

Honorable John C. Coughenour

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MICROSOFT CORPORATION, a
Washington corporation,

Plaintiff,

v.

KEVIN HERTZ, a California resident,

MATT OLSON, a Washington resident,

ALONZO VILLANUEVA, a/k/a Jason
Anderson, a Texas resident,

MIKE WISSING, SHARI WISSING, and the
MARITAL COMMUNITY COMPOSED
OF MIKE AND SHARING WISSING,
Iowa residents,

AMAF JARKASI, a New Jersey resident,

JOHN E. ROGERS, a Washington resident,

ROBERT KALFAYAN, a Quebec, Canada
resident,

JIRAYR KALFAYAN, a Quebec, Canada
resident,

CARL BRANDON SCHUSTER, a Florida
resident,

No. CV04-2219C

SECOND AMENDED COMPLAINT
FOR DAMAGES AND INJUNCTIVE
RELIEF

SECOND AMENDED COMPLAINT FOR
DAMAGES AND INJUNCTIVE RELIEF - 1

K:\00103\02662\TJA\TJA_P2329

PRESTON GATES & ELLIS LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

1 SCOTT HOLLAND and THE MARITAL
2 COMMUNITY COMPOSED OF SCOTT
3 HOLLAND AND JANE DOE
4 HOLLAND, Washington residents,

5 MICHAEL DELASSIO, a New York
6 resident,

7 JAGIR SINGH, an Iowa resident,

8 JEREMY THOMPSON, a Florida resident,

9 KEN a/k/a MATT PRESSLEY, a North
10 Carolina and Arizona resident,

11 SCOTT SANDERS, a British Columbia,
12 Canada, and Illinois resident,

13 ANTHONY ROY, a Quebec, Canada
14 resident,

15 DENNIS a/k/a URIAH CAMPBELL, a
16 Wyoming resident,

17 XUNQI a/k/a PETER HUANG, a Toronto,
18 Ontario, Canada resident,

19 JASON CATALDO, a Florida and
20 Pennsylvania resident,

21 JEROME PELLETIER, a Quebec, Canada
22 resident.

23 MICHAEL TURNBILL, a Kentucky
24 resident,

25 DON ABADIE, a California resident,

26 MARK NEWMAN,

MARLON PHILLIPS, a Missouri resident,

LISA EDWARDS, a Nova Scotia, Canada,
resident,

ALEX NAZEPOUR, a California resident,

IGOR SHAPOSHNIKOV, a New York
resident,

SECOND AMENDED COMPLAINT FOR
DAMAGES AND INJUNCTIVE RELIEF - 2

K:\001031\02662\TJA\TJA_P2329

PRESTON GATES & ELLIS LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

1 MARIUS STRANDER,
2 ANDREW WIETLISPACH, a Texas and
3 Illinois resident,
4 “TIM VAN BULCK,” a New York resident,
5 LEONEL RUAS,
6 MY NEW HOSTING, and its principals,
7 JOHN DOES 36-37,
8 MATTHEW LEE, a Windsor, Ontario,
9 Canada resident,
10 EVERETT BYRD, a Florida resident,
11 BLACK MOUNTAIN GROUP, a Delaware
12 Limited Liability Company, and its
13 principals, MELIH BASAR and
14 ARDESHIR AKHAVAN, California
15 residents,
16 “HEAD HONCHO,” a Florida resident, and
17 JOHN DOES 44 - 50 d/b/a Myauctionbiz.biz
18
19 Defendants.

16 Plaintiff Microsoft Corporation (“Microsoft”) brings this action against the defendants
17 set forth below.

18 **I. JURISDICTION AND VENUE**

19 1. This is an action for violation of the CAN-SPAM Act of 2003 (15 U.S.C.
20 §7701 et seq.), the Washington Commercial Electronic Mail Act (RCW Ch. 19.190), the
21 Washington Consumer Protection Act, and other state and federal causes of action. Microsoft
22 seeks damages and injunctive relief to remedy defendants’ unauthorized use of Microsoft’s
23 computers and computer systems to send millions of misleading and deceptive unsolicited
24 commercial e-mail messages, or “spam,” in violation of federal and state law and Microsoft’s
25 policies.

1 8. Defendant Alonzo Villanueva, a/k/a Jason Anderson, is a Texas resident, who
2 was assigned affiliate identification number 6206, and possibly others, in the affiliate
3 programs administered by Hertz. Microsoft is informed and believes, and on that basis
4 alleges that Villanueva also is responsible for illegal commercial e-mail promoting others'
5 affiliate programs or products or services. Villanueva uses the alias "Jason Anderson,"
6 among others.

7 9. Defendants Mike and Shari Wissing, and the marital community composed
8 thereof (collectively, "the Wissings"), are Iowa residents, who were assigned affiliate
9 identification number 4925, and possibly others, in the affiliate programs administered by
10 Hertz. Microsoft is informed and believes, and on that basis alleges that the Wissings also are
11 responsible for illegal commercial e-mail promoting others' affiliate programs or products or
12 services. The Wissings use the alias "Dave Smith," among others.

13 10. Defendant Amaf Jarkasi is a New Jersey resident, who was assigned affiliate
14 identification number 864, and possibly others, in the affiliate programs administered by
15 Hertz. Microsoft is informed and believes and on that basis alleges that Jarkasi also is
16 responsible for illegal commercial e-mail promoting others' affiliate programs or products or
17 services.

18 11. Defendant John E. Rogers is a Washington resident, who was assigned the
19 affiliate identification number 574, and possibly others, in the affiliate programs administered
20 by Hertz. Microsoft is informed and believes and on that basis alleges that Rogers also is
21 responsible for illegal commercial e-mail promoting others' affiliate programs or products or
22 services.

23 12. Defendants Robert and Jirayr Kalfayan (collectively, "the Kalfayans") are
24 residents of Montreal, Quebec, Canada, who were assigned the affiliate identification
25 numbers 8162 and 8262, and possibly others, in the affiliate programs administered by Hertz.
26 Microsoft is informed and believes and on that basis alleges that the Kalfayans also are

1 responsible for illegal commercial e-mail promoting others' affiliate programs or products or
2 services, including but not limited to the affiliate program "RealGoodOffers," in which they
3 were assigned affiliate identification number 101025 and the affiliate program "Vimax-
4 Offers" in which they were assigned affiliate identification number 111213.

5 13. Defendant Carl Brandon Schuster is a resident of Florida, who was assigned
6 affiliate identification numbers 4906, 4910, 6768, 6770, and possibly others, in the affiliate
7 programs administered by Hertz. Microsoft is informed and believes and on that basis alleges
8 that Schuster also is responsible for illegal commercial e-mail promoting others' affiliate
9 programs or products or services.

10 14. Defendants Scott Holland and the marital community composed of Scott
11 Holland and Jane Doe Holland (collectively, "the Hollands") are a residents of Washington,
12 who were assigned affiliate identification numbers 430 and 431, and possibly others, in the
13 affiliate programs administered by Hertz. Microsoft is informed and believes and on that
14 basis alleges that the Hollands are responsible for illegal e-mail promoting others' affiliate
15 programs or products or services. The Hollands also have used the alias "Kiryah
16 Blackhawk."

17 15. Defendant Michael DeLassio is a resident of New York, who was assigned
18 affiliate identification number 4753, and possibly others, in the affiliate programs
19 administered by Hertz. Microsoft is informed and believes and on that basis alleges that
20 DeLassio is responsible for illegal e-mail promoting others' affiliate programs or products or
21 services.

22 16. Defendant Jagir Singh is a resident of Iowa, who was assigned affiliate
23 identification number 4586, and possibly others, in the affiliate programs administered by
24 Hertz. Microsoft is informed and believes and on that basis alleges that Singh also is
25 responsible for illegal e-mail promoting others' affiliate programs or products or services.
26 Singh has used the alias "Harry Potter" among others.

1 17. Defendant Jeremy Thompson is a Florida resident, who was assigned affiliate
2 identification numbers 409 and 5129, and possibly others, in the affiliate programs
3 administered by Hertz. Microsoft is informed and believes and on that basis alleges that
4 Thompson also is responsible for illegal e-mail promoting others' affiliate programs or
5 products or services.

6 18. Defendant Ken a/k/a "Matt" Pressley is a North Carolina resident and
7 Microsoft is informed and believes, and on that basis alleges, that Pressley also maintains a
8 residence in Arizona. Pressley was assigned affiliate identification number 5429, and
9 possibly others, in the affiliate programs administered by Hertz. Microsoft is informed and
10 believes and on that basis alleges that Pressley also is responsible for illegal e-mail promoting
11 others' affiliate programs or products or services.

12 19. Defendant Scott Sanders is a resident of Surrey, British Columbia, Canada, and
13 Microsoft is informed and believes, and on that basis alleges, that Sanders maintains a
14 residence in Illinois. Sanders was assigned affiliate identification numbers 618 and 5371, and
15 possibly others, in the affiliate programs administered by Hertz. Microsoft is informed and
16 believes and on that basis alleges that Sanders also is responsible for illegal e-mail promoting
17 others' affiliate programs or products or services.

18 20. Defendant Anthony Roy is a resident of Quebec, Canada, who was assigned
19 affiliate identification number 5152, and possibly others, in the affiliate programs
20 administered by Hertz. Microsoft is informed and believes and on that basis alleges that Roy
21 also is responsible for illegal e-mail promoting others' affiliate programs or products or
22 services.

23 21. Defendant Dennis a/k/a Uriah Campbell is a Wyoming resident, who was
24 assigned affiliate number 5714, and possibly others, in the affiliate programs administered by
25 Hertz. Microsoft is informed and believes and on that basis alleges that Campbell also is
26 responsible for illegal e-mail promoting others' affiliate programs or products or services.

1 22. Defendant Xunqi a/k/a Peter Huang is a Toronto, Ontario, Canada, resident
2 who was assigned the affiliate identification numbers 689, 5932, and 5983, and possibly
3 others, in the affiliate programs administered by Hertz. Microsoft is informed and believes
4 and on that basis alleges that Huang also is responsible for illegal e-mail promoting others'
5 affiliate programs or products or services.

6 23. Defendant Jason Cataldo is a Florida resident who also maintains a residence
7 in Pennsylvania. Cataldo was assigned affiliate identification number 5259, and possibly
8 others, in the affiliate programs administered by Hertz. Microsoft is informed and believes
9 and on that basis alleges that Cataldo also is responsible for illegal e-mail promoting others'
10 affiliate programs or products or services.

11 24. Defendant Jerome Pelletier is a resident of Montreal, Quebec, Canada, who
12 was assigned affiliate identification number 4941, and possibly others, in the affiliate
13 programs administered by Hertz. Microsoft is informed and believes and on that basis alleges
14 that Pelletier also is responsible for illegal e-mail promoting others' affiliate programs or
15 products or services.

16 25. Defendant Michael Turnbull is a resident of Kentucky, who was assigned
17 affiliate identification numbers 5054, 5055, and 6024, and possibly others, in the affiliate
18 programs administered by Hertz. Microsoft is informed and believes and on that basis alleges
19 that Turnbull is responsible for illegal e-mail promoting others' affiliate programs or products
20 or services.

21 26. Defendant Don Abadie is a California resident who was assigned affiliate
22 identification number 4903, and possibly others, in the affiliate programs administered by
23 Hertz. Microsoft is informed and believes and on that basis alleges that Abadie also is
24 responsible for illegal e-mail promoting others' affiliate programs or products or services.

25 27. Microsoft is informed and believes that defendant Mark Newman is a U.S.
26 resident. His address presently is unknown. Newman was assigned affiliate identification

1 number 4944, and possibly others, in the affiliate programs administered by Hertz. Microsoft
2 is informed and believes and on that basis alleges that Newman also is responsible for illegal
3 e-mail promoting others' affiliate programs or products or services.

4 28. Defendant Marlon Phillips is a Missouri resident, who was assigned affiliate
5 identification number 386, and possibly others, in the affiliate programs administered by
6 Hertz. Microsoft is informed and believes and on that basis alleges that Phillips also is
7 responsible for illegal e-mail promoting others' affiliate programs or products or services.

8 29. Defendant Lisa Edwards is a resident of Hubbards, Nova Scotia, Canada. She
9 was assigned affiliate identification numbers 522 and 8405, and possibly others, in the
10 affiliate programs administered by Hertz. Microsoft is informed and believes and on that
11 basis alleges that Edwards also is responsible for additional illegal e-mail promoting others'
12 affiliate programs or products or services.

13 30. Microsoft is informed and believes, and on that basis alleges, that defendant
14 Alex Nazepour is a resident of California. Nazepour was assigned the affiliate identification
15 number 8190, and possibly others, in the affiliate programs administered by Hertz. Microsoft
16 is informed and believes and on that basis alleges that Nazepour also is responsible for
17 additional illegal e-mail promoting others' affiliate programs or products or services,
18 including but not limited to the affiliate program "Vimax-Offers."

19 31. Defendant Igor Shaposhnikov is a resident of New York, who was assigned the
20 affiliate identification numbers 4924 and 5846, and possibly others, in the affiliate programs
21 administered by Hertz. Microsoft is informed and believes and on that basis alleges that
22 Shaposhnikov also is responsible for additional illegal e-mail promoting others' affiliate
23 programs or products or services. Shaposhnikov uses the alias Eric Slap, among others.

24 32. Microsoft is informed and believes that defendant Marius Strander is a U.S.
25 resident. His address presently is unknown. Strander was assigned affiliate identification
26 number 650, and possibly others, in the affiliate programs administered by Hertz. Microsoft

1 is informed and believes and on that basis alleges that Strander also is responsible for
2 additional illegal e-mail promoting others' affiliate programs or products or services.

3 33. Defendant Andrew Wietlispach is a resident of Texas who also maintains a
4 residence in Illinois. Wietlispach was assigned affiliate identification number 5048, and
5 possibly others, in the affiliate programs administered by Hertz. Microsoft is informed and
6 believes and on that basis alleges that Wietlispach also is responsible for additional illegal
7 e-mail promoting others' affiliate programs or products or services.

8 34. Microsoft is informed and believes that defendant "Tim Van Bulck" is a
9 resident of New York. His address presently is unknown. Van Bulck was assigned affiliate
10 identification number 681, and possibly others, in the affiliate programs administered by
11 Hertz. Microsoft is informed and believes and on that basis alleges that Van Bulck also is
12 responsible for additional illegal e-mail promoting others' affiliate programs or products or
13 services.

14 35. Microsoft is informed and believes that defendant Leonel Ruas is a U.S.
15 resident. His address presently is unknown. Ruas was assigned affiliate identification
16 number 372, and possibly others, in the in the affiliate programs administered by Hertz.
17 Microsoft is informed and believes and on that basis alleges that Ruas also is responsible for
18 additional illegal e-mail promoting others' affiliate programs or products or services.

19 36. Microsoft is informed and believes that defendant My New Hosting is a U.S.
20 entity and its principals, John Does 36-37 are U.S. residents. The addresses and places of
21 residence of My New Hosting and its principals presently are unknown. My New Hosting
22 and its principals were assigned the affiliate identification number 375, and possibly others, in
23 the affiliate programs administered by Hertz. Microsoft is informed and believes and on that
24 basis alleges that My New Hosting and its principals are responsible for additional illegal
25 e-mail promoting others' affiliate programs or products or services.

1 37. Defendant Matthew Lee is a resident of Windsor, Ontario, Canada. Lee was
2 assigned affiliate identification number 642, and possibly others, in the affiliate programs
3 administered by Hertz. Microsoft is informed and believes and on that basis alleges that Lee
4 is responsible for additional illegal e-mail promoting others' affiliate programs or products or
5 services.

6 38. Microsoft is informed and believes that defendant Everett Byrd is a resident of
7 Florida. Byrd was assigned affiliate identification number 4610, and possibly others, in the
8 affiliate programs administered by Hertz. Microsoft is informed and believes and on that
9 basis alleges that Byrd is responsible for additional illegal e-mail promoting others' affiliate
10 programs or products or services.

11 39. Defendants Black Mountain Group, LLC, is a Delaware LLC, and its
12 principals Melih Basar and Ardeshir Akhavan, are residents of California. Black Mountain
13 Group and its principals were assigned affiliate identification number 393, and possibly
14 others, in the affiliate programs administered by Hertz. Microsoft is informed and believes
15 and on that basis alleges that Black Mountain Group and its principals are responsible for
16 additional illegal e-mail promoting others' affiliate programs or products or services.

17 40. Microsoft is informed and believes, and on that basis alleges, that Defendant
18 "Head Honcho" is a Florida resident, who was assigned the affiliate identification number
19 4895, and possibly others, in the affiliate programs administered by Hertz. Microsoft is
20 informed and believes and on that basis alleges that Head Honcho is responsible for additional
21 illegal e-mail promoting others' affiliate programs or products or services.

22 41. Microsoft is unaware of the true names and capacities of defendants sued
23 herein as DOES 44-50 and, therefore, sues these defendants by such fictitious names.
24 Microsoft will amend this complaint to allege their true names and capacities when
25 ascertained. Microsoft is informed and believes and therefore alleges that each of the
26 fictitiously named defendants is responsible in some manner for the occurrences herein

1 alleged, and that Microsoft's injuries as herein alleged were proximately caused by such
2 defendants.

3 42. Microsoft is informed and believes and on that basis alleges that each of the
4 named and unnamed defendants is responsible in some manner for the occurrences herein
5 alleged, and that Microsoft's injuries as herein alleged were proximately caused by such
6 defendants.

7 43. Microsoft is informed and believes and on that basis alleges that the actions
8 alleged herein to have been undertaken by the defendants were undertaken by each defendant
9 individually, were actions that each defendant caused to occur, were actions that each
10 defendant authorized, controlled, directed, or had the ability to authorize, control or direct,
11 and/or were actions each defendant assisted, participated in, or otherwise encouraged, and are
12 actions for which each defendant is liable. Each defendant aided and abetted the actions of
13 the defendants set forth below, in that each defendant had knowledge of those actions,
14 provided assistance and benefited from those actions, in whole or in part. Each of the
15 defendants was the agent of each of the remaining defendants, and in doing the things
16 hereinafter alleged, was acting within the course and scope of such agency and with the
17 permission and consent of other defendants. Each of the defendants knew, or consciously
18 avoided knowing, that other defendants had or would engage in a pattern or practice that
19 violated the CAN-SPAM Act of 2003.

20 **III. NATURE OF MICROSOFT'S INTERNET E-MAIL SERVICES**

21 44. Microsoft owns and operates interactive computer services that enable its
22 customers to, among other things, access the Internet and exchange electronic mail ("e-mail")
23 on the Internet. Microsoft owns and maintains computers and other equipment, including
24 specialized computers or "servers" that process e-mail messages and otherwise support its
25 e-mail services. Microsoft maintains this equipment in Washington and California, among
26 other states. E-mail sent to and from Microsoft's customers is processed through and stored

1 on these computers. Microsoft is an internet service provider (“ISP”), a provider of “Internet
2 Access Service” as defined by 15 U.S.C. §7702(11), and an “interactive computer service” as
3 defined by RCW 19.190.010. Microsoft’s computers and computer systems are “protected
4 computers” under 15 U.S.C. § 7702(13) and 18 U.S.C. § 1030(e)(2).

5 45. One of Microsoft’s services is “MSN Hotmail” which provides free and
6 subscription based e-mail on the Internet through a web-based e-mail service that can be
7 accessed at www.hotmail.com. MSN Hotmail allows account-holders to exchange e-mail
8 messages with any other e-mail user who has an Internet e-mail address throughout the world.
9 MSN Hotmail has millions of registered accounts, whose users all have unique e-mail
10 addresses ending in “@hotmail.com.”

11 46. Another of Microsoft’s services is “MSN Internet Access” (referred to herein
12 as “MSN”) which provides free and subscription-based e-mail services that can be accessed
13 on the web or via Microsoft’s proprietary network. MSN allows account-holders to exchange
14 e-mail messages with any other e-mail user who has an Internet e-mail address throughout the
15 world. MSN has millions of registered accounts, whose users all have unique e-mail
16 addresses ending in “@msn.com.”

17 **IV. SPAM AND THE PURPOSES BEHIND THE FEDERAL CAN-SPAM ACT AND**
18 **THE WASHINGTON COMMERCIAL ELECTRONIC MAIL ACT**

19 47. The United States Congress, in passing the CAN-SPAM¹ Act of 2003,
20 concluded that “[u]nsolicited commercial e-mail, commonly known as ‘spam’, has quickly
21 become one of the most pervasive intrusions in the lives of Americans.” Indeed, Congress
22 estimated that by the end of 2003, if not sooner, spam would account for over 50% of all e-
23 mail. This is in sharp contrast to two years earlier when spam only accounted for 8% of all
24 e-mail. Congress has concluded that the rate at which spam is increasing is “reaching
25

26 ¹ CAN-SPAM is an acronym for “Controlling the Assault of Non-Solicited Pornography and
Marketing Act of 2003”.

1 critically high levels.” In fact, in 2003, an estimated 2 trillion spam messages were expected
2 to be sent over the Internet.

3 48. In addition to plaguing recipients by its sheer volume, spam is also notoriously
4 deceptive in form and content. In April 2003, the Federal Trade Commission found that 66%
5 of all spam contains “some kind of false, fraudulent, or misleading information, either in the
6 e-mail’s routing information, its subject line, or the body of its message.” In fact, the FTC
7 found that “one-third of all spam contains a fraudulent return e-mail address that is included
8 in the routing information (known as the ‘header’) of the e-mail message”. Congress found
9 that falsified headers “not only trick ISP’s increasingly sophisticated filters,” but also “lure
10 consumers into mistakenly opening messages from what appears to be people they know.”

11 49. Congress also found that not only do spammers use false sender information,
12 but they also use false or misleading subject lines. According to Congress, the FTC found
13 that 42% of spam contains misleading subject lines that “trick the recipient into thinking that
14 the e-mail sender has a personal or business relationship with the recipient.” Congress
15 provided examples of this type of false or misleading subject line: “Hi, it’s me” and “Your
16 order has been filled.”

17 50. The economic impact of spam is enormous. Congress noted that a 2001
18 European Union study found that “spam costs Internet subscribers worldwide \$9.4 billion
19 each year.” Congress also noted that the estimated costs “to United States businesses from
20 spam in lost productivity, network system upgrades, unrecoverable data, and increased
21 personnel costs, combined, will top \$10 billion in 2003.” Of that amount, approximately \$4
22 billion will be associated with lost employee productivity.

23 51. With these findings as a backdrop, the United States Congress passed the
24 CAN-SPAM Act. In so doing, Congress provided four specific purposes of the Act:
25 “(i) prohibit senders of electronic mail (e-mail) for primarily commercial advertisement or
26 promotional purposes from deceiving intended recipients or Internet service providers as to

1 the source or subject matter of their e-mail messages; (ii) require such e-mail senders to give
2 recipients an opportunity to decline to receive future commercial e-mail from them and to
3 honor such requests; (iii) require senders of unsolicited commercial e-mail (UCE) to also
4 include a valid physical address in the e-mail message and a clear notice that the message is
5 an advertisement or solicitation; and (iv) prohibit businesses from knowingly promoting or
6 permitting the promotion of, their trade or business through e-mail transmitted with false or
7 misleading sender or routing information.”

8 52. As Congress recognized, the growth in unsolicited commercial electronic mail
9 imposes significant monetary costs on providers of Internet access services that carry and
10 receive such mail, as there is a finite volume of mail that such providers can handle without
11 further investment in infrastructure. The sheer volume of spam is threatening to overwhelm
12 not only the average consumer's in-box, but also the network systems of Internet access
13 service providers.

14 53. Washington State has likewise responded to the threat posed by spam. In
15 enacting the Commercial Electronic Mail Act, RCW Ch. 19.190, in 1998, Washington
16 became one of the first states to regulate spam. The Act recognizes that the spamming
17 practices prohibited by the Act are “matters vitally affecting the public interests” and are
18 unfair and deceptive practices which have a significant negative impact on Washington
19 businesses and consumers.

20 54. Microsoft has invested substantial time and money in efforts to protect itself
21 and its equipment from spam and the spammers who promote and profit from spam, as well as
22 in efforts to protect its registered users worldwide from receiving spam.

23 55. Microsoft has a clearly articulated policy prohibiting the use of its services for
24 junk e-mail, spamming, or any unsolicited messages (commercial or otherwise). Microsoft's
25 policies also prohibit automated queries of any sort, harvesting or collection of e-mail
26 addresses, and any use of the services that is not personal and non-commercial. These

1 policies are included in the Terms of Use for MSN and MSN Hotmail, which can be accessed
 2 via a clearly marked link on www.msn.com, as well as on the home pages for each of the
 3 services.

4 **V. DEFENDANTS' UNLAWFUL CONDUCT**

5 56. Microsoft is informed and believes, and on that basis alleges, that defendants
 6 have been—and are currently—involved in widespread spamming by sending misleading,
 7 deceptive and unsolicited commercial e-mail to MSN Hotmail account holders.

8 57. Microsoft is informed and believes, and on that basis alleges, that defendants
 9 own, operate, or promote thorough commercial e-mail, a number of products or services,
 10 including numerous Internet domains associated with websites that promote the sale of kits
 11 that train persons how to “Earn HUGE Profits On eBay.” Those domain names include, but
 12 are not limited to: <29jfen.info>, <4rfv.info>, <awwicnd.info>, <bbccddee.biz>,
 13 <ccddeeff.biz>, <cmrirugh.info>, <cnzcnie.info>, <cunfh5h.info>, <djenis.info>,
 14 <dkenis.info>, <ebayvideo.net>, <ensie.info>, <fdnxir0of.info>, <fsj03.info>, <ghjbnm.biz>,
 15 <lewndixj.info>, <iwenudh.info>, <jjlsdse.info>, <jjlsdse.info>, <kseiodn.info>,
 16 <lfeins.info>, <lmvieux9.info>, <lsdkne.info>, <lsense.biz>, <Lwensiz.info>,
 17 <mesncje.info>, <mnsdfh.info>, <msenieje.info>, <myauctionbiz.biz>, <Neufh.info>,
 18 <nfdvijd.info>, <nidueh.info>, <nvndsj.info>, <oiukjh.info>, <powenei.biz>,
 19 <powndiz.info>, <pwemicu3.info>, <qpkds.info>, <qxsubfg.info>, <rtyfgh.biz>,
 20 <slinendi.info>, <Slknséis.info>, <slvcei.info>, <Sneihz.info>, <svniejf.info>, <vfrbgt.biz>,
 21 <vnjicd.info>, <weniez.info>, <wersdf.biz>, <woiejf.info>, <Wuwensd.info>,
 22 <xhjwien.info>, <xnsidh4h.info>, and <xswcde.biz>.

23 58. Microsoft is informed and believes, and on the basis alleges, that defendants
 24 have sent millions of commercial e-mail messages to its MSN and MSN Hotmail service that
 25 contain those, and other, domain names advertising defendants' products.

1 59. Many of those commercial e-mail messages are sent through open proxies, or
2 hijacked computers, thereby disguising the true sender of the e-mail messages. The use of
3 open proxies or hijacked computers misrepresents or obscures the point of origin or
4 transmission path of the e-mails and renders the headers materially false and materially
5 misleading.

6 60. Many of defendants commercial e-mails include Microsoft's <hotmail.com> or
7 <msn.com> domain names in the "From:" header to falsely suggest that the messages were
8 sent from, or through, Microsoft's servers. Defendants do not have permission to use
9 Microsoft's domain names in this manner, and the use of Microsoft's domain names in this
10 manner misrepresents or obscures the point of origin or transmission path of the e-mails and
11 renders the headers materially false and materially misleading.

12 61. Many of defendants' commercial e-mails use the domain names of innocent
13 third-parties, including but not limited to the domain names <aol.com>, <att.net>,
14 <earthlink.net>, and <yahoo.com >. Microsoft is informed and believes, and on that basis
15 alleges, that defendants did not have permission to use those domain names, and the use of
16 those domain names misrepresents or obscures the point of origin or transmission path of the
17 e-mails and renders the headers materially false and materially misleading.

18 62. Many of defendants' commercial e-mails contain falsified or "spoofed"
19 Internet Protocol addresses, including Internet Protocol addresses assigned to Microsoft. The
20 use of such IP addresses misrepresents or obscures the point of origin or transmission path of
21 the e-mails and renders the headers materially false and materially misleading.

22 63. Many of defendants' commercial e-mails lack a valid physical postal address
23 of the sender and lack clear and conspicuous identification that the message is an
24 advertisement or solicitation.

25 64. Many of defendants' commercial e-mails have false or misleading information
26 in the subject line or subject heading, such as: "Auction completed successfully" or "I will

1 remember you.” Many messages contain a first name in the subject line, such as “Shelby,” or
2 “Jayson.” The use of such subject lines are likely to mislead a recipient, acting reasonably
3 under the circumstances, about a material fact regarding the contents or subject matter of the
4 message.

5 65. Microsoft has been adversely affected by defendants’ actions. As a result of
6 defendants’ activities, Microsoft’s computer equipment and servers were required to process
7 millions of improper spam e-mails, as well as “bounce back” e-mails which had been sent by
8 defendants to non-existent, out-dated or incorrect e-mail addresses. This significant number
9 of e-mails has taken up substantial amount of Microsoft’s finite computer space, threatens to
10 delay and otherwise adversely affect MSN Hotmail subscribers in sending and receiving
11 legitimate e-mail, and has resulted in and continues to result in significant costs to Microsoft.

12 **COUNT I**
13 **(Violation of the Federal Controlling the Assault of Non-Solicited Pornography and**
14 **Marketing Act of 2003—“CAN-SPAM” (15 U.S.C. § 7704(a)(1)))**

15 66. Microsoft realleges paragraphs 1 through 65 of this Complaint as if fully set
16 forth herein.

17 67. Defendants initiated the transmission, to protected computers, of commercial
18 e-mail messages that contained, or were accompanied by, header information that is
19 materially false or materially misleading.

20 68. Defendants’ actions were willful and knowing.

21 69. As a result of defendants’ actions, Microsoft has been damaged in an amount
22 to be proven at trial.

23 70. Defendants’ actions violated 15 U.S.C. § 7704(a)(1), and entitle Microsoft to
24 injunctive relief, statutory damages and aggravated damages under 15 U.S.C.
25 § 7704(g)(3)(C)(i)-(ii) because of defendants’ willful and knowingly violation of the CAN-
26 SPAM Act and because defendants knowingly relayed or retransmitted commercial e-mail

1 messages that were unlawful under 15 U.S.C. § 7704(a) from a protected computer or
2 computer network that they had accessed without authorization.

3
4 **COUNT II**
5 **(Violation of the Federal Controlling the Assault of Non-Solicited Pornography and**
6 **Marketing Act of 2003—“CAN-SPAM” (15 U.S.C. § 7704(a)(2) and (5))**

7 71. Microsoft realleges paragraphs 1 through 70 of this Complaint as if fully set
8 forth herein.

9 72. Defendants engaged in a pattern or practice of initiating, to protected
10 computers, commercial e-mail messages that:

11 a) contained subject headings that defendants knew, or reasonably should
12 have known, were likely to mislead a recipient, acting reasonably under the
13 circumstances, about a material fact regarding the contents or subject matter of the
14 messages;

15 b) failed to contain a functioning return e-mail address or other Internet-
16 based mechanism, clearly and conspicuously displayed, that a recipient could use to
17 submit a reply e-mail message or other form of Internet-based communication
18 requesting not to receive future commercial e-mail messages from that sender at the e-
19 mail address where the message was received; and

20 c) failed to include a clear and conspicuous identification that the message
21 was an advertisement or solicitation, failed to provide a clear and conspicuous notice
22 of the opportunity to decline to receive further commercial electronic mail messages
23 from the sender; or failed to provide a valid physical postal address of the sender.

24 73. Defendants' actions were willful and knowing.

25 74. As a result of defendants' actions, Microsoft has been damaged in an amount
26 to be proven at trial.

1 75. Defendants' actions violated 15 U.S.C. § 7704(a)(2), (a)(3) and (a)(5), and
2 entitle Microsoft to injunctive relief, statutory damages and aggravated damages under 15
3 U.S.C. § 7704(g)(3)(C)(i)-(ii) because of defendants' willful and knowingly violation of the
4 CAN-SPAM Act and because defendants knowingly relayed or retransmitted commercial e-
5 mail messages that were unlawful under 15 U.S.C. § 7704(a) from a protected computer or
6 computer network that they had accessed without authorization.

7
8 **COUNT III**
(Trespass to Chattels)

9 76. Microsoft realleges and incorporates by this reference each and every
10 allegation set forth in paragraphs 1 through 75 above.

11 77. The computers, computer networks and computer services that constitute
12 Microsoft's MSN Hotmail e-mail system are the personal property of Microsoft.

13 78. Defendants were aware that their actions were specifically prohibited by
14 Microsoft's Terms of Service and/or were on notice that Microsoft did not authorize their
15 actions in any way.

16 79. Defendants have knowingly, intentionally and without authorization used and
17 intentionally trespassed upon Microsoft's property.

18 80. As a result of defendants' actions, Microsoft has been damaged in an amount
19 to be proven at trial.

20
21 **COUNT IV**
(Conversion)

22 81. Microsoft realleges and incorporates by this reference each and every
23 allegation set forth in paragraphs 1 through 80 above.

24 82. Defendants have willfully interfered with and converted Microsoft's personal
25 property, without lawful justification, as a result of which Microsoft has been deprived of
26 possession and use of its property.

1 83. As a result of defendants' actions, Microsoft has been damaged in an amount
2 to be proven at trial.

3 **COUNT V**
4 **(Violation of the Washington Commercial Electronic Mail Act (RCW Ch. 19.190) and**
5 **the Washington Consumer Protection Act (RCW Ch. 19.86))**

6 84. Microsoft realleges and incorporates by this reference each and every
7 allegation set forth in paragraphs 1 through 83 above.

8 85. Defendants initiated the transmission, conspired with one another to initiate the
9 transmission or assisted in the transmission of commercial e-mail messages from a computer
10 located in Washington and/or to an e-mail address that they knew, or had reason to know, is
11 held by a Washington resident. Those commercial e-mail messages:

12 a) used Microsoft's or another third party's internet domain names without
13 permission;

14 b) misrepresented or obscured information identifying the true point of origin or the
15 transmission path of a commercial electronic e-mail message; or

16 c) contained false or misleading information in the subject line.

17 86. As a result of defendants' actions, Microsoft has been damaged in an amount
18 to be proven at trial.

19 87. Defendants' actions violated RCW § 19.190.020, and entitle Microsoft to
20 actual damages or statutory damages of \$1,000 per e-mail, whichever is greater.

21 88. Defendants' actions affected the public interest, are unfair or deceptive acts in
22 trade or commerce and unfair methods of competition, and violated the Washington
23 Consumer Protection Act, RCW Ch. 19.86. Microsoft is entitled to treble damages and an
24 award of its attorneys' fees and costs under that Act.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

COUNT VI
(Violation of the Lanham Act – 15 U.S.C. § 1125(a))

89. Microsoft realleges and incorporates by this reference each and every allegation set forth in paragraphs 1 through 88 above.

90. Defendants used the designations “msn.com” and “hotmail.com,” which incorporate Microsoft’s registered trademarks and service marks, are words, terms, names, or combinations thereof, used in interstate commerce in connection with goods and services.

91. Defendant’s conduct constitutes intentional and willful infringement of Microsoft’s registered trademark and service mark and unfair competition.

92. Defendants’ conduct is likely to cause confusion, mistake, or deception as to defendants’ affiliations, connection, or association with Microsoft, or as to the origin, sponsorship, or approval of their goods or services, or commercial activities.

93. Microsoft has been damaged by these acts in an amount to be proved at trial. Microsoft is also entitled under the Lanham Act to injunctive and equitable relief against defendants.

PRAYER FOR RELIEF

WHEREFORE, Microsoft respectfully requests that the Court enter judgment against defendants, jointly and severally, as follows:

1. That the Court issue temporary and permanent injunctive relief against defendants, and that defendants, their officers, agents, representatives, servants, employees, attorneys, successors and assignees, and all others in active concert or participation with defendants, be enjoined and restrained from:

- a) establishing any accounts with Microsoft’s MSN or MSN Hotmail services;
- b) using Microsoft’s computers and computer systems in connection with sending commercial e-mail messages;

1 c) making unauthorized use of Microsoft's computers, computer systems,
2 or intellectual property;

3 d) continuing to violate Microsoft's Terms of Service;

4 e) continuing to violate the CAN-SPAM Act of 2003, or the Washington
5 Commercial Electronic Mail Act; and

6 f) assisting, aiding, or abetting any other person or business entity in
7 engaging in or performing any of the activities referred to in subparagraphs a) through
8 e) above.

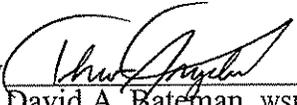
9 2. That the Court award Microsoft actual damages, liquidated damages and
10 statutory damages, in amount to be proven at trial;

11 3. That the Court award Microsoft its attorneys' fees and costs incurred herein;
12 and

13 4. That the Court grant Microsoft such other or additional relief as is just and
14 proper.

15 DATED this 31st day of October, 2005.

16 PRESTON GATES & ELLIS LLP

17
18 By 
19 David A. Bateman, WSBA # 14262
20 Theodore J. Angelis, WSBA #30300
21 925 Fourth Avenue, Suite 2900
22 Seattle, WA 98104
23 Phone: (206) 623-7580
24 Fax: (206) 623-7022
25 Email: theoa@prestongates.com
26 Attorneys for Plaintiff
Microsoft Corporation

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

DECLARATION OF SERVICE

I declare, under penalty of perjury, under the laws of the State of Washington, that I served a copy of the foregoing document by mailing the same, properly addressed and prepaid, on the 31st day of October, 2005, to:

Kevin Hertz
433 G Street, #404
San Diego, CA 92101
Defendant

Signed this 31st day of October, 2005, at Seattle, King County, Washington.

Rhonda Hinman
Rhonda Hinman