

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MICROSOFT CORPORATION, a
Washington corporation,

Plaintiff,

v.

JDO MEDIA, INC., et al.,

Defendants.

No. C04-0515P

PLAINTIFF MICROSOFT
CORPORATION'S MOTION FOR
LEAVE TO AMEND ITS
COMPLAINT

NOTE ON MOTION CALENDAR:
NOVEMBER 24, 2004

I. INTRODUCTION

Microsoft Corporation ("Microsoft") seeks leave of Court to amend its First Amended Complaint for Damages and Injunctive Relief to add John McLeod ("McLeod") as a defendant. Microsoft has obtained written consent from defendants Timothy Roland ("Roland"), Tony Lampert ("Lampert"), and Erik Summers ("Summers") to amend its Complaint to add McLeod as a defendant. Microsoft does not need to obtain written consent from defendant JDO Media, Inc. ("JDO") because it has not filed a responsive pleading.

II. STATEMENT OF FACTS

Microsoft filed its Complaint for Damages and Injunctive Relief ("Complaint") against JDO on March 9, 2004. *See* Complaint. Microsoft obtained discovery from JDO, including a 30(b)(6) deposition of on the issue of personal jurisdiction. Based on that information,

1 Microsoft amended its Complaint to add defendants Roland, Lampert, and Summers.
2 Microsoft filed its First Amended Complaint on June 17, 2004. Microsoft continued to
3 pursue third-party discovery and, as a result of that discovery, now seeks to add John McLeod
4 (JDO's President) as a defendant. *See* Declaration of Robert J. Dzielak ("Dzielak Decl."), at ¶ 2
5 (p. 1-17). Microsoft obtained written consent from Defendants Roland, Lampert and
6 Summers. *Id.* ¶ 3 (p. 1). Because JDO has not filed a responsive pleading, Microsoft does
7 not need written consent from JDO.

8 III. STATEMENT OF ISSUE

9 Whether the Court should grant Microsoft's Motion to Amend its Complaint where all
10 of the defendants who have filed responsive pleadings have provided Microsoft with written
11 consent to amend its complaint to add John McLeod as a defendant.

12 IV. EVIDENCE RELIED UPON

13 This motion is based on the Declarations of Robert J. Dzielak and the exhibits attached
14 thereto, and the pleadings and papers previously filed.

15 V. AUTHORITY AND ARGUMENT

16 Leave to amend a complaint "shall be freely given when justice so requires." CR 15(a).
17 Indeed, the "purpose of pleadings is to facilitate a proper decision on the merits", and not to
18 erect formal and burdensome impediments to the litigation process. *Conley v. Gibson*, 355
19 U.S. 41, 48, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957). Rule 15 "was designed to facilitate the
20 amendment of pleadings except where prejudice to the opposing party would result." *United*
21 *States v. Hougham*, 364 U.S. 310, 316, 5 L. Ed. 2d 8, 81 S. Ct. 13 (1960).

22 **A. A Corporate Officer Is Liable for Torts That He Authorized, Directed, or** 23 **Participated.**

24 Microsoft seeks to add John McLeod as a defendant because, as a corporate officer of
25 JDO, he is liable for authorizing, directing, or participating in the performance of tortious
26

1 acts. "A corporate officer or director is, in general, personally liable for all torts which he
2 authorizes or directs or in which he participates, notwithstanding that he acted as an agent of
3 the corporation and not on his own behalf." *Coastal Abstract Serv., Inc. v. First Am. Title Ins.*
4 *Co.*, 173 F.3d 725, 734 (9th Cir. 1999). McLeod knew or consciously avoided knowing that
5 the lupautomated program, in which JDO shared the profits evenly with the other defendants,
6 provided its members with the tools necessary to send e-mail in violation of the law. These
7 tools included fake "from" e-mail addresses, misleading subject lines, and proxy e-mailing
8 software, among other services. *See* Dzielak Decl. ¶¶ 4-5 (pp. 1-2, 18-21).

9 **B. McLeod Will Not Be Prejudiced by Microsoft's Proposed Change to the**
10 **Complaint.**

11 There is still plenty of time for the parties to prepare for the July 25, 2005 trial date
12 and complete all necessary discovery by March 28, 2005. Because trial is approximately
13 eight months away, the discovery cut-off is four months away, and McLeod has been
14 involved in the litigation from the outset as the President of JDO, he will be not be prejudiced
15 by Microsoft amending its complaint. *See e.g., Estate of Randmel v. Pounds*, 38 Wn. App.
16 401, 404, 685 P.2d 638 (1984) (holding that the trial court erred by denying the plaintiff's
17 motion to amend the complaint at the time of the summary judgment hearing where there was
18 a "lack of prejudice" to the defendant); *Caruso*, 100 Wn. 2d at 350 (finding that a delay of five
19 years and four months before seeking to amend did not result in prejudice to the other party).

20 If Microsoft is not allowed to add McLeod as a defendant, Microsoft will have to
21 institute an additional lawsuit against McLeod for violations of the CAN-SPAM Act and
22 Washington's Commercial Electronic Mail Act. The evidence in that case would be virtually
23 identical, including the witnesses, to the evidence in this case. Having separate cases pending
24 would be contrary to the purpose of CR 15 of facilitating decisions on the merits in an
25 efficient manner.
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VI. PROPOSED ORDER

A proposed form of order is attached.

DATED this 24th day of November, 2004.

PRESTON GATES & ELLIS LLP

By /s/ Robert J. Dzielak
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1 **DECLARATION OF SERVICE**

2 I declare, under penalty of perjury, under the laws of the State of Washington, that on
3 November 24, 2004, I electronically filed the foregoing document, along with the supporting
4 Declaration of Robert J. Dzielak, 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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15 Signed this 24th day of November, 2004, at Seattle, King County, Washington.

16 Rhonda Hinman
17 Rhonda Hinman, Legal Secretary
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