101,977-7

SUPREME COURT OF THE STATE OF WASHINGTON

Court of Appeals No. 834860-1

CULINARY VENTURES, LTD D/B/A BITEMOJO,

Plaintiff/Appellant,

v.

MICROSOFT CORPORATION

Defendant/Respondent.

ANSWER TO PETITION FOR REVIEW

David A. Perez, WSBA No. 43959
DPerez@perkinscoie.com
Paige L. Whidbee, WSBA No. 55072
PWhidbee@perkinscoie.com

PERKINS COIE LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Telephone: 206.359.8000
Facsimile: 206.359.9000

Attorneys for Microsoft Corporation

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I. INTRODUCTION

Despite having agreed to a binding forum selection clause in a contract with Microsoft Ireland requiring it to bring its lawsuit in Ireland, Petitioner Culinary Ventures, Ltd. d/b/a Bitemojo ("Bitemojo") chose to bring suit in King County, Washington, against Microsoft Corporation.

Applying the plain terms of the forum selection clause, the Superior Court quickly dismissed the case, and the Court of Appeals affirmed based on a "case-specific" interpretation of the parties' agreement. Undeterred, Bitemojo now seeks Supreme Court review but can point to no grounds to justify its request. RAP 13.4(b).

First, Bitemojo incorrectly asserts the Court of Appeals' interpretation of the forum selection clause raises "an issue of substantial public interest," even though the Court of Appeals' expressly narrow and fact-specific holding is consistent with Washington law and supported by the weight of authority elsewhere. Notably, Bitemojo cannot identify a single case supporting an alternative result.

Second, Bitemojo incorrectly asserts the holding conflicts with this Court's decision in *Dix v. ICT Group, Inc.*, 160 Wn.2d 826, 837, 161 P.3d 1016 (2007), despite conceding that Bitemojo has "feasible alternative[s] for seeking relief" in Ireland—the only requirement *Dix* imposes.

The Court should deny Bitemojo's Petition.

II. COURT OF APPEALS' DECISION

The decision of Division I of the Court of Appeals was issued on April 10, 2023 and is available at 527 P.3d 122.

III. ISSUES PRESENTED FOR REVIEW

1. Whether the Court of Appeals' "case-specific" determination that Microsoft Ireland and Bitemojo intended their forum selection clause to apply to Bitemojo's claims raises "an issue of substantial public interest that should be determined by the Supreme Court."

2. Whether the Court of Appeals' holding that the forum selection clause is enforceable because it gives Bitemojo a "feasible alternative for seeking relief" is consistent with this Court's holding in *Dix v. ICT Group, Inc.*, 160 Wn.2d 826, 837, 161 P.3d 1016 (2007).

IV. STATEMENT OF CASE

A. The Parties and the Agreement

Bitemojo is an Israeli-based company operating in the international tourism and travel industry that markets a smartphone application for self-guided food tours. CP1-2 (Compl. ¶¶ 1, 4), CP3 (Compl. ¶¶ 14-15).

Bitemojo subscribed to Microsoft Azure's "server-side hosting" to store "its code and infrastructure." CP4 (Compl. ¶ 19). To obtain this subscription, Bitemojo entered into an

Online Subscription Agreement (the "Agreement") with Microsoft Ireland, a subsidiary of Microsoft Corporation and a distinct legal entity. CP1, 4 (Compl. ¶¶ 1, 19); CP16-26 (Declaration of Vikram Desai ("Desai Decl.") ¶ 2, Ex. A (Agreement)).

Microsoft Corporation is not a party to the Agreement—the *only* parties to the Agreement are Bitemojo and Microsoft Ireland. CP19 (Agreement at 1).

The Agreement provides that Microsoft Ireland "may suspend your use of the Online Services if . . . you do not pay amounts due under this agreement[] . . . or you violate the terms of this agreement." CP22 (Agreement § 3(c)). The Agreement further provides that "[i]f you do not fully address the reasons for the suspension within 60 days after we suspend, we may terminate your Subscription and delete your Customer Data without any retention period. We may also terminate your Subscription if your use of the Online Services is suspended more than twice in any 12-month period." *Id.* (Agreement § 3(c)(ii)). And it makes clear that Microsoft Ireland "does not and will not assume any obligations with respect to the Customer Data . . . other than as expressly set forth in this [A]greement or as required by applicable law." CP19 (Agreement § 1(d)).

Section 7(h) establishes a reciprocal choice of forum that sets the venue in the home country of the party being sued:

> If we bring an action to enforce this agreement, we will bring it in the jurisdiction where you have your headquarters. *If you bring an action to enforce this agreement, you will bring it in Ireland*.

CP24 (Agreement § 7(h)) (the "Forum Selection Clause") (emphasis added).

B. Bitemojo Stops Making Payments to Microsoft Ireland and Repeatedly Suspends Its Account

In March 2020, the coronavirus pandemic "decimated the travel industry" and, by extension, Bitemojo's business. CP5 (Compl. ¶ 21). In response, Bitemojo "made the difficult decision to reduce Bitemojo's monthly expenses to zero." *Id.*

As a part of that effort, Bitemojo requested in March 2020 and again in June 2020 that its Azure account and associated payments be suspended. CP5-6 (Compl. ¶¶ 22-24, 26). On both occasions, an Azure support engineer confirmed that Bitemojo's subscription and payments were suspended, and that Microsoft's system would automatically delete the account along with its data after 90 days absent further action. CP5-6 (Compl. ¶¶ 24, 26, 67). When Bitemojo asked in June 2020 whether "all our data will be kept there as before," a technical support engineer responded that "there is no issue keeping your data safe just make sure to contact me or another engineer

within 3 months to postpone the data deletion." CP6 (Compl. ¶ 26).

Between March and September 2020, Bitemojo repeatedly received notices that its data was scheduled to be deleted and that it should "**Back up your data while there's still time**." CP115, 129 (emphasis in original).

Bitemojo did not attempt to contact Microsoft Ireland again until September 5, 2020—only days before its data was set for automatic deletion—and requested a third suspension of its account. CP6-7 (Compl. ¶ 27). Bitemojo "received no response" and made no other attempt to ensure Microsoft Ireland had received its message and would take steps to delay the "automatic" deletion of Bitemojo's data. *Id.* at CP11 (Compl. ¶ 67). As a result, Microsoft Ireland's "computerized system" "automatic[ally]" deleted Bitemojo's data on September 9, 2020. CP6-7, 11 (Compl. ¶¶ 27, 67).

C. Bitemojo Files This Lawsuit Against the Wrong Party in the Wrong Venue

On August 19, 2021, Bitemojo initiated this lawsuit. CP1. Although its Agreement was with Microsoft Ireland, Bitemojo sued Microsoft Ireland's parent company, Microsoft Corporation. *Id.* And although the Agreement provides that Bitemojo was required to "bring an[y] action to enforce this

agreement . . . in Ireland," Bitemojo brought suit in King County, Washington. CP1, 24.

D. The Superior Court Dismisses the Lawsuit Based on the Forum Selection Clause

On October 7, 2021, Microsoft Corporation moved to dismiss Bitemojo's complaint. CP27. First, pursuant to CR 12(b)(3), because the Forum Selection Clause required the lawsuit to be brought in Ireland. CP38-39. And second, pursuant to CR 12(b)(6), because Microsoft Corporation was not a proper party to the lawsuit and Bitemojo had not adequately pleaded any of its claims. CP39-49.

The Superior Court held oral argument on November 19, 2021, and then dismissed the case with prejudice because the Forum Selection Clause required Bitemojo to bring suit in Ireland. CP217-18. The Superior Court deferred ruling on any of the other bases for dismissal that Microsoft Corporation raised in its motion to dismiss. *Id*.

On December 7, 2021, Bitemojo filed a notice of appeal.

E. The Court of Appeals Affirms the Trial Court's Dismissal of Bitemojo's Claims

On April 10, 2023, following briefing, Division I of the Court of Appeals affirmed the trial court's dismissal of the case with prejudice because "the parties intended that the forum selection clause apply to claims such as Bitemojo's that concern the subject matter of the agreement," and enforcing the clause

still gave Bitemojo a "feasible alternative for seeking relief." Petition, Appendix A (hereinafter "Order"), at 2, 17, 21. Finding it "not necessary" to issue a broad ruling on the scope of forum selection clauses, the court's holding was, instead, based on "the standard tools of contract interpretation" and a "case-specific" examination of "the intention of the parties reflected in the wording of particular clauses and the facts of [the] case." *Id*. at 11.

On May 10, 2023, Bitemojo filed a petition for review.

V. ARGUMENT

A. Legal Standard

As relevant here, a petition for review will be accepted only if the Court of Appeals' decision conflicts with either a Supreme Court or another published Court of Appeals' decision, or involves an issue of substantial public interest. RAP 13.4(b).

Bitemojo contends that the Supreme Court should accept review because this case involves an issue of substantial public interest, and because the Court of Appeals' decision conflicts with the Supreme Court's holding in *Dix*. Bitemojo is incorrect on both counts, and the Court should deny the petition.

B. The Petition Does Not Identify Any Issue of Substantial Public Interest that Warrants Review

1. The Court of Appeals' Interpretation Narrowly Focused on the Parties' Intent in This Case

The Court of Appeals' holding that Bitemojo's claims are subject to the Forum Selection Clause—a narrow, "case-specific" determination based on the Agreement's specific text and surrounding facts—does not raise an issue of "substantial public interest" warranting Supreme Court review. RAP 13.4(b)(4).

Contrary to Bitemojo's assertion, the court's ruling does not alter the scope of "forum selection provisions governing actions to 'enforce' contracts." Petition at 14. Instead, the court expressly "declined" to issue a broad or bright-line rule, reasoning instead that:

> [T]he analysis of whether noncontract claims, including tort claims, are covered by forum selection clauses is a "*case-specific exercise*" and "depends upon the intention of the parties reflected in the wording of particular clauses and the facts of each case."

Order at 11 (emphasis added) (quoting *Terra Int'l, Inc. v. Miss. Chem. Corp.*, 119 F.3d 688, 693 (8th Cir. 1997)).

Using "standard tools of contract interpretation," Order at 11, the court issued a narrow and fact-specific holding that does not raise any issue of "substantial public interest that should be

determined by the Supreme Court." RAP 13.4(b). Bitemojo's petition should, therefore, be denied.

2. The Court of Appeals Correctly Applied Washington Contract Law

The Court of Appeals' interpretation was correct under Washington law. Bitemojo does not dispute the court's holding that, when interpreting a contract, Washington courts' primary objective is to discern the parties' intent, based on reading the contract as a whole. Petition at 15; Order at 11-12 (citing *Weyerhaeuser Co. v. Com. Union Ins. Co.*, 142 Wn.2d 654, 669-70, 15 P.3d 115 (2000) & *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 504, 115 P.3d 262 (2005)).

In fact, Bitemojo expressly concedes that the Court of Appeals was correct when it determined that the plain meaning of the forum selection clause applied to claims that seek "'to give force to,' 'cause to take effect,' or 'give effect to' the [A]greement." Petition at 16 (citing Order at 12-13).

And Bitemojo cannot reasonably question the Court of Appeals' "case-specific" analysis of the Agreement. The court first noted that the Agreement contains both an integration clause and a "reciprocal" forum selection clause with "only one exception" that does not apply here: for "violation of intellectual property rights." Order at 12. It then concluded that "[r]eading the contract as a whole, because the agreement

constitutes 'the entire agreement concerning its subject matter,' we determine that the parties intended that the forum selection clause apply to all claims concerning the subject matter of the agreement, with the sole exception of claims relating to intellectual property rights." *Id.* at 13.

Then, turning to "the facts in this case," the court correctly found that the forum selection clause applies to Bitemojo's claims. Order at 13. That is because the core allegation underlying each of Bitemojo's four claims is that Microsoft failed to honor an alleged promise to suspend Bitemojo's contractual payment obligation and "keep its data safe." CP8-11 (Compl. ¶¶ 37 (estoppel), 49 (breach of contract), 56 (conversion), 66-67 (CPA)); *see also* Order at 13-15. Bitemojo cannot dispute that the Agreement governed these payments and the storage of the data in question. To the contrary, as the Court of Appeals noted, the Agreement makes clear that Microsoft Ireland "does not and will not assume any obligations with respect to the Customer Data . . . other than as expressly set forth in this agreement or as required by applicable law." Order at 15 (citing CP19 (Agreement § 1(d))).

The Court of Appeals also correctly found that each of Bitemojo's claims requires the interpretation and application of the Agreement's terms. To borrow Bitemojo's own characterization, every one of its claims is based on the same

allegation that Microsoft Ireland's technical support engineers "promised forbearance of payments for *Plaintiff's existing subscription* [under the Agreement], deferring payments that would *otherwise be owed immediately* [pursuant to Section 2(c)], and assured [Bitemojo] that this would result in Microsoft keeping *the data Plaintiff was storing on Microsoft's servers* secure [suspending the deletion right under Section 3(c)]." CP71 (Opp'n at 14) (emphasis added).

As the Court of Appeals noted, these interactions "did not occur in a vacuum" but "all related to services that Microsoft Azure agreed to provide to Bitemojo pursuant to the online services agreement." Order at 13. And Bitemojo cannot reasonably dispute the court's conclusion that its claims are governed by the Agreement because "they are claims about data deletion," and "[w]ithout the . . . [A]greement, Microsoft Azure would not have any of Bitemojo's data in the first place." Order at 14-15.

This fact-specific analysis—of a *foreign* contract executed exclusively between *Irish* and *Israeli* companies—can involve no "substantial public interest" for the state of Washington that could justify Supreme Court review. And, in any event, the court's analysis is also plainly correct under Washington law.

3. The Court of Appeals' Interpretation Does Not Conflict with Washington Case Law and Is Consistent with the Weight of Authority in Other Jurisdictions

Bitemojo broadly insists that the Court of Appeals' ruling represents a shift in how "action to enforce" clauses are interpreted. And yet, Bitemojo *cannot cite a single case* supporting its contention that the clause should not apply here.

While no Washington cases directly address whether a forum selection clause that applies to "actions to enforce" an agreement can encompass non-contract claims, Order at 8, the weight of authority in other jurisdictions confirms the Court of Appeals' interpretation in this case was correct, consistently holding that this type of "action to enforce" clause encompasses all claims based on conduct governed by the contract in question. *See, e.g.*, *Lambert v. Kysar*, 983 F.2d 1110, 1121-22 (1st Cir. 1993) (clause covering "action[s] brought to enforce" a contract encompassed "contract-related tort claims involving the same operative facts as a parallel claim for breach of contract"); *All. Commc'ns Co-op., Inc. v. Glob. Crossing Telecomms., Inc.*, Nos. Civ. 06-4221-KES, 06-3023-KES, 2007 WL 1964271, at *8-9 (D.S.D. July 2, 2007) ("any action to enforce or interpret" clause encompassed tort claims that required interpretation of contract); *LTVN Holdings LLC v. Odeh*, Civ. No. CCB-09-0789, 2009 WL 3736526, at *5 (D. Md. Nov. 5, 2009) ("[a]ny action to enforce this agreement"

included claims "that are not purely contractual" including conversion, unjust enrichment, copyright infringement, and invasion of privacy); *Auld v. Daugherty Sys., Inc.*, Civ. No. 15-3336 (DSD/SER), 2015 WL 5970731, at *2 (D. Minn. Oct. 13, 2015) (where alleged promises "directly modified the Agreement's terms" an "attempt to enforce the promises is an attempt to enforce the Agreement"); *Thorrez Indus., Inc. v. LuK Transmissions Sys., LLC*, No. 5:09-cv-01986, 2010 WL 1434326, at *5 (N.D. Ohio Apr. 8, 2010) (forum selection clause covering "any actions or proceedings to enforce this contract" encompassed account stated and unjust enrichment claims because both claims were "inseparable" from plaintiff's contract claim); *Third Ave. Tr. v. Suntrust Bank*, 163 F. Supp. 2d 215, 217-22 (S.D.N.Y. 2001) (conversion and unjust enrichment claims were governed by a forum selection clause that applied to "any action to enforce, interpret or construe any provision of this agreement").

And the four cases Bitemojo cites do nothing to support its argument. Three stand only for the unremarkable proposition that claims for *rescission* of a contract are not "actions to enforce" the contract (because their core assertion is that the contract is unenforceable). *See Muzek v. Eagle Mfg. of N. Am., Inc.*, No. 6:18-CV-199-REW, 2018 WL 5499675, at *2 (E.D. Ky. Oct. 29, 2018) (rescission); *Vankineni v. Santa Rosa*

Beach Dev. Corp. II, 57 So. 3d 760, 762-63 (Ala. 2010) (rescission); *Jacobson v. Mailboxes Etc. U.S.A., Inc*., 646 N.E.2d 741, 745-46 (Mass. 1995) (fraud in the inducement). And the lone on-point case that Bitemojo cites—*Melnik v. AAS-DMP Mgmt. L/P*—is a more than twenty-year-old unpublished decision whose analysis relied exclusively on a New York decision that was *vacated several months after Melnik was decided*. No. C97-1110C, 1998 WL 1748751, *2 (W.D. Wash. Sept. 1, 1998) (citing *Cuizon v. Kedma, Ltd.*, 1997 WL 37938, at *4 (S.D.N.Y. Jan. 30, 1997), *vacated* (Dec. 17, 1998)); *see also Webster v. Royal Caribbean Cruises, Ltd.*, 124 F. Supp. 2d 1317, 1324 (S.D. Fla. 2000) ("*Cuizon* is an unpublished opinion from the Southern District of New York that was vacated on December 17, 1998. Accordingly, the *Cuizon* opinion carries no precedential or persuasive weight in this court.").

The Court of Appeals' holding was undoubtedly correct, and consistent not only with Washington law but also with other jurisdictions. Bitemojo's failure to cite a single case to support its position confirms the Petition should be denied.

C. The Court of Appeals Decision Does Not Conflict with Supreme Court Authority

Bitemojo next contends that Supreme Court review is appropriate based on a manufactured conflict with this Court's

opinion in *Dix v. ICT Group, Inc.*, 160 Wn.2d 826, 834, 161 P.3d 1016 (2007). Petition at 27-31. But no such conflict exists.

In *Dix*, the Court declined to enforce a forum selection clause because the chosen forum, Virginia, did not allow class action lawsuits. 160 Wn.2d at 837. The Court's animating concern was that a plaintiff's "[i]ndividual claims may be so small that it otherwise would be impracticable to bring them," such that a preclusion of class suits could allow an "'unscrupulous seller' . . . [to] retain [the] benefits of its wrongful conduct." *Id*. at 839 (quoting *Am. Online, Inc. v. Super. Ct*., 90 Cal. App. 4th 1, 17, 108 Cal. Rptr. 2d 699, *as modified* (July 10, 2001)).

Accordingly, the Court held that "a forum selection clause that seriously impairs the plaintiff's ability to go forward on a claim of small value by eliminating class suits in circumstances where there is *no feasible alternative for seeking relief* violates public policy and is unenforceable." *Dix*, 160 Wn.2d at 837 (emphasis added). As the Court of Appeals correctly reasoned, "[w]here the factual basis for the CPA claim is the same as that in other claims, the plaintiff may still have a feasible alternative avenue to seek relief for the conduct." Order at 21.

Bitemojo concedes that it has a "feasible alternative for seeking relief" for the conduct at issue in Ireland and offers no explanation of exactly *how* the Court of Appeals' holding conflicts with *Dix*—having notably abandoned the two incorrect arguments it raised below. *See* Appendix at APP36–40 (Brief of Appellant).

Bitemojo's only assertion is that if it brings suit in Ireland, it may be unable to bring a CPA claim that is purely derivative of the claims it concedes it *can* bring. But *Dix* did not hold that courts should invalidate a contractual choice of forum so that a nonresident plaintiff with "feasible alternative[s] for seeking relief" can pursue duplicative and derivative claims under the CPA—a statute intended to benefit Washington consumers.[1]

Instead, the Court in *Dix* adopted its "public policy" exception after considering federal law. *Dix*, 160 Wn.2d at 834-35 (citing *Bremen v. Zapata Off–Shore Co.*, 407 U.S. 1, 10 (1972) *& Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 589-95 (1991)); *see also Acharya v. Microsoft Corp.*, 189 Wn. App. 243, 253, 354 P.3d 908 (2015) ("[I]n *Dix*, the Washington Supreme Court agreed with the federal test for

[1] A good sign that Bitemojo's argument is hopelessly flawed is that it has no limiting principle: under Bitemojo's understanding, no forum selection clause would ever be enforceable because a plaintiff could always fall back on a duplicative CPA claim.

whether a forum selection clause was enforceable and recognized that the test was generally in agreement with other Washington appellate decisions."). And the federal courts have expressly and repeatedly rejected Bitemojo's position, enforcing forum selection clauses unless "the law of the transferee court is so deficient that the plaintiffs would be deprived of *any* reasonable recourse." *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 723 (9th Cir. 1999) (emphasis added) (enforcing forum selection clause "despite the fact that the plaintiffs' federal statutory claims would not be available under [foreign] law"); *see also, e.g., Richards v. Lloyds of London*, 135 F.3d 1289, 1296 (9th Cir. 1998) (enforcing forum selection clause that deprived plaintiffs of claims under U.S. securities law because they "have recourse . . . for fraud, breach of fiduciary duty, or negligent misrepresentation").

The Court of Appeals' holding is consistent with this Court's opinion in *Dix* and with the federal case law that informed that decision. Because Bitemojo has not identified any conflict between the Court of Appeals' holding and a decision of this Court, the Petition should be denied. RAP 13.4(b).

D. Bitemojo Does Not Assert Any Other Grounds for Supreme Court Review

Bitemojo does not contend that the holding below either "is in conflict with a published decision of the Court of Appeals" or raises "a significant question of law under the Constitution of the State of Washington or of the United States." RAP 13.4(b)(2)–(3). Because Bitemojo cannot establish any basis to permit Supreme Court review, the Petition should be denied.

VI. CONCLUSION

For the foregoing reasons, the Court should DENY Bitemojo's Petition for Review.

I certify that this response contains 3,587 words, in compliance with RAP 18.17.

DATED: June 9, 2023

s/ David A. Perez, WSBA No. 43959
DPerez@perkinscoie.com
Paige L. Whidbee, WSBA No. 55072
PWhidbee@perkinscoie.com
Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Telephone: 206.359.8000
Facsimile: 206.359.9000

Attorneys for Microsoft Corporation

CERTIFICATE OF SERVICE

I certify that on June 9, 2023, I caused a true and correct copy of the foregoing to be served on the following via the means indicated:

Jennifer Rust Murray, WSBA #36983 Beth E. Terrell, WSBA #26759 Ryan Tack-Hooper, WSBA #56423 **TERRELL MARSHALL LAW GROUP PLLC** 936 North 34th Street, Suite 300 Seattle, WA 98103-8869 Tel: (206) 816-6603 Fax: (206) 319-5450 Email: jmurray@terrellmarshall.com bterrell@terrellmarshall.com ryan@terrellmarshall.com ***Attorneys for Appellant Culinary Ventures, Ltd. d/b/a Bitemojo***	☐ Via Electronic Mail ☐ Via Facsimile ☐ Via Legal Messenger ☐ Via Overnight Courier ☐ Via U.S. Mail ☑ Via the Court of Appeals Electronic Filing Notification System

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 9th day of June, 2023

s/ David A. Perez, WSBA No. 43959
David A. Perez, WSBA No. 43959

PERKINS COIE LLP

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- pwhidbee@perkinscoie.com
- ryan@terrellmarshall.com

Comments:

Answer to Petition for Review; Appendix

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Address:
1201 3RD AVE STE 4900
SEATTLE, WA, 98101-3099
Phone: 206-359-8000

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APPENDIX TO MICROSOFT CORPORATION'S ANSWER TO PETITION FOR REVIEW

David A. Perez, WSBA No. 43959
DPerez@perkinscoie.com
Paige L. Whidbee, WSBA No. 55072
PWhidbee@perkinscoie.com

PERKINS COIE LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Telephone: 206.359.8000
Facsimile: 206.359.9000

Attorneys for Microsoft Corporation

No. 834860-1

IN THE COURT OF APPEALS
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DIVISION 1

King County Superior Court No. 21-2-11021-1 SEA

CULINARY VENTURES, LTD d/b/a BITEMOJO,
Plaintiff/Appellant,

v.

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Defendant/Respondent.

BRIEF OF APPELLANT

Beth E. Terrell, WSBA #26759
Jennifer R. Murray, WSBA #36983
Ryan Tack-Hooper, WSBA #56423
TERRELL MARSHALL LAW GROUP PLLC
936 North 34th Street, Suite 300
Seattle, Washington 98103
Telephone: (206) 816-6603

Attorneys for Plaintiff/Appellant

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OTHER AUTHORITIES

I. INTRODUCTION

This appeal seeks to prevent Washington's largest corporation from evading responsibility under Washington's keystone consumer protection statute. In this lawsuit, the developer of a smartphone app called Bitemojo alleges that Defendant Microsoft Corporation violates the Consumer Protection Act (CPA) by permitting Microsoft's customer support agents to make promises that Microsoft refuses to honor.

In Bitemojo's case, Microsoft deleted all of Bitemojo's critical company data, purportedly for non-payment, even though Microsoft's customer service agents had excused Bitemojo's payment obligations during the COVID-19 pandemic and had assured Bitemojo that its data would be kept safe. The ordeal also revealed other unfair or deceptive practices, including that Microsoft lacks reasonable safeguards to prevent such accidental deletion of data and lacks back-up procedures sufficient to recover data lost in such circumstances.

Bitemojo challenges Microsoft's practices under the CPA, and also seeks relief under theories of promissory estoppel, breach of contract, and conversion.

The trial court dismissed the complaint for improper venue under CR 12(b)(3), finding that the dispute falls within a forum selection clause contained in the Microsoft Online Services Agreement. Even though Bitemojo does not seek to enforce that Agreement, the trial court held that Bitemojo's lawsuit was subject to that Agreement's forum selection clause, which states "[i]f you bring an action to enforce this agreement, you will bring it in Ireland." The trial court reasoned that Bitemojo's claims arise under that Agreement because they are related to Microsoft's services. The trial court rejected Bitemojo's argument that "arise under" and "action to enforce" are different standards, and that the phrase "action to enforce this agreement" does not include an action that does not seek to enforce any obligations in the agreement.

The trial court also rejected Bitemojo's argument that the forum selection clause was unenforceable under the controlling holding of *Dix v. ICT Grp., Inc*. 160 Wn. 2d 826, 830, 161 P.3d 1016 (2007). In *Dix*, the Washington Supreme Court held that a forum selection clause that leaves the plaintiff with no feasible avenue for seeking relief for violations of the CPA is unenforceable because it violates Washington's public policy. Since Bitemojo cannot bring its CPA claim in Ireland, the forum selection clause forecloses Bitemojo's CPA claim. Relying on an argument that *Dix* expressly rejected, the trial court found that the forum selection clause could nevertheless be enforced since Bitemojo could pursue other common law claims in Ireland.

Bitemojo appeals these two errors of law and asks this Court to reverse the trial court's dismissal order and remand for further proceedings.

II. ASSIGNMENTS OF ERROR

Assignments of Error

1. The trial court erred as a matter of law in entering the order of November 19, 2021, granting Defendant's motion to dismiss under CR 12(b)(3).

Issues Pertaining to Assignments of Error

1. Did the trial court err by interpreting a forum selection clause that applies to an "action to enforce the agreement" to include an action that does not allege or require that the agreement has been breached? (Assignment of Error 1.)

2. Did the trial court contravene the holding of *Dix v. ICT Grp., Inc.*, 160 Wn. 2d 826, 830, 161 P.3d 1016 (2007) by enforcing a forum selection clause that completely forecloses Bitemojo's CPA claims? (Assignment of Error 1.)

III. STATEMENT OF THE CASE

Bitemojo is a smartphone app that offers interactive, self-guided food tours. CP 82 ¶ 2; CP 1. Bitemojo is the trade name of an Israeli company called Culinary Ventures, Ltd. CP

82 ¶ 2; CP 2 ¶ 4. The app provides users with curated tour itineraries and, through partnerships with local small businesses, access to the best local dishes. CP 82 ¶ 2; CP 3 ¶ 14. When COVID-19 decimated the travel industry in March 2020, Bitemojo made the difficult decision to shut down until tourism improved. CP 84 ¶ 11; CP 5 ¶ 21.

Because Bitemojo's operations would be suspended during the global emergency, it did not require most of the services offered through its agreements with Microsoft, including sending data to Bitemojo users across the globe. CP 86 ¶ 20; CP 5 ¶ 21. Accordingly, Bitemojo contacted Microsoft Support, and through a series of email communications asked for and twice received forbearance from account payments. CP 84-86 ¶¶ 12-21; CP 5-6 ¶¶ 22-26. Bitemojo followed Microsoft's instructions for making sure its data would still be stored and not deleted during this period of forbearance. CP 84-87 ¶¶ 12-23; CP 5-6 ¶¶ 22-26.

Microsoft deleted Bitemojo's data anyway. CP 87 ¶ 24; CP 6-7 ¶¶ 27-28. Microsoft repeatedly apologized for the deletion when it happened and indicated that it was taking steps to make sure it did not happen to other customers. CP 87 ¶ 26; CP 7-8 ¶¶ 28-35. However, Microsoft now contends that the deletion was a fully justified account termination for nonpayment. CP 27-50. Microsoft contends that their customer service agents' promises do not bind them. CP 43-44. And Microsoft says this lawsuit should have been brought in Ireland pursuant to the forum selection clause contained within one of the agreements related to the use of Microsoft's services. CP 38-39.

A. Bitemojo relied on Microsoft to host its data and make it available to users across the globe.

In 2016, Bitemojo applied for and was accepted into Microsoft's BizSpark program, which gives start-ups access to Microsoft Azure cloud services, software, and support. CP 83 ¶ 6. Through the resources provided in the BizSpark program, Bitemojo relied on Microsoft not only to host and protect its

data, but also to provide the infrastructure to run Bitemojo on a global scale. CP 83-84 ¶¶ 7-9; CP 4-5 ¶¶ 19-20.

Since 2016, Bitemojo has stored all of the data critical to Bitemojo's operation on Microsoft's Azure servers in the United States, including user data from more than 50,000 customers worldwide; supplier and proprietary tour ratings; and the text and visual content for all tours across its twelve destination cities. CP 83-84 ¶¶ 7-10; CP 4-5 ¶¶ 19-20.

B. In 2016, Bitemojo and Microsoft Ireland entered into a contract related to Microsoft Azure with a forum selection clause that applies to "actions to enforce" that contract.

Among the multiple contracts applying to Microsoft Azure is the Microsoft Online Services Agreement. CP 16 ¶ 2. According to Microsoft, at some point in 2016, Bitemojo automatically entered into this Agreement as a condition of using Microsoft Azure. CP 16 ¶ 2. The Agreement is between Bitemojo and Microsoft Ireland Operations Limited. The obligations it imposes on Microsoft include things like who is responsible for defending intellectual property rights in the

Azure software and warranties as to the performance of the online services. CP 19-25.[1]

The Microsoft Online Services Agreement also addresses what can happen, and the steps Microsoft must and may take, if a customer does not "fully address" its failure to make payments. CP 22 § 3(c)(ii). But the Agreement has no provisions concerning voluntary suspensions of account services or forbearance from payments during periods of emergency or non-operation. CP 19-25. It says nothing about and does not otherwise govern the status of separate promises made by Microsoft customer support agents. CP 19-25.

The Agreement contains a forum selection clause that states: "This agreement is governed by the laws of Ireland. If we bring an action to enforce this agreement, we will bring it in

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[1] Microsoft asserts that Bitemojo's dispute in this case is properly with Microsoft Ireland Operations Limited rather than Microsoft Corporation. CP 39-40. Bitemojo disagrees. CP 68-69. The trial court did not reach this issue, having ruled that the forum selection clause required the action to be filed in Ireland. RP 43-46.

the jurisdiction where you have your headquarters. If you bring an action to enforce this agreement, you will bring it in Ireland. This choice of jurisdiction does not prevent either party from seeking injunctive relief in any appropriate jurisdiction with respect to violation of intellectual property rights." CP 24 § 7(h).

C. Microsoft deleted Bitemojo's data even though Microsoft customer support agents promised Bitemojo in 2020 that they would preserve it.

Microsoft authorizes customer support agents to handle certain aspects of customer accounts and directs inquiries sent to Microsoft Support to those agents for assistance. CP 84-85 ¶¶ 12-14; CP 187.[2] On March 15, 2020, Bitemojo's co-founder Michael Weiss submitted a ticket to Microsoft customer support on behalf of Bitemojo requesting that Microsoft "hold

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[2] Among the disputes between the parties that are not relevant to this appeal is the precise relationship between these customer support agents and Microsoft. They are employed by Tek Experts, which Bitemojo contends is an agent of Microsoft. CP 85 ¶ 13; CP 187.

monthly payments" while Bitemojo's business was shut down as a result of the COVID-19 pandemic. CP 84 ¶ 12; CP 5 ¶ 22. The agent who responded, Mr. Velinov, agreed to Bitemojo's request, waived an existing charge on the account, and explained that there would be no future charges during this period. CP 85 ¶ 13-15; CP 5 ¶ 23.

A few days later, an Azure Subscription Support Engineer contacted Bitemojo to explain that Bitemojo's subscription was suspended and that Bitemojo would need to reactivate before June 13, 2021 (90 days) to avoid data deletion. CP 85 ¶ 15; CP 5-6 ¶ 24. She informed Bitemojo that it could email her or Mr. Velinov to reactivate. CP 85 ¶ 15; CP 5-6 ¶ 24.

On June 5, 2020, Bitemojo emailed Mr. Velinov again, copying Microsoft's general support email, to request an "extension in keeping our server down and our data secured." CP 85-86 ¶ 18; CP 6 ¶ 26. After some confusion over what precisely Bitemojo was requesting, Mr. Velinov clarified that Microsoft would refrain from exercising its right to demand

payments and would instead "hold on to your overdue payments and keep the information inside your subscription." CP 86 ¶ 20; CP 6 ¶ 26.

In light of the earlier communication about data deletion, and to make sure the terms of Microsoft's commitment were clear, Bitemojo asked the agent to confirm: (1) that "all our data will be kept there as before"; and (2) that the "suspension periods would be with no outstanding balance that we would need to pay." CP 86 ¶ 21; CP 6 ¶ 26. The agent confirmed that understanding and assured Bitemojo that "[t]here is no issue keeping your data safe" and payments would resume "only when [Bitemojo] is fully recovered." CP 86 ¶ 21; CP 6 ¶ 26.

On September 5, 2020, Bitemojo contacted the Microsoft Agent, copying the general Microsoft Support email, to request another extension of the forbearance, as Bitemojo had done in June and using the procedure prescribed in its earlier communications with Microsoft Support. CP 87 ¶ 23; CP 6-7 ¶ 27.

This time, instead of receiving a response from Microsoft Support as it had twice previously, Bitemojo received an email explaining that the data it had spent years creating and compiling had been deleted, purportedly because Bitemojo had cancelled its subscription. CP 87 ¶ 24; CP 6-7 ¶¶ 27-28. Microsoft repeatedly apologized for deleting the data, and assured Bitemojo that steps were being taken to prevent this kind of incident in the future and that they would try to recover the data, but they were unable to recover it. CP 87 ¶ 26; CP 7-8 ¶¶ 28-35.

D. Bitemojo sued Microsoft based on the promises made by the customer support agents, for conversion, and for violation of the CPA.

On August 16, 2021, Bitemojo filed suit in King County Superior Court. Bitemojo alleged that the statements made by Microsoft's customer support agents in response to Bitemojo's requests for forbearance amounted to enforceable promises under a theory of promissory estoppel or as independent contracts because they were made to keep a "loyal client." CP

8-9; CP 86 ¶ 21. Bitemojo also alleged that by deleting its data without legal justification, Microsoft committed conversion. CP 10. Bitemojo did not allege anything about the Microsoft Online Services Agreement. CP 1-13.

Because Microsoft Azure is used by thousands of businesses, and many customers like Bitemojo are directed to work with Microsoft customer support to resolve account issues, Bitemojo also brought a claim for violation of the CPA. CP 10-12; CP 78. Bitemojo contends that Microsoft violated the CPA by deploying improperly safeguarded automatic deletion protocols; allowing Microsoft customer support agents to make promises to its customers about payment, activation, and suspension of accounts that Microsoft then refuses to honor; and failing to have procedures for retaining data in an archived format so it could be recovered if improperly deleted. CP 10-12.

E. The trial court dismissed Bitemojo's lawsuit based on the "action to enforce" forum selection clause, even though Bitemojo does not seek to enforce the Microsoft Online Services Agreement, and even though it extinguishes Bitemojo's CPA claim.

Microsoft moved to dismiss this case on multiple grounds, including for improper venue under Rule 12(b)(3) pursuant to the "action to enforce" forum selection clause contained within the Microsoft Online Services Agreement. CP 38-39. After briefing and oral argument, the trial court issued its opinion from the bench. RP 43-47. The trial court did not reach the 12(b)(6) issues raised by Microsoft's motion and instead addressed the 12(b)(3) motion alone. The trial court found that the forum selection clause applied because "without the underlying subscription contract, none of these claims are arising or viable in any way." RP 45:20-22. The trial court elaborated, "To me there's just this existential disconnect between saying that the plaintiff is not seeking to enforce the contract, and yet it has all of these claims that are obviously

derivative of that contract. They simply don't arise without that contract." RP 45:23-46:2.

On the question of waiver of the CPA claim, the Court agreed with Bitemojo that enforcement of the forum selection clause would eliminate Bitemojo's "ability to enforce Washington's Consumer Protection Act claim" because "Ireland doesn't have a Consumer Protection Act claim." RP 46:8-11. However, the trial court went on to state: "But I don't find that it so denies the plaintiff of relief or the ability to pursue other claims, such as those that it's alleged here, that it should override the explicit venue provision in the agreement, which really is the foundation on which all of these claims are brought." RP 46:12-16.

Based on that opinion, the trial court issued an order granting Microsoft's 12(b)(3) motion and declining to rule on Microsoft's 12(b)(6) motion. CP 213-14. Bitemojo timely filed this appeal of that ruling. CP 215.

IV. ARGUMENT AND AUTHORITY

A forum selection clause is a contract term and its application is a *de novo* question of law unless there are disputed facts relevant to its meaning under contract interpretation principles, such as extrinsic evidence of meaning. *Keystone Masonry, Inc. v. Garco Const., Inc.*, 135 Wn. App. 927, 932, 147 P.3d 610 (2006); *see also Viking Bank v. Firgrove Commons 3, LLC*, 183 Wn. App. 706, 711, 334 P.3d 116 (2014) ("[C]ontract interpretation is a question of law when the interpretation does not depend on the use of extrinsic evidence."). The forum selection clause at issue in this case applies to "actions to enforce" the Microsoft Online Services Agreement, CP 24 § 7(h). Plaintiffs do not seek to enforce that Agreement. Therefore, the clause does not apply.

Even if a forum selection clause applies to a particular dispute, it is unenforceable if one of three criteria are met: "(i) it was induced by fraud or overreaching, (ii) the contractually selected forum is so unfair and inconvenient as, for all practical

purposes, to deprive the plaintiff of a remedy or of its day in court, or (iii) enforcement would contravene a strong public policy of the State where the action is filed." *Acharya v. Microsoft Corp.*, 189 Wn. App. 243, 254, 354 P.3d 908 (2015) (quoting *Dix*, 160 Wn.2d at 834, 161 P.3d 1016). When a party appeals the determination under the third prong–whether a forum selection clause is against public policy–then appellate review of that determination is *de novo*. *Id.*; *Oltman v. Holland Am. Line USA, Inc.*, 163 Wn. 2d 236, 243 n.4, 178 P.3d 981 (2008). In this case, enforcement of the forum selection clause contravenes Washington's public policy of regulating businesses under the CPA. *See Dix*, 160 Wn.2d at 834, 161 P.3d 1016.

A. The trial court erred by concluding that this lawsuit is an "action to enforce" an agreement merely because it relates to the services discussed in that agreement.

Because the relevant term in Microsoft's forum selection clause is "an action to enforce," and because the plain meaning of that phrase is lawsuits that concern the breach or

enforcement of some obligation in that contract, the trial court erred by applying the forum selection clause even though Bitemojo is not attempting to enforce the Microsoft Online Services Agreement.

1. The scope of a forum selection clause is determined based on its plain meaning.

A forum selection clause is a contract term. *Keystone Masonry, Inc.*, 135 Wn. App. at 932. The "basic rule of contract construction" is that an unambiguous "contract's meaning is to be determined from the language alone." *Frank v. Day's Inc.*, 13 Wn. App. 401, 404, 535 P.2d 479 (1975). A court interpreting a contract clause reads the contract "as an average person would read it without giving it strained or forced meaning." *City of Union Gap v. Printing Press Properties, L.L.C.*, 2 Wn. App. 2d 201, 225, 409 P.3d 239 (2018); *see also Cedar City Amusements, LLC v. Bartholomew Cty. 4-H Fair, Inc.*, No. 1:10-CV-0392-TWP-TAB, 2010 WL 4923843, at *2 (S.D. Ind. Nov. 28, 2010) (noting that, questions of enforceability aside, the threshold issue in a forum selection

dispute was that the "plain and unambiguous language of the forum-selection clause establishes that it does not apply under the present circumstances."). The words of a contract "are to be taken in their common or ordinary meaning." *State v. Seattle Elec. Co.*, 71 Wash. 213, 215, 128 P. 220 (1912).

2. The plain meaning of "enforce" is "to give force or effect to or to compel obedience to."

The forum selection clause at issue in this case applies to "actions to enforce" the Microsoft Online Services Agreement. CP 24 § 7(h). An "action to enforce" means causes of action attempting to force a party to comply with its obligations under a contract or punish breach of those obligations. *See Vankineni v. Santa Rosa Beach Dev. Corp. II*, 57 So. 3d 760, 762-63 (Ala. 2010) (holding that since "[t]he word 'enforce' means 'to give force or effect to or to compel obedience to,'" it followed that an action to rescind a contract was not an action to enforce it) (quoting *Enforce,* Black's Law Dictionary (8th ed. 2004)).

An "action to enforce" does not include claims merely related to or arising under the contract if a party does not seek

to enforce the contract's terms. *See Melnik v. AAS-DMP Mgmt. L/P*, No. C97-1110C, 1998 WL 1748751, at *2 (W.D. Wash. Sept. 1, 1998) (holding that the language "action to enforce" does not include torts arising out of the contractual relationship); *Muzek v. Eagle Mfg. of N. Am., Inc.*, No. 6:18-CV-199-REW, 2018 WL 5499675, at *2 (E.D. Ky. Oct. 29, 2018) (rejecting application of "action to enforce" to recission claim); *Jacobson v. Mailboxes Etc. U.S.A., Inc.*, 646 N.E.2d 741, 745-46 (1995) (rejecting application of "action to enforce" to precontract misrepresentations and for fraud in the inducement).

3. Bitemojo does not seek to give force or effect to or to compel obedience to the Microsoft Online Services Agreement.

Based on the plain meaning of the term "enforce," an action to enforce the Microsoft Online Services Agreement would include causes of action such as breach of that Agreement or an action otherwise alleging, explicitly or

implicitly, that Microsoft did not meet some obligation under the Agreement.

Bitemojo's contract and promissory estoppel claims concern separate promises made after and apart from the Microsoft Online Services Agreement concerning issues not contemplated by that Agreement whatsoever—i.e., mutually agreed forbearance from payment during the COVID-19 pandemic.

In the trial court, Microsoft briefly argued that the terms of the Microsoft Online Services Agreement somehow displaced or overrode those subsequent promises. CP 44:3-12. Bitemojo disagrees with Microsoft's contentions about the law of promissory estoppel and separate consideration, and about the meaning of the Agreement. But regardless of which party is correct on those points as to Microsoft's merits defenses, there is no colorable basis for contending that Bitemojo is attempting to *enforce* the provisions of the Microsoft Online Services Agreement. On the contrary, Bitemojo contends that the

provisions cited by Microsoft are wholly irrelevant to the subsequent promises made by Microsoft's agents. *See Muzek*, 2018 WL 5499675, at *2 (finding that a lawsuit was not an action to enforce an agreement where "the facts pleaded in the Complaint are entirely unrelated to the [] agreements' terms or enforceability" and where the plaintiff did "not even attach copies of the agreement to their Complaint").

Bitemojo does not seek to compel Microsoft to follow any obligation imposed by the Microsoft Online Services Agreement. Indeed, Bitemojo does not contend that the Microsoft Online Services Agreement has even been breached. An action that does not claim an agreement has been or will be breached, and that makes no reference to any obligation under that agreement, cannot be characterized as an effort to enforce that agreement. It therefore follows from the plain meaning of "enforce" that this is not an action to enforce the Microsoft Online Services Agreement. *See Melnik*, 1998 WL 1748751, at

*2; *Muzek*, 2018 WL 5499675, at *2; *Vankineni*, 57 So. 3d at 762-63; *Jacobson*, 646 N.E.2d at 745-46.

4. The trial erred by finding that it was sufficient that Bitemojo's claims "don't arise without" the Microsoft Services Online Agreement.

The trial court did not identify any obligation in the Microsoft Online Services Agreement that Bitemojo was attempting to enforce, directly or indirectly. It should therefore have concluded that Bitemojo's claims are not covered by the forum selection clause.

Instead, the trial court erred by applying the forum selection clause on the basis that "without the underlying subscription contract, none of these claims are arising or viable in any way" and because Bitemojo's claims "don't arise without that contract." RP at 45-46.[3] That is, the Court reasoned

[3] This premise is incorrect to the extent it is suggesting that Bitemojo and Microsoft do not have a relationship outside of the Microsoft Online Services Agreement. As noted above, Bitemojo's relationship with Microsoft began with the BizSpark program. CP 83-84 ¶¶ 7-9. Regardless, applying an

that since Bitemojo's claims would not exist if it had not signed up for Microsoft Azure it followed that they arise from the Microsoft Online Services Agreement.

As explained above, the forum selection clause in this case is not an "arise under" clause. Microsoft sometimes drafts broader forum selection clauses that do use the "arising under" language. *See, e.g.*, *Acharya*, 188 Wn. App. at 247, 354 P.3d 908 (addressing a forum selection clause applying to "any dispute, controversy or claim arising under, out of or in relation to this Employment Agreement, its valid conclusion, binding effects, interpretation, including tort claims."); *Video Streaming Sols. LLC v. Microsoft Corp.*, No. 13 C 7031, 2014 WL 2198480, at *2 (N.D. Ill. May 27, 2014) (analyzing forum selection clause applying to claims "arising under" the contract).

"arise under" standard was legal error because that is not the language of the relevant forum selection clause.

But Microsoft did not use an "arise under" provision in this contract. It chose the narrower "actions to enforce" language. The trial court's broad interpretation of the forum selection clause was therefore not tethered to the actual language of the "action to enforce" clause selected by Microsoft in this case. Because the trial court misinterpreted the forum selection clause, this Court should reverse the 12(b)(3) dismissal.

B. The trial court erred by failing to follow the controlling holding in *Dix*, incorrectly distinguishing *Dix* based on an argument *Dix* rejected.

The trial court acknowledged that the basic predicate for applying *Dix* to find a forum selection clause unenforceable was met in this case: Bitemojo's CPA claim will disappear if the clause is enforced. But the trial court nevertheless declined to apply *Dix* because Bitemojo has other claims it can pursue in Ireland. RP 46:12-16. A careful reading of *Dix* shows why this reasoning is mistaken. The dispute in *Dix* was precisely about whether there is an independent public policy basis for refusing

to enforce a forum selection clause because it forecloses CPA claims, regardless of the availability of other relief for the individual plaintiffs. *Dix*, 160 Wn.2d at 835-36, 161 P.3d 1016.

1. Under *Dix*, a forum selection clause that "leaves the plaintiff with no feasible avenue for seeking relief for violations of the CPA" is unenforceable.

The Washington Supreme Court's decision in *Dix* involved allegations by two customers that American Online, Inc. (AOL) used misleading pop-up ads to create and charge them for additional membership accounts they did not want. *Dix*, 160 Wn.2d at 830, 161 P.3d 1016. On behalf of a proposed class of AOL customers, the plaintiffs brought claims in Washington under the CPA, as well as for conversion and unjust enrichment. *Id.* at 830. The trial court dismissed the suit, finding that AOL's terms of service contained a forum selection clause specifying Virginia as the forum for any suits relating to the membership services. *Id.* at 828.

The AOL customers appealed, arguing that the forum selection clause violated Washington's public policy as

expressed in the CPA because Virginia would not permit their class action suit. *Dix v. ICT Grp., Inc.*, 125 Wn. App. 929, 935, 106 P.3d 841 (2005). The Court of Appeals agreed and reversed the trial court. *Id.* It held that "the CPA does not exist merely for the purpose of benefiting an individual plaintiff," and therefore a forum selection violates Washington's public policy if, as a practical matter, it prevents individuals from bringing a CPA suit "to protect the public and foster fair and honest competition" among businesses. *Id.*

The Washington Supreme Court affirmed the Court of Appeals, adopting a test that finds a forum selection clause unenforceable if: "(i) it was induced by fraud or overreaching, (ii) the contractually selected forum is so unfair and inconvenient as, for all practical purposes, to deprive the plaintiff of a remedy or of its day in court, or (iii) enforcement would contravene a strong public policy of the State where the action is filed." *Dix*, 160 Wn.2d at 830, 161 P.3d 1016. The court held that the clause in that case was unenforceable under

the third prong of the test because "a forum selection clause that seriously impairs a plaintiff's ability to bring suit to enforce the CPA violates the public policy of this state." *Id.* at 837.

In holding that forum selection clauses that impair the ability to bring CPA claims are unenforceable, the court in *Dix* expressly rejected the argument that the appropriate question on enforceability was limited to the second prong of the test it announced (i.e., whether "enforcement would be so seriously inconvenient as to deprive the party of a meaningful day in court."). *Id.* at 835-37. The Washington Supreme Court explained that a clause may be unenforceable on the independent grounds that it contravenes a strong public policy of the state. *Id.*

Because the public policy embodied by the CPA is to encourage individual CPA suits to regulate the business practices of Washington companies, the Court explained that even indirect restrictions on CPA claims, such as barring class actions which leads to small claims being impractical, violates

Washington's public policy. *Id.* at 838-840. Such restrictions violate public policy not because they deny relief to individual plaintiffs, but because they undermine the overall enforcement of CPA's statutory scheme. *Id.*

Accordingly, under the controlling precedent in *Dix*, a forum selection clause is unenforceable if it "leaves the plaintiff with no feasible avenue for seeking relief for violations of the CPA." *Id.* at 841

2. The trial court found that the forum selection clause in this case leaves Bitemojo with no CPA claim.

The trial court agreed with Bitemojo that its CPA claim would be extinguished by enforcement of the forum selection clause. RP at 46. That finding was based on the fact that Irish law would apply in the Irish court and Ireland has no equivalent CPA cause of action. RP 46; CP 66-67. Microsoft did not contest the assertion that Bitemojo would lose its ability to assert a CPA claim, and instead argued that the absence of a CPA claim was "irrelevant." CP 204. The undisputed fact that

Bitemojo cannot pursue a CPA claim in Ireland should have ended the question of enforceability under *Dix*, since it meant that Bitemojo would be left with "no feasible avenue for seeking relief for violations of the CPA." *Id.* at 841.

3. The trial court erred by attempting to distinguish *Dix* on the basis that Bitemojo has other common law claims.

The trial court found the forum selection clause enforceable despite the loss of the CPA claim because transfer to Ireland would not deny "the plaintiff of relief or the ability to pursue other claims." RP 46. That reasoning directly contravenes *Dix*, adopting the precise argument made by AOL that *Dix* rejected. *Dix*, 160 Wn.2d at 835-36, 161 P.3d 1016 (rejecting AOL's argument that a forum selection clause is enforceable unless enforcement would deprive the party of a meaningful day in court).

The Court of Appeals and the Supreme Court in *Dix* both expressly held that there is a public policy basis for refusing to enforce forum selection clauses independent from questions

about the availability of relief for individual plaintiffs—indeed, the test adopted by *Dix* makes them separate prongs entirely. *Id.* (rejecting argument that enforceability turns on availability of individual relief); *Dix*, 125 Wn. App. 929, 936 (2005) (same); *see also Oltman*, 163 Wn.2d at 253, 178 P.3d 981 (explaining the separate bases of prong two and prong three of the *Dix* test).

In fact, the AOL customers in *Dix* had themselves pleaded other common law claims that they could have pursued in Virginia. *Id.* at 830. Those other causes of action were irrelevant in *Dix*, as they are here, because they did not affect the public policy question about whether the CPA would be enforced. *Dix*, 160 Wn.2d at 835-41, 161 P.3d 1016.

The public policy purpose of the CPA is that "private citizens act as private attorneys general in protecting the public's interest against unfair and deceptive acts and practices in trade and commerce." *Scott v. Cingular Wireless*, 160 Wn.2d 843, 853, 161 P.3d 1000 (2007) *overruled on other grounds by AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341 (2011).

"Consumers bringing actions under the CPA do not merely vindicate their own rights; they represent the public interest and may seek injunctive relief even when the injunction would not directly affect their own private interests." *Id.* (internal citation and quotation omitted). The goal is to protect the broader public from the unfair and deceptive practices as well as to foster fair and honest competition among businesses. *Riley v. Iron Gate Self Storage*, 198 Wn. App. 692, 709, 395 P.3d 1059 (2017).

Just as in *Dix*, Washington's public policy interest in preventing and punishing unfair acts and practices of businesses is served by refusing to enforce the forum selection clause in this case. *See Thornell v. Seattle Serv. Bureau, Inc.*, 184 Wn.2d 793, 803, 363 P.3d 587 (2015) (explaining that the public policy of the CPA is served even when non-Washington plaintiffs bring the suit because the focus is regulation of the defendant). Bitemojo seeks to hold Microsoft liable for its practices concerning customer service agents and data deletion and backups, including seeking injunctive relief with respect to

those practices. CP 10-12. Accordingly, this lawsuit addresses not just the narrow questions of whether Bitemojo's data was wrongfully deleted or whether the specific promises made by Microsoft's customer support agents to Bitemojo were binding, but also questions of broader concern to the public about Microsoft's practices with respect to customer service agents and the retention and automatic deletion of data. Indeed, Microsoft acknowledged the injury its policies could have on other consumers when it admitted it was reviewing its practices to make sure what happened to Bitemojo did not happen to anyone else. CP 8 ¶ 25.

If Bitemojo is required to pursue its claims in Ireland, the larger questions about Microsoft's unfair and deceptive practices will go unaddressed and no injunctive relief will be available. In order to preserve Washington's public policy of holding corporations accountable under the CPA, the trial court's decision must be reversed. *See Dix*, 160 Wash. 2d at 835-36, 161 P.3d 1016.

V. CONCLUSION

For all of the foregoing reasons, Bitemojo respectfully requests that this Court reverse the trial court's dismissal of this case under CR 12(b)(3) and remand for further proceedings.

This document contains 5,342 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED AND DATED this 8th day of April, 2022.

TERRELL MARSHALL LAW
GROUP PLLC

By:/s/ Jennifer R. Murray, WSBA #36983
Beth E. Terrell, WSBA #26759
Email: bterrell@terrellmarshall.com
Jennifer Rust Murray, WSBA #36983
Email: jmurray@terrellmarshall.com
Ryan Tack-Hooper, WSBA #56423
Email: ryan@terrellmarshall.com
936 North 34th Street, Suite 300
Seattle, Washington 98103-8869
Telephone: (206) 816-6603
Facsimile: (206) 319-5450

Attorneys for Plaintiff/Appellant

CERTIFICATE OF SERVICE

I certify that on April 8, 2022, I caused a true and correct copy of the foregoing to be served on the following via the means indicated:

David A. Perez, WSBA #43959
Email: dperez@perkinscoie.com
Ian Rogers, WSBA #46584
Email: irogers@perkinscoie.com
Paige L. Whidbee, WSBA #55072
Email: pwhidbee@perkinscoie.com
PERKINS COIE LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Telephone: (206) 359-8000
Facsimile: (206) 359-9000

Attorneys for Defendant/Appellee

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 8th day of April, 2022.

By: /s/ Jennifer Rust Murray, WSBA #36983
Jennifer Rust Murray, WSBA #36983

TERRELL MARSHALL LAW GROUP PLLC

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