

67404-8

67404-8

No. 67404-8-I

COURT OF APPEALS  
DIVISION I  
STATE OF WASHINGTON

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RICHARD EROG ET AL, Appellants,

v.

L.D.M. WORLDWIDE CORP. Respondent

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REPLY BRIEF OF APPELLANT

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NOAH DAVIS, WSBA #30939  
Attorney for Richard Erog and  
Broadcast Media, Appellants  
IN PACTA PLLC  
801 2<sup>nd</sup> Ave Ste 307  
Seattle WA 98104  
206-709-8281  
Fx. 206.860.0178  
[www.inpacta.com](http://www.inpacta.com)  
[nd@inpacta.com](mailto:nd@inpacta.com)

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## I. RE-INTRODUCTION

There are no surprises in Respondent/Plaintiff L.D.M. WORLDWIDE INCORPORATED's Responsive Brief. The facts are as they were cited in Appellants RICHARD EROG and BROADCAST FACILITY opening Brief. Erog and Broadcast Facility are Nevada residents who were named as Defendants in a breach of contract action brought by LDM. After receiving notice of a Default Judgment in Washington, and because they had not been served with the summons and complaint, Appellants moved to vacate the Court's Order of Default and Default Judgment. (CP 42-84, Motion to Vacate) Unfortunately, that motion was denied. (CP 156-158, Order Denying Motion to Vacate)

Appellants Erog and Broadcast Facility now request that the Court reverse and remand due to:

- 1) Respondent/Plaintiff LDM Worldwide's ("LDM") failure to serve the summons and complaint (and correctly support their Motion for Default with an admissible declaration); and
- 2) the lack of insufficient contacts to satisfy the constitutional minima for requiring the Nevada Defendants (Appellants) to be hailed into court in the State of Washington.<sup>1</sup>

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<sup>1</sup> A third ground is that the Default Judgment exceeded the prayer in the Amended Complaint, and should have been vacated as erroneous rather than simply being corrected

## II. SUBSTANTIVE REPLY TO LDM'S ARGUMENTS<sup>2</sup>

There is little question that default judgments are disfavored under Washington jurisprudence. See *Morin v. Burris*, 160 Wn.2d 745, 754, 161 P.3d 956 (2007)<sup>3</sup> And, when default judgment has been wrongfully entered against a defendant, the defendant can avail himself of Civil Rule 60 as a means of vacating such orders of default (and default judgments). "If the court had not acquired jurisdiction over the person of the defendant, she would ordinarily be entitled to immediate dismissal." *Bethel v. Sturmer*, 3 Wn.App. 862, 865-66, 479 P.2d 131 (1970); see also *Mendoza v. Neudorfer Eng'rs, Inc.*, 145 Wn.App. 146, 149, 185 P.3d 1204 (2008)<sup>4</sup>

In particular, here, Civil Rule 60(b)(5) provides a succinct ground for vacating the order of default (and judgment).

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without even a Motion being brought. LDM of course does not deny that there was an error in the judgment amount but seem to assert that it was harmless.

<sup>2</sup> In the factual section of its Response, the Respondent/Plaintiff LDM begins by alleging that Eroq and Broadcast Facility breached the contract between the Parties. However, that allegation (and who breached what) is not central to this appeal. Nevertheless, the Appellants relish the opportunity to defend that accusation.

<sup>3</sup> "Because Washington law disfavors default judgments, we are more likely to find an abuse of discretion and to reverse a trial court decision refusing to vacate a default judgment than one that sets aside such a judgment." *White v. Holm*, 73 Wn.2d 348, 351-52, 438 P.2d 581 (1968); *Showalter v. Wild Oats*, 124 Wn.App. 506, 511, 101 P.3d 867 (2004)

<sup>4</sup> Proper service of a summons and complaint is a prerequisite to the court obtaining jurisdiction over a party. "*Woodruff v. Spence*, 76 Wash.App. 207, 209, 883 P.2d 936 (1994) Whether service of process was proper is a question of law that this court reviews de novo. *Pascua v. Heil*, 126 Wash.App. 520, 527, 108 P.3d 1253 (2005) LDM cites to *Allen v. Starr*, 104 Wash. 246, 247, 176 P. 2 (1918); however, there, the Court held that considerations of the regularity and stability are found "after a judgment has been rendered upon proof made by the sheriff's return." *Allen*, 104 Wash. at 247, 176 P. 2 (emphasis added).

CR 60(b)(5) authorizes vacations of void judgments. Motions to vacate void judgments may be brought at any time and a party does not waive this challenge merely because time has elapsed. *In re Marriage of Leslie*, 112 Wash.2d 612, 618-19, 772 P.2d 1013 (1989)<sup>5</sup> The validity of a default judgment requires that a proper summons was served upon the defaulting party. . . The default judgment is void if [the Defendant] did not receive a proper summons. . .

*Lindgren v. Lindgren*, 58 Wn.App. 588, 596-598, 794 P.2d 526

(Wash.App. Div. 1 1990)

It is a fundamental element of due process<sup>6</sup> that a Defendant be given notice of a pending or impending lawsuit. *See City of Redmond v. Arroyo-Murillo*, 149 Wn.2d 607, 617, 70 P.3d 947 (2003). Without service being effectuated, the Defendant is not properly before the Court. *John Hancock Mut. Life Ins. Co. v. Gooley*, 196 Wash. 357, 83 P.2d 221 (1938). When a court lacks in personam jurisdiction over a party (due to the failure to serve or because of insufficient contacts), any judgment entered against that party is void. *See Scott v. Goldman*, 82 Wn.App. 1, 6, 917 P.2d 131 (1996)

Civil Rule 60(b)(1) also provides a basis for vacating the default order in this case due to irregularity, surprise and excusable neglect.

An irregularity for purposes of CR 60(b)(1) has been defined as the want of adherence to some prescribed rule or mode of proceeding; and it consists either in the omitting to do

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<sup>5</sup> The challenge need not be brought within one year. *In Re Leslie*, 112 Wn.2d at 618-19

<sup>6</sup> See *Fourteenth Amendment to the United States Constitution; Article I, Section 3 of the Washington Constitution*.

something that is necessary for the due and orderly conducting of a suit, or in doing it in an unreasonable time or improper manner.

*Haller v. Wallis*, 89 Wn.2d 539, 543, 573 P.2d 1302 (1978). *See also* *Summers v. Dep't of Revenue*, 104 Wn.App. 87, 93, 15 P.3d 902 (2001) (Irregularities within the meaning of CR 60(b)(1) concern departures from prescribed rules or regulations and involve procedural defects unrelated to the merits). Here, the failure of the Affidavit of Service to include the required oath under Washington law is an irregularity that merits vacating under CR 60(b)(1).<sup>7</sup>

There are in general three jurisdictional elements in every valid judgment, namely, jurisdiction of the subject matter, jurisdiction of the person, and the power or authority to render the particular judgment.” *John Hancock Mut. Life Ins. Co. v. Gooley*, 196 Wash. 357, 363, 83 P.2d 221, 226-227 (1938) If any of these elements are absent, and made apparent to the trial court, the judgment may be vacated at any time. *Id.* In fact, a trial court has no discretion when faced with a void judgment, and must vacate the judgment "whenever the lack of jurisdiction comes to

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<sup>7</sup> See e.g. *Davis v. W. One Automotive Grp.*, 140 Wn.App. 449, 455 n.1, 166 P.3d 807 (2007) (Refusing to consider improper evidence on appeal:

While an unsworn declaration may substitute for an affidavit, it must meet the explicit requirements of RCW 9A.72.085. GR 13(a). Neither the declarations nor the unsworn declarations of West One employees attached to the declarations meet these requirements).

LDM's admitted mistake concerning the judgment amount is another ground for voiding the judgment.

light." *Mitchell v. Kitsap County*, 59 Wn.App. 177, 180-81, 797 P.2d 516 (1990)

**A. The Failure to Serve and/or Issue of Fact regarding Service and the Defective Affidavit of Service**

In its Response, LDM asserts that the Appellants are lying. (See Resp. Br. Pg. 7) In making this accusation, LDM precisely defines the issue: and that is one of credibility that can only be resolved by an evidentiary hearing – and not on competing declarations with the attorneys standing behind the propensity of their witnesses' statements.

Where a defendant challenges jurisdiction based on insufficient service of process, the plaintiff has the burden of proof to establish a prima facie case of proper service. *Gross v. Sunding*, 139 Wn.App. 54, 60, 161 P.3d 380 (2007). "Since proper service of process is required for jurisdiction, sufficiency of service of process is a question of law. As a result, the determination of valid service is reserved to the judge." *Id.* at 67. Moreover, a court may abuse its discretion by failing to hold an evidentiary hearing when affidavits present an issue of fact requiring a determination of witness credibility. *Woodruff v. Spence*, 76 Wn.App. 207, 210, 883 P.2d 936 (1994)

Here, the trial court was presented with Harvey's and Obermeits' motions, filed within a day of each other, both of which raised the issue of service of process under RCW 46.64.040. Obermeit sought to have the case dismissed pursuant to CR 12(b)(2) and CR 12(b)(5), based on lack of service of process and lack of jurisdiction, while Harvey sought to strike the affirmative defense regarding service of process. These motions raised the issue of whether there was jurisdiction based on substituted service under RCW

46.64.040, and the court found there were factual disputes surrounding service of process, for which a hearing was appropriate.

*Harvey v. Obermeit*, 163 Wn.App. 311) at 327-328, 261 P.3d 671, (Wash.App. Div. 1 2011) (citing with approval, the Trial Court's use of an evidentiary hearing to resolve disputed issues of material fact regarding service) In *Harvey*, because the Court conducted a fact-finding hearing regarding the issue of service instead of relying solely on the declarations of the process server, the Court found that the process server was not credible and found the service attempts to be insufficient.

At the May 7 hearing, the trial court did not rule on the motions but instead set the matter for a fact-finding hearing on June 18, citing the need for a factual determination as to Harvey's efforts to find Obermeit. Harvey objected to a fact-finding hearing. At the June 18 hearing, the attorneys questioned Conley, the process server. He testified that he made three service attempts in the early morning hours on August 9, 16, and 17 and one attempt at 10:00 p.m. on August 18. Conley acknowledged that his declaration of attempted service indicated two attempts but his later declaration indicated four. He explained that he included the extra two attempts at service not detailed in the declaration of attempted service because he wanted to give his client extra attempts at service when he was in the Maple Valley area. He testified that he sometimes made up to ten attempts at service, depending on what the client wanted. He explained that he placed paper clips on the tires of two cars and later saw that the paper clips had not moved. Conley saw only two cars at the address and did not

know how many cars were registered to that address. Conley also testified that the neighbors did *not* tell him that the Obermeits took off for weeks at a time, but rather that they took trips on the weekends.

The trial court made an oral ruling. It found that Conley was not credible and concluded that, even assuming four service attempts were made, they were not adequate to show due diligence to personally serve Obermeit. It entered written findings of fact and conclusions of law and dismissed the lawsuit on July 7, 2010. It concluded that service on the secretary of state was improper because Obermeit was found within the state but not personally served; Harvey did not make a due and diligent search; Harvey lacked personal jurisdiction over Obermeit; and the statute of limitations had expired. The trial court entered an order denying Harvey's motion for partial summary judgment on July 15, 2010. Harvey filed a motion for reconsideration, which was denied. He appeals.

*Harvey* 163 Wn.App. at 316-317.

The original Affidavit of Service alleged service at the Eroq residence on September 15, 2010 at 9:32pm. (CP 19-23, Affidavits of Service) However, Eroq testified through his declaration that he was never served a copy of the summons and complaint in Nevada, where he resides. (CP 54-55, Decl. of R. Eroq, at CP 54, ¶8) The original Affidavit of Service failed to state any reference as to who supposedly answered the door at Mr. Eroq's home and who allegedly received service that evening while Mr. Eroq was away (CP 19-23, Affidavits of Service)

Mr. Erog was not home on September 15, 2010 at 9:23pm, but was instead away with out-of-state friends visiting the Las Vegas Strip. (CP 54-55, Decl. of Richard Ergo, at CP 54, ¶3; CP 57-59, Decl. of Olena Gordiyenko; CP 61-63, Decl. of Efecan Gurel). The only people home on the evening of September 15, 2010 were a babysitter and Mr. Erog's minor children. (CP 54-55, Decl. of Richard Erog, at CP 54, ¶6; CP 57-59, Decl. of Olena Gordiyenko)

In addition to being vague and non-descript, the first Affidavits of Service were legally insufficient and should have been stricken as inadmissible hearsay – as the testimony failed to include the “Declare under the Penalty of Perjury” oath that is required under the laws of the State of Washington. See RCW Chap. 5.28.60, RCW 9A.72.085

Seeing as how it had failed to provide a legally sufficient and admissible Affidavit of Service, in response to the Motion to Vacate, the Respondent produced a new declaration of service (this time with the required oath) that introduced new alleged facts as to who was served on the night in question. (CP 141-143, Declaration of Marc J. Amell) Almost the entirety of LDM's arguments contained in their Response are based on the second declaration of service (and not the first). (See e.g. Resp. Br. Pg. 14)

However, there are two problems with LDM's second Affidavit of Service in terms of the original Order of Default and sufficiency of service. First, the second declaration does not remedy (or save) an Order of Default that was incorrectly and erroneously entered on an inadmissible statement from the process server.<sup>8</sup> See *Leen v. Demopolis*, 62 Wn.App. 473, 478, 815 P.2d 269 (1991) (in order to gain presumptive validity, the declaration of service must not be irregular on its face) And second, the new affidavit only introduces a question of material of fact into the equation by its, after the fact, attempt to assert detail that was not included in the first declaration (and which attempts to paint a new picture of service and save LDM from the original failure to serve and the declaration's shortcomings). (Compare CP 54-55, Decl. of Richard Erog; CP 57-59, Decl. of Olena Gordiyenko; CP 61-63, Decl. of Efecan Gurel; with CP 141-143, Decl. of Marc J. Amell)<sup>9</sup>

"A proceeding to vacate or set aside a default judgment is equitable in its character, and the relief sought or afforded is to be administered in

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<sup>8</sup> And, likewise, the Judgment by Default is void since it was entered on a Void Order of Default.

<sup>9</sup> LDM tries to argue, again in its factual section, that Erog's failure to provide a second declaration, in response to the new declaration of the process service, which would have included the same facts that he provided in his first declaration somehow make the process server's declaration have more merit. This argument has not basis. With only one day to answer a seemingly contrived second declaration, what can a moving party do other than deny, move to strike and rely on their first declaration. LDM also argues, in its factual section, that somehow its after-the-fact evidence is better than Appellants. That is simply not the case. LDM's new declaration with new information to attempt to support service appears so overtly contrived that it calls for an evidentiary hearing.

accordance with equitable principles and terms." *Morin v. Burris*, 160 Wn.2d at 754 Thus, "where there is a showing, not manifestly insufficient, the court should be liberal in the exercise of its discretion in furtherance of justice." *Id.* Thus, while the Appellant/Defendant should be afforded some benefit of doubt in favor of vacating a default judgment under Washington law<sup>10</sup>, particularly when three affidavits testify to the same thing, at the very least, issues of material fact require in an equitable proceeding required the court to hold an evidentiary hearing.<sup>11</sup>

Here, the Declarations of Mr. Ergo, Ms. Gordiyenko, and Mr. Gurel all confirm that Mr. Ergo was not served – which is clear and convincing evidence and contrary to the Affidavits of Service provided in support of the Motion for Default. (CP 19-23, Affidavits of Service #1)<sup>12</sup>

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<sup>10</sup> (because of Washington's disfavor of default judgments and because Plaintiff must prove a prima facie case of service)

<sup>11</sup> As for failure to serve Appellant Broadcast Media, the same facts apply since Mr. Ergo is alleged to be the owner (See CP 42-84, Motion to Vacate) and therefore must be personally served for this entity to become a party to the suit.

<sup>12</sup> The first Affidavits of Service (provided with the Motion for Default) also failed to show exactly "who" was allegedly served on the date and time set forth, or how those persons were served (as there lacks any description of the alleged receiver of service or description of how service was made). See CP19-23, Affidavits of Service #1. The second Affidavit of Service attempts to make up for the insufficiency by stating that it was Mr. Ergo who was served. (CP 141-143, Affidavit of Service #2 provided in Response to the Motion to Vacate) In its Response, LDM attempts to argue that its server is "credible" while Mr. Ergo's witnesses are somehow not. (See Resp. Br. Pg.15) LDM forgets that it paid its process server to serve Mr. Ergo and that it is terrible if not fatal for its business to have failed to have served Mr. Ergo when it said that it had. On the other hand, Mr. Ergo submitted declarations from two uninterested and "credible" witnesses.

The Appellant/Defendants were simply not present to be served and therefore were not served. The Affidavits of Service upon which the Order of Default and Default Judgment were based were inadmissible. As a result, the trial court lacked jurisdiction to enter the Order of Default and Default Judgment. The trial court's decision must be reversed.

**B. Insufficient, Minimum Contacts With Washington**

In addition to the failure of service, and regardless of the decision the Court Appeals reaches on the service issue, Washington does not have a sufficient nexus to extend its long arm statute for purposes of personal jurisdiction to reach the Appellants. This is because Mr. Erog and Broadcast Facility are residents of Las Vegas, Nevada, the events underlying the contracts took place outside of Washington –in Southern California and South Africa – and there exist only communications between the Plaintiff and Mr. Erog in the form of email and phone conversations without any evidence of purposeful availment or intent to be amenable to suit in Washington. (CP 54-55, Decl. of Richard Erog; CP 105-108 Decl. of Larry Meyer)<sup>13</sup> LDM admits this. (See Resp. Br. Pg 5 (The anticipated performance of the two contracts was to be in California and South Africa (and not Washington) and “[n]early all of the negotiation that occurred between the parties took place by email”).

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<sup>13</sup> The bank “wire” that LDM refers to was made out of a Nevada bank with credit to a Washington bank and was most definitely not made in Washington.

In its Response, L.D.M. asserts that there were “extensive” negotiations before two separate agreements were entered into. (Resp. Br. Pg. 5, ln1) However, there is scant evidence of any such extensive negotiations. The relatively few communications that are evidenced in the record did not physically occur in Washington, but instead, electronically. (See CP 105-40) LDM asserts that these communications led LDM to perform some of the logistical arrangements in Washington. (See Resp. Br. pg. 5, ¶2) However, these “logistical” arrangements do not appear in any of the scant communications in the record and thus could not be possibly asserted to be material or central to or even included in the terms of the purported contract. The only other contact that the Appellants had with LDM was wiring funds from Las Vegas to a bank in Washington at LDM’s direction. And despite LDM’s assertion that these facts aren’t disputed, to the extent they have been colored to fit LDM’s argument, they absolutely are.<sup>14</sup> While Appellants don’t dispute the existence of email communications and telephone calls between the Parties, there was never any intent for Appellants have availed themselves of anything in Washington or anything to do with Washington. There was no business conducted in Washington and the Defendants never advertised here or

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<sup>14</sup> And, as they did in the trial court, the Appellants dispute and object to LDM’s attempt to introduce new evidence or unsubstantiated argument relating to the sourcing of materials to be used on California or South Africa.

came to Washington to do business with LDM. And there was no agreement to continue to have an “open” or “continuing” relationship.

**1. The Appellant/Defendants Simply have an Insufficient Nexus to, and Lack Minimum Contacts with, Washington**

In addition to the failure of service, Washington does not have a sufficient nexus to extend personal jurisdiction under its long arm statute to Defendants. This is because Mr. Eroq and Broadcast Facility are residents of Las Vegas, the events at issue took place outside of Washington –in Southern California and South Africa – and there were only communications between the parties in the form of email and phone conversations without any intent to have the Defendants amenable to suit in Washington. And thus, there lack sufficient minimum contacts such that traditional notions of justice and fair play would be offended by extending person jurisdiction to Defendants.

Just like Appellants could not bring LDM into Nevada to be sued on the existence or performance of the alleged contract, LDM could not bring Eroq and Broadcast Facility to Washington. To the extent all of the material terms of a contract exist, it was for performance in California and South Africa. There is very little connection to Washington.

*i. Personal Jurisdiction Fails Under Washington's Long Arm Statute and the Three Prong Test*

Washington State courts have applied a three-prong test to determine whether personal jurisdiction can be extended to nonresident defendants under Washington State's long arm statute, RCW 4.28.185:<sup>15</sup>

(1) The nonresident defendant or foreign corporation must purposefully do some act or consummate some transaction in the forum state; (2) the cause of action must arise from, or be connected with, such act or transaction; and (3) the assumption of jurisdiction by the forum state must not offend traditional notions of fair play and substantial justice, consideration being given to the quality, nature, and

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<sup>15</sup> **Personal service out of state — Acts submitting person to jurisdiction of courts — Saving.**

(1) Any person, whether or not a citizen or resident of this state, who in person or through an agent does any of the acts in this section enumerated, thereby submits said person, and, if an individual, his personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any of said acts:

- (a) The transaction of any business within this state;
- (b) The commission of a tortious act within this state;
- (c) The ownership, use, or possession of any property whether real or personal situated in this state;
- (d) Contracting to insure any person, property or risk located within this state at the time of contracting;

\* \* \*

(2) Service of process upon any person who is subject to the jurisdiction of the courts of this state, as provided in this section, may be made by personally serving the defendant outside this state, as provided in RCW 4.28.180, with the same force and effect as though personally served within this state.

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

(4) Personal service outside the state shall be valid only when an affidavit is made and filed to the effect that service cannot be made within the state.

(5) In the event the defendant is personally served outside the state on causes of action enumerated in this section, and prevails in the action, there may be taxed and allowed to the defendant as part of the costs of defending the action a reasonable amount to be fixed by the court as attorneys' fees.

(6) Nothing herein contained limits or affects the right to serve any process in any other manner now or hereafter provided by law.

*See also, CTVC of Hawaii*, 82 Wn.App. at 709-710 and *Shute v. Carnival Cruise Lines*, 113 Wn.2d 763, 767, 783 P.2d 78 (1989)

extent of the activity in the forum state, the relative convenience of the parties, the benefits and protection of the laws of the forum state afforded the respective parties, and the basic equities of the situation.

*Freestone Capital Partners L.P. v. MKA Real Estate Opportunity Fund I, LLC*, 155 Wn. App. 643, 652-53, 230 P.3d 625 (2010). Moreover, “[t]he sufficiency of the contacts is determined by the quality and nature of activities, not the number of acts or mechanical standards.” *CTVC of Hawaii Co. v. Shinawatra*, 82 Wn.App. 699, 710-11, 919 P.2d 1243 (1996).

In the present case, none of the three prongs are satisfied. Plaintiff has failed to establish that personal jurisdiction exists.

*a. Defendants did not purposefully do some act or consummate some transaction in the forum state*

In order to determine whether the first prong of the test under the long-arm statute is met, the entire transaction must be examined. *See Raymond v. Robinson*, 104 Wn.App. 627, 637, 15 P.3d 697 (2001). This includes “negotiations; contemplated future consequences; the terms of the contract; and the parties’ actual course of dealing.” *Id.* And, of course, despite what LDM argues, even the mere existence of a contract with a Washington corporation is insufficient to establish personal jurisdiction. *See Freestone Capital*, 155 Wn.App. at 654 (citing *Burger King Corp. v.*

*Rudzewicz*, 471 U.S. 462, 478, 105 S. Ct. 2174, 2185, 85 L. Ed. 2d 528 (1985)); *Precision Lab. Plastics, Inc. v. Micro Test, Inc.*, 96 Wn.App. 721, 727, 981 P.2d 454 (1999); *MBM Fisheries, Inc. v. Bollinger Mach. Shop & Shipyard, Inc.*, 60 Wn.App. 414, 423, 804 P.2d 627 (1991).

And here, even the existence of a contract has not been shown. (See CP 27-29, Motion for Default & CP 105-104, Decl. of Larry Meyers, series of emails) If there was one, what were its exact terms? What is the exact amount of payment and the terms of payment? At best, what was present in this case is a quasi-contract (and even a less of a ground to base bringing an out of state Defendant in with hardly any contacts with the forum state).

Yet even were the court to accept Respondent/Plaintiff's assertion that there existed a contract to perform video production services for Glen Helen Motocross and South Africa World Cup events outside of Washington (see First Amended Complaint, CP 8-14), the Appellant/Defendants' contacts are still not sufficient enough to suggest that the Defendants had purposefully availed themselves of "the privilege of conducting activities within the forum state, thereby invoking the benefits and protections of its laws." *Walker v. Bonney-Watson Co.*, 64 Wn.App. 27, 34, 823 P.2d 518 (1992) (citing *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958)).

These simple and few emails and phone calls between Plaintiff and Defendants are not sufficient contacts for personal jurisdiction, especially since the actual delivery of facilities and services occurred in California and South Africa. And, according to Respondent/Plaintiff's own evidence, Plaintiff initiated contact with the Defendants. (CP 105-140 Decl. of Larry Meyer, [first email] at CP 112) While evidence of who initiated the parties' relationship is not determinative, it is still relevant. *Byron Nelson Co. v. Orchard Management Corp.*, 95 Wn.App. 462, 466, 975 P.2d 555 (1999). Moreover, this deal did not involve goods being shipped in or out of Washington, advertising, or the provision of loans. *See Byron*, 95 Wn. App. at 467; *see Raymond*, 104 Wn.App. at 640; *Freestone Capital*, 155 Wn.App. at 655. The Appellant/Defendants' contacts were limited to arranging for activities to occur outside of Washington.

In *SeaHAVN Ltd. v. Glitnir Bank*, the court found that "communication by telephone and e-mail is not dispositive. The 'salient factor' is whether the defendant negotiates an ongoing business relationship with a Washington company that has substantive effects and created future obligations in Washington." 154 Wn.App. 550, 226 P.3d 141 (2010) (citing *Precision Lab.*, 96 Wn.App. at 727). Here, the only obligation created in Washington was the incidental obligation to pay Respondent/Plaintiff for services provided outside of Washington. There

is no evidence that the Appellant/Defendants ever entered Washington to do business or that there were to be performed future service or operations.<sup>16</sup> Discussions about two out of state projects does not evidence the type of “ongoing or continual” business connection that is required by *SeaHAVN, supra*, or *Kysar v. Lambert*. 76 Wn.App. 470, 887 P.2d 431 (1995)

Despite the substantive reliance by the Respondent/Plaintiff that it made arrangements from its office in Washington does not bring in an out of state Defendant who otherwise lacks sufficient contacts to Washington. That relates to Plaintiff’s operations and not the Defendants. And, even were these operations a part of the business relationship of the Parties (which they of course were not), they would still be deemed incidental. In fact, in *Washington Equipment Mfg. Co., Inc. v. Concrete Placing Co., Inc.*, the court held that visits by the Defendant’s employees to Washington, the telephone calls, and the delivery of the equipment were incidental to the sale of machinery to an Idaho business in Idaho. 85 Wn.App. 240, 247, 931 P.2d 170 (1997). In the present case, the arrangements (which may have occurred in Washington) for services which were to be provided outside of Washington are likewise incidental to the business to be conducted in California and South Africa. Thus, in

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<sup>16</sup> Which, even if they had, the *SeaHAVN* did not find alone to be a sufficient contact. 154 Wn.App. at 566-688

no way, shape or form has Respondent/Plaintiff has established that Defendants purposely acted within Washington State. No such connection exists.

*b. The cause of action did not arise from, nor was it connected with, an act or transaction in the forum state*

Under the second prong, there needs to be a nexus between the cause of action and the Appellant/Defendant's activities in the forum state. *Raymond*, 104 Wn.App. at 640. The activities must pass the “but for” test. In other words, “[j]urisdiction is proper in Washington if the events giving rise to the claim would not have occurred ‘but for’ the corporation’s solicitation of business in the forum state.” *CTVC of Hawaii Co.*, 82 Wn.App. at 719.

Here, the Appellant/Defendants did not solicit business in Washington State but were instead solicited in Nevada. (CP 105-140 Decl. of Larry Meyer, [first email] at CP 112)<sup>17</sup> And, Washington had nothing to do with the services to be performed in California or South Africa, except to be the incidental location of LDM and where LDM would like to have it suit filed and heard to the detriment of the out of state Appellants.

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<sup>17</sup> In fact, under the “but for” test, it would appear that Nevada is the appropriate jurisdiction for suit.

*c. The assumption of jurisdiction by the forum state will offend traditional notions of fair play and substantial justice*

With the absence of anything more than a few emails and allegations of phone calls (which are alleged to form a contract for activity to occur in states outside Washington), forcing an out of state defendant to appear and defend a suit in Washington not only offends traditional notions of fair play and substantial justice but undoes a lengthy history of Washington jurisprudence requiring more than the insufficient contacts found here. This undoing of Washington law does not pass Constitutional muster.

If anywhere, suit must be brought in Nevada (where Defendants reside) or California (where the subject matter underlying this lawsuit took place).

In addition, with respect to the minimum contacts issues, there is a dispute over where the product/accessories/supplies came from that were allegedly used in California, as this evidence was not in the record and therefore cannot support a finding of sufficient contacts. (CP 175-180, Motion for Reconsideration)

### III. CONCLUSION

The Defendants Richard Erog and Broadcast Facility respectfully request that the Court of Appeals reverse the trial court and enter an Order directing the Trial Court to vacate the Order of Default and Default Judgment and/or dismiss the Appellant/Defendants since the Appellants were not served notice of the lawsuit, and since the Appellants lack the requisite contacts and sufficient nexus with Washington so as to have purposefully availed themselves of the jurisdiction of this State.

Respectfully submitted this 29<sup>th</sup> day of May, 2013.



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Noah Davis, WSBA #30939  
Attorney for Richard Erog &  
Broadcast Facility, Appellants  
IN PACTA PLLC  
801 2nd Ave Ste 307  
Seattle WA 98104  
206.709.8281  
[nd@inpacta.com](mailto:nd@inpacta.com)

COURT OF APPEALS, DIVISION ONE  
STATE OF WASHINGTON

RICHARD EROG ET AL.,  
Appellant,

CASE # 67404-8-I

v.

**PROOF OF SERVICE**

L.D.M. WORLDWIDE CORP.  
Respondent.

TO CLERK OF THE COURT OF APPEALS

AND TO: BENJAMIN T G NIVISON  
HELSELL FETTERMAN LLP  
1001 4<sup>TH</sup> AVE STE 4200  
SEATTLE WA 98154-1154

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COURT OF APPEALS DIV 1  
STATE OF WASHINGTON

I, Noah Davis, do hereby certify that a copy of the attached Reply Brief was filed with the Washington State Court of Appeals, Division One and served by first class mail on Benjamin T G Nivison at the above address on May 29, 2013.

DATED this 29th day of May, 2013

By   
Noah Davis WSBA# 30939  
IN PACTA PLLC  
801 2<sup>nd</sup> Ave Ste 307  
Seattle WA 98104  
206.709.8281