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THE HONORABLE JOHN C. COUGHENOUR

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

REBECCA COUSINEAU, individually on her
own behalf and on behalf of all others similarly
situated,

Plaintiff,

v.

MICROSOFT CORPORATION, a Delaware
corporation,

Defendant.

Case No. 2:11-cv-01438-JCC

**AMENDED CLASS ACTION
COMPLAINT**

Hon. John C. Coughenour

PLAINTIFF’S AMENDED CLASS ACTION COMPLAINT

Plaintiff Rebecca Cousineau (“Plaintiff”) brings this Amended Class Action
Complaint against Defendant Microsoft Corporation (“Microsoft” or “Defendant”) based
upon its practice of unlawfully tracking its users’ geolocation information through their
mobile devices. Plaintiff, for her Amended Class Action Complaint, alleges as follows upon
personal knowledge as to herself and her own acts and experiences and, as to all other
matters, upon information and belief, including investigation conducted by her attorneys:

NATURE OF THE ACTION

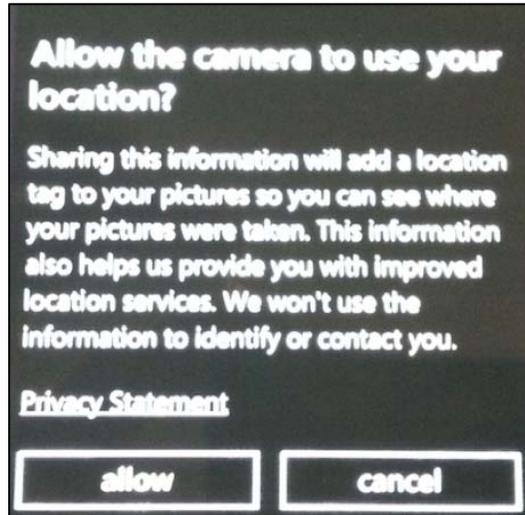
1. Until this lawsuit brought these issues to light, Microsoft intentionally tracked
the movements of its users’ mobile devices in direct contravention of their privacy settings
and the law. While Microsoft claimed that users could opt-out of its location-tracking

1 program, Microsoft designed its mobile device software to deceptively track its users
2 locations even after they *affirmatively denied* Microsoft consent to do so. As discussed more
3 fully herein, Microsoft effectuated this scheme through its popular mobile operating system
4 (“OS”), Windows Phone 7 (“Windows Phone”), which is used by a variety of manufacturers
5 of mobile devices, such as HTC, Samsung, and LG. Regardless of the model of mobile
6 device the software operates on, Microsoft consciously designed its OS to siphon geographic
7 location information from the device revealing the user’s specific whereabouts and transmit
8 this data to Microsoft’s servers.

9 2. Over the past decade, mobile telephony use among United States consumers
10 has grown exponentially. Seeking to capitalize on this new medium of communication,
11 Microsoft is racing to develop a system that facilitates targeted advertisements to consumers
12 based upon their geographic locations. Before Microsoft is able to execute such a marketing
13 campaign, however, it must first compile data points to create a digital map by collecting
14 geographic information and unique identifiers from cellular towers, wireless network routers,
15 cellular telephones, and computer systems.

16 3. Faced with the expensive and laborious task of collecting this information,
17 Microsoft has elected to gather the necessary geolocation information through its customers’
18 mobile devices. In this way, Microsoft uses its customers as a virtual army of surveyors who
19 constantly gather and transmit the geolocation information necessary to build its digital map.

20 4. One method by which Microsoft gathers such data is through its camera
21 application, which comes standard with a mobile device running the Windows Phone OS.
22 The first time a user opens the camera application, a display screen prompts the user to allow
23 or deny Microsoft access to her or her geolocation:

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10 (The above depiction is a true and accurate copy of the Windows Phone OS display screen
11 (“Display Screen”).)

12 5. Users who click “cancel” explicitly deny Microsoft access to their
13 geolocations. Unfortunately for its users, however, Microsoft continued to collect users’
14 location information, regardless of whether or not the individual chose “cancel.” Thus,
15 Microsoft surreptitiously forced even unwilling users into its non-stop geo-tracking program
16 in the interest of developing its digital marketing grid.

17 6. Microsoft publicly maintained that it only collected geolocation data “with the
18 express consent of the user.” (A true and accurate copy of Microsoft’s Letter to Congress,
19 dated May 9, 2011, is attached hereto as **Exhibit A**.) Nevertheless, and in clear contradiction
20 to its assertions, Microsoft designed its camera application to regularly transmit its users’
21 geolocation information to Microsoft’s servers—even when the user expressly denied
22 Microsoft access to such information.

23 7. In September of 2011, shortly after this lawsuit was filed, Microsoft publicly
24 admitted that its software continued to transmit users’ geolocation information without
25 consent.¹ Microsoft recently deployed a software upgrade, Windows Phone 7.5, which

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¹ Location and my privacy FAQ, <http://www.microsoft.com/windowsphone/en-US/howto/wp7/web/location-and-my-privacy.aspx> (last visited October 12, 2011).

1 purports to remedy the unlawful tracking at issue.

2 8. Rather than owning up to its deceptive behavior, Microsoft astonishingly
3 claims that this unlawful tracking was the result of a “bug” in its software.

4 9. The truth, however, is that Microsoft intentionally designed its Windows
5 Phone camera application to thwart consumers ability to prohibit the collection of their
6 geolocation information, in blatant disregard of its users’ privacy rights, and in violation of
7 numerous state and federal laws.

8 **PARTIES**

9 10. Plaintiff Rebecca Cousineau is a natural person domiciled in the state of
10 Michigan.

11 11. Defendant Microsoft Corporation is a Delaware corporation with its principal
12 place of business located at 1 Microsoft Way, in the city of Redmond, state of Washington.

13 **JURISDICTION AND VENUE**

14 12. This Court has jurisdiction over the subject matter of this action pursuant to
15 28 U.S.C. § 1331. This Court has personal jurisdiction over Defendant because it resides in
16 this District, conducts business in this District, and the improper conduct alleged in the
17 Amended Complaint occurred in this District.

18 13. Venue is proper in this District under 28 U.S.C. § 1391(b) because Defendant
19 resides in this District, conducts business in this District, the improper conduct alleged in the
20 Amended Complaint occurred in this District, and the injury arose in this District. Venue is
21 additionally proper because Defendant transacts significant business in this District.

22 **FACTUAL BACKGROUND**

23 **I. Microsoft Profits from Collecting its Users’ Location Data**

24 14. Mobile advertising is projected to become a \$2.5 billion dollar industry by
25 2015.² To gain a competitive advantage, Microsoft is using mobile devices running the

26 _____
27 ² See, <http://www.nytimes.com/2011/04/26/technology/26locate.html> (last visited
October 13, 2011).

1 Windows Phone OS to build a digital map, comprised of cell tower and wireless network
2 (“WiFi”) access point information. (Ex. A, p 4.) In turn, this map can be used to help
3 pinpoint the location of users’ mobile phones and other devices.

4 15. In the future, Microsoft will be able to use its proprietary database of cell
5 tower and WiFi information to deploy targeted advertisements to mobile phone users based
6 upon their geolocations.

7 16. In order to gather the information for the database described above, Microsoft
8 designed the Windows Phone OS to collect and send geolocation data to its servers when “a
9 user-authorized application has made a request for location.” (Ex. A, p. 4.)

10 17. However, when consumers used certain Windows Phone OS mobile
11 applications, they—regardless of their privacy restrictions—unwittingly transmitted specific
12 geolocation data to Microsoft.

13 18. Previously, Microsoft allowed public access via the Internet to its database
14 containing the approximate locations of millions of mobile phones, laptop computers, and
15 other devices that was gathered through, *inter alia*, its users’ mobile devices.

16 19. Despite Microsoft’s adamant claims to the contrary, researchers were able to
17 show that it was possible to track the approximate whereabouts of individual consumers
18 using information gleaned from Microsoft’s database.³ Facing increased scrutiny over
19 privacy concerns raised by the researchers’ discovery, Microsoft recently ceased publication
20 of the contents of its geolocation database.

21 **II. Microsoft Promises Not to Collect Geolocation Data Without User Consent**

22 20. In April of 2011, leaders of the United States House of Representatives
23 Committee on Energy and Commerce sent a letter to Microsoft requesting information about
24 how its software was designed to track and store users’ locations. In its response to
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27 ³ See, Microsoft Curbs Wi-Fi Location Database, http://news.cnet.com/8301-31921_3-20086489-281/microsoft-curbs-wi-fi-location-database/ (last visited October 14, 2011).

1 Congress's inquiry, Microsoft unequivocally stated that the Windows Phone OS never
2 collects geolocation data without the express consent of its users. (Ex. A, pp. 1, 2, 4, 5, 9.)

3 21. Specifically, Microsoft asserted that its OS will "collect data *only* if ... the
4 user has allowed an application to access and use location data." (Ex. A, p. 4) (emphasis
5 added.)

6 22. Microsoft's representations to Congress were false.

7 **III. Microsoft Intentionally Broke its Promise to Consumers**

8 23. Through her attorneys, Plaintiff has retained an independent security expert to
9 investigate whether Microsoft collected location information from Windows Phone users
10 without consent. (A true and accurate copy of the Windows Phone 7 Geolocation
11 Investigative Report (the "Report") is attached hereto as **Exhibit B**.)

12 24. The research detailed in the Report shows that, even after a Windows Phone
13 user expressly denied Microsoft access to location information through the camera
14 application, the device transmitted the following data to Microsoft's servers when the camera
15 was activated: the approximate latitude and longitude coordinates of the user's device, a
16 unique identifier for the device, current date and time, and the locations of the closest cellular
17 tower and WiFi network. (Ex. B, p. 4).

18 25. As a result, Microsoft—or anyone with access to this data—was provided
19 with the exact location of hundreds of thousands of United States consumers who explicitly
20 denied Microsoft access to such information.

21 **IV. Microsoft Admits To Unlawful Tracking**

22 26. In September of 2011, shortly after this lawsuit was filed, Microsoft issued a
23 press release indicating that it had discovered a "bug" in its Windows Phone OS that caused
24 mobile devices running the software to transmit location information to Microsoft's servers
25 through its camera application—without user consent.

26 27. Specifically, Microsoft's press release stated, in relevant part, that:
27

1 We have identified an unintended behavior in the Windows
2 Phone 7 software that results in information about nearby Wi-
3 Fi access points and cell towers being periodically sent to
4 Microsoft when using the Camera application ... the software
bug results in the behavior even where you have disabled geo-
tagging photos in the Camera application.⁴

5 28. Although Microsoft attempts to blame its unauthorized tracking scheme on a
6 software “bug,” the true facts show otherwise. Microsoft is one of the largest and most
7 renowned software developers in the world, with a highly sophisticated staff of engineers.
8 The idea that, during the programming process, these software engineers simply
9 “overlooked” the fact that their own code was designed to ignore users’ refusal to consent to
10 be tracked is untenable.

11 29. Furthermore, as described above, Microsoft made very specific
12 representations to U.S. Congress members about the very functionality of its Windows Phone
13 7 OS that the Company now claims is flawed. Even assuming, *arguendo*, that Microsoft’s
14 initial oversight led to the unlawful transmission of its users’ geolocation data, surely
15 Microsoft’s engineering team conducted further investigation into the software before
16 submitting to Congress that its software never transmits geolocation data without express
17 permission of the user.

18 30. In truth, this was no coding error. Microsoft intentionally programmed its
19 software to send its users’ geolocation information to its servers without consent because it
20 wanted to maximize the amount of data it receives for use in its database. Now that it has
21 been exposed, Microsoft is attempting to cover-up its malfeasance.

22 **FACTS RELATING TO PLAINTIFF**

23 31. Plaintiff Cousineau owns a mobile device operating Windows Phone 7 and,
24 when prompted by the camera application whether to allow access to her “location
25 information,” expressly denied the request by clicking “cancel.” (*See*, ¶3.)

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27 ⁴ *See supra* note 1.

1 any questions that may affect individual members of the Class. Common questions for the
2 Class include but are not limited to the following:

- 3 (a) Whether Microsoft collected geolocation data through the camera
4 application included in the Windows Phone 7 operating system after
5 the user denied Microsoft access to that information;
- 6 (b) Whether Microsoft profits, or intends to profit, from the collection of
7 geolocation data obtained as a result of the unlawful practices
8 described herein;
- 9 (c) Whether Microsoft's conduct described herein violates the Stored
10 Communications Act, 18 U.S.C. §§ 2701, *et seq.*;
- 11 (d) Whether Microsoft's conduct described herein violates the Electronic
12 Communications Privacy Act, 18 U.S.C. §§ 2510, *et seq.*;
- 13 (e) Whether Microsoft's conduct described herein violates the
14 Washington Consumer Protection Act, RCW §§ 19.86, *et seq.*;
- 15 (f) Whether Microsoft's conduct described herein violates Washington's
16 Privacy Act, RCW §§ 19.73, *et seq.*; and
- 17 (g) Whether Microsoft has been unjustly enriched by Plaintiff and the
18 Class.

19 37. **Typicality:** The factual and legal bases of Microsoft's liability to Plaintiff and
20 to the other members of the Class are the same and resulted in injury to Plaintiff and all of
21 the other members of the Class. Plaintiff and the other members of the Class have all suffered
22 harm as a result of Microsoft's wrongful conduct.

23 38. **Adequate Representation:** Plaintiff will fairly and adequately represent and
24 protect the interests of the Class members, and has retained counsel competent and
25 experienced in complex class actions. Plaintiff has no interest antagonistic to those of the
26 Class and Defendant has no defenses unique to Plaintiff.

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1 writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by
2 a wire, radio, electromagnetic, photoelectronic or photooptical system that affects interstate
3 or foreign commerce....” 18 U.S.C. § 2510(12). The Stored Communications Act (the
4 “SCA”) incorporates this definition.

5 43. Pursuant to the ECPA and the SCA, “electronic storage” means any
6 “temporary storage of a wire or electronic communication incidental to the electronic
7 transmission thereof.” 18 U.S.C. § 2510(17)(A). This type of electronic storage includes
8 communications in intermediate electronic storage that have not yet been delivered to their
9 intended recipient.

10 44. The SCA mandates, among other things, that it is unlawful for a person to
11 obtain access to stored communications on another’s computer system without authorization.
12 18 U.S.C. § 2701.

13 45. Congress expressly included provisions in the SCA to address this issue so as
14 to prevent “unauthorized persons deliberately gaining access to, and sometimes tampering
15 with, electronic or wire communications that are not intended to be available to the public.”
16 Senate Report No. 99–541, S. REP. 99-541, 35, 1986 U.S.C.C.A.N. 3555, 3589.

17 46. Microsoft programmed its Windows Phone 7 operating system to temporarily
18 store the location information (“the stored file”) of its users without their consent. Microsoft
19 has violated 18 U.S.C. § 2701(a)(1) because it intentionally accessed, and continues to
20 access, consumers’ communications without authorization and obtained, altered, or prevented
21 authorized access to a wire or electronic communication while in electronic storage by
22 collecting location data from the stored file on Plaintiff and the Class’s mobile devices
23 through the camera application, despite the fact that the users expressly denied Defendant
24 access to that information. At all relevant times, Defendant had actual knowledge of, and
25 benefited from, this practice.

26 47. Additionally, Defendant has violated 18 U.S.C. § 2701(a)(2) because it
27 intentionally exceeded the authorization of consumers to access consumers’ communications

1 and obtained, altered, or prevented authorized access to a wire or electronic communication
2 while in electronic storage by collecting location data from the stored file on Plaintiff's and
3 the Class's mobile devices through the camera application, despite the fact that the user
4 expressly denied Defendant access to that information. At all relevant times, Defendant had
5 actual knowledge of, and benefited from, this practice.

6 48. As a result of Defendant's conduct described herein and its violation of §
7 2701, Plaintiff and the Class have suffered injuries. Plaintiff, on her own behalf and on behalf
8 of the Class, seeks an order enjoining Defendant's conduct described herein and awarding
9 herself and the Class the maximum statutory and punitive damages available under 18 U.S.C.
10 § 2707.

11 **SECOND CAUSE OF ACTION**
12 **Violations of the Electronic Communications Privacy Act**
13 **18 U.S.C. §§ 2510, *et seq.***
14 **(On behalf of Plaintiff and the Class)**

14 49. Plaintiff incorporates the forgoing allegations as if fully set forth herein.

15 50. The Electronic Communications Privacy Act, 18 U.S.C. §§ 2510, *et seq.* (the
16 "ECPA") broadly defines an "electronic communication" as "any transfer of signs, signals,
17 writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by
18 a wire, radio, electromagnetic, photoelectronic or photooptical system that affects interstate
19 or foreign commerce..." 18 U.S.C. § 2510(12).

20 51. The ECPA defines an "electronic communications system" as "any wire,
21 radio, electromagnetic, photooptical or photoelectronic facilities for the transmission of wire
22 or electronic communications, and any computer facilities or related electronic equipment for
23 the electronic storage of such communications." 18 U.S.C. § 2510(14).

24 52. The ECPA broadly defines the contents of a communication. Pursuant to the
25 ECPA, "contents" of a communication, when used with respect to any wire, oral, or
26 electronic communications, include any information concerning the substance, purport, or
27 meaning of that communication. 18 U.S.C. § 2510(8). "Contents," when used with respect to

1 any wire or oral communication, includes any information concerning the identity of the
2 parties to such communication or the existence, substance, purport, or meaning of that
3 communication. The definition thus includes all aspects of the communication itself. No
4 aspect, including the identity of the parties, the substance of the communication between
5 them, or the fact of the communication itself, is excluded. The privacy of the communication
6 to be protected is intended to be comprehensive.

7 53. Defendant's conduct violated 18 U.S.C. § 2511(1)(a) because Defendant
8 endeavored to intercept and intentionally intercepted Plaintiff's and Class Members'
9 electronic communications to, from, and within their mobile devices without consent.

10 54. Defendant's conduct violated 18 U.S.C. § 2511(1)(d) because Defendant
11 endeavored to use and used the contents of Plaintiff's and Class Members' electronic
12 communications to profit from its unauthorized collection and sale, knowing and having
13 reason to know that the information was obtained through interception in violation of 18
14 U.S.C. § 2511(1).

15 55. Defendant intentionally obtained and/or intercepted, by device or otherwise,
16 these electronic communications, without the knowledge, consent or authorization of
17 Plaintiff or the Class.

18 56. Plaintiff and the Class suffered harm as a result of Defendant's violations of
19 the ECPA, and therefore seek (a) preliminary, equitable and declaratory relief as may be
20 appropriate, (b) the sum of the actual damages suffered and the profits obtained by Defendant
21 as a result of their unlawful conduct, or statutory damages as authorized by 18 U.S.C. §
22 2520(2)(B), whichever is greater, (c) punitive damages, and (d) reasonable costs and
23 attorneys' fees.

24 **THIRD CAUSE OF ACTION**
25 **Violations of Washington's Privacy Act**
26 **RCW §§ 9.73, *et seq.***
(On behalf of Plaintiff and the Class)

27 57. Plaintiff incorporates the forgoing allegations as if fully set forth herein.

1 66. As described herein, Microsoft’s unlawful and unconscionable conduct of
2 transmitting geolocation data after the user has expressly denied Microsoft access to such
3 information constitutes an unlawful business practice in violation of RCW §§ 19.86, *et seq.*

4 67. By doing so, Microsoft engaged in a deceptive and misleading course of
5 conduct intended to deceive and significantly confuse consumers into purchasing its software
6 (via purchasing any Windows Phone) and using its applications (*i.e.*, its Windows Phone
7 camera application) which constitutes unconscionable commercial practices, deception,
8 fraud, false promises, false pretenses and/or misrepresentations in its interactions with
9 Plaintiff and the Class.

10 68. The ability to control the privacy settings of a consumer product (*i.e.*, access
11 to geolocation information) is material to any transaction because it is likely to affect a
12 consumer’s choice of, or conduct regarding, whether to purchase a product. Any deception
13 related to the privacy settings of a consumer product is materially misleading.

14 69. The misrepresentation of the privacy settings of Microsoft’s Windows 7
15 Phone products is likely to mislead a reasonable consumer who is acting reasonably under
16 the circumstances.

17 70. Microsoft has violated the “unfair” prong of the CPA in that their actions
18 caused substantial injury to consumers by failing to disclose that it was accessing consumers’
19 geolocation information after the user has expressly denied Microsoft access to such
20 information. The injury caused by Microsoft’s conduct is not outweighed by any
21 countervailing benefits to consumers or competition, and the injury is one that consumers
22 themselves could not reasonably have avoided.

23 71. Microsoft’s acts and practices are injurious to the public interest because
24 Microsoft has injured numerous people beyond just Plaintiff. Microsoft has the ongoing
25 capacity to injure members of the public through similar conduct as that alleged in this
26 Amended Complaint.

1 by purchasing a mobile device with the Windows Phone 7 OS that Microsoft claimed would
2 not transmit geolocation data without the express consent of the user.

3 80. While Plaintiff and the Class did not purchase their Windows Phones directly
4 from Microsoft, Microsoft receives a monetary benefit for each and every Windows Phone
5 sold by its partners. Accordingly, Microsoft received and retained money from every
6 Windows Phone transaction.

7 81. Plaintiff and the Class purchased mobile devices operating Microsoft's
8 Windows Phone OS under the auspice that the software would function as advertised,
9 specifically that applications included with the mobile device would honor user requests not
10 to transmit location data. Because Microsoft designed its software to ignore user requests not
11 to send location data, Plaintiff and the Class received mobile devices of diminished value.
12 Therefore, Plaintiff and the Class are entitled to the difference in price between mobile
13 devices operating properly functioning software, as advertised, and a mobile device operating
14 the diminished value Windows Phone OS that they received.

15 82. Additionally, Microsoft received and retained a monetary benefit from its
16 unlawful conduct described herein by developing a database of geolocation data that will be
17 used in mobile marketing campaigns.

18 83. Defendant appreciates or has knowledge of these benefits.

19 84. Under principles of equity and good conscience, Defendant should not be
20 permitted to retain the money that Defendant has unjustly received as a result of its unlawful
21 actions.

22 85. Accordingly, Plaintiff and the Class seek full disgorgement and restitution of
23 any amounts Microsoft has retained as a result of the unlawful and/or wrongful conduct
24 alleged herein.

25 **PRAYER FOR RELIEF**

26 WHEREFORE, Plaintiff Rebecca Cousineau, individually and on behalf of the Class,
27 prays for the following relief:

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Dated: October 17, 2011

Respectfully submitted,

TOUSLEY BRAIN STEPHENS PLLC

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CERTIFICATE OF SERVICE

I hereby certify that on October 17, 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send electronic notification of such filing to all counsel of record and additional persons listed below:

2:09-cv-00037-MJP Notice has been electronically mailed to:

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Dated October 17, 2011.

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