**
- 2 **Application of Washington Law, Exhibit C** [Dkt. No. 62]: Designed for
- 3 Microsoft Windows and Windows Vista Logo Licensing Agreement;
- 4 3. **Declaration of William C. Smart in Support of Plaintiffs’ Motion for the**
- 5 **Application of Washington Law, Exhibit D** [Dkt. No. 63]: Microsoft
- 6 Business Terms Document for OEM Customers;
- 7 4. **Declaration of William C. Smart in Support of Plaintiffs’ Motion for the**
- 8 **Application of Washington Law, Exhibit F** [Dkt. No. 64]: OEM Marketing
- 9 Bulletin: Windows Vista Capable Program;
- 10 5. **Plaintiffs’ Motion for Class Certification** [Dkt. No. 65], in which the
- 11 following pages referred to or described materials that Microsoft designated as
- 12 confidential: 3:1-5, 3:7-41, 4:1-9, and 15:11-17;²
- 13 6. **Declaration of Jeffrey I. Tilden in Support of Plaintiffs’ Motion for Class**
- 14 **Certification, Exhibit A** [Dkt. No. 67]: OEM Marketing Bulletin: Windows
- 15 Vista Capable Program;³ and
- 16 7. **Declaration of Jeffrey I. Tilden in Support of Plaintiffs’ Motion for Class**
- 17 **Certification, Exhibit L** [Dkt. No. 68]: Certain pages from the Transcript of
- 18 the Rule 30(b)(6) Deposition of Microsoft (Mark Croft), of which only lines
- 19 1-9 of page 50 contains testimony designated as confidential by Microsoft.

20 Under the Court’s Protective Order [Dkt. No. 57 ¶ 13(b)], Microsoft, as the party that

21 disclosed the materials at issue and designated those materials as “Confidential,” now must

22 make the showing required by CR 5(g) in its response to Plaintiffs’ Motion to Seal. Microsoft

23 is submitting this brief, supported by the contemporaneously filed Declaration of Nicholas J.

24 Psyhogeos (“Psyhogeos Decl.”), for the purpose of making that showing.

25 _____
¹ The pages identified in Plaintiffs’ Motion for the Application of Washington Law contain references to the (a) Microsoft’s Designed for Microsoft Windows and Windows Vista Logo Licensing Agreement and (b) Microsoft’s OEM Marketing Bulletin: Windows Vista Capable Program.

26 ² The pages identified in Plaintiffs’ Motion for Class Certification contain references to Microsoft’s OEM Marketing Bulletin: Windows Vista Capable Program.

27 ³ The OEM Marketing Bulletin attached as Exhibit A to Mr. Tilden’s Declaration in support of Plaintiffs’ Motion for Class Certification is the same document as Exhibit F attached to Mr. Smart’s Declaration in support of Plaintiffs’ Motion for the Application of Washington Law. Both are Bates stamped as MS-KELL 00000000039-58.

1 **A. Under the Relevant Standard, Microsoft Need Only Show That “Good**
2 **Cause” Exists to Seal the Materials, and Microsoft Has Produced**
3 **Evidence That Well Exceeds That Standard.**

4 Microsoft already has discussed the legal standard used in the Ninth Circuit to
5 determine whether a court may seal confidential materials submitted by a party on a non-
6 dispositive motion. In Microsoft’s Supplemental Memorandum in Support of its Motion to
7 Seal Confidential Documents [Dkt. No. 53] in relation to materials that Plaintiffs submitted to
8 the Court with their reply brief in support of their Motion to Compel, Microsoft explained that
9 in *Kamakana v. City and County of Honolulu*, 447 F.3d 1172 (9th Cir. 2006), the Ninth
10 Circuit held that the presumption of public access to judicial records does not apply to a
11 sealed discovery document attached to a non-dispositive motion. The Court explained:

12 We have ... “carved out an exception to the presumption of access” to
13 judicial records, *Foltz [v. State Farm Mutual Auto. Insurance Co.]*,
14 331 F.3d [1122,] 1135 [(9th Cir. 2003)], for a “**sealed discovery**
15 **document** [attached] to a **non-dispositive** motion,” such that “the
16 usual presumption of the public’s right of access is rebutted.” *Phillips*
17 *v. General Motors Corp.*, 307 F.3d 1206, 1213 (9th Cir. 2002)
18 (emphasis added). There are, as we explained in *Foltz*, “good reasons
19 to distinguish between dispositive and non-dispositive motions.” 331
20 F.3d at 1135. Specifically, the public has less of a need for access to
21 court records attached only to non-dispositive motions because those
22 documents are often “unrelated, or only tangentially related, to the
23 underlying cause of action.” *Id.* (quoting *Seattle Times Co. v.*
24 *Rhinehart*, 467 U.S. 20, 33, 104 S.Ct. 2199, 81 L.Ed.2d 17 (1984)).

25 447 F.2d at 1179 (emphasis in original).

26 Plaintiffs have submitted sealed discovery documents and materials in support of two
27 motions that are, by any measure, non-dispositive: Plaintiffs’ Motion for the Application of
28 Washington Law and their Motion for Class Certification. Plaintiffs did not file either Motion
29 to resolve disputes as to the merits of this litigation. To the contrary, Plaintiffs argue that,
30 since they filed their Motion for Class Certification before the parties completed detailed
31 merits discovery, the Court’s analysis must focus on the Plaintiffs’ allegations and the issues

1 derived therefrom, not the merits of the case. *See* Dkt. No. 65, p. 9.⁴ Likewise, Plaintiffs’
2 Motion for the Application of Washington Law, which Plaintiffs also filed before the parties
3 engaged in detailed merits discovery, requests only that the Court determine the applicable
4 law, not rule upon the merits. *See* Dkt. No. 60, p. 24 (“Conclusion”). Even if either of
5 Plaintiffs’ Motions require the Court to consider evidence that overlaps with the merits, such
6 “consideration” by the Court would not be sufficient to impose *Kamakana*’s more rigorous
7 standard for sealing materials submitted in relation to dispositive motions. *See, e.g., In re*
8 *Nat’l Sec. Agency Telecomms. Records Litig.*, MDL Docket No 06-1791 VRW, 2007 U.S.
9 Dist. LEXIS 14473, *45-47 (N.D. Cal. Feb. 20, 2007) (Walker, J.) (denying motion to unseal
10 records submitted in support of plaintiffs’ motion for a preliminary injunction, finding the
11 public’s right of access to be rebutted under *Kamakana*’s standard for sealed materials filed in
12 support of non-dispositive motions, and rejecting media claims that “consideration” of the
13 merits of the dispute was sufficient to treat the motion as “dispositive” under *Kamakana*).⁵
14 Thus, under Ninth Circuit authority, Microsoft need only show that “good cause” exists for
15 continuing to keep these materials under seal.

16 Here, the accompanying Psychogeos Declaration presents facts that satisfy both the
17 “good cause” standard that applies to the sealing of discovery materials attached to non-
18 dispositive motions and the “sufficiently compelling reasons” standard that applies to the
19 sealing of materials attached to dispositive motions. Microsoft has a strong interest in
20 keeping the terms of its contractual relationships with its OEM partners and the details of its
21 marketing strategies confidential and unavailable to competitors. As explained in the

22 ⁴ Plaintiffs carefully distinguished their Class Certification Motion from the standards that apply to
23 dispositive proceedings, such as motions for summary judgment. *See* Dkt. No. 65, p. 9, fn 2.

24 ⁵ Although the OEM Marketing Bulletin and the Designed for Microsoft Windows and Windows
25 Vista Logo License Agreement do contain information pertinent to Microsoft’s defenses to Plaintiffs’
26 claims, that information is not why Plaintiffs submitted those materials with Plaintiffs’ Motions.

1 Psychogeos Declaration, with one exception,⁶ each of the materials at issue is, or contains
 2 information about, a commercially sensitive business matter, and each has significant
 3 competitive value to Microsoft. Psychogeos Decl. ¶ 4. Indeed, the materials at issue include
 4 fundamental licensing and business term documents in Microsoft’s desktop operating system
 5 business with OEMs, one of the largest sources of Microsoft’s revenue. Indeed, Microsoft
 6 uses the business term document not only in licensing desktop operating systems (Windows
 7 on individual PCs), but in licensing all of its most important software—including Microsoft
 8 Office and server operating system software (operating system software on computers that
 9 serve many PCs)—to OEMs. These documents reveal the terms and strategies under which
 10 Microsoft licenses Windows, Office, and the Windows logo to OEMs, and Microsoft
 11 considers them to be highly confidential. *Id.* ¶¶ 6, 26, 31.

12 The Supreme Court and the Ninth Circuit both have acknowledged that, even in the
 13 context of dispositive proceedings, courts may deny public access to judicial documents
 14 where such records constitute “sources of business information that might harm a litigant’s
 15 competitive standing.” *See, e.g., Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 598 (1978)

16 ⁶ Although part of a larger section of Mr. Croft’s testimony designated as “Confidential” by Microsoft,
 17 the portion of page 50 (50:1-9) from the deposition of Mark Croft attached as Exhibit L to the Tilden
 18 Declaration does not disclose commercially sensitive information from Microsoft when taken out of
 19 the context of Mr. Croft’s prior testimony on pages 48 and 49 of his deposition transcript. (In those
 20 pages, Mr. Croft testifies regarding the terms of Microsoft’s OEM Marketing Bulletin for the
 21 Windows Vista Capable Program.) But Microsoft respectfully submits that lines 1-22 of page 50 of
 22 Mr. Croft’s deposition testimony have no bearing on any points that Plaintiffs make in their Motion
 23 for Class Certification and that, as a result, the Court’s Protective Order required that Plaintiffs not
 24 submit that portion of the deposition to the Court. *See* Dkt. No. 57, ¶ 12 (directing that documents
 25 containing “Confidential” material shall not be filed with the Court unless it is reasonably necessary to
 26 do so). Microsoft therefore urges Plaintiffs promptly to withdraw lines 1-9 of page 50 of Mr. Croft’s
 27 deposition from the record, which will obviate the need to keep Exhibit L under seal. Even if
 Plaintiffs refuse to do so, Microsoft will, in this instance, waive its right to require that lines 1-9 of
 page 50 submitted by Plaintiffs in support of Plaintiffs’ Motion for Class Certification be filed under
 seal—while reserving its right to assert that the larger section of Mr. Croft’s testimony designated as
 “Confidential” (*i.e.*, pages 48:24-50:9), which includes the portion of page 50 at issue, is, in fact,
 confidential when considered in its totality.

1 (denying access to copies of tapes played at trial and noting that courts have refused public
 2 access to their files where granting such access might “become a vehicle for improper
 3 purposes,” including causing a litigant competitive harm); *Kamakana*, 447 F.3d at 1179
 4 (“[C]ompelling reasons’ sufficient to outweigh the public’s interest in disclosure and justify
 5 sealing court records exist when such ‘court files might have become a vehicle for improper
 6 purposes,’ such as the use of records to...release trade secrets.”) (citing *Nixon*, 435 U.S. at
 7 598); *Foltz*, 331 F.3d at 1135 (quoting *Hagestad v. Tragesser*, 49 F.3d 1430, 1434 (9th Cir.
 8 1995)) (noting that, when deciding whether to seal confidential materials submitted with
 9 summary judgment motions under the “sufficiently compelling reasons” standard, a court
 10 should consider “whether disclosure of the material could result in ...infringement upon trade
 11 secrets”). The declaration of Mr. Psyhogeos, the General Manager of Microsoft’s Worldwide
 12 OEM Programs & Policy team, establishes that the documents at issue fall into that category.

13 **B. Microsoft’s Confidential Business Materials Should Be Sealed Because**
 14 **Disclosure Would Harm Microsoft’s Competitive Standing.**

15 **1. Microsoft’s Business Terms Document for OEM Customers**

16 Microsoft’s Business Terms Document for OEM Customers (hereafter, “BTD”) [Dkt.
 17 63] sets forth the business terms that are incorporated into Microsoft’s licensing agreements
 18 with OEMs for specific software products, including, but not limited to, Microsoft’s Desktop
 19 Operating System License Agreement for OEM Customers (the “DTOS Agreement”).
 20 Psyhogeos Decl. ¶ 6. The DTOS Agreement is the license agreement that Microsoft enters
 21 into with an OEM that authorizes the OEM to preinstall specified Microsoft operating system
 22 software on the PCs the OEM manufactures and sells. Although Microsoft licenses such
 23 operating system software under uniform terms and conditions to all OEMs (pursuant to the
 24 consent decree with the U.S. Department of Justice) Microsoft does not divulge these terms,
 25 which are set forth in the DTOS Agreement and the BTD, to its software competitors or to the
 26

1 public. *Id.* ¶ 7. The DTOS Agreement incorporates by reference all of the terms of the BTD,
2 which include such information as: (a) specific instructions for OEMs to make payments to
3 Microsoft, including wiring instructions and Microsoft bank account numbers; (b) contractual
4 limitations on the licenses granted by Microsoft to OEMs; (c) certain reporting requirements
5 for OEM licensees; (d) warranty information; (e) confidentiality agreements; (f) terms relating
6 to the termination of the agreement; and (g) other general business terms for OEMs. *Id.* ¶¶ 8,
7 9. Microsoft considers both the DTOS Agreement and the BTD to be commercially sensitive
8 business matters and takes steps to keep these materials confidential. *Id.* ¶¶ 10, 11.

9 **2. Microsoft's Designed for Microsoft Windows and Windows Vista 10 Logo License Agreement with OEMs**

11 Microsoft's Designed for Microsoft Windows and Windows Vista Logo License
12 Agreement with OEMs (hereafter, the "Logo License Agreement") is a contract in which
13 Microsoft specifies criteria under which OEMs may use particular Microsoft-created logos on
14 or in connection with the PCs the OEMs manufacture and sell. Psyhogeos Decl. ¶¶ 12, 13.
15 Microsoft does not divulge the terms of the Logo License Agreement to its software
16 competitors or to the public; it considers the Logo License Agreement to be a commercially
17 sensitive business matter; and it takes steps to keep these materials confidential. *Id.* ¶ 14.

18 **3. The OEM Marketing Bulletin**

19 Microsoft created the OEM Marketing Bulletin, dated September 20, 2006 (the "OEM
20 Marketing Bulletin") to explain in detail to its OEM partners the marketing strategy behind its
21 "Windows Vista Capable" program and the specific steps and guidelines Microsoft had
22 developed to implement that program. Psyhogeos Decl. ¶¶ 17, 18. Microsoft made the
23 Bulletin available only to the OEM partners who were eligible to participate in the "Windows
24 Vista Capable" program, and it provided the OEM Marketing Bulletin to those OEMs under a
25 non-disclosure agreement. *Id.* Like the BTD, the DTOS Agreement, and the Logo License
26 Agreement, Microsoft considers the OEM Marketing Bulletin to be a commercially sensitive

1 business matter. *Id.* ¶ 18. It does not disclose the OEM Marketing Bulletin or other
2 documents detailing its marketing strategies to its software competitors or to the public, and it
3 takes steps to keep such materials confidential. *Id.*

4 Even before it designated these documents as “Confidential” in this lawsuit, Microsoft
5 labeled the BTM, the Logo License Agreement, and the OEM Marketing Bulletin [Dkt. Nos.
6 63, 62, 64, 67] as “Confidential,” thus demonstrating that both Microsoft and the OEMs
7 intended that these materials be kept confidential. *Id.* ¶ 4. Indeed, the OEMs themselves have
8 contractual rights to confidentiality under their agreements with Microsoft, and they expect
9 that Microsoft will maintain that confidentiality. *Id.* ¶ 5.

10 The Psychogeos Declaration describes the substantial efforts that Microsoft takes to
11 maintain the confidentiality of commercially sensitive business documents such as the BTM,
12 the DTOS Agreement, the Logo License Agreement, and the OEM Marketing
13 Bulletin—including (a) maintaining these types of materials in areas not open to the public in
14 locations protected by passwords (for online information) or locked cabinets and/or doors
15 accessible only with company-issued keys held by those with responsibility for protecting this
16 information, and (b) making this information available only to Microsoft personnel with a
17 business need for the information and to the particular OEM(s) to which the information
18 pertains. *Id.* ¶¶ 21-22. Further, Microsoft has made its marketing strategies available to
19 OEMs only under a non-disclosure agreement. *Id.* ¶¶ 18, 23.

20 The public disclosure of the terms of any of Microsoft’s agreements with OEMs or the
21 details of Microsoft’s marketing strategies would put Microsoft at a competitive disadvantage
22 vis-à-vis its software competitors. *Id.* ¶¶ 24-28. If Microsoft’s competitors knew the terms to
23 which Microsoft was willing to agree with OEM partners, those competitors could use that
24 information in their own negotiations with OEMs. *Id.* ¶ 24. If competitors knew the details
25 of marketing strategies that Microsoft had developed for use by its OEM partners, those
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1 competitors could use that information in their own marketing programs or could structure
 2 their own marketing programs to undercut the effectiveness of the strategies Microsoft had
 3 developed. *Id.* ¶ 25. Public disclosure of these materials thus would put Microsoft at a
 4 significant competitive disadvantage in the marketplace. *Id.* ¶¶ 24-28.

5 **C. The Harm That Microsoft May Suffer If These Materials Are Disclosed Is**
 6 **Even Greater Than The Harm Set Forth In Microsoft's Prior Brief.**

7 Indeed, Microsoft's interests in maintaining the confidentiality of the materials that
 8 Plaintiffs have submitted in support of their Motions for Class Certification and for the
 9 Application of Washington Law and the competitive harm Microsoft may suffer if those
 10 materials are disclosed to the public are, in many ways, even greater than those being
 11 considered by the Court in the context of Microsoft's Motion to Seal confidential materials
 12 filed by the Plaintiffs in support of their Motion to Compel [Dkt. Nos. 45, 53]. As Mr.
 13 Psyhogeos explains in his Declaration:

- 14 • Previously, in the context of Plaintiffs' Motion to Compel, Plaintiffs submitted
 15 *excerpts* from Microsoft's highly confidential DTOS Agreement. Plaintiffs have
 16 now submitted into evidence a copy of the *entire* BTB, which is an integral part of
 17 the DTOS Agreement. [Dkt. No. 63]; Psyhogeos Decl. ¶¶ 3, 11.
- 18 • The BTB contains Microsoft's confidential banking information, including the
 19 details of Microsoft's banking relationships and its specific bank account numbers.
 20 [Dkt. No. 63, at MS-KELL 00000000208]. Disclosing this information would
 21 jeopardize the security of Microsoft's bank accounts. Psyhogeos Decl. ¶ 26.
- 22 • Previously, in the context of Plaintiffs' Motion to Compel, Plaintiffs submitted
 23 *excerpts* from the Rule 30(b)(6) deposition transcript of Microsoft designee Ms.
 24 Christine Mullaney Sundlie in which counsel for Plaintiffs questioned Ms.
 25 Mullaney Sundlie about the Logo License Agreement. [Dkt. No. 48 (Attachment
 26 A)]. Now, Plaintiffs have submitted into evidence a copy of the Logo License
 27 Agreement *in its entirety* [Dkt. No. 62]. It is even more vital to Microsoft that the
 actual terms of the Logo Agreement itself, in its entirety, be protected from public
 disclosure. Psyhogeos Decl. ¶¶ 3, 15, 16, 27.
- Previously, in the context of Plaintiffs' Motion to Compel, Plaintiffs submitted
excerpts from Microsoft's confidential OEM Marketing Bulletin [Dkt. 48
 (Attachment B)]. Plaintiffs have now submitted into evidence a copy of the OEM
 Marketing Bulletin *in its entirety* [Dkt. Nos. 64, 67]. It is even more vital to

1 Microsoft that the *entire* OEM Marketing Bulletin be protected from public
disclosure. Psyhogeos Decl. ¶¶ 3, 17, 19, 20, 28.

2 **D. Microsoft’s Confidential Materials Have Commercial Sensitivity After**
3 **The Conclusion Of The Windows Vista Capable Marketing Program.**

4 Finally, even though the Windows Vista Capable marketing program contemplated by
5 the OEM Marketing Bulletin and authorized by the Logo License Agreement is now
6 complete, those documents retain their commercial sensitivity. The Logo License Agreement
7 licensed not only the Windows Vista Capable logo during the term of the program but also
8 other Microsoft operating system logos after the program ended. It and the OEM Marketing
9 Bulletin contain the details of Microsoft’s business and marketing methods and strategies with
10 respect to OEMs. The public disclosure of those terms, even after the conclusion of the
11 Windows Vista Capable marketing program, would put Microsoft at a competitive
12 disadvantage vis-à-vis its competitors. Psyhogeos Decl. ¶¶ 12, 13, 29.

13 Similarly, the fact that individual versions of the DTOS Agreement and the BTD
14 contain an Expiration Date and an End Date, respectively, does not mean that those
15 documents no longer contain commercially sensitive information for Microsoft and the
16 OEMs. Both the DTOS Agreement and the BTD contain the terms of Microsoft’s agreements
17 with its OEMs. The public disclosure of the terms of these agreements with OEMs would put
18 Microsoft at a competitive disadvantage vis-à-vis its software competitors. If those
19 competitors knew the terms to which Microsoft was willing to agree with an OEM partner,
20 Microsoft’s competitors could use that information in their own negotiations with OEMs.
21 This risk is particularly great where, as is the case here, the agreements at issue—version 9.0
22 of the BTD (July 2007), version 8.01 of the DTOS Agreement (July 2006), and version 9.3 of
23 the Logo License Agreement (2006)—are so recent. *Id.* ¶ 30.

24 Moreover, the confidential documents at issue play a substantial role in Microsoft’s
25 long-term business and marketing strategies involving its OEM partners. The BTD, the

1 DTOS Agreement, and the Logo License Agreement are all agreements that Microsoft uses to
2 run its desktop operating system business, one of Microsoft's largest sources of revenue.

3 Because of the importance of the desktop operating system business to Microsoft, Microsoft
4 considers these agreements to be highly confidential. *Id.* ¶ 31. Microsoft has used all three
5 agreements on a continuous basis, and they have evolved through several versions over many
6 years. Although the terms of these agreements change to some degree when they are
7 revised—usually each year—the basic framework they provide for Microsoft's business
8 dealings with its OEM partners usually remains similar from one year to the next. *Id.*

9 In addition, Microsoft uses the BTM to provide business terms for its most important
10 software licenses with OEMs, including licenses for software that is not at issue in this
11 litigation, such as Microsoft Office and Microsoft's server operating system software. As a
12 result, the BTM contains the majority of Microsoft's business terms for licensing software to
13 OEMs, and any public disclosure of the BTM would reveal a large amount of highly
14 confidential information about how Microsoft conducts its licensing business with its OEM
15 partners. *Id.* ¶ 26. Similarly, the OEM Marketing Bulletin reveals a marketing strategy that
16 Microsoft used in the release of its last two desktop operating systems—Windows XP and
17 Windows Vista—and Microsoft may well use the OEM Marketing Bulletin again to provide a
18 framework for a similar marketing program in the future. *Id.* ¶ 32. As a result, Microsoft
19 would still suffer a competitive disadvantage if a competitor obtained access to the OEM
20 Marketing Bulletin, regardless of the fact that the Windows Vista Capable marketing program
21 is now complete. *Id.* ¶ 32. Microsoft and its OEM partners have continued to treat the BTM,
22 the DTOS Agreement, the Logo License Agreement, and the OEM Marketing Bulletin as
23 confidential business information, and Microsoft continues to make commercially reasonable
24 efforts to ensure that the terms of those documents (including those terms that are required to
25 be uniform) are not divulged outside of Microsoft's relationships with its OEM partners, even
26

1 though (a) Microsoft’s Windows Vista Capable marketing program has ended and (b) the
2 Expiration Date or End Date for the particular versions of the BTD or DTOS Agreement here
3 have arrived. *Id.* ¶ 33. “Disclosing them would cause Microsoft serious harm.” *Id.* ¶ 31.

4 Balancing Plaintiffs’ limited purpose in submitting Microsoft’s confidential materials
5 to the Court on two non-dispositive motions against the commercially sensitive nature of the
6 materials and the serious competitive harm that could result if those materials become part of
7 the public record demonstrates that Microsoft has made the showing required under CR 5(g).

8 For these reasons, Microsoft requests that the Court enter an Order under Local Civil
9 Rule 5(g) directing that the BTD [Dkt. No. 63], the Logo Licensing Agreement [Dkt. No. 62],
10 and the OEM Marketing Bulletin [Dkt. Nos. 64, 67] remain filed under seal. Consistent with
11 its proposed order, Microsoft proposes that appropriately redacted copies of Plaintiffs’
12 Motions [Dkt. Nos. 60, 65] should be filed for public record.

13 DATED this 24th day of October, 2007.

14 Davis Wright Tremaine LLP
Attorneys for Microsoft Corporation

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CERTIFICATE OF SERVICE

I hereby certify that on Wednesday, October 24, 2007, I electronically filed the foregoing Microsoft’s Response to Plaintiffs’ Motion to Seal Certain Confidential Documents Making the Showing Required by CR 5(g), as well as the related Declaration of Nicholas Psychogeos, 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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DATED this 24th day of October, 2007.

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