

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

MICROSOFT CORPORATION, a	)	Case No.: No. CV-04-0515P
	)	
Washington corporation,	)	DEFENDANT’S MOTION TO DISMISS
	)	FOR LACK OF PERSONAL JURISDICTION
Plaintiff,	)	
	)	
vs.	)	NOTE ON MOTION CALENDAR:
	)	<b>May 14, 2004</b>
JDO MEDIA, INC., a Florida corporation, and	)	
	)	
JOHN DOES 1-50,	)	
	)	
Defendant.	)	
	)	

Defendant JDO MEDIA, INC. (hereafter “JDO MEDIA”), by and through its undersigned counsel, and pursuant to Rule 12(b)(2) of the Federal Rules of Civil Procedure, moves to dismiss MICROSOFT CORPORATION’s Complaint because there is a lack of jurisdiction over JDO MEDIA in the state of Washington and the maintenance of this action in this forum would offend traditional notions of fair play and substantial justice.

2           **I.       Jurisdictional Allegations and Facts**

3           A.       Jurisdiction Allegations made in MICROSOFT’s Complaint

4           In its Complaint For Damages and Injunctive relief, Plaintiff MICROSOFT  
5 CORPORATION (hereinafter “MICROSOFT”) sues “JDO MEDIA and JOHN DOES 1-50”  
6 for alleged violations of the new federal CAN-SPAM Act of 2003 (15 U.S.C. §7701 et seq.),  
7 Trespass to Chattels, Conversion, alleged violation of the Washington Commercial Electronic  
8 Mail Act and the Washington Consumer Protection Act (RCW Ch. 19.190 and RCW  
9 Ch.19.86), alleged violation of the federal Computer Fraud and Abuse Act (18 U.S.C. §  
10 1030(a)(4) and (5), (g)), and the alleged violation of the Lanham Act (15 U.S.C. § 1125(a)).  
11 *See* Complaint, p. 1, lines 17-20; p. 9, line 23; p.10, line 9; p. 10, lines 10-18; p. 10, line 19 – p.  
12 11, line 13; p. 11, line 14 – p. 12, line 13; and p. 12, line 14 – p. 13, line 2 . Nearly every  
13 allegation made by MICROSOFT in its Complaint is against “the defendants” with virtually no  
14 specification as to what actions MICROSOFT contends that JDO MEDIA took as opposed to  
15 “JOHN DOES 1-50”. As such, the Complaint, read in its entirety, is clearly a “shotgun”  
16 approach to attempt to allege the above-referenced theories of liability without specifying what  
17 MICROSOFT contends each defendant did.

18           MICROSOFT’s personal jurisdictional allegations suffer from the same “shotgun” or  
19 aggregating style of pleading as the remainder of the Complaint. In paragraph 5 of the  
20 Complaint, MICROSOFT alleges the following:

21           5.       The Court has personal jurisdiction over the Defendants,  
22           who have engaged in business activities in and directed to  
23           Washington, have committed a tortious act within the state, have  
24           used personal property in the state, and have purposefully availed  
25           themselves of the opportunity to conduct commercial activities in  
26           this forum.

2 See Complaint, Section I “Jurisdiction and Venue” , p. 2, lines 15-18. With the exception of  
3 paragraph 8 wherein MICROSOFT correctly alleges that JDO MEDIA is a Florida Corporation  
4 with its principal place of business in Ocala, Florida, the remainder of the complaint fails to  
5 differentiate or specify what actions that MICROSOFT contends that JDO MEDIA took,  
6 instead of “the defendants” as a whole, which might confer personal jurisdiction over JDO  
7 MEDIA in the state of Washington.

8 B. Jurisdictional Facts established by John McLeod’s Affidavit

9 In support of this motion to dismiss, John McLeod, JDO MEDIA’s founder and  
10 president has executed an affidavit providing the Court with jurisdictional evidence as to JDO  
11 MEDIA’s activities, or lack thereof, directed to the state of Washington. See Affidavit of John  
12 McLeod in Support of Motion to Dismiss (hereinafter “Affidavit”), dated April 15, 2004,  
13 attached as Exhibit A to this Motion. JDO Media is a small company incorporated in the State  
14 of Florida in January of 2003. See Affidavit, p.1, lines 23-24. JDO MEDIA provides its  
15 customers and clients with software, website design, and hosting services from and in Ocala,  
16 Florida. *Id.*, at p. 2, lines 2-3. At the request of three of its customers, JDO MEDIA registered  
17 the domain name(s) of “1upautomated.com” and “oneupautomated.com” and designed the  
18 “1upautomated.com” website. *Id.*, p. 2, lines 4-7. JDO Media, at the request of its customers,  
19 acted as a webmaster for the site and posted material on the backoffice, non-public, password  
20 protected side of the website. *Id.*, p. 2, lines 8-11. JDO MEDIA, again acting as the webmaster  
21 for the website, also provided a small number of email accounts in support of the website such  
22 as [support@1upautomated.com](mailto:support@1upautomated.com). *Id.*, at lines 12-13. The public side of the website provided  
23 only limited information to a visitor to the site such as Terms of Use, and was not interactive.

2 *Id.*, at lines 14-16. JDO MEDIA never advertised the site in the state of Washington or  
3 anywhere else. *Id.*, at lines 17-18.

4 JDO MEDIA has had virtually no contacts with the state of Washington. It has not  
5 transacted any business within Washington and does not advertise in the state. *Id.*, at lines 19-  
6 21. JDO MEDIA has not registered as a foreign corporation with the state of Washington and  
7 has no offices in the state. *Id.*, at lines 22-23. It does not maintain any Washington telephone  
8 or fax numbers and has no employees, directors, agents, or subcontractors that reside in  
9 Washington. *Id.*, at p. 3, lines 2-5. JDO MEDIA does not own and has not used any real or  
10 personal property in the State of Washington. *Id.*, at p. 3, lines 8-9. JDO MEDIA has not  
11 committed any acts, including tortious acts, within Washington. *Id.*, at p. 3, lines 6-7. Finally,  
12 JDO MEDIA has **not** initiated the transmission of any commercial electronic mail which  
13 would or could constitute “spam” as defined under the federal CAN-SPAM Act of 2003. *Id.*,  
14 at p. 3, lines 14-15.

15 The only “contact(s)” with the state of Washington that JDO MEDIA can identify are  
16 the very few instances where JDO MEDIA, as webmaster for the 1upautomated.com website,  
17 has responded to questions that Washington resident(s) may have electronically sent to the  
18 “[support@oneupautomated.com](mailto:support@oneupautomated.com)” email address.

## 19 **II. The Law of Personal Jurisdiction in Washington and the Ninth Circuit**

20 The district court’s determination of a party’s amenability to suit is made by reference  
21 to the law of the forum in which it sits. *See Whitson v. Stolpman*, 174 F.Supp.2d 1131, 1132  
22 (W.D. Wash. 2001) (citing *Peterson v. Kennedy*, 771 F.2d 1244, 1262 n.12 (9<sup>th</sup> Cir. 1985),  
23 *cert. denied*, 475 U.S. 1122, 106 S.Ct. 1642, 90 L.Ed.2d 187 (1986)). The plaintiff bears the

2 burden of establishing personal jurisdiction over a defendant. *See Hirsch v. Blue Cross, Blue*  
3 *Shield of Kansas*, 800 F.2d 1474, 1477 (9<sup>th</sup> Cir. 1986); *Cognigen Networks v. Cognigen Corp.*,  
4 174 F.Supp.2d 1134, 1137 (W.D. Wash. 2001) (On defendant’s motion to dismiss for lack of  
5 personal jurisdiction, it is the plaintiff’s burden to show that jurisdiction is proper); *Langlois v.*  
6 *Déjà Vu, Inc.*, 984 F.Supp. 1327, 1332 (W.D. Wash. 1997) (plaintiff bears the burden of  
7 proving that jurisdiction exists as to each out-of-state defendant). While some courts have  
8 noted that at a preliminary stage, a plaintiff need only make a “prima facie showing of  
9 jurisdiction”<sup>1</sup>, the Ninth Circuit Court of Appeals has held that plaintiff’s factual allegations  
10 are treated as true only to the extent that the allegations are not disputed or are supported by  
11 affidavit or other evidence. *See Brand v. Menlove Dodge*, 746 F.2d 1070, 1072 (9<sup>th</sup> Cir. 1986);  
12 *see also Langlois*, 984 F.Supp. at 1332-33 (Through the presentation of affidavits and  
13 discovery materials, plaintiffs must prove a prima facie case of jurisdiction as to each and  
14 every out-of-state defendant).

15 Constitutionally, a court can assert jurisdiction over a non-resident defendant only if it  
16 has a threshold level of “minimum contacts” with the forum state such that “traditional notions  
17 of fair play and substantial justice” are not offended. *See Cognigen Networks*, 174 F.Supp.2d  
18 at 1137 (citing *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95  
19 (1945)). This standard may be satisfied if the defendant has a continuous and systematic  
20 presence in the forum state, and thus “general jurisdiction” is said to exist, or if the claim arises  
21 out of the defendant’s forum directed activities, and thus “specific jurisdiction” can be asserted

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23 <sup>1</sup> *See Whitson*, 174 F.Supp.2d at 1133 n.1; *Cognigen Networks*, 174 F.Supp.2d at 1137.

2 over the defendant within the forum. *Id.*, at 1137 (citing *Heliocopteros Nacionales de*  
3 *Colombia, S.A. v. Hall*, 466 U.S. 408, 414, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984)); *see also*  
4 *Amazon.com, Inc. v. Kalaydjian*, 2001 WL 491752, \*2 (W.D. Wash. 2001) (citing *Panavision*  
5 *Int'l, L.P. v. Toeppen*, 141 F.3d 1316, 1320 (9<sup>th</sup> Cir. 1998)).

6 General jurisdiction exists if (1) the defendant is domiciled in the forum state; or (2) the  
7 defendant's activities in the forum state are substantial or continuous and systematic. Based  
8 upon MICROSOFT's jurisdictional allegations, it does not appear that it is attempting to allege  
9 that jurisdiction exists over JDO MEDIA, along with JOHN DOES 1-50, pursuant to general  
10 jurisdiction principles.

11 The determination of whether there exists specific jurisdiction is determined by looking  
12 to Washington's long-arm statute, RCW 4.28.185, which the Washington Supreme Court has  
13 held "extends jurisdiction to the limit of federal due process." *See Shute v. Carnival Cruise*  
14 *Lines*, 783 P.2d 78 (Wash. App. 1989); *see also Whitson*, 174 F.Supp.2d at 1132. While the  
15 Washington Long-Arm Statute provides for a number of specific acts by which a foreign  
16 defendant may be subject to suit in Washington, MICROSOFT's Complaint appears to attempt  
17 to track the following provisions:

18 RCW 4.28.185 Personal service out of state—Acts submitting person to  
19 jurisdiction of courts—Saving

20 (1) Any person, whether or not a citizen or resident of this state, who in  
21 person or through an agent does any of the acts in this section enumerated,  
22 thereby submits said person . . . to the jurisdiction of the courts of this state as to  
23 any cause of action arising from the doing of any of said acts:

- 24 (a) The transaction of any business within this state;
- 25 (b) The commission of a tortious act within this state;
- (c) The ownership, use, or possession of any property whether real or  
personal situated in this state;

2 (3) Only causes of action arising from acts enumerated herein may be asserted  
3 against a defendant in an action in which jurisdiction over him is based upon this  
4 section.

4 RCW 4.28.185.

5 In order to exercise specific jurisdiction over a non-resident defendant under the federal  
6 constitution and RCW 4.28.185, the courts of Washington have applied a three-part test:

- 7 (1) the nonresident defendant must do some act or consummate some  
8 transaction with the forum or perform some act by which he purposefully avails  
9 himself of the privilege of conducting activities in the forum, thereby invoking  
10 the benefits and protections of the forum's laws;  
11 (2) the claims must be one which arises out of or results from the  
12 defendant's forum-related activities; and  
13 (3) exercise of jurisdiction must be reasonable.

11 *See Whitson*, 174 F.Supp.2d at 1332 (citing *Omeluk v. Langsten Slip & Batbyggeri A/S*, 52  
12 F.3d 267, 270 (9<sup>th</sup> Cir. 1995)); *see also Panavision Int'l v. Toeppen*, 141 F.3d 1316, 1320 (9<sup>th</sup>  
13 Cir. 1998).

14 **III. Personal Jurisdiction over JDO MEDIA in Washington Is Lacking.**

15 MICROSOFT has not even alleged a prima facie case of personal jurisdiction over JDO  
16 MEDIA in its Complaint because it lumps JDO MEDIA's alleged activities with the activities  
17 of JOHN DOES 1-50 when it claims "the defendants" did various acts in Washington. *See*  
18 Complaint p.2, lines 15-18. At a minimum, this Court should dismiss the Complaint against  
19 JDO MEDIA and order MICROSOFT to specifically allege activities of JDO MEDIA that it  
20 contends support jurisdiction over JDO MEDIA in Washington.

21 In the unlikely event that this court finds that MICROSOFT has at least sufficiently  
22 pled its jurisdictional allegations against JDO MEDIA, this motion to dismiss should still be  
23

2 granted because the affidavit of JDO MEDIA's president affirmatively establishes that  
3 personal jurisdiction is lacking.

4 As noted previously, MICROSOFT does not appear to be alleging that JDO MEDIA's  
5 alleged contacts with Washington confer general jurisdiction. Even if general jurisdiction is  
6 alleged, the affidavit of John McLeod provides this court with competent evidence that JDO  
7 MEDIA has not conducted any activities within Washington that can be construed as  
8 substantial or continuous and systematic. As such, any further analysis as to whether there is  
9 general jurisdiction is unwarranted. Instead, this court should examine whether JDO MEDIA  
10 is subject to specific jurisdiction under Washington's Long-Arm Statute.

11 A. Specific Jurisdiction: (1) Purposeful Availment Factor

12 A defendant purposefully avails himself of the benefits of the forum if he has  
13 deliberately "engaged in significant activities within a state or has created 'continuing  
14 obligations' between himself and the residents of the forum, and the cause of action arises out  
15 of those obligations. *See Whitson*, 174 F.Supp.2d at 1133 (citing *Burger King Corp. v.*  
16 *Rudzewicz*, 471 U.S. 462, 475-76, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985)). MICROSOFT's  
17 various claims in the Complaint are based upon its (mis)assumption that JDO MEDIA, one of  
18 "the defendants", transmitted "spam" emails into Washington by utilizing MICROSOFT's  
19 Washington based computer system and servers. John McLeod's Affidavit provides this court  
20 with evidence that JDO MEDIA never sent any "spam" to Washington or any other state.  
21 Instead, JDO MEDIA simply acted as a webmaster and created a website at the request of one  
22 or more of its customers. While JDO MEDIA admits to sending a few response emails to  
23 Washington residents inquiring to [support@lupautomated.com](mailto:support@lupautomated.com), MICROSOFT's Complaint is

2 clearly not based upon these response emails that cannot be construed as “spam” under the  
3 CAN-SPAM Act of 2003. The few contacts which JDO MEDIA has identified with the state  
4 of Washington simply do not allow the conclusion that JDO MEDIA is engaging in significant  
5 activity within Washington such that it should reasonably anticipate being haled into a  
6 Washington court. Therefore, dismissal of the Complaint against JDO MEDIA for lack of  
7 personal jurisdiction in Washington is warranted.

8 B. Specific Jurisdiction: (2) Cause of Action Must Arise out of  
9 Defendant’s Forum Related Contacts

10 To satisfy this factor, the plaintiff must demonstrate a nexus between the cause of  
11 action and the defendant’s activities within the forum state. *See Raymond v. Robinson*, 15 P.3d  
12 697 (Wash. App. 2001). The gravamen of MICROSOFT’s Complaint is that “the defendants”  
13 are sending illegal “spam” through MICROSOFT’s computer system and servers. JDO  
14 MEDIA denies this allegation and has produced competent evidence in the form of an  
15 Affidavit that JDO MEDIA did not send any illegal spam to or through the MICROSOFT  
16 computer system. Unless MICROSOFT can bolster its mere shotgun allegations with specific  
17 evidence showing JDO MEDIA sent illegal spam through the MICROSOFT computers to raise  
18 a prima facie jurisdictional issue, this Court should dismiss Plaintiff’s Complaint for lack of  
19 personal jurisdiction. Clearly, in the absence of a MICROSOFT affidavit or some competent  
20 evidence that JDO MEDIA sent illegal spam, the requirement that the cause of action arise  
21 from the Defendant’s activities within the forum state can not be met.

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2 C. Specific Jurisdiction: (3) Jurisdiction Must be Reasonable

3 In the court's examination of the third factor, reasonableness of jurisdiction, the court  
4 should give consideration to the "quality, nature, and extent of the activity in the forum state,  
5 the relative convenience of the parties, the benefits and protection of the law afforded the  
6 respective parties, and the basic equities of situation. *See Tyee Const. Co. v. Dulien Steel*  
7 *Products, Inc.*, 381 P.2d 245 (Wash. App. 1963); *Precision Lab. Plastics, Inc., v. MicroTest,*  
8 *Inc.*, 981 P.2d 454 (Wash. App. 1999); *Shute*, 783 P.2d 78 (Wash. App. 1989).

9 As shown in John McLeod's Affidavit, the "quality, nature, and extent" of JDO  
10 MEDIA's activities in Washington are minimal. As to the convenience of the parties, the  
11 burden on litigating in Washington will force JDO MEDIA to close. *See* Affidavit, ¶19, p.3,  
12 lines 16-19. In contrast, MICROSOFT can and does litigate in Florida, a viable jurisdictional  
13 forum, on a consistent basis.

14 While the benefits and protections of the Washington statute(s) may be a consideration,  
15 the basic equalities of the case clearly favor dismissal or, in the alternative, transfer to the  
16 Middle District of Florida. The "reasonable" factor thus weighs in favor of dismissal.

17 **IV. Conclusion**

18 MICROSOFT has wholly failed to allege sufficient conduct specific to JDO MEDIA  
19 for the exercise of jurisdiction in the state of Washington. Moreover, even assuming that  
20 MICROSOFT has sufficiently alleged jurisdictional facts, the Affidavit of John McLeod,  
21 president of JDO MEDIA, establishes that JDO MEDIA lacks the requisite minimum contacts  
22 with Washington to pass constitutional muster.

2 For all the reasons expressed herein, JDO MEDIA's Motion to Dismiss should be  
3 granted because personal jurisdiction is lacking.

4 DATED: April 16, 2004.

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