

Complaints and Other Initiating Documents4:08-cv-00061 v. Microsoft Corporation**U.S. District Court****SOUTHERN DISTRICT OF TEXAS****Notice of Electronic Filing**

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Case Name: v. Microsoft Corporation**Case Number:** 4:08-cv-61**Filer:** Orlando Perez
Shannon Smith
Keith A Kay**Document Number:** 1**Docket Text:**

COMPLAINT against Microsoft Corporation (Filing fee \$ 350 receipt number 3355743) filed by Shannon Smith, Keith A Kay, Orlando Perez.(Gibson, Jason)

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IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

SHANNON SMITH, KEITH A. KAY and
ORLANDO PEREZ, On Behalf of Themselves
and All Others Similarly Situated

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CIVIL ACTION NO. _____
(JURY)

v.

MICROSOFT CORPORATION

PLAINTIFFS ORIGINAL COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

Plaintiffs SHANNON SMITH, KEITH A. KAY and ORLANDO PEREZ, bring this lawsuit, individually and on behalf of all class members, complaining of MICROSOFT CORPORATION and would respectfully show:

**I.
PARTIES**

1. Plaintiff SHANNON SMITH ("Smith") is a resident of Beaumont, Jefferson County, Texas.
2. Plaintiff KEITH A. KAY ("Kay") is a resident of Houston, Harris County, Texas.
3. Plaintiff ORLANDO PEREZ ("Perez") is a resident of Pearland, Brazoria County, Texas.
4. Defendant, MICROSOFT CORPORATION, is a Washington corporation authorized to do business in the state of Texas and with its principal place of business in Washington. Defendant may be served via its registered agent for service, Corporation Service Company, 701 Brazos St., Austin, Travis County, Texas 78701.

**II.
JURISDICTION**

5. The court has jurisdiction over the lawsuit under 28 U.S.C. § 1332(d), the Class Action Fairness Act, because the suit is a class action with an amount in controversy exceeding \$5 million. The parties are minimally diverse because at least one party is a citizen of a state other than Washington, the citizenship state of Defendant.

**III.
VENUE**

6. Venue is proper in this district under 28 U.S.C. § 1391(c) because Defendant's acts took place in this judicial district and because Defendant does business in this judicial district.

**IV.
CONDITIONS PRECEDENT**

7. All conditions precedent have been performed or have occurred as required by Federal Rule of Civil Procedure 9(c).

**V.
FACTS**

8. In December 2007, XBOX Live crashed and prevented Plaintiffs around the world from accessing online play for several weeks. XBOX Live is Microsoft's gaming membership that provides gamers to access Microsoft's servers for online gaming. XBOX Live continues to deny subscribers access and has even issued apologies for their failure to correct server problems. Over eight (8) million gamers worldwide subscribe to XBOX Live.

9. Specifically, interruptions in game-play kicked many Plaintiffs offline of XBOX Live and displayed messages such as "Server Error." Other Plaintiffs have been unable sign into

XBOX Live at all or use the advertised features such as "match-make" or "account recovery," despite paying for these services in their yearly subscription dues. Many Plaintiffs purchased new subscriptions specifically to play online during the holidays. In the last three months of 2007, Microsoft sold over four (4) million XBOX console units. This increase in console purchases led to a substantial increase in XBOX Live subscriptions. Microsoft knew the increase in subscriptions would increase game-play on its servers yet failed to provide adequate access and service to XBOX Live and its subscribers.

10. Plaintiffs purchased XBOX Live accounts in expectation of enhancing their gaming experience via online play, usually costing each Plaintiff between \$30 and \$50 per year for a subscription. Subscribers can then play their XBOX console online amongst other subscribers. Plaintiffs represent a class of subscribers that have been denied access to XBOX Live beginning in December 2007.

**VI.
CLASS ACTION ALLEGATIONS**

11. The named Plaintiffs bring this action on their own behalf and on behalf of a class of individuals under Federal Rule of Civil Procedure 23. One or more of the class members may sue as a representative party on behalf of the class, if the following requirements are met¹:

- The class is so large that joinder of all members is impracticable;
- There are questions of law or fact common to the class;
- The claims or defenses of the representative parties are typical of the class; and
- The representative party will fairly and adequately protect the interests of the class.

¹FED. R. CIV. PRO. 23(a).

12. The class of Plaintiffs in this case are so numerous that joinder of all members is impracticable. Over eight (8) million gamers subscribe to XBOX Live worldwide. Joinder of a class this size would be impracticable, if not impossible.

13. The class members all have common questions of law and fact. Each member is a subscriber who paid annual subscription fees to access XBOX Live through their XBOX console system. These members were denied access beginning in December of 2007 when Microsoft's servers failed.

14. The claims of Shannon Smith, Keith A. Kay and Orlando Perez, proposed class representatives, are typical of the claims of all the class members. Each has the same interests and has generally suffered the same type of injury as the rest of the class. Microsoft prevented Smith, Kay, Perez and each class member from accessing XBOX Live despite paying a yearly premium for that purpose.

15. Smith, Kay and Perez will fairly and adequately protect the interests of the class. Each is a member of the class, has the same interests as, and no conflicts with, the class members, suffered identical injuries as the class members, has the means to pursue the case, and has competent counsel.

16. The common questions of law and fact predominate over any questions affecting only individual members, and the class action is superior to other available methods for the fair and efficient adjudication of the controversy. Furthermore, separate actions by each individual class member would create a risk of inconsistent or varying adjudications for individual class members. This would establish incompatible standards of conduct for Defendant.

**VII.
BREACH OF CONTRACT**

17. Plaintiffs and Defendant, Microsoft, entered into subscription contracts for access to Defendant's servers in connection with XBOX Live. Plaintiffs annually paid between \$30 and \$50 for their subscriptions. In return, Defendant would provide an online gaming center for the subscribing Plaintiffs to play their XBOX console online with other subscribers. Defendant has not performed its contractual obligations. Defendant's breach includes:

- Failing to allow Plaintiffs to sign on or use XBOX Live;
- Failing to provide Plaintiffs with the full features paid for, including, but not limited to, "match-making" and "account recovery;" and
- Failing to provide uninterrupted service to online gamers.

18. As a direct and proximate result of Defendant's breach, Plaintiffs suffered damages including expenses associated with XBOX Live memberships.

**VIII.
BREACH OF WARRANTY**

19. An implied warranty existed between Defendant and Plaintiff regarding the XBOX Live subscription. Plaintiffs had a reasonable expectation that the purchased subscription would allow access to an online gaming center through their XBOX console systems.

20. Defendant, as a seller, is considered a merchant with respect to the product sold. The product which Defendant sold was not fit for the ordinary purposes for which such goods are used.

21. Furthermore, Defendant had reason to know of the particular purpose for which the product it sold would be used, as well as the knowledge that persons such as Plaintiffs would rely on the seller's skill to furnish a suitable product. Defendant breached this

warranty by failing to provide adequate access to XBOX Live.

22. Plaintiff's injuries and damages were proximately caused by Defendant's defective product and subsequent breach of warranty.

**IX.
NEGLIGENT MISREPRESENTATION**

23. Defendant Microsoft made representations to Plaintiffs in the course of business, supplied false information for the guidance of Plaintiffs, and failed to exercise reasonable care or competence in obtaining or communicating the information. Plaintiffs justifiably relied on the representations made by Microsoft which were the proximate cause of Plaintiffs' damages.

24. Microsoft represented a subscription to XBOX Live would allow subscribers to access Microsoft servers for online gaming through an XBOX console. Plaintiffs reasonably believed they would receive access to the servers. Plaintiffs relied to their detriment on Microsoft's representations by paying annual dues but not receiving XBOX Live access.

25. Microsoft failed to exercise reasonable care or competence in communicating information regarding the nature of the services offered through XBOX Live. Plaintiffs reasonably relied on Microsoft's representations and suffered damages as a result.

**X.
ATTORNEY FEES**

26. It was necessary for Plaintiffs to hire the undersigned attorney to file this lawsuit. Upon judgment, Plaintiff respectfully requests an award of attorney fees and costs.

**XI.
JURY DEMAND**

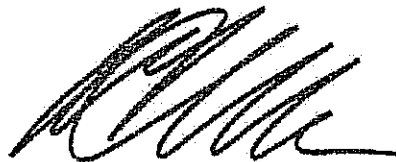
27. Plaintiffs assert their rights under the Seventh Amendment to the United States Constitution and demands, in accordance with Federal Rule of Civil Procedure 38, a trial by jury on all issues.

**XII.
PRAYER**

28. For the above reasons, Plaintiffs pray Defendant be cited to appear and answer, that upon final trial and hearing, Plaintiffs have their judgment against Defendant, together with interest on the judgment at the legal rate, prejudgment interest, costs of court, and for such other and further relief, both in law and equity, to which Plaintiffs may show themselves justly entitled.

Respectfully Submitted,

THE GIBSON LAW FIRM



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