Honorable John C. Coughenour

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

IN RE MICROSOFT XBOX 360 SCRATCHED DISC LITIGATION

C07-1121-JCC

THIS ORDER RELATES TO ALL ACTIONS

ORDER

This matter is before the Court on Plaintiffs' motion for class certification and application of Washington law. (Dkt. No. 58). The Court has also considered Defendant's response (Dkt. No. 89), Plaintiffs' reply (Dkt. No. 105), and Defendant's surreply. (Dkt. No. 117). In addition to reviewing the parties' pleadings and attached declarations, exhibits and other submissions, the Court heard oral argument on September 29, 2009.

For the reasons below, the Court hereby DENIES Plaintiffs' motion to certify them as representatives of the proposed Console Owners Class. The Court FURTHER DENIES Plaintiffs' motion to certify them as representatives of the proposed Damaged Disc Subclass.

I. BACKGROUND

This case involves an alleged product defect of Defendant Microsoft Corporation's popular video-game console, the Xbox 360. Microsoft launched the Xbox in November 2005, and has sold more than ten million of the machines since then. The success of the Xbox is partly the result of the high speeds at which it spins game discs. The Xbox is capable of spinning discs at 7500 rotations per minute, while competing products like the Nintendo Wii and Sony Playstation III spin discs at 3000 to 4000 rotations per minute. Plaintiffs claim that this allows the Xbox to load games more quickly, render smoother graphics, and create a better overall video-gaming experience. (Pl. Mot. 5–6 (Dkt. No. 58)).

Plaintiffs Jose Caraballo, Justin Hanson, Robert Ling III, Christine Moskowitz, Luis Torres and David Wood are Xbox owners from three different states who bought Xbox consoles in 2006 or 2007.[1] Each alleges that he or she was playing a video game when a grinding noise coming from inside the machine caught his or her attention. Each of them ejected the video-game disc and found deep grooves on its readable side.[2] In each case, the game disc had been rendered inoperable. Plaintiffs called Microsoft customer service and asked for a refund of the price of the damaged game discs. In all six cases, Microsoft refused. (Pl. Decls. (Dkt. No. 59–64)). Plaintiffs' experiences are not unique. Microsoft's customer-service department has received approximately 55,000 complaints about scratched game discs. (Pl. Mot. 9 (Dkt. No. 58)).

Plaintiffs allege that the damage occurred because the greater speed at which the Xbox rotates discs exerts greater gyroscopic pressure on the discs—pressure the machine is unable to handle. They allege that the machines had chucked the games discs from the spindle, and then kept trying to spin the chucked discs. Under Plaintiffs' theory, the discs, free from the spindles, wobbled and rubbed against an

---

[1]Caraballo is a resident of Pennsylvania; Hanson is a resident of Washington; and Ling, Moskowittz, Torres and Wood are residents of California. (Pl. Decls. (Dkt. No. 59–64)).

[2]In the case of Plaintiff Christine Moskowitz, her son Hunter was actually the principle user of the machine. He was using the machine when it damaged the disc. (Decl. (Dkt. No. 62)).

interior part of the Xbox, which caused the characteristic deep grooves. (*Id.* at 5–7).

Microsoft agrees that this scenario is possible, but argues that it can only occur if a game player misuses the machine by moving it while a disc is spinning inside. Microsoft first learned that the Xbox is capable of chucking game discs from their spindles a few months before the November 2005 product launch. Its engineers studied the problem and determined that the scenario occurred only when users tilted the machine *during* game play. (Def. Opp'n 8–9 (Dkt. No. 89)). Microsoft began the process of placing a warning sticker across the disc-tray mechanism which has a large green exclamation mark and reads: "Do not move console with disc in tray." Because the sticker lays across the disc tray, it is impossible for an owner to use the machine without having first removed the sticker. (*Id.* at 5).The Xbox manual also expressly warns people to "remove discs before moving the console or tilting it between the horizontal and vertical positions." (Pl. Mot. 10–11 (Dkt. No. 58)).

Plaintiffs argue that the Xbox suffers from a fundamental design defect which no warning can cure. The Xbox uses a tray-loading optical-disc drive: Users load game discs onto a slide-out tray, which is then pulled back into the machine. The machine then mounts the disc on a rotating spindle, where it is held by magnetic force. Plaintiffs argue that the design of the tray-loading drive reflects older technology and that Microsoft should have used a slot-loading drive and a stronger disc holder. They point to the designs of the Microsoft Xbox's two chief competitors: the Sony Playstation III and the Nintendo Wii. Both use a slot-loading drive. And even though both machines spin discs at fewer rotations per minute, their disc holders apply greater force to discs. (Pl. Mot. 5–7 (Dkt. No. 58)) *and* (Sigman Decl. 19–20) (Dkt. No. 65-1)). Plaintiffs argue that Microsoft rejected three possible post-launch solutions to the alleged problem. Microsoft could have increased the magnetic force of the disc holder, slowed the rotation speed of the disc drive, or placed small soft patches inside the machine where the discs were likely to contact the machine parts. (Pl. Mot. 8–9 (Dkt. No. 58)).

Plaintiffs filed this suit in July 2007. In May 2009, they filed this motion, asking the Court to

certify them as representatives of two classes: the *Console Owners Class*, which they define to include "all persons residing in the United States who, within four years preceding the filing of Plaintiffs' complaint on July 18, 2007, purchased or were given an Xbox 360 console"; and the *Damaged Disc Subclass*, which includes "all members of the Console Owners Class who purchased or were given Xbox 360 game discs that were subsequently scratched by an Xbox 360 and rendered unusable." (Pl. Mot. 2 (Dkt. No. 58)).

In addition to asking the Court to certify them as representatives of a class and subclass, Plaintiffs argue that this Court should apply the law of Washington State to all their claims, regardless of their different states of residence. If as many as fifty different state laws apply to Plaintiffs' potential class-action claims, their case is more likely to be so unmanageable as to preclude class certification. *See, e.g., Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1189 (9th Cir. 2001). If, on the other hand, the law of Washington State applies to all claims, regardless of where a particular plaintiff resides, then common issues of law are much more likely to predominate, making class certification a more likely prospect. Because the resolution of the choice-of-law question affects the class-certification analysis, the Court addresses it first. *See Kelley v. Microsoft Corp.*, 251 F.R.D. 544 (W.D. Wash. 2008) (addressing the choice-of-law issue before turning to the question of class-action certification because "[v]ariations in state law affect the Court's analysis . . . under FED. R. CIV. P. 23.").

II. CHOICE OF LAW

The parties agree that Washington law governs this Court's choice-of-law analysis in a diversity case such as this.[3] (Pl. Mot. 28 (Dkt. No. 58)) *and* (Def. Opp'n 28 (Dkt. No. 89)). They disagree about

[3]The Court notes that the Due Process Clause of the U.S. Constitution also limits the application of state law in class actions. *See Kelley v. Microsoft Corp.*, 251 F.R.D. 544, 550 (W.D. Wash. 2008). Microsoft declined to argue the constitutional issue. The Court addresses it in passing, and finds that the application of Washington State law is consistent with the U.S. Constitution for many of the same reasons offered by the *Kelley* court. *See Kelley*, 251 F.R.D. at 550 (noting, *inter alia*, that Microsoft is incorporated and has its principal headquarters in Washington).

how Washington law applies to a choice-of-law clause contained in the Xbox 360 warranty. The clause reads: "If you acquired the Xbox Product in the United States, the laws of the State of Washington, U.S.A., will apply to this Limited Warranty. *The laws of your state of residence will apply to any tort claims and/or any claims under any consumer protection statutes*." (Warranty (Dkt. No. 45 at 29)) (emphasis added). Plaintiffs argue that the Court should refuse to enforce this clause, because "contractual choice-of-law provisions do not dictate the choice of law for tort claims." (Pl. Mot. 34 (Dkt. No. 58)). Defendant, on the other hand, argues that the clause is enforceable as written. (Def. Opp'n. 25–28 (Dkt. No. 89)).

As a general rule, Washington courts abide by contractual choice-of-law and choice-of-forum provisions. *Truck Center Corp. v. General Motors Corp.*, 837 P.2d 631, 634 n.3 (Wash. App. 1992). There is an important exception, however: "A contractual choice-of-forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision." *Dix v. ICT Group*, 160 P.3d 1016, 1021 (Wash. 2007) (quoting *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972)); *see also Rutter v. BX of Tri-Cities, Inc.*, 806 P.2d 1266, 1268 (Wash. App. 1991) ("Washington courts will not give effect to an express choice-of-law clause if the application of the law of the chosen state would be contrary to a fundamental policy of Washington and Washington has a materially greater interest in the determination of the particular issue."). Washington courts have constructed a three-step approach to determining whether to enforce a choice-of-law provision. In *McKee v. AT&T Corp.*, the State Supreme Court stated that courts "disregard the contract provision and apply Washington law if, (1) without the provision, Washington law would apply; (2) the chosen state's law violates a fundamental public policy of Washington; and (3) Washington's interest in the determination outweighs the chosen state's interests." *McKee*, 161 P.3d 845, 851 (Wash. 2008) (numbering added). The test is conjunctive: Washington courts invalidate a choice-of-forum clause only if a moving party meets all three requirements. Because this

Court finds the issue of public policy dispositive, it does not reach the other issues.

A. Public Policy

Two cases recently decided by the Washington State Supreme Court are particularly instructive: *Dix v. ICT Group*, 161 P.3d 1016 (Wash. 2007), and *McKee v. AT&T Corp.*, 191 P.3d 845 (Wash. 2008). In *Dix*, plaintiffs alleged that ICT Group, a customer-service company working for America Online, Inc. (AOL), had violated the Washington Consumer Protection Act by conspiring with AOL to charge users for unwanted second and third user accounts created under dubious circumstances. Each plaintiff alleged damages of less than one-hundred dollars. *Dix*, 161 P.3d at 1018–19. The trial court dismissed the action because of a forum-selection clause in AOL's standard-form contract which provided:

> You expressly agree that exclusive jurisdiction for any claim or dispute with AOL or relating in any way to your membership or your use of the AOL Services resides in the courts of Virginia and you further agree and expressly consent to the exercise of personal jurisdiction in the courts of Virginia in connection with any dispute including any claim involving AOL or AOL Services.

Id. at 1018. The Washington State Supreme Court reversed, finding that the clause left the plaintiffs and others in their position without an effective remedy because Virginia law foreclosed the class-action device. *Id.* at 1022. The provision therefore violated a public-policy choice manifested in the CPA: "[Washington State] public policy is violated when a citizen's ability to assert a private right of action [under the CPA] is significantly impaired by a forum selection clause that precludes class actions in circumstances where it is otherwise economically unfeasible for individual consumers to bring their small-value claims." *Id.* at 1024.

In *McKee*, the plaintiff objected that AT&T was improperly charging him municipal telephone taxes for a city in which he did not reside. He filed a lawsuit alleging less than twenty dollars in damages, but noted that "small amounts add up to very large sums." 191 P.3d at 848. AT&T moved to dismiss, relying on a choice-of-law provision in the customer contract which required the application of

New York law, as well as another provision which required that all disputes be resolved via arbitration rules that specifically forbade class actions. *Id.* at 849. The trial court refused to enforce the clauses, and the State Supreme Court affirmed, stating that "a forum-selection clause that seriously impairs the plaintiff's ability to go forward on a claim of small value by eliminating class suits in those circumstances where there is no feasible alternative for seeking relief violates public policy and is unenforceable." *Id.* at 852 (citing *Dix*, 161 P.3d at 1022).

At first glance, the cases seem to support Plaintiffs' position. The State Supreme Court held that Washington public policy favors class-action resolution of small claims, and trumps contractual choice-of-forum and choice-of-law provisions. Plaintiffs argue that this ends the inquiry: "Preventing the aggregation of claims such as those asserted here . . . is a procedural device with a substantive effect: as a practical matter, it would shield Microsoft from liability for violating tort and consumer-protection laws." (Reply 16 (Dkt. No. 105)).

This Court finds that a closer reading of the cases, combined with more careful attention to the facts of this case, supports Defendant's position. In *Dix*, AOL's provision would have required Washington residents to litigate in courtrooms on the other side of the country. Microsoft's provision requires no such thing, and in fact subjects Microsoft to liability in the *plaintiff's* most convenient forum, his or her home state. In *McKee*, AT&T's choice-of-law provision would have required that Washington residents hire an attorney familiar with New York law. Microsoft's provision imposes no such burden, and in fact obligates *Microsoft* to familiarize itself with the consumer-protection laws of fifty different states. In short, in both *Dix* and *McKee*, corporate defendants attempted to bind customers to legal rules that specifically foreclosed the possibility of class-action status, and the Washington State Supreme Court found that their attempts offended public policy. Microsoft's choice-of-forum provision, on the other hand, is enforceable, because it leaves open a "feasible alternative for seeking relief." *See McKee*, 191 P.3d at 852. Aggrieved Xbox customers have the option of filing *statewide* class-action

suits in their home states. Plaintiffs fail to point to a Washington case holding that the State's public policy is to guarantee *nationwide* class-action resolution of small claims, and this Court does not read *Dix* and *McKee* as stating that much.

Plaintiffs' motion to apply Washington law is DENIED.

III. CLASS-ACTION CERTIFICATION

The analytical framework for class-action certification is clear: The party seeking certification must establish (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998) (describing the requirements of FED. R. CIV. P. 23(a)). Some of the requirements involve similar considerations. *See, e.g.*, *Armstrong v. Davis*, 275 F.3d 849, 868 (2001) (noting that "the commonality and typicality requirements tend to merge into one another"). If potential class representatives meet the four requirements of Rule 23(a), they must then demonstrate that the stated claim for relief falls within one of the three categories outlined in Rule 23(b). In this case, the named plaintiffs argue that their claims meet the requirements of Rule 23(b)(3), which permits class certification where "the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." FED. R. CIV. P. 23(b)(3). Throughout the class-action-certification inquiry, the plaintiff bears the burden of proof. *Zinser v. Accufix Research Inst.*, 253 F.3d 1180, 1186 (9th Cir. 2001).

Because the Court finds that Plaintiffs fail to meet the predominance requirement of Rule 23(b)(3), it does not consider the four requirements of Rule 23(a).

A. Predominance

Rule 23(b)(3) permits a class action to be maintained if "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly adjudicating the controversy."

FED. R. CIV. P. 23(b)(3). The requirements of Rule 23(b)(3) test "whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 623 (1997). As the Ninth Circuit has stated, "When common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is clear justification for handling the dispute on a representative rather than an individual basis." *Hanlon*, 150 F.3d at 1022 (internal markings omitted).

Because the choice-of-forum clause in Microsoft's limited warranty is enforceable, individual issues of law predominate over common issues of law. State consumer-protection law varies considerably across the fifty states. As a leading treatise states, "There is no monolithic products-liability law in the United States. . . . [T]his Balkanization creates enormous confusion when comparing the detailed aspects of the law of one state with that of another." FRUMER & FRIEDMAN, 1 PRODUCTS LIABILITY § 2.01 (1997). This defect alone would justify the Court in denying Plaintiffs' motion for class certification, as the application of fifty different state laws in a single adjudication would create innumerable difficulties. *See Zinser*, 253 F.3d at 1189 ("Where the applicable law derives from the law of the fifty states, as opposed to a unitary federal cause of action, differences in state law will compound the disparities among class members from the different states.").

Individual issues of fact also predominate over common issues of fact. In this context, the Court finds the reasoning of Judge Andrew Guildford of the Central District of California especially persuasive. In *Gable v. Land Rover N.A., Inc.*, the plaintiffs sought to represent a class of "all current and former owners and lessees of model year 2004, 2005, and 2006 Land Rover LR3s purchased or leased in the state of Michigan." No. CV07-0376, 2008 WL 4441960 (C.D. Cal. 2008). The plaintiffs alleged that *all* of the vehicles suffered a manufacturing defect which caused *some* of the vehicles to wear the tires out unevenly. Plaintiffs alleged that some owners had to purchase new tires too early because of the alleged defect, and argued that Land Rover should bear the cost. The court denied the

motion for class certification, in part because individual issues with respect to the factual question of *damages* predominated over common questions. The court noted that many members of the proposed class had not actually experienced the defect. *See id.* at *3 ("Cars and tires have a limited useful life. At the end of their lives they, and whatever defect they may have contained, wind up on a scrap heap. If the defect has not manifested in that time, the buyer has received what he bargained for." (*citing Hicks v. Kaufman & Broad Home Corp.*, 89 Cal. App. 4th 908, 923 (2001))). In addition to finding that individual issues of *damages* predominated over common issues, the court found that individual issues of *causation* predominated over common issues, stating:

> Without individual inquiry, there is no way in adjudicating this case to determine whether the need for a particular repair was based on normal wear, a defective original part, a defective after-market part, environmental factors such as weather or road conditions, the presence of foreign objects in the braking system, the failure of parts other than the braking system, poor workmanship by a third party, or individual driving habits.

Id. at *4 (*citing Kia Motors America Corp. v. Yvonne Butler*, No. 3D05-11455 (Fla. Dist. Ct. App. 2008)).

This Court is persuaded by the reasoning of Judge Guilford. Plaintiffs have alleged a defect that actually manifests in fewer than one percent of the Xbox consoles sold. In today's era of increasingly sophisticated image rendering, processor speed, and memory storage, many of the millions of satisfied Xbox owners will have replaced their consoles in a few years with a new system that makes the Xbox obsolete by incorporating new technology. The Xbox consoles of those happy customers will have ended up in the video-game console equivalent of the "scrap heap," gathering dust in the basement next to Atari 2600 consoles, Nintendo Entertainment Systems, and Sega Genesis machines.[4] In short, "[i]f the defect has not manifested [during the limited useful life of the Xbox 360], the buyer has received what

[4]The Atari 2600, launched in 1977, was one of the earliest video-game systems. The original Nintendo Entertainment System was launched in 1983, and the Sega Genesis was launched in 1988. All three are now relics.

he bargained for." Individual issues of *damages* therefore preclude the certification of the Console Owners Class.

Individual issues of *causation* also predominate, just as in *Gable*. In *Gable*, some of the plaintiffs' vehicle frames may have distorted because of poor attempts at parallel parking or under-inflated tires. *Gable*, 2008 WL 4441960 at *3. Similar issues of causation arise in this case. Some plaintiffs might have suffered scratched discs because a pet dog, waking from its sleep to see its master playing *Dance Dance Revolution*, rushed over to join in the fun, knocking the machine off a shelf in the process. Other discs might have scratched when an overzealous *Guitar Hero* strummed the electronic chords too energetically, unwittingly striking the machine while living his fantasy of rock-stardom[5] Whether each user's actions constituted misuse, and whether his or her use/misuse caused the damage, would present individual issues of fact for the jury.

Plaintiffs attempt to distinguish *Gable*, but fail. They argue:

> The district court denied class certification on the ground that only a fraction of the proposed class members had actually experienced the defect and because misalignment could have many different causes. Here, in contrast, the design defect appears in every Xbox console sold and the injury linked to the defect—the distinctive deep circular gouges in game discs—can plausibly come from only one cause: the defective Xbox 360 [optical-disc drive] design.

(Pl. Mot. 22 (Dkt. No. 58)). Plaintiffs' argument misses the mark. The *Gable* court acknowledged that every Land Rover suffered the same design flaw, but nonetheless refused to certify the class, because the defect had not *manifested* in every Land Rover. That is exactly the case here. The Xbox 360 may suffer from a design defect, but that defect has not manifested in the vast majority of the machines that have been sold, which means individual issues predominate with respect to damages. With respect to causation, the *Gable* court left open the possibility that a defective design may have contributed to the

[5] *Dance Dance Revolution* and *Guitar Hero* are popular games that require users to dance particular steps and play musical instruments, respectively.

premature tire wear. The court simply found that other proximate causes may have conspired to produce that result in different ways in different cases, meaning individual issues of fact predominated. The same is true here: Just as poor parallel-parking skills and under-inflated tires may have caused a pre-existing defect to manifest in different ways, the hypothetical pet dog and guitar hero might have set in motion a chain of causes ending in disc scratching. Even if one link of that chain is a design defect, the other links are unique to each plaintiff and require individual attention. The requirements of individual attention to each plaintiff on issues of law and fact make this case an inappropriate candidate for class-action resolution.

IV. CONCLUSION

For the foregoing reasons, the Court hereby DENIES Plaintiffs' motion to certify them as representative of the *Console Owners Class* and *Damaged Disc Subclass*. The Court also DENIES Plaintiffs' motion to apply Washington law to their claims.

DATED this 5th day of October, 2009.

JOHN C. COUGHENOUR
United States District Judge