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Court of Appeals No. 834860-1

SUPREME COURT OF
THE STATE OF WASHINGTON

CULINARY VENTURES, LTD. d/b/a BITEMOJO,

Plaintiff/Appellant,

v.

MICROSOFT CORPORATION,

Defendant/Respondent.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Petitioner Culinary Ventures is the developer of a smartphone app called Bitemojo. Bitemojo asks the Court to accept review of the Court of Appeals decision terminating review of the trial court's dismissal of its claims against Microsoft Corporation.

II. CITATION TO COURT OF APPEALS DECISION

In *Culinary Ventures, Ltd. v. Microsoft Corporation*, -- Wn. App. --, 527 P.3d 122 (2023), the Court of Appeals affirmed dismissal of Bitemojo's claims based on a forum selection clause in Microsoft's Online Services Agreement that requires an "action to enforce this agreement" be brought in Ireland, even though Bitemojo does not seek to enforce any provision of the MOSA and will be deprived of its claim for violation of Washington's Consumer Protection Act.

Bitemojo's injury did not result from a breach of the MOSA. Bitemojo's business was destroyed as a result of Bitemojo's reliance on Microsoft's customer service agents'

representations that Microsoft would preserve Bitemojo's data while Bitemojo's use of Microsoft's Azure platform was voluntarily and temporarily stopped and its payments deferred, and Microsoft's unfair practice of destroying customers' data without consideration for agreements its agents make to override its automated deletion protocols. Because Microsoft's data preservation and deletion policies and practices are uniform and automatically deployed, the same thing that happened to Bitemojo could happen to thousands of others. That is why Bitemojo sued Microsoft in its home state of Washington for CPA violations, seeking injunctive relief as well as damages for the CPA violation and for breach of the separate agreement Bitemojo entered into with Microsoft during the extraordinary circumstances of the pandemic.

The Court of Appeals made new law in holding that Bitemojo's claims fall within the "action to enforce" forum selection clause despite acknowledging that Bitemojo does not seek to enforce any provision of the MOSA. This broad

interpretation of the clause is contrary to this Court's instruction that the meaning of unambiguous contract terms is determined from the words used in the contract, which must be given their ordinary and usual meaning, unless the entirety of the contract clearly establishes a contrary intent. *See Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503-04, 115 P.3d 262 (2005).

Relying on a federal appellate decision applying federal law to interpret an ambiguous forum selection clause, the Court of Appeals determined that three provisions of the MOSA had to be considered to determine the parties' intent. The Court of Appeals held that provisions pertaining to the suspension of accounts for nonpayment and the content of customers' data had to be interpreted to resolve Bitemojo's claims. But neither provision addresses the circumstances of Bitemojo's claims or includes any obligation that Bitemojo is seeking to enforce against Microsoft—in fact, neither provision imposes any obligation on Microsoft at all.

The Court of Appeals also found the MOSA's integration clause was relevant to determining the parties' intent. The MOSA's declaration that it "is the entire agreement concerning its subject matter" is simply false, and this Court does not bind parties to these types of clauses when the parties have agreed to a separate term that is not inconsistent with the agreement. *Black v. Evergreen Land Devs.*, 75 Wn.2d 241, 250-51, 450 P.2d 470 (1969).

If allowed to stand, the Court of Appeals decision will expand the scope of forum selection clauses applying to actions to "enforce" a contract beyond their plain meaning to include claims that arise outside the terms of the contract just because they relate to the subject matter of the contract, conflicting with this Court's guidance for interpreting unambiguous contract provisions. The decision also raises an issue of substantial public interest because consumers will be unable to rely on the ordinary and usual meaning of the language in form contracts. The decision impacts not only forum selection clauses, but also

other provisions applicable to actions to “enforce” a contract that are commonly found in form contracts, such as arbitration and class waiver clauses.

Small businesses like Bitemojo are increasingly moving their data to the cloud at the urging of companies like Microsoft Azure and Amazon Web Services. As that trend continues, questions will continue to arise about what companies offering cloud computing services must do to protect the integrity of other businesses’ data. There is a substantial public interest in having those questions resolved in courts in Washington (where the major cloud computing companies are headquartered) rather than pushing them to overseas forums.

The Court of Appeals decision also contravenes this Court’s holding in *Dix v. ICT Group, Inc.*, 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 the public policy of this state.” 160 Wn. 2d 826, 837, 841, 161 P.3d 1016 (2007). There

is no dispute that enforcing the forum selection clause in the MOSA will deprive Bitemojo of its CPA claim. The Court of Appeals nonetheless found the clause enforceable, misreading *Dix* as limited to class actions brought by plaintiffs with small damages claims that cannot assert other claims with the same factual basis. The holding of *Dix* is not that narrow.

The *Dix* plaintiffs had no feasible avenue for pursuing their CPA claim absent a class action because their costs to litigate against AOL far outweighed their potential recovery. This Court found the forum selection clause in AOL's form agreement to be unenforceable because it required the plaintiffs to sue in Virginia, which does not permit class suits. Bitemojo has the resources to bring an individual CPA claim but cannot do so in Ireland, where the forum selection clause requires Bitemojo to bring a suit to enforce the MOSA. That Bitemojo can file a breach of contract claim against Microsoft in Ireland is just as irrelevant as its ability to file an individual CPA claim. Bitemojo seeks injunctive relief requiring Microsoft to change

its unfair and deceptive practices so that other Azure users are not subject to Microsoft's mistaken deletion of their data. In *Dix*, this Court recognized the critical importance of the private right of action to enforce the CPA, which allows a plaintiff to obtain injunctive relief that will benefit the public and foster fair and honest competition "even if that injunction would not affect that particular consumer's private interests." 160 Wn.2d at 837.

The Court should accept review and reverse either because the MOSA does not encompass Bitemojo's claims, or because the forum selection clause leaves Bitemojo with no feasible avenue for seeking relief for violations of the CPA.

A copy of the Court of Appeals decision is attached as Appendix A. The Clerks Papers (CP) are attached as Appendix B.

III. ISSUES PRESENTED FOR REVIEW

1. Does a forum selection clause limited to “an action to enforce this agreement” exclude actions that do not seek to enforce any provision of the agreement?

2. Is a forum selection clause unenforceable when it leaves the plaintiff with no feasible avenue for seeking injunctive relief for CPA violations by one of Washington’s largest corporations?

IV. STATEMENT OF THE CASE

A. Bitemojo used Microsoft’s Azure product to host its critical operational data.

Bitemojo is a smartphone app that offers interactive, self-guided food tours. CP82 ¶2; CP3 ¶14. 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. CP93-94; CP83-84 ¶¶6-9; CP4-5 ¶¶19-20. Bitemojo was a leader in the app-based travel industry and used Microsoft Azure’s dedicated Web App and

SQL Database services to run the app on a global scale. Azure's reliable high-speed Content Delivery Network allowed Bitemojo to make dynamic updates to the app's content and deliver customized tours within minutes. CP4-5 ¶¶20; CP83-84 ¶¶7. As part of its use of the Azure services, Bitemojo was required to store all its code and data on Microsoft's Azure servers, including user data of over 50,000 customers worldwide; individually crafted tours in its destination cities, including the visual and textual content for each tour; supplier and proprietary tour ratings; and bitcoin data for its users. CP83-84 ¶¶7-10; CP3-5 ¶¶14-20.

B. Microsoft's agents agreed to preserve Bitemojo's data but Microsoft's automated processes permanently deleted it.

In early 2020, the COVID-19 pandemic decimated the travel industry and Bitemojo had to shut down. CP84 ¶¶11; CP5 ¶¶21. Bitemojo no longer had any use for the Azure platform, and contacted Microsoft to ask if it could temporarily stop its Azure services subscription. CP84 ¶¶12; CP100-101; CP5 ¶¶22.

Microsoft's customer support agents agreed to deactivate Bitemojo's subscription. CP85 ¶13; CP103-104; CP5 ¶23. Microsoft informed Bitemojo that it would delete Bitemojo's data after 90 days unless Bitemojo contacted Microsoft to reactivate, and Bitemojo confirmed the procedures to follow to reactivate to ensure the data would not be deleted. CP85 ¶¶14-16; CP106-109; CP5-6 ¶24.

Ninety days later the pandemic had not ended and Bitemojo contacted Microsoft to request another "extension in keeping our server down and our data secured." CP85-86 ¶18; CP112. Microsoft agreed. Bitemojo asked Microsoft to confirm that "all our data will be kept there as before," and that "both suspension periods would be with [n]o outstanding balance." Microsoft's agent assured Bitemojo that "[t]here is no issue keeping your data safe" as long as you "contact me or another engineer again within 3 months to postpone the data deletion." CP86 ¶¶20-21; CP118-127; CP6 ¶26.

Bitemojo carefully complied with the procedures Microsoft established. CP85-86 ¶¶13-18, CP5-6 ¶¶24-26. But when Bitemojo contacted Microsoft support in early September 2020 to request another extension of the forbearance, Microsoft sent an automated email stating that Bitemojo's subscription had been cancelled and its data had been deleted. CP87 ¶4; CP140; CP6-7 ¶¶27-28. Microsoft repeatedly apologized for deleting the data, assured Bitemojo that steps were being taken to prevent this from happening in the future, and said it would try to recover the data. CP87 ¶26; CP7-8 ¶¶28-34. Microsoft was unable to recover Bitemojo's data. CP8 ¶35.

C. Bitemojo sued Microsoft and the trial court granted Microsoft's motion to dismiss.

Bitemojo alleges that Microsoft's customer support agents' statements in response to its requests for forbearance are enforceable promises under a theory of promissory estoppel or as independent contracts because they were made to keep a "loyal client." CP8-9; CP86 ¶21. Bitemojo alleges Microsoft's

deletion of Bitemojo's data without legal justification was conversion. CP10.

Because Microsoft Azure is used by thousands of businesses, and many customers like Bitemojo are directed to work with Microsoft customer support agents to resolve account issues, Bitemojo also sued for violation of the CPA. CP10-12; CP78. Bitemojo alleges Microsoft violated the CPA by deploying improperly safeguarded automatic deletion protocols; allowing Microsoft customer support agents to make promises to its customers about payment and suspension of accounts that Microsoft fails to honor; and failing to maintain procedures for retaining data in an archived format so it can be recovered if improperly deleted. CP10-12.

Microsoft moved to dismiss Bitemojo's claims on several grounds, including for improper venue under Civil Rule 12(b)(3). CP38-39. Microsoft contends that the MOSA requires litigation of Bitemojo's claims in Ireland. The MOSA's forum selection clause states:

This agreement is governed by the laws of Ireland. 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. 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.

CP24 §7.h.

The MOSA outlines Microsoft's obligations, such as its responsibility for defending intellectual property rights in the Azure software and warranties for performance of the online services. CP19-25. The MOSA also addresses the steps Microsoft must and may take if a customer does not "fully address" its failure to make payments. CP22 §3.c.ii. But the MOSA has no provisions concerning voluntary suspensions of account services or forbearance from payments during periods of emergency or non-operation. It says nothing about and does not otherwise govern the status of separate promises made by Microsoft customer support agents. CP19-25.

The trial court found the forum selection clause enforceable and granted Microsoft's motion to dismiss. CP217-218. The Court of Appeals affirmed. Appendix A.

V. ARGUMENT

This Court should accept review because the Court of Appeals' published opinion is in conflict with decisions of this Court, RAP 13.4(b)(1), and Bitemojo's petition raises issues of substantial public interest, RAP 13.4(b)(4).

A. The Court of Appeals' expansion of the scope of forum selection provisions governing actions to "enforce" contracts, is contrary to this Court's precedent and of substantial public interest.

The scope of a forum selection clause applicable to actions to "enforce" a contract is an issue of substantial public interest this Court must address. As the Court of Appeals noted, "No Washington cases directly address whether a forum selection clause that applies to 'actions to enforce' an agreement encompasses claims other than contract claims, such as those that sound in tort." Appendix A at 8. By approving

dismissal of claims that arose outside the terms of the contract, the Court of Appeals created new law that greatly expands the scope of forum selection clauses and other contract provisions applicable to actions to “enforce” a contract.

1. The plain meaning of an action to “enforce” a contract is that the claims seek to compel a party to comply with obligations in the contract.

A forum selection clause is a contract term and is therefore subject to the “basic rule of contract construction” that an unambiguous contract term’s “meaning is to be determined from the language alone.” *Jacoby v. Grays Harbor Chair & Mfg. Co.*, 77 Wn.2d 911, 917, 468 P.2d 666 (1970) (citation omitted); *see also Hearst Commc’ns*, 154 Wn.2d at 503-04 (“[W]hen interpreting contracts, the subjective intent of the parties is generally irrelevant if the intent can be determined from the actual words used.”). Courts must “impute an intention corresponding to the reasonable meaning of the words used.” *Hearst*, 154 Wn.2d at 503. And words in a contract are generally given their “ordinary, usual, and popular meaning

unless the entirety of the agreement clearly demonstrates a contrary intent.” *Id.* at 504.

The forum selection clause in the MOSA limits where “an action to enforce this agreement” may be filed. CP24 §7.h. Black’s Law Dictionary defines “enforce” as “to give force or effect to or to compel obedience to.” *Enforce*, Black’s Law Dictionary (8th ed. 2004). As the Court of Appeals noted, “[t]he dictionary definition of ‘enforce’ includes ‘to give force to: reinforce’ and ‘to put in force: cause to take effect: give effect to.’” Appendix A at 12 (citing Webster’s Third New International Dictionary 751 (2002)). It follows from this ordinary and usual meaning that a forum selection clause applicable to actions to “enforce” an agreement pertains to actions seeking to force a party to comply with its obligations in the contract.

Courts interpret similar forum selection clauses to exclude claims that, like Bitemojo’s claims, do not seek to enforce a term of the contract even if those claims relate to the

subject matter of the contract. *See Vankineni v. Santa Rosa Beach Dev. Corp. II*, 57 So. 3d 760, 762-63 (Ala. 2010) (clause applicable to an “action to enforce a provision” of the contract does not encompass rescission of the contract because rescission is the opposite of enforcement); *Jacobson v. Mailboxes Etc. U.S.A., Inc.*, 646 N.E.2d 741, 745-46 (Mass. 1995) (clause that “by its terms relates only to actions to *enforce* the agreement” encompasses claims for specific performance and for damages for breach of contract but not claims for precontract misrepresentations and fraud in the inducement); *see also Melnik v. AAS-DMP Mgmt. L/P*, No. C97-1110C, 1998 WL 1748751, at *2 (W.D. Wash. Sept. 1, 1998) (clause applicable to “[a]ny action to enforce the provisions of this crew contract” does not encompass tort claims 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) (plaintiffs’ claims “to rescind or recover despite the contracts” are not encompassed

by a forum selection clause applicable to “[a]ny action to enforce the terms of this contract”).

2. The Court of Appeals interpreted the clause more broadly than its ordinary and usual meaning.

The Court of Appeals recognized that Bitemojo’s “noncontract” claims do not seek to enforce any provision of the MOSA. Appendix A at 11. But the Court of Appeals held the forum selection clause required dismissal of Bitemojo’s claims anyway because they are “about data deletion, a subject matter” of the MOSA, “are not independent from the parties’ preexisting relationship,” and require interpretation of two provisions of the MOSA. Appendix A at 14-15. This expansive reading of the clause disregards its plain language and the ordinary and usual meaning of “enforce,” instead treating the clause the same as broader forum selection clauses that apply to claims “relating to,” “in connection with,” or “arising out of” a contract. *See, e.g., Sun v. Advanced China Healthcare, Inc.*, 901 F.3d 1081, 1086 (9th Cir. 2018) (“forum-selection clauses

covering disputes ‘arising out of’ a particular agreement apply only to disputes ‘relating to the interpretation and performance of the contract itself,’” while “forum-selection clauses covering disputes ‘relating to’ a particular agreement apply to any disputes that reference the agreement or have some ‘logical or causal connection’ to the agreement”).

The specific language a drafter uses in a contract provision matters, as Microsoft knows since it uses different forum selection clauses in different agreements. For example, Microsoft included a clause encompassing claims “arising under, out of or in relation to” the employment contract at issue in *Acharya v. Microsoft Corp.*, 189 Wn. App. 243, 247, 354 P.3d 908 (2105). Microsoft chose a forum selection clause applicable to actions “directly arising between the parties” in the license agreement at issue in *Video Streaming Solutions LLC v. Microsoft Corp.*, No. 13-C-7031, 2014 WL 2198480, at *2 (N.D. Ill. May 27, 2014). For the MOSA, Microsoft wrote a clause selecting a different forum for each of three types of

claims: claims brought by Microsoft to enforce the agreement, claims brought by the consumer to enforce the agreement, and claims relating to intellectual property rights. Bitemojo's claims do not fall into any of these three categories. And there is no reason to interpret the provision broadly in favor of Microsoft, as the drafter that selected this particular clause for this particular contract.

3. Bitemojo's claims are independent of the MOSA and do not require interpretation of any of its provisions.

In looking beyond the plain language of the forum selection clause, the Court of Appeals relied on a federal case addressing whether a differently-worded and ambiguous forum selection clause encompassed tort claims based on facts that “would also give rise to a breach of contract claim.” *Terra Int’l, Inc. v. Mississippi Chem. Corp.*, 119 F.3d 688, 695 (8th Cir. 1997) (construing a clause applicable to “[a]ny dispute or disputes arising between the parties hereunder”). *Terra* could not be more distinguishable. The forum selection clause in the

MOSA is not ambiguous; neither the trial court nor the Court of Appeals found that it was. Bitemojo's claims are not based on facts that would also give rise to a claim for breach of the MOSA; Bitemojo does not seek to enforce any obligations imposed on Microsoft by the MOSA and could assert its claims even if the MOSA was deemed unenforceable.

Perhaps most importantly, Washington law governs and requires that the words of a contract provision be given their ordinary and reasonable meaning unless a contrary intent is clear from the entirety of the agreement. *Hearst*, 154 Wn.2d at 503-04. The Court of Appeals found three MOSA provisions relevant to interpreting the MOSA but none demonstrates an intent contrary to the plain language of the forum selection clause.

- a. Sections 3.c and 1.d of the MOSA include no enforceable obligations and do not have to be interpreted to resolve Bitemojo's claims.*

Bitemojo's breach of contract and promissory estoppel claims concern separate promises made after and apart from the

MOSA. They are based on Bitemojo's request that Microsoft preserve Bitemojo's data and defer payment during the pandemic because Bitemojo would not be using Azure's services and arise from the written communications between Bitemojo and Microsoft's customer service agents. CP8-9. The Court of Appeals found that Bitemojo's promissory estoppel and breach of contract claims "require interpreting and applying Section 3.c of the agreement" but did not explain why. Appendix A at 14. Section 3.c gives Microsoft the right to suspend an account as a penalty for conduct like failing to respond to a claim of infringement or not making payments that are due, and ultimately to terminate an account after providing notice. CP22. It does not address Microsoft's agreement to maintain data and forbear payment when a customer voluntarily and temporarily stops using the Azure platform. And Bitemojo does not seek to enforce Section 3.c against Microsoft.

Bitemojo's conversion and CPA claims are also independent of the MOSA. Bitemojo alleges that Microsoft

committed the tort of conversion by deleting Bitemojo's data without legal authority to do so. CP10. And Bitemojo alleges several unfair or deceptive practices in violation of the CPA that are unrelated to any MOSA provision: (1) Microsoft lacks policies or procedures for temporarily retaining customer data in an archived format so the data can be recovered if it is lost or improperly deleted; (2) Microsoft uses the same designation for the punitive suspension of an account as for a mutually-agreed suspension, leading to the application of automatic penalties to the wrong accounts; and (3) Microsoft permits its customer service agents to modify Azure subscription terms, but later disavows those modifications and promises made about them. CP11. The Court of Appeals found that Bitemojo's conversion and CPA claims require interpretation of Section 1.d of the MOSA. Appendix A at 15. In that provision, Microsoft disclaims responsibility for "the content of all Customer Data." CP19. Bitemojo's claims concern the deletion of its data, not the content of its data. And Bitemojo does not seek to enforce

Section 1.d against Microsoft—indeed, there is no enforceable obligation in Section 1.d.

That Microsoft may defend Bitemojo’s claims based on these provisions does turn *Bitemojo*’s claims into ones that seek to enforce the contract. Microsoft’s defense that it was allowed to do what it did under its contract only reinforces the view that Bitemojo’s action is not one to “enforce” that contract.

b. The integration clause does not sweep Microsoft’s separate agreement with Bitemojo into the scope of the forum selection clause.

The Court of Appeals also noted the MOSA’s integration clause. CP24 §7.i. But this Court has long recognized that “[a] party to a contract is not bound by a false recital of fact” in an integration clause and that to hold a party to a “boilerplate” clause when the parties “very definitely and did agree” to a separate agreement that “was not contrary or inconsistent” with the agreement “would amount to a constructive fraud practiced

by the defendants upon the plaintiffs.” *Evergreen Land*, 75 Wn.2d at 250-51.

Microsoft “very definitely and did agree” to preserve Bitemojo’s data as long as Bitemojo timely contacted Microsoft to postpone the data deletion, an agreement that is not contemplated by the MOSA and is “not contrary or inconsistent” with the MOSA. CP86 ¶¶20-21; CP118-127; CP6 ¶26. Because the statement in the MOSA that “[t]his agreement is the entire agreement concerning its subject matter” is false, the integration clause does not absolve Microsoft of its duties under its subsequent agreement with Bitemojo. *See Evergreen Land*, 75 Wn.2d at 250-51 (integration clause could not be used “to vitiate the manifest understanding of the parties as evidenced by” subsequent conduct of the parties).

4. The decision has a significant impact on forum selection clauses and other contract provisions.

This Court has explained that “enforcement of forum selection clauses serves the salutary purpose of enhancing

contractual predictability.” *Dix*, 160 Wn.2d at 834 (citation omitted). That purpose is undermined if the words used in a forum selection clause are interpreted inconsistently with their ordinary and usual meaning. Corporations often include forum selection clauses in form agreements like the MOSA.

Consumers must be able to rely on the plain language of form agreements to know what their rights are and what rights they are giving up. The Court of Appeals decision impacts other contract provisions as well, such as arbitration and class action waiver clauses. *See JC Aviation Inv., LLC v. Hytech Power, LLC*, 16 Wn. App. 2d 1051, 2021 WL 778043, at *3 & n.11 (2021) (unpublished) (discussing conflict between courts of appeals about whether a dispute “under” an agreement is as broad as a dispute “arising out of” or “relating to” the agreement). This Court should accept review to clarify the scope of forum selection clauses limited to actions to “enforce” a contract.

B. The Court of Appeals decision directly conflicts with a decision of this Court that holds forum selection clauses unenforceable when they deprive the plaintiff of a CPA claim.

In *Dix v. ICT Group*, this 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 the public policy of this state.” 160 Wn.2d at 837, 841. The Court of Appeals acknowledged that Bitemojo would not be able to assert a consumer protection claim against Microsoft if the forum selection clause is enforced¹ but found the clause was enforceable because Bitemojo is “worth millions” (or was before Microsoft deleted its data), did not file a class action, and can file a breach of contract claim in Ireland. Appendix A at 21. This ruling is contrary to *Dix*.

¹ See CP66-67 (businesses cannot enforce Ireland’s consumer protection laws).

In *Dix*, this Court recognized the importance of the private right of action to enforce the CPA's purpose of protecting the public from unfair or deceptive practices and fostering fair and honest competition. 160 Wn.2d at 836-37. Bitemojo alleges that Microsoft engages in unfair or deceptive practices in violation of the CPA how it authorizes customer service agents to make representations to customers that Microsoft later disavows and how it uses automated processes to delete customer data without safeguards for error and without regard for its agents' promises. CP11 ¶67. While Bitemojo's data is lost forever, the data of many others is put at risk by these practices. Bitemojo therefore seeks injunctive relief requiring Microsoft to change its practices and ensure that customers' data is not deleted when they have made timely requests that it be preserved. CP12 ¶74, Prayer. Bitemojo can seek this relief for "the public as a whole" because under the CPA "a private consumer can obtain injunctive relief even if

that injunction would not affect that particular consumer's private interests." *Dix*, 160 Wn.2d at 837.

The Court of Appeals misread *Dix* as applying only to class actions brought by plaintiffs with small damages claims. It is true that the *Dix* plaintiffs were unable to pursue their CPA claim against AOL if they could not bring it as a class action because the costs of suit far surpassed their potential damages. 160 Wn.2d at 831. As this Court recognized, "Individual claims may be so small that it otherwise would be impracticable to bring them; a class action may be the only means that the public interest may be vindicated." *Id.* at 837. But the holding of *Dix* does not turn on whether a case is brought by a plaintiff with a small damages claim as a class action; those were merely the circumstances that would have precluded the *Dix* plaintiffs from pursuing a consumer protection claim if they were forced to litigate in a Virginia court. This Court later recognized the broader holding in *Dix* "that a forum selection clause selecting Virginia as the forum for an arbitration was unenforceable on

public policy grounds if it left the plaintiff with no feasible avenue for seeking relief for violations of Washington’s CPA” *Saleemi v. Doctor’s Assocs., Inc.*, 176 Wn.2d 368, 383 n.7, 292 P.3d 108 (2013).

The Court of Appeals also declined to apply *Dix* because “the factual basis for the CPA claim is the same as that in other claims” and Bitemojo “may still have a feasible alternative avenue to seek relief for the conduct.” Appendix A at 21. The Court cited *West Consultants, Inc. v. Davis*, where the damages the plaintiff sought were significant enough for the plaintiff to seek on an individual basis—unlike the small damages claims that would be foreclosed by dismissal in *Dix*. 177 Wn. App. 33, 39, 42, 310 P.3d 824, 828 (2013). Bitemojo has the resources to pursue an individual CPA claim against Microsoft seeking injunctive relief that will benefit the public. But Bitemojo cannot obtain this relief by suing Microsoft for breach of contract in Ireland. Washington has a public policy interest in seeing that one of its largest corporations stops those

practices—for the protection of the public and to foster fair and honest competition among businesses in Washington. *See Thornell v. Seattle Serv. Bureau, Inc.*, 184 Wn.2d 793, 800, 363 P.3d 587 (2015) (explaining that a purpose of the CPA is holding Washington entities liable for unfair and deceptive practices, including practices directed to out-of-state residents). Enforcing the forum selection clause leaves Bitemojo with “no feasible avenue for seeking relief for violations of the CPA” and “violates the public policy of this state.” *Dix*, 160 Wn.2d at 837, 841.

VI. CONCLUSION

Bitemojo asks the Court to accept review, reverse the decision of the Court of Appeals, and remand for further proceedings.

VII. RAP 18.17(b) CERTIFICATION

This document contains 4,956 words, excluding the parts of the document exempted from the word count by RAP 18.17(b) and RAP 18.17(c)(11).

RESPECTFULLY SUBMITTED AND DATED this
10th day of May, 2023.

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CERTIFICATE OF SERVICE

I certify that on May 10, 2023, I caused a true and correct copy of the foregoing to be served on the following via the Court of Appeals Electronic Filing Notification System:

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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 10th day of May, 2023.

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

APPENDIX

Appendix A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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

Appellant,

v.

MICROSOFT CORPORATION,

Respondent.

No. 83486-0-I

DIVISION ONE

PUBLISHED OPINION

CHUNG, J. — Culinary Ventures d/b/a Bitemojo, the creator of a smartphone application for self-guided food tours, entered into a subscription agreement with Microsoft Ireland for its Azure online cloud-based data storage services. The agreement included a forum selection clause specifying that if it brought an action to enforce the agreement, Bitemojo would bring such an action in Ireland. At Bitemojo's request, Azure twice suspended Bitemojo's account, as well as the required payments. Thereafter, Azure deleted Bitemojo's data. Subsequently, Bitemojo sued Microsoft Corporation in King County for promissory estoppel, breach of contract, conversion, and violation of the Washington Consumer Protection Act (CPA), chapter 19.86 RCW. The trial court granted Microsoft Corporation's CR 12(b)(3) motion to dismiss for improper venue based on the agreement's forum selection clause.

We determine that the parties intended that the forum selection clause apply to claims such as Bitemojo's that concern the subject matter of the agreement. Further, Bitemojo has not shown that enforcement of the agreement's forum selection clause to foreclose the CPA claim is unreasonable. Accordingly, we affirm the trial court's dismissal of Bitemojo's claims.

FACTS

Bitemojo is the trade name for a smartphone application developed by Culinary Ventures, an Israeli company. The Bitemojo application provided travelers with food tours that included content and access to dishes offered by small, local restaurants. Within three years of its launch, Bitemojo offered tours in 12 cities worldwide. It had raised millions of dollars in investment and had built a database that included information about each of its users.

Bitemojo chose Microsoft's Azure services to host its data, including user data, Bitemojo's products, visual and textual content, and biteCoins, its virtual currency. Microsoft's Irish subsidiary, Microsoft Ireland Operations Limited, offers the Azure services. The online services agreement between Bitemojo and Microsoft Ireland contains this forum selection clause:

This agreement is governed by the laws of Ireland. 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. 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.

Because of COVID-19, in March 2020, Bitemojo decided to shutter the company until the tourism industry improved. Bitemojo co-founder

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Michael Weiss asked Azure if it would agree to suspend charges for its subscription services. On March 15, 2020, an Azure subscription support engineer told him the account would not incur additional charges. A few days later, another Azure subscription support engineer confirmed that Bitemojo's subscription was suspended and that "the system will delete [the account], after 90 days along with its data, if you do not want to reactivate it."

Weiss emailed Azure again on June 5, 2020, asking for "another extension in keeping our server shut down and our data secured." Azure responded on June 9 that it would suspend Bitemojo's subscription and "delay [its] payment," and that "there is no issue keeping your data safe[,] just make sure to contact [an] engineer within 3 months to postpone the data deletion."

At the end of the second suspension period, Weiss emailed Azure on Saturday, September 5, 2020, but received no response. Instead, on September 9,¹ Bitemojo received an email stating that its "data and services were deleted on September 9, 2020, because you cancelled your subscription 90 days ago." Weiss immediately opened a service case and over the next two weeks corresponded with various Microsoft² employees who escalated the request and sought responses from various internal

¹ Monday, September 7, 2020, was Labor Day, a holiday in the U.S.

² Bitemojo sued Microsoft Corporation, which contends it is not the proper party because its subsidiary Microsoft Ireland was party to the contract with Bitemojo for Azure services. As we do not address that issue, we refer in this opinion to both Microsoft Corporation and Microsoft Ireland as Microsoft unless a distinction between the two is necessary for clarity.

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teams. On September 23, 2020, Microsoft wrote to Weiss that it had exhausted all available resources and could not recover the data.

In August 2021, Bitemojo filed suit against Microsoft Corporation in King County, Washington, raising several claims. First, Bitemojo claims promissory estoppel, alleging that Azure subscription support engineers promised to keep Bitemojo's data safe as long as it contacted Azure within three months of suspending the subscription. Bitemojo contends that in reliance on that promise, it refrained from moving its data to another server and contacted Azure within three months to request an extension.

Bitemojo further alleges the Azure subscription support engineer created a binding contract when he promised Bitemojo's data would be kept safe if Bitemojo provided proper notification within ninety days. Thus, Bitemojo claims, Microsoft breached this agreement when, despite Bitemojo's proper notification, it deleted Bitemojo's data. Bitemojo also alleges Microsoft's deletion of its data constituted conversion.

Finally, Bitemojo alleges Microsoft violated the CPA because it assured Bitemojo it would not delete its data if Bitemojo followed up within 90 days, yet it then treated Bitemojo's subscription as cancelled. Bitemojo claims that Microsoft failed to implement policies or procedures for retaining data in an archived format so it could be recovered if improperly deleted.

Microsoft moved to dismiss for improper venue under CR 12(b)(3) based on the agreement's forum selection clause. It also sought dismissal pursuant to CR 12(b)(6), arguing that Microsoft Corporation was not a proper party to the

lawsuit because Microsoft Ireland was a distinct legal entity. In the alternative, Microsoft argued Bitemojo's claims failed as a matter of law. In response, Bitemojo argued that it was not seeking to enforce the agreement, so its complaint was not subject to the forum selection clause. Bitemojo further argued that the clause was unenforceable because it would prevent it from obtaining relief under the CPA.

The trial court determined that the forum selection clause applied to all of Bitemojo's claims because "without the underlying subscription contract, none of these claims are arising or viable in any way." The court also found that the venue provision of the agreement required the claims "to be brought in Ireland, and that the law of Ireland prevails." It then determined that enforcing the forum selection clause would not "so den[y] the plaintiff of relief or the ability to pursue other claims." Therefore, the trial court granted the CR 12(b)(3) motion to dismiss for improper venue and on that basis, dismissed Bitemojo's complaint with prejudice. It declined to rule on the CR 12(b)(6) motion. Bitemojo appeals.

DISCUSSION

In general, a forum selection clause is prima facie valid and "may be enforced even if it is in a standard form consumer contract not subject to negotiation."³ Dix v. ICT Group, Inc., 160 Wn.2d 826, 834, 161 P.3d 1016 (2007). However, a court may deny enforcement upon a clear showing that, in the

³ The reason these clauses are presumptively valid is that "enforcement of forum selection clauses serves the salutary purpose of enhancing contractual predictability." Voicelink Data Servs., Inc. v. Datapulse, Inc., 86 Wn. App. 613, 617, 937 P.2d 1158 (1997); see Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 593-94, 111 S. Ct. 1522, 113 L. Ed. 2d 622 (1991). Additionally, such clauses may reduce the costs of doing business, thus resulting in reduced prices to consumers. Carnival Cruise Lines, Inc., 499 U.S. at 594.

particular circumstance, enforcement would be unreasonable. Id. at 834. A court may determine that a forum selection clause is unreasonable 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.

Id. at 834. The party resisting enforcement has the burden of demonstrating that it is unreasonable. Id. at 835.

The standard for a motion to dismiss for improper venue under CR 12(b)(3) differs from the more familiar standard for CR 12(b)(6) motions.⁴ Voicelink Data Servs., Inc. v. Datapulse, Inc., 86 Wn. App. 613, 624, 937 P.2d 1158 (1997). In assessing a forum selection clause for enforceability, the court does not accept the pleadings as true. Dix, 160 Wn.2d at 835 (citations omitted). Rather, the challenging party must present evidence to justify nonenforcement. Id. Thus, when conducting an analysis under CR 12(b)(3), the court may consider facts outside the pleadings to assess whether the challenger satisfied its burden to provide evidence of nonenforceability. Voicelink, 86 Wn. App. at 624-25.

We review a trial court's decision on a CR 12(b)(3) motion to dismiss for improper venue for abuse of discretion. Dix, 160 Wn.2d at 833. A trial court

⁴ Under CR 12(b)(6), dismissal is warranted only if the plaintiff cannot prove any set of facts justifying recovery. Karstetter v. King Cnty. Corr. Guild, 193 Wn.2d 672, 677, 444 P.3d 1185 (2019).

abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds. Id. As the Washington Supreme Court has explained,

If the trial court's ruling is based on an erroneous view of the law or involves application of an incorrect legal analysis it necessarily abuses its discretion. . . . Thus, the abuse of discretion standard gives deference to a trial court's fact-specific determination on enforceability of a forum selection clause, while permitting reversal where an incorrect legal standard is applied.

Id. (internal citations omitted). However, if a question of pure law is involved, such as whether strong public policy precludes giving effect to a forum selection clause, the standard of review is de novo. Id. at 833-34. Likewise, the legal effect of a contract is a question of law subject to de novo review. Keystone Masonry, Inc. v. Garco Const., Inc., 135 Wn. App. 927, 932, 147 P.3d 610 (2006).

I. Whether Bitemojo's claims are subject to the forum selection clause

Bitemojo argues the trial court erroneously applied an "arise under" standard rather than the actual "action to enforce" language of the Azure agreement's clause when it reasoned that "without the underlying agreement, none of these claims are arising or viable in any way." According to Bitemojo, this was legal error because "arise under" was not the language of the forum selection clause in the agreement. Bitemojo notes that Microsoft "sometimes drafts broader forum selection clauses," such as the one covering claims "arising under" the contract at issue in Acharya v. Microsoft Corp., 189 Wn. App. 243, 247, 354 P.3d 908, 910 (2015). Bitemojo further contends its claims are not "actions to enforce" the contract subject to the forum selection clause because they do not seek to enforce any obligations in the agreement. Microsoft counters

that an “action to enforce” encompasses “contract-related tort claims involving the same operative facts as a parallel claim for breach of contract.”

Bitemojo's arguments about whether the term “action to enforce” includes its claims do not challenge the validity of the forum selection clause. Rather, they raise questions about the meaning and effect of the language. Cf. Terra Int'l, Inc. v. Miss. Chem. Corp., 119 F.3d 688, 692 (8th Cir. 1997) (applying de novo review to interpretation of forum selection clause, where parties contested meaning of language, not validity).

No Washington cases directly address whether a forum selection clause that applies to “actions to enforce” an agreement encompasses claims other than contract claims, such as those that sound in tort. Bitemojo cites several cases where courts refused to enforce a forum selection clause using the “action to enforce” language, but none is controlling in Washington. Also, each is distinguishable factually, as the claims in those cases did not require reference to the contract.⁵ Cases cited by Microsoft are similarly all from other jurisdictions and also factually distinct.⁶

⁵ See Melnik v. AAS-DMP Mgmt. L/P, 1998 WL 1748751 at *2 (W.D. Wash. Sept. 1, 1998) (personal injury action by crew member injured on a fishing vessel was not “[a]ny action to enforce the provisions of this crew [employment] contract”); Vankineni v. Santa Rosa Beach Dev. Corp. II, 57 So.3d 760, 762-63 (Ala. 2010) (forum selection clause stating “any action to enforce” a provision in the agreement did not apply to claims of alleged securities act violations and rescission; “enforcement of a contract is the opposite of” rescission); Muzek v. Eagle Mfg. of N. Am., Inc., 2018 WL 5499675, at *2 (E.D. Ky. Oct. 29, 2018) (facts in complaint related to claims of fraudulent inducement to enter agreement were entirely unrelated to stock purchase agreements’ terms and enforceability); Jacobson v. Mailboxes Etc. USA, Inc., 646 N.E.2d 741, 745 (1995) (forum selection clause by its terms related only to “actions enforcing this agreement,” not to actions based on unlawful conduct that induced a franchisee to sign the agreement).

⁶ See Alliance Commc’ns Co-op., Inc. v. Glob. Crossing Telecommc’ns, Inc., 2007 WL 1964271, at *8-12 (D.S.D. July 2, 2007) (forum selection clause covering “any action to enforce or interpret the terms” applied to claims for breach of contract, unjust enrichment, and fraud for

Ultimately, “ ‘[w]hether tort claims are to be governed by forum selection provisions depends upon the intention of the parties reflected in the wording of particular clauses and the facts of each case.’ ” Terra Int’l, 119 F.3d at 693 (quoting Berrett v. Life Ins. Co. of the Sw, 623 F. Supp. 946, 948-49 (D. Utah 1985)). While acknowledging that the scope of a forum selection clause was “a rather case-specific exercise,” the court in Terra Int’l nonetheless described different courts’ approaches to the question:

The Third Circuit has indicated that where tort claims “ultimately depend on the existence of a contractual relationship” between the parties, such claims are covered by a contractually-based forum selection clause. Coastal Steel Corp. v. Tilghman Wheelabrator Ltd., 709 F.2d 190, 203 (3d Cir.), cert. denied, 464 U.S. 938, 104 S. Ct. 349, 78 L. Ed. 2d 315 (1983). In Manetti-Farrow, Inc. v. Gucci America, Inc., 858 F.2d 509, 514 (9th Cir.1988), the Ninth Circuit stated that “[w]hether a forum selection clause applies to tort claims depends on whether resolution of the claims relates to interpretation of the contract.” The First Circuit has phrased its test slightly differently, explaining that “contract related tort claims involving the same operative facts as a parallel claim for breach of contract should be heard in the forum selected by the contracting parties.” Lambert v. Kysar, 983 F.2d 1110, 1121-22 (1st Cir. 1993).^[7]

“failing to pay the correct price”); LTVN Holdings LLC v. Odeh, 2009 WL 3736526, at *5 (D. Md. Nov. 5, 2009) (forum selection clause stating that “[a]ny action to enforce this agreement shall be brought in the federal or state courts located in the state of Maryland” encompassed claims of copyright infringement, Lanham Act, breach of contract, unjust enrichment, conversion, and false appropriation because they related to use of videos without proper attribution, and the contract prohibited such use); Auld v. Daugherty Sys., Inc., 2015 WL 5970731, at *2 (D. Minn. Oct. 13, 2015) (clause limiting venue to the Eastern District of Missouri “[i]n any suit to enforce this Agreement” applied to breach of contract, promissory estoppel, and whistleblower claims); C. Thorrez Indus., Inc. v. LuK Transmissions Sys. LLC, 2010 WL 1434326, at *5 (N.D. Ohio 2010) (clause stating that “[a]ny actions or proceedings to enforce this contract shall be venued in Wayne County, OH” applied to claims for unjust enrichment and “account stated” that were “inseparable” from the contract); Third Ave. Tr. v. Suntrust Bank, 163 F. Supp. 2d 215, 220 n.3 (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,” where the parties also “irrevocably waive[] any defense of improper venue or forum non conveniens”).

⁷ In Coastal Steel Corp., the relevant contract clause stated, “In the event of any dispute arising the same shall be determined by the English Courts of Law.” 709 F.2d at 193. In Manetti-

Terra Int'l, 119 F.3d at 694 (determining that under language of the agreement and facts of the case that the First Circuit's approach merited application).

Microsoft urges the court to apply the First Circuit's analysis of a similar forum selection clause in Lambert v. Kysar, 983 F.2d 1110. In Lambert, the agreement provided, "In the event any action is brought to enforce such terms and conditions, venue shall lie exclusively in Clark County, Washington."⁸ Id. at 1112. Despite this clause, the unsatisfied buyer of Christmas trees filed suit in a Massachusetts state court claiming misrepresentation, breach, and unfair business practices. Id. The seller removed to federal court and moved to dismiss under Fed. R. Civ. P. 12(b)(3) and 12(b)(6). Id. The buyer argued that the parties' forum selection clause did not apply to its allegations of tortious conduct relating to the formation, rather than the performance, of their contract. Id. at 1121. But the court disagreed, reasoning, "We cannot accept the invitation to reward attempts to evade enforcement of forum selection agreements through 'artful pleading of [tort] claims' in the context of a contract dispute." Id.

The Lambert court noted that the Supreme Court had held that a forum selection clause is not enforceable if "the inclusion of that clause in the contract was the product of fraud or coercion"—i.e., an allegation of fraud in a transaction generally was insufficient to apply the fraud exception to the enforceability of a

Farrow, the forum selection clause provided that Florence would be the forum for resolving disputes regarding "interpretation" or "fulfillment" of the contract. 858 F.2d at 513-14.

⁸ Moreover, the Lambert court applied Washington law to determine the enforceability of the forum selection clause. 983 F.2d at 1118-19 (analyzing choice of law). Nevertheless, in its analysis of the application of the forum selection clause to the noncontract tort claims, the court relied on federal cases. 983 F.2d at 1121-22. This is not surprising, as this question remains unaddressed by Washington courts.

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forum selection clause. Id. (quoting Scherk v. Alberto-Culver Co., 417 U.S. 506, 519 n.14, 94 S. Ct. 2449, 41 L. Ed. 2d 270 (1974) (emphasis in original)).

However, the Lambert court reasoned, “The better general rule . . . is that contract-related tort claims involving the same operative facts as a parallel claim for breach of contract should be heard in the forum selected by the contracting parties.” Lambert, 983 F.2d at 1121-22.

Here, it is not necessary to adopt the Lambert court’s “same operative facts” rule to analyze whether a forum selection clause applies to tort claims, and we decline to do so. Instead, we agree with the court in Terra Int’l that the 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.” Terra Int’l, 119 F.3d at 693 (internal quotations omitted).

Microsoft’s deletion of Bitemojo’s data is at the heart of the parties’ dispute. The online subscription agreement, which includes the forum selection clause, governs the relationship and obligations between Microsoft and Bitemojo. Even if Bitemojo contends its claims are not directly based on the agreement, an examination of the agreement is nevertheless required to interpret the forum selection clause and determine its scope. Thus, we use the standard tools of contract interpretation and apply the forum selection clause to the specific claims Bitemojo raises in this case.

When interpreting a contract, our primary objective is to discern the parties’ intent. Tanner Elec. Co-op. v. Puget Sound Power & Light, 128 Wn.2d

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656, 674, 911 P.2d 1301 (1996). We view the contract as a whole, interpreting particular language in the context of other contract provisions. See Weyerhaeuser Co. v. Commercial Union Ins. Co., 142 Wn.2d 654, 669-70, 15 P.3d 115 (2000). “We generally give words in a contract their ordinary, usual, and popular meaning unless the entirety of the agreement clearly demonstrates a contrary intent.” Hearst Commc’ns, Inc. v. Seattle Times Co., 154 Wn.2d 493, 504, 115 P.3d 262 (2005). This meaning may be ascertained by reference to standard English dictionaries. Queen City Farms, Inc. v. Cent. Nat’l Ins. Co., 126 Wn.2d 50, 77, 882 P.2d 703 (1994).

Turning to the online services agreement, we note it includes an integration clause that states that “[t]his agreement is the entire agreement concerning its subject matter” The forum selection clause is reciprocal: “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.” The agreement includes only one exception: “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.” As the claims here do not relate to intellectual property rights, the relevant question is whether the parties intended the forum selection clause to cover claims such as Bitemojo’s.

The dictionary definition of “enforce” includes “to give force to: reinforce,” and “to put in force: cause to take effect: give effect to.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 751 (2002). Thus, the forum selection clause applies

to claims that seek “to give force to,” “cause to take effect,” or “give effect to” the agreement. Reading 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.

Next, we look at the facts in this case to determine whether the claims concern the subject matter of the agreement. Bitemojo’s promissory estoppel claim alleges that Azure subscription support engineers made promises regarding the retention of Bitemojo’s data that they then breached. Similarly, Bitemojo’s breach of contract claim alleges that the statements by the engineers to Weiss regarding account suspension created a binding contract, which then was breached.⁹ Specifically, Bitemojo claims the engineers made enforceable promises that the subscription was “suspended” and that they would “delay [its] payment,” and that these promises were entirely separate from the agreement between Bitemojo and Azure.

But Bitemojo’s interactions with Azure’s engineers did not occur in a vacuum. Those interactions all related to services that Microsoft Azure agreed to provide to Bitemojo pursuant to the online services agreement. Section 3.c of this agreement addresses “Suspension”:

c. **Suspension.** We may suspend your use of the Online Services if: . . . (3) you do not pay amounts due under this agreement If one or more of these conditions occurs, then:

⁹ At oral argument, Bitemojo confirmed its position that the engineers’ statements created a separate contract and were not modifications to the original services agreement.

- (i) For Limited Offerings, we may suspend your use of the Online Services or terminate your Subscription and your account immediately without notice.
- (ii) For all other Subscriptions, a suspension will apply to the minimum necessary part of the Online Services and will be in effect only while the condition or need exists. We will give notice before we suspend, except where we reasonably believe we need to suspend immediately. We will give at least 30 days' notice before suspending for nonpayment. If 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.

Bitemojo's promissory estoppel and breach of contract claims require determining whether Bitemojo's two requests to suspend its account and its subsequent nonpayment triggered Azure's rights under this provision to terminate Bitemojo's subscription and delete its data. Because these claims require interpreting and applying Section 3.c of the agreement, the forum selection clause applies to them.

The conversion and CPA claims likewise are governed by the agreement because they are claims about data deletion, a subject matter of the agreement. The conversion claim alleges Azure "permanently . . . destroyed" its personal property "without consent or permission . . . and without contractual . . . authority." Bitemojo's CPA claim alleges that despite Microsoft subscription support engineers' promises to excuse nonpayment and to continue retaining Bitemojo's data, Microsoft's systems deleted its data without procedures for archiving and recovering the data. Bitemojo contends that Microsoft's conduct is deceptive because consumers are likely to be misled when Microsoft's

subscription support engineers make promises that Microsoft then refuses to honor and that “Microsoft’s systems” deleted data without proper procedures to archive or recover mistakenly deleted data. Yet the factual basis for the allegedly deceptive conduct is Microsoft support engineers’ unique interactions with Bitemojo about Bitemojo’s account and deletion of Bitemojo’s data. This lawsuit is not a class action, and there are no allegations of similar promises to anyone else, nor deletion of anyone else’s data.

As with the promissory estoppel and contract claims, the conversion and CPA claims are not independent from the parties’ preexisting relationship. Without the online subscription agreement, Microsoft Azure would not have any of Bitemojo’s data in the first place. According to Microsoft, section 1.d of the agreement limits its responsibility for customer data by stating, “Microsoft does not and will not assume any obligations with respect to Customer Data” Because Bitemojo’s conversion and CPA claims require interpretation of the parties’ rights and obligations under the agreement, the parties intended that the forum selection clause apply to such claims.

“We cannot accept the invitation to reward attempts to evade enforcement of forum selection agreements through ‘artful pleading of [other] claims’ in the context of a contract dispute.” Lambert, 983 F.2d at 1121. We hold that Bitemojo’s promissory estoppel, breach of contract, conversion, and CPA claims all concern the subject matter of the online services agreement, and the parties’ intent was that Bitemojo bring such claims in Ireland. Thus, the trial court did not abuse its discretion by dismissing the promissory estoppel, contract, and

conversion claims under CR 12(b)(3). As for the CPA claim, even if the forum selection clause encompasses it, under Dix, we must next analyze whether applying the clause to that claim would be unreasonable.¹⁰

II. Whether enforcement of the forum selection clause to foreclose the CPA claim would be unreasonable

The trial court concluded that under Dix, enforcement of the forum selection clause to foreclose the CPA claim did not contravene strong public policy because Bitemojo could pursue other claims and was not so denied relief that a court should override the forum selection clause. Bitemojo argues this was error. We disagree.

Here, the parties did not dispute that the contract, by its terms, would require both litigation in Ireland and application of Irish law. Thus, Bitemojo argues that Dix requires that “[t]he undisputed fact that Bitemojo cannot pursue a CPA claim in Ireland should have ended the question of enforceability under Dix, since it . . . would be left with ‘no feasible avenue for seeking relief for violations of the CPA.’ ” Br. of App. at 30 (quoting Dix, 160 Wn.2d at 841).

In Dix, the plaintiffs were AOL users who claimed AOL was double-billing them and providing deceptive customer service to avoid refunds. Id. at 830. They filed a class action alleging conversion, unjust enrichment, and violation of the CPA. Id. at 830-31. The complaint alleged that because the amount of damage owed any one class member was small, it was impracticable and inefficient to pursue separate actions. Id. at 831. However, their agreement with AOL

¹⁰ Bitemojo does not claim enforcement of the forum selection clause is unreasonable with respect to the non-CPA claims.

contained a provision giving Virginia exclusive jurisdiction over any claim or dispute with AOL, and Virginia law precluded class action lawsuits. Id. at 829, 842. The court analyzed the history of the CPA, noting that the individual consumer enforcement action to vindicate the public interest was a significant aspect of the CPA's dual enforcement scheme. Id. at 837. Further, "class suits are an important tool for carrying out the dual enforcement scheme." Id. Thus, "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. The court then reasoned that a clause that impairs a plaintiff's ability to pursue a small value claim "by eliminating class suits in circumstances where there is no feasible alternative for seeking relief" violated public policy and was unenforceable. Id.

Bitemojo claims that the strong public policy expressed in the CPA is an "independent" ground for unenforceability, separate from the availability of another avenue for relief.¹¹ In other words, Bitemojo's reading of Dix is that because Washington has a strong public policy of allowing private enforcement

¹¹ Bitemojo points to Oltman v. Holland Am. Line USA, Inc., 163 Wn.2d 236, 253, 178 P.3d 981 (2008), for support of the concept that the public policy basis for refusing to enforce a forum selection clause is independent from availability of relief. But Oltman did not so hold. Rather, it merely cited the discussion in Dix in which the court synthesized federal cases to identify three bases on which forum selection clauses may be deemed unreasonable. The first, not mentioned in Oltman, is when the clause was induced by fraud or overreaching. Dix, 160 Wn.2d at 834. The second is when "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," and the third is when "enforcement would contravene a strong public policy of the State where the action is filed." Id. The court in Oltman merely restated the last two bases as follows: "a forum selection clause can be found to be unenforceable if the party challenging enforceability establishes that the contractually selected forum is so unfair and inconvenient that the plaintiff is essentially denied his day in court or that enforcement would contravene strong public policy of the state where the action is filed." 163 Wn.2d at 253. Bitemojo never challenged the forum selection clauses here on the second basis, that the selected forum was "unfair and inconvenient," but rather, only on the third basis, that enforcement "would contravene a strong public policy."

of the CPA, no forum selection clause can ever be enforceable if it would foreclose plaintiff's CPA claim. But the holding in Dix is not that broad.¹²

In West Consultants, Inc., v. Davis, 177 Wn. App. 33, 310 P.3d 824 (2013), this court applied Dix and determined that even though a forum selection clause foreclosed a CPA claim, enforcing the forum selection clause was not unreasonable. The plaintiff, West Consultants, purchased software that it claimed did not work properly and filed a CPA claim, as well as claims for breach of implied warranties of merchantability and fitness for a particular purpose and unjust enrichment. Id. at 37. The alleged CPA violation was defendant's "selling a poor quality product" and failing to provide installation, training, and maintenance to render the product useful. Id. at 40. The license agreement required bringing any claim "relating in whole or in part to this Agreement" to a Virginia court, a forum in which the CPA claim would be barred. Id. at 37. West Consultants conceded that its claims, including its CPA claim, "related to" the license agreement. Id. at 40. Then, this court went on to address whether enforcing the forum selection clause would be unreasonable because it would violate the CPA's public policy goals. Id. at 42.

The West Consultants court quoted Dix's holding: " '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

¹² Microsoft's argument that Washington's strong public policy as stated by its CPA can be invoked only by Washington residents is also not correct. "Under the CPA, an out-of-state plaintiff may bring a claim against a Washington corporate defendant for allegedly deceptive acts. Similarly, an out-of-state plaintiff may bring a CPA claim against an out-of-state defendant for the allegedly deceptive acts of its in-state agent." Thornell v. Seattle Serv. Bureau, Inc., 184 Wn.2d 793, 804, 363 P.3d 587 (2015).

alternative for seeking relief violates public policy and is unenforceable.’ ” Id. (quoting Dix, 160 Wn.2d at 837). It then contrasted the facts from those in Dix, reasoning that because West Consultants sought substantial damages, \$119,544, did not seek to bring a class action, and presented no evidence to the trial court that it had no feasible alternative for seeking relief, it had not met its burden to show the forum selection clause was unreasonable even though it foreclosed the CPA claim.¹³ Id. Thus, West Consultants demonstrates that Dix does not stand for the proposition that applying a forum selection clause to foreclose a CPA claim is always unreasonable. Instead, we must assess the particular facts alleged in the claim as well as the specific public policy to determine if foreclosing the particular claim “would contravene a strong public policy.” Dix, 160 Wn.2d at 834.

Bitemojo also relies on Acharya v. Microsoft Corp., 189 Wn. App. at 257, to suggest that the proper focus should be on “a public policy in the enforcement of [a] particular Washington statute, and not the feasibility or inconvenience of pursuing other common law claims.” App. Reply Br. at 13-14. But Bitemojo misconstrues Acharya.

In Acharya, the plaintiff accepted a London-based position with a foreign subsidiary of Microsoft and signed an employment contract specifying that any dispute arising under the contract would be governed by Swiss law in Swiss

¹³ The plaintiff in West Consultants also argued on appeal that its claims against one of the defendants would be time-barred in Virginia and that pursuing its claims in either state or federal court in Virginia would be “cost prohibitive.” West Consultants, 177 Wn. App. at 42. However, because the trial court did not consider this argument timely, this court also declined to address it. Id. at 43.

courts. Id. at 247. The plaintiff suffered gender-based discrimination in her London job and after returning to Washington, sued Microsoft. Id. at 248-49. Critical to the court's analysis was that "[u]nder Washington law, the right to be free from discrimination is nonnegotiable and cannot be waived in contract." Id. at 255. "[U]nder the forum selection clause and the choice of law provision, Acharya's WLAD (Washington Law Against Discrimination) claim would not be cognizable." Id. Therefore, the court held that "[i]t would be unreasonable to enforce the forum selection and choice of law clauses" to preclude Acharya from pursuing her WLAD claims. Id. at 255-56. It also rejected Microsoft's arguments that the parties had agreed to the inconvenient forum. It reasoned that "litigation in the designated forum, together with the choice of law clause, would foreclose Acharya's ability to pursue her claim for discrimination cognizable under WLAD," and public policy prohibited WLAD rights from being waived by contract. Id. at 257. Thus, even if the parties had agreed to litigate in Europe, "foreseeable inconvenience" did not outweigh this "significant public policy interest." Id.

While Bitemojo is correct that the Acharya court rejected arguments based on the inconvenience of litigating in the foreign forum, it did not abandon or disregard the inquiry set out in Dix as to whether "there is no feasible alternative avenue for seeking relief" for a CPA claim. Acharya and Dix involved different kinds of claims and, thus, different public policy interests. To determine whether enforcement of a forum selection clause that forecloses a CPA claim would contravene a strong public policy, Dix and West Consultants require us to consider both the specific claim and whether the forum chosen by the parties

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provides “no feasible alternative avenue for seeking relief on such claims.” Dix, 160 Wn.2d at 842-43. This analysis turns on the specific facts of the case.

Where 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. As in West Consultants, that is the case here. While Bitemojo has not specified the amount of damages it seeks, its complaint alleges Microsoft deleted the products and customer data of a company worth millions, a leader in the app-based travel industry. Also, Bitemojo has not filed a class action. This case differs from Dix, where the public policy at stake was an individual’s ability to pursue a small damages CPA claim, and this ability was “seriously impaired” because Virginia did not allow class actions. Here, Bitemojo has not established that it cannot pursue a contract claim for the complained-of conduct in the parties’ chosen forum, Ireland. Enforcing the forum selection clause to foreclose Bitemojo’s CPA claim does not contravene a strong Washington public policy and would not be unreasonable.

Bitemojo has not met its “heavy burden” to present evidence to justify nonenforcement. Dix, 160 Wn.2d at 835. The trial court did not err by enforcing the agreement’s forum selection clause to foreclose the CPA claim.

CONCLUSION

We hold that Bitemojo’s claims are subject to the forum selection clause’s requirement that the claims be litigated in Ireland. Further, Bitemojo has not met its heavy burden to show the agreement’s forum selection clause is

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unreasonable as applied to its CPA claim. Therefore, the trial court properly granted Microsoft's CR 12(b)(3) motion to dismiss Bitemojo's claims.

Affirmed.

Cheng, J.

WE CONCUR:

Cohen, J.

Bruner, J.

Appendix B

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
COUNTY OF KING

CULINARY VENTURES, LTD
d/b/a BITEMOJO,

Plaintiff,

v.

MICROSOFT CORPORATION,

Defendant.

NO.

COMPLAINT

I. NATURE OF THE CASE

1. Plaintiff Culinary Ventures LTD d/b/a Bitemojo (“Plaintiff” or “Bitemojo”) created a smartphone application for self-guided food tours. Plaintiff chose to use Microsoft’s Azure product for its server and data services. When Plaintiff’s business was severely impacted by Covid-19, Microsoft agreed to temporarily suspend Plaintiff’s Azure subscription. Microsoft promised to keep Plaintiff’s data safe during this suspension but instead deleted Plaintiff’s data, including code, infrastructure, user content, and Bitemojo’s customer contact database.

2. Under established principles of law, Microsoft is legally responsible for the damages resulting from its conduct. Microsoft is liable (a) under a theory of promissory estoppel because its promise induced Plaintiff to refrain from moving the Bitemojo data to another server; (b) for breach of contract because Microsoft’s employee promised Plaintiff to keep its data safe while the account was suspended; (c) for conversion because Microsoft

1 willfully interfered with Plaintiff's chattel without lawful justification; and (d) under
2 Washington's Consumer Protection Act, RCW 19.86 et seq., which prohibits unfair or deceptive
3 acts or practices conducted in the course of any trade or commerce.

4 3. Plaintiff brings this lawsuit against Microsoft because it has been injured as a
5 result of Microsoft's unlawful conduct. Plaintiff requests an award of damages sufficient to
6 return it to the position it was in before Microsoft deleted its data. In addition, Plaintiff
7 requests an injunction, requiring Microsoft to recover all of the data it deleted from Plaintiff's
8 account to the extent that recovery is possible.

9 II. PARTIES

10 4. Plaintiff Culinary Ventures LTD d/b/a Bitemojo is a foreign limited liability
11 company with its principal place of business in Jerusalem, Israel.

12 5. Defendant Microsoft Corporation is a Washington Corporation with its principal
13 place of business in Redmond, Washington.

14 III. JURISDICTION AND VENUE

15 6. This Court has original jurisdiction over Plaintiff's claims under the Washington
16 Constitution, Article IV, Section 6; RCW 4.12.020, RCW 2.08.010, and RCW 19.86.090.

17 7. Venue is proper in King County. Defendant transacts business in King County, is
18 headquartered in King County, and therefore resides in King County. Further, Microsoft's
19 unlawful conduct occurred in and emanated from King County.

20 8. Plaintiff brings its claims under Washington law. No federal question exists.

21 IV. FACTUAL BACKGROUND

22 A. Microsoft Azure sells data storage and infrastructure support for small businesses.

23 9. Microsoft is one of the world's wealthiest and most influential corporations with
24 annual revenues that regularly exceed a hundred billion dollars.

25 10. Microsoft sells cloud-based data storage services through an arm of the
26 company called Microsoft Azure.

1 11. Microsoft Azure also offers a Content Delivery Network service, which is
2 “designed to send audio, video, apps, photos, and other files to your customers faster and more
3 reliably, using the servers closest to each user.” [https://azure.microsoft.com/en-](https://azure.microsoft.com/en-us/pricing/details/cdn/)
4 [us/pricing/details/cdn/](https://azure.microsoft.com/en-us/pricing/details/cdn/).

5 12. Microsoft Azure’s Content Delivery Network service includes a service called
6 Acceleration Data Transfer, which “provides dynamic cite acceleration of non-cacheable,
7 dynamic content generated by your web applications.” *Id.*

8 13. Microsoft Azure also offers an “App Service” that companies can use to build and
9 host apps, maintain a relational database as a service to host their “high-performance, data-
10 driven apps” and to “[m]anage and monitor apps to help diagnose issues, improve
11 performance, and assess usage.” <https://azure.microsoft.com/en-us/free/apps/search/>.

12 **B. Plaintiff was a leader in the app-based travel industry.**

13 14. Plaintiff developed the Bitemojo app to give users the ability to take tours that
14 combine travel and culinary experiences. Plaintiff’s innovative app provided travelers with both
15 content and access to the best dishes offered by small local businesses. Plaintiff became one of
16 the most promising companies in the “things-to-do” travel market, as it offered a real
17 experience that included food, rather than just content and tips, and was very attractively
18 priced relative to other food experiences on the market.

19 15. Less than three years after its launch, Plaintiff reached several significant
20 milestones, including raising \$1 million from investors, including personal investments from a
21 number of the leading venture capitalists in Israel; generating more than \$1 million in revenue;
22 and offering tours in 12 cities across Europe, Asia, and the United States with a dozen new
23 destinations in the works. Plaintiff had entered into agreements with some of the largest
24 business-to-business companies in the market. For example, Plaintiff had a strategic
25 partnership with “NYC Sightseeing,” one of the largest providers of double decker bus tours, to
26 create tailored “Bus&bite” tours in New York City and London.

1 16. In March 2020, Plaintiff finalized a new investment round led by investors from
2 Israel's leading crowdfunding platform "Pipelbiz," with an agreed pre-money valuation of \$8.5
3 million based on an in-depth due diligence review by Pipelbiz analysts that was set to raise an
4 additional \$2 million to support Plaintiff's continued growth.

5 17. Plaintiff was one of very few startups in the world to have won more than five
6 different prizes from both the e-commerce and travel industries. Plaintiff was named "best
7 startup to connect travelers and locals through advance payment technology" in World Visa's
8 June 2017 global competition in Copenhagen, the "startup with the biggest impact on local
9 economies in Booking.com's March 2018 competition in Tel-Aviv, "the most influencing startup
10 in food travel" in United Nations World Travel Organization's May 2019 global competition in
11 Spain, and was heralded as the most promising startup by Israel Mobile Summit in May 2018
12 and by Travel Massive in March 2019.

13 18. Plaintiff built a robust customer base consisting of travelers who purchased tours
14 either directly in the app or through distribution channels like GetYourGuide, TripAdvisor, or
15 Expedia (B2C), and travel agents and youth organizers who brought groups of travelers to cities
16 the app serves (B2B). This user base was critical to Plaintiff's strategic growth. Plaintiff believed
17 the B2C prong of its business to have the greatest potential for growth and Plaintiff had
18 assembled a database of users from all over the world, along with extensive information about
19 each user, which it planned to leverage by allowing users to create their own tours and identify
20 their favorite vendors in the app.

21 19. One of the first decisions Plaintiff had to make was where to host its code and
22 infrastructure. After exploring many different options, Plaintiff chose Microsoft Azure for its
23 server-side hosting because of Microsoft's reputation as a reliable and trustworthy business.

24 20. Microsoft stored all of Plaintiff's critical information on its Azure server:

25 a. **All of Bitemojo's users' data**, which was collected from more than 50,000
26 paid customers around the world and consisted of users' contact information, the tours they
27

1 took, their food preferences, social sharing from tours, and many other details. This data does
2 not exist anywhere else.

3 b. **All of Bitemojo’s products**, which include hundreds of manually-crafted
4 tours from all twelve destinations. Some of the tours were specially designed for B2B customers
5 with tour specifications, logs, and images. Plaintiff created this data dynamically through the
6 Microsoft Azure platform.

7 c. **Textual content** 2428- content represented four years of ongoing work,
8 and while the tours were originally created on external spreadsheets, all edits and revisions
9 were made directly in Azure, including B2B customer updates, which gave Plaintiff the ability to
10 provide customized tours within minutes.

11 d. **Visual content** consisting of thousands of photos of Plaintiff’s tours, food
12 dishes, vendors, and points of interest, which were cropped and edited to meet exact, app-
13 specific designations.

14 e. **Customers’ biteCoins**. Many of Plaintiff’s customers held “biteCoins” in
15 their accounts. Customers purchased these coins in the app, were rewarded with coins, or were
16 left with biteCoins from previous tours they took.

17 **C. Microsoft deleted Plaintiff’s data despite promising to keep it safe.**

18 21. In March 2020, Covid-19 decimated the travel industry. Plaintiff was not spared
19 and made the difficult decision to reduce Bitemojo’s monthly expenses to zero, shuttering the
20 company until the tourism industry improved.

21 22. Plaintiff’s co-founder, Michael Weiss, reached out to Microsoft and asked if
22 Microsoft would agree to suspend charges for the Azure service.

23 23. Plaintiff was very pleased with Microsoft’s response. On March 15, 2020, Azure
24 Subscription Support Engineer Mihail Velinov told Mr. Weiss that the Bitemojo account would
25 not incur additional charges.

26 24. A few days later, Azure Subscription Support Engineer Ani Farkova confirmed
27 “that the [Bitemojo] subscription is suspended” and informed Mr. Weiss that “the system will

1 delete it, after 90 days along with its data, if you do not want to reactivate it and use it.” Mr.
2 Weiss specifically asked Ms. Farkova who he should contact to reactivate the subscription. She
3 responded, “Thank you for the email. Yes, you can send the email here, or to my colleague
4 @Mihail_Velinov since is the original case owner. We will assist you in activating the
5 subscription.”

6 25. Microsoft included two email addresses on every communication it sent to Mr.
7 Weiss—the email address of the person who replied to his email and a general support email
8 address. This “two-tiered approach” to customer support and accountability assured Mr. Weiss
9 that Microsoft was receiving his communications and would receive them in the future even if
10 the support person responsible for his account was unavailable. And, in fact, the two-tiered
11 approach twice worked well. In March 2020, for example, Ms. Farkova responded to Mr.
12 Weiss’s email communications when her colleague, Mr. Velinov, was out of the office. And on
13 June 9, 2020, Mr. Velinov responded to Mr. Weiss’s email that was addressed to Ms. Farkova.

14 26. By June 2020, Plaintiff determined it would be irresponsible to resume a travel-
15 based business given the ongoing pandemic. Mr. Weiss sent an email to Ani Farkova on June 5,
16 2020 asking “for another extension in keeping our server shut down and our data secured.”
17 Mihail Velinov responded on June 9 that Microsoft “reactivated your service as it was
18 suspended.” When Mr. Weiss asked for clarification, Mihail Velinov told him that Microsoft will
19 “suspend your subscription” and “delay your payment.” Mr. Weiss requested confirmation that
20 “all our data will be kept there as before.” Mihail Velinov replied that “there is no issue keeping
21 your data safe just make sure to contact me or another engineer within 3 months to postpone
22 the data deletion.”

23 27. Relying on Microsoft’s promise to keep the Bitemojo account data safe, Mr.
24 Weiss emailed both Mihail Velinov and Microsoft’s general support address on September 5,
25 2020, which was within the three-month period to request another extension. Mr. Weiss felt
26 confident that sending his message to both email addresses would ensure that Microsoft would
27 receive his message as it had in the past. But he received no response. Instead, four days later,

1 Mr. Weiss received a message from Microsoft Azure that the Bitemojo “data and services were
2 deleted on September 9, 2020 because you cancelled your subscription 90 days ago.”

3 28. Plaintiff immediately opened a service case with Microsoft support. On
4 September 10, 2020—one day after Bitemojo’s data and services were deleted—Support
5 Engineer Debbie Jimenez Pierce wrote Mr. Weiss and told him that “on[c]e the subscription has
6 been deleted, there is no possible way to retrieve the resources and information.” Ms. Pierce
7 then told Mr. Weiss she was “truly sorry for the inconvenience this may have caused you.”

8 29. Mr. Weiss immediately wrote back that this answer was unacceptable, informing
9 Microsoft that it had “deleted our entire platform, 5 years of work and hundreds [of] thousands
10 of USD, there is absolutely no way we can accept this answer.”

11 30. Business Lead Alexander Cordero wrote back on September 11, 2020 that he
12 planned “to contact engineering team looking for the option to recover your information and
13 reinstate your sbuscription [sic].” Like Ms. Pierce, Mr. Cordero apologized, stating he was
14 “terribly sorry on behalf of the team for the frustration and inconvenience caused” and that he
15 could “completely understand if this has soured the support experience here.”

16 31. But Microsoft apparently did not contact its technical team until five days later
17 when, on September 16, 2020, Microsoft Support Engineer Evert Mauricio L. Monger informed
18 Mr. Weiss, “Today we are engaging our technical advisor team to have your issue escalated and
19 have an answer as soon as possible.”

20 32. Mr. Weiss followed up with Microsoft again on September 17 and September 18.
21 On September 18, 2020, Microsoft’s Evert Lopez Monger told him he was “actually waiting for a
22 response from our technical leads on your request of retrieving the account and subscriptions
23 information.” Mr. Monger asked Mr. Weiss to wait 24-48 hours for a response.

24 33. Although Mr. Weiss followed up on September 19, he did not hear back until
25 September 21 when Mr. Monger asked for his “understanding and patience” telling him “as
26 soon as I get an answer I will reach you.”
27

34. On September 22, 2020, Mr. Monger wrote Mr. Weiss that Microsoft had “engaged another internal team to help retrieve the account information” and told Mr. Weiss he would “have an update within the next 24 hours.” At that point, it had been nearly two weeks since Plaintiff’s data had been deleted.

35. On September 23, 2020, Mr. Monger wrote that Microsoft had “exhaust[ed] all available resources” and could not recover the data. Mr. Monger again apologized on behalf of Microsoft, stating he was “sorry for the inconvenience this can cause.” On September 25, 2020 Mr. Cordero emailed Mr. Weiss asking him to “accept my apologies for all the delays and back and forth with this issue. Rest assured we will be reviewing internally to help prevent this in the future.”

V. FIRST CLAIM FOR RELIEF

(Promissory Estoppel)

36. Plaintiff realleges and incorporates by reference each and every allegation set forth in the preceding paragraphs.

37. Microsoft promised Plaintiff that it would keep its data safe so long as Plaintiff contacted Microsoft within three months to postpone the data deletion.

38. Microsoft should have reasonably expected Plaintiff to change its position based on Microsoft's promises.

39. Plaintiff did change its position based on Microsoft's promise by contacting Microsoft within three months to request an extension on its account suspension and refraining from moving its Bitemojo data to another server.

40. Plaintiff's change in position was based on justifiable reliance on Microsoft's promises.

41. Injustice can only be avoided by enforcing Microsoft's promise.

42. Microsoft is liable to Plaintiff pursuant to the doctrine of promissory estoppel for the damages it incurred as a result of Microsoft deleting its data.

43. Plaintiff is entitled to legal and equitable relief against Microsoft, including damages, injunctive relief, attorneys' fees, costs of suit, and other relief as appropriate.

VI. SECOND CLAIM FOR RELIEF

(Breach of Contract)

44. Plaintiff realleges and incorporates by reference each and every allegation set forth in the preceding paragraphs.

45. Plaintiff had a Microsoft Azure account.

46. Microsoft granted Mihail Velinov actual authority to activate and suspend Azure accounts, including Plaintiff's account.

47. Microsoft placed Mr. Velinov in a position that would lead persons of ordinary prudence, reasonably conversant with business usages and customs, to believe and assume that he possessed the authority to activate and suspend Azure accounts, including Plaintiff's account.

48. Plaintiff reasonably believed Mr. Velinov possessed the authority to make decisions regarding future extensions of account suspensions.

49. Mr. Velinov created a binding contract between Microsoft and Plaintiff when he promised Plaintiff its data would be kept safe if Plaintiff provided proper notification within ninety days.

50. Plaintiff notified Microsoft within 90 days that Plaintiff needed an account extension.

51. Microsoft breached the agreement between Microsoft and Plaintiff when it deleted Plaintiff's data despite the fact that Plaintiff provided the proper notification.

52. As a proximate result of Microsoft's breach of the contract with Plaintiff, Plaintiff has suffered actual damages in an amount to be proven at trial.

53. Because of its breach of contract, Microsoft is liable to Plaintiff for damages and attorneys' fees and costs.

1 **VII. THIRD CLAIM FOR RELIEF**

2 **(Conversion)**

3 54. Plaintiff realleges and incorporates by reference each and every allegation set
4 forth in the preceding paragraphs.

5 55. Plaintiff owned the data stored on Microsoft's servers.

6 56. Microsoft deleted Plaintiff's data, apparently permanently.

7 57. Microsoft's deletion of the data was unjustified because Microsoft intentionally
8 destroyed personal property of Plaintiff without consent or permission of Plaintiff and without
9 contractual or legal authority.

10 58. Microsoft's acts constitute willful interference with chattel because Microsoft
11 acted intentionally and its acts deprived Plaintiff of its personal property.

12 59. To date, Microsoft has not returned the personal property it took from Plaintiff
13 despite a demand that the property be returned.

14 60. Such a failure constitutes an unjustified and willful interference with Plaintiff's
15 personal property and demonstrates an intent to exercise permanent dominion or control over
16 Plaintiff's personal property.

17 61. Microsoft's destruction of, or unjustified interference with, Plaintiff's personal
18 property with intent to exercise dominion and control of the property without lawful
19 justification constitutes an act of conversion.

20 62. As a direct and proximate result of Microsoft's conversion, Plaintiff suffered
21 damages in an amount to be proved at trial.

22 **VIII. FOURTH CLAIM FOR RELIEF**

23 **(Violation of Washington's Consumer Protection Act, RCW 19.86 et seq.)**

24 63. Plaintiff realleges and incorporates by reference each and every allegation set
25 forth in the preceding paragraphs.

26 64. Plaintiff is a "person" within the meaning of the Washington Consumer
27 Protection Act, RCW 19.86.010(1).

1 65. Microsoft is a “person” within the meaning of the Washington Consumer
2 Protection Act, RCW 19.86.010(1), and conducts “trade” and “commerce” within the meaning
3 of the Washington Consumer Protection Act, RCW § 19.86.010(2).

4 66. The conduct described above and throughout this Complaint is unfair within the
5 meaning of the Washington Consumer Protection Act, RCW 19.86.010, et seq.

6 67. Microsoft engaged in unfair acts or practices in the conduct of its business by the
7 conduct set forth above. Specifically, Microsoft assured Plaintiff that it would not delete
8 Plaintiff’s data if Plaintiff followed up within 90 days, which Plaintiff did. Microsoft failed to
9 establish an internal alert that would have prevented deletion of the data before the 90 days
10 expired. Instead, Microsoft’s computerized systems treated Plaintiff’s subscription as cancelled
11 when Plaintiff’s subscription had not actually been cancelled resulting in the automatic and
12 permanent deletion of Plaintiff’s data. Microsoft failed to implement policies or procedures for
13 retaining data in an archived format so that the data could be recovered if it was improperly
14 deleted. And, when it realized the data had been wrongly deleted, Microsoft failed to promptly
15 attempt to retrieve it. After it deleted Plaintiff’s data, Microsoft admitted it was “reviewing
16 internally to help prevent this in the future.”

17 68. Microsoft’s conduct is unfair within the meaning of the CPA because (1) it is
18 unethical, oppressive, or unscrupulous; (2) caused injury to Plaintiff and has the potential to
19 cause injury to other consumers; (3) is not outweighed by any countervailing benefits to
20 consumers or competitors; and (4) was not reasonably avoidable by Plaintiff.

21 69. Microsoft’s unfair acts or practices have occurred in trade or commerce within
22 the meaning of the CPA, RCW 19.86.010(2) and RCW 19.86.020.

23 70. There is substantial potential for Microsoft’s unscrupulous conduct to be
24 repeated.

25 71. Microsoft’s unfair acts or practices impact the public interest because they have
26 injured Plaintiff and have the capacity to injure other consumers who use Microsoft Azure.

27

72. As a direct and proximate result of Microsoft's unfair acts or practices, Plaintiff suffered serious financial injury.

73. Plaintiff is therefore entitled to legal relief against Microsoft, including recovery of actual damages, treble damages, attorneys' fees, costs of suit, and such further relief as the Court may deem proper.

74. Plaintiff also is entitled to injunctive relief in the form of an order prohibiting Microsoft from engaging in the alleged misconduct and such other equitable relief as the Court deems appropriate.

V. PRAYER FOR RELIEF

WHEREFORE, Plaintiff requests that this Court enter a judgment against Microsoft and in favor of Plaintiff and award the following relief and damages:

A. Entry of a judgment in favor of Plaintiff against Microsoft in an amount to be proven at trial, including compensatory damages and treble damages pursuant to RCW 19.86.090 or other applicable law;

B. Entry of a judgment in favor of Plaintiff and against Microsoft for reasonable attorneys' fees and costs pursuant to RCW 19.86.090 or other applicable law;

C. Injunctive relief requiring Microsoft to restore Plaintiff's data if it has not been permanently deleted and to enact procedures preventing Microsoft from deleting customers' data after the customer has timely requested that the data not be deleted;

D. Leave to amend this Complaint to conform to evidence and information developed in this case; and

E. For such other and further relief as the Court deems just and equitable.

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RESPECTFULLY SUBMITTED AND DATED this 16th day of August, 2021.

TERRELL MARSHALL LAW GROUP PLLC

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Attorneys for Plaintiff

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
COUNTY OF KING

CULINARY VENTURES, LTD
d/b/a BITEMOJO,

Plaintiff,

v.

MICROSOFT CORPORATION,

Defendant.

NO.

SUMMONS (20 DAY)

TO: MICROSOFT CORPORATION
c/o Corporation Service Company
300 Deschutes Way SW, Suite 208 MC-CSC1
Tumwater, Washington 98501

A lawsuit has been started against you in the above-entitled court by the Plaintiff. The Plaintiff's claims are stated in the written complaint, a copy of which is served upon you with this summons.

In order to defend against this lawsuit, you must respond to the complaint by stating your defense in writing, and by serving a copy upon the person signing this summons within 20 days after the service of this summons, excluding the day of service, or a default judgment may be entered against you without notice. A default judgment is one where Plaintiff is entitled to what has been asked for because you have not responded. If you serve a notice of appearance

1 on the undersigned person, you are entitled to notice before a default judgment may be
2 entered.

3 You may demand that Plaintiff files this lawsuit with the Court. If you do so, the demand
4 must be in writing and must be served upon Plaintiff. Within fourteen (14) days after you serve
5 the demand, Plaintiff must file this lawsuit with the Court, or the service on you of this
6 Summons and Complaint will be void.

7 If you wish to seek the advice of an attorney in this matter, you should do so promptly
8 so that your written response, if any, may be served on time.

9 THIS SUMMONS is issued pursuant to Rule 4 of the Superior Court Civil Rules of the
10 State of Washington.

11 DATED this 16th day of August, 2021.

12 TERRELL MARSHALL LAW GROUP PLLC

13
14 By: /s/ Jennifer Rust Murray, WSBA #36983
15 Jennifer Rust Murray, WSBA #36983
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1 THE HONORABLE JUDITH H. RAMSEYER

2 Department 46

3 Hearing Date: November 19, 2021

4 Hearing Time: 10:00 a.m.

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8 SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

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10 CULINARY VENTURES, LTD, d/b/a
BITEMOJO,

11 Plaintiff,

12 v.

13 MICROSOFT CORPORATION,

14 Defendant.

No. 21-2-11021-1

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**DECLARATION OF VIKRAM DESAI IN
SUPPORT OF MICROSOFT
CORPORATION'S MOTION TO DISMISS**

17 Vikram Desai declares:

19 1. I am a Principal PM Manager at Microsoft Corporation. I have personal
20 knowledge of, and am competent to testify to, the matters discussed in this declaration.

21 2. As a condition of signing up for the Microsoft Azure services discussed in the
22 Complaint, Plaintiff Culinary Ventures Ltd, d/b/a Bitemojo ("Bitemojo") agreed to the Microsoft
23 Online Subscription Agreement ("Agreement"). A true and correct copy of the Agreement that
24 Bitemojo agreed to when it signed up for Azure services is attached hereto as **Exhibit A**. The
25 current form of that Agreement is available at << [https://azure.microsoft.com/en-](https://azure.microsoft.com/en-us/support/legal/subscription-agreement/?country=il&language=en)
26 [us/support/legal/subscription-agreement/?country=il&language=en](https://azure.microsoft.com/en-us/support/legal/subscription-agreement/?country=il&language=en) >>.

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed this 7th day of October, 2021 at Redmond, Washington.

Vikram Desai

Vikram Desai (Oct 7, 2021 11:30 PDT)

Vikram Desai

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

Exhibit A

Exhibit A

Microsoft Online Subscription Agreement

This Microsoft Online Subscription Agreement is between the entity you represent, or, if you do not designate an entity in connection with a Subscription purchase or renewal, you individually (“you” or “your”), and Microsoft Ireland Operations Limited (“Microsoft”, “we”, “us”, or “our”). It consists of the terms and conditions below, as well as the Online Services Terms, the SLAs, and the Offer Details for your Subscription or renewal (together, the “agreement”). It is effective on the date we provide you with confirmation of your Subscription or the date on which your Subscription is renewed as applicable. Key terms are defined in Section 9.

1. *Use of Online Services.*

- a. **Right to use.** We grant you the right to access and use the Online Services and to install and use the Software included with your Subscription, as further described in this agreement. We reserve all other rights.
- b. **Acceptable use.** You may use the Product only in accordance with this agreement. You may not reverse engineer, decompile, disassemble, or work around technical limitations in the Product, except to the extent applicable law permits it despite these limitations. You may not disable, tamper with, or otherwise attempt to circumvent any billing mechanism that meters your use of the Online Services. You may not rent, lease, lend, resell, transfer, or host the Product, or any portion thereof, to or for third parties except as expressly permitted in this agreement or the Online Services Terms.
- c. **End Users.** You control access by End Users, and you are responsible for their use of the Product in accordance with this agreement. For example, you will ensure End Users comply with the Acceptable Use Policy.
- d. **Customer Data.** You are solely responsible for the content of all Customer Data. You will secure and maintain all rights in Customer Data necessary for us to provide the Online Services to you without violating the rights of any third party or otherwise obligating Microsoft to you or to any third party. Microsoft does not and will not assume any obligations with respect to Customer Data or to your use of the Product other than as expressly set forth in this agreement or as required by applicable law.
- e. **Responsibility for your accounts.** You are responsible for maintaining the confidentiality of any non-public authentication credentials associated with your use of the Online Services. You must promptly notify our customer support team about any possible misuse of your accounts or authentication credentials or any security incident related to the Online Services.
- f. **Preview releases.** We may make Previews available. **Previews are provided “as-is,” “with all faults,” and “as-available,” and are excluded from the SLAs and all limited warranties provided in this agreement.** Previews may not be covered by customer support. We may change or discontinue Previews at any time without notice. We also may choose not to release a Preview into general availability.
- g. **Managed Services for Microsoft Azure.** You may use Microsoft Azure Services to provide a Managed Service Solution provided (1) you have the sole ability to access, configure, and administer the Microsoft Azure Services, (2) You have administrative access to the virtual OSE(s), if any, in the Managed Service Solution, and (3) the third party has administrative access only to its application(s) or virtual OSE(s). You are responsible for the third party’s use of Microsoft Azure Services in accordance with the terms of this agreement. Your provision of Managed Services remains subject to the following limitations in the Online Services Terms:
 - (i) you may not resell or redistribute the Microsoft Azure Services, and
 - (ii) you may not allow multiple users to directly or indirectly access any Microsoft Azure Services feature that is made available on a per user basis.
- h. **Additional Software for use with the Online Services.** To enable optimal access to and

use of certain Online Services, you may install and use certain Software in connection with your use of the Online Service as described in the Online Services Terms. We license Software to you; we do not sell it. Proof of your Software license is (1) this agreement, (2) any order confirmation, and (3) proof of payment. Your rights to access Software on any device do not give you any right to implement Microsoft patents or other Microsoft intellectual property in software or devices that access that device.

2. Purchasing services.

- a. Available Subscription offers.** The Portal provides Offer Details for available Subscription offers, which generally can be categorized as one or a combination of the following:
- (i) Commitment Offering.** You commit in advance to purchase a specific quantity of Online Services for use during a Term and to pay upfront or on a periodic basis in advance of use. With respect to Microsoft Azure Services, additional or other usage (for example, usage beyond your commitment quantity) may be treated as a Consumption Offering. Committed quantities not used during the Term will expire at the end of the Term.
 - (ii) Consumption Offering (also called Pay-As-You-Go).** You pay based on actual usage in the preceding month with no upfront commitment. Payment is on a periodic basis in arrears.
 - (iii) Limited Offering.** You receive a limited quantity of Online Services for a limited term without charge (for example, as a Trial Subscription) or as part of another Microsoft offering (for example, MSDN). Provisions in this agreement with respect to pricing, cancellation fees, payment, and data retention may not apply.
- b. Ordering.**
- (i)** By ordering or renewing a Subscription, you agree to the Offer Details for that Subscription. Unless otherwise specified in those Offer Details, Online Services are offered on an “as available” basis. You may place orders for your Affiliates under this agreement and grant your Affiliates administrative rights to manage the Subscription, but Affiliates may not place orders under this agreement. You also may assign the rights granted under Section 1.a to a third party for use by that third party in your internal business. If you grant any rights to Affiliates or third parties with respect to Software or your Subscription, such Affiliates or third parties will be bound by this agreement and you agree to be jointly and severally liable for any actions of such Affiliates or third parties related to their use of the Products.
 - (ii)** Some offers may permit you to modify the quantity of Online Services ordered during the Term of a Subscription. Additional quantities of Online Services added to a Subscription will expire at the end of that Subscription. If you decrease the quantity during a Term, we may charge you a cancellation fee for the decrease in quantity as described below in Section 3.b.
- c. Pricing and payment.** Payments are due and must be made according to the Offer Details for your Subscription.
- (i)** For Commitment Offerings, the price level may be based on the quantity of Online Services you ordered. Some offers may permit you to modify the quantity of Online Services ordered during the Term and your price level may be adjusted accordingly, but price level changes will not be retroactive. During the Term of your Subscription, prices for Online Services will not be increased, as to your Subscription, from those posted in the Portal at the time your Subscription became effective or was renewed, except where prices are identified as temporary in the Offer Details, or for Previews or Non-Microsoft Products. All prices are subject to change at the beginning of any Subscription renewal.
 - (ii)** For Consumption Offerings, pricing is subject to change at any time upon notice.

d. Renewal.

- (i) Upon renewal of your Subscription, this agreement will terminate, and your Subscription will thereafter be governed, by the terms and conditions set forth in the Portal on the date on which your Subscription is renewed (the "Renewal Terms"). If you do not agree to any Renewal Terms, you may decline to renew your Subscription.
- (ii) For Commitment Offerings, you may choose to have a Subscription automatically renew or terminate upon expiration of the Term. Automatic renewal is pre-selected. You can change your selection at any time during the Term. If the existing Term is longer than one calendar month, we will provide you with notice of the automatic renewal before the expiration of the Term.
- (iii) For Consumption Offerings, your Subscription will renew automatically for additional one-month terms until you terminate the Subscription.
- (iv) For Limited Offerings or Trial Subscriptions, renewal may not be permitted.

e. Eligibility for Academic, Government and Nonprofit versions. You agree that if you are purchasing an academic, government or nonprofit offer, you meet the respective eligibility requirements listed at the following sites:

- (i) For academic offers, the requirements for educational institutions (including administrative offices or boards of education, public libraries, or public museums) listed at <http://go.microsoft.com/?linkid=9862882>;
- (ii) For government offers, the requirements listed at <http://go.microsoft.com/?linkid=9862883>; and
- (iii) For nonprofit offers, the requirements listed at <http://www.microsoftvolumelicensing.com/userights/DocumentSearch.aspx?Mode=3&DocumentTypeId=19>.

Microsoft reserves the right to verify eligibility at any time and suspend the Online Service if the eligibility requirements are not met.

f. Taxes. Prices are exclusive of any taxes unless otherwise specified on the invoice as tax inclusive. You must pay any applicable value added, goods and services, sales, gross receipts, or other transaction taxes, fees, charges or surcharges, or any regulatory cost recovery surcharges or similar amounts that are owed under this agreement and which we are permitted to collect from you under applicable law. You will be responsible for any applicable stamp taxes and for all other taxes that you are legally obligated to pay including any taxes that arise on the distribution or provision of Products to your Affiliates. We will be responsible for all taxes based on our net income, gross receipts taxes imposed in lieu of taxes on income or profits, or taxes on our property ownership.

If any taxes are required to be withheld on payments you make to us, you may deduct such taxes from the amount owed to us and pay them to the appropriate taxing authority; provided, however, that you promptly secure and deliver an official receipt for those withholdings and other documents we reasonably request to claim a foreign tax credit or refund. You must ensure that any taxes withheld are minimized to the extent possible under applicable law.

3. Term, termination, and suspension.

- a. Agreement term and termination.** This agreement will remain in effect until the expiration, termination, or renewal of your Subscription, whichever is earliest.
- b. Subscription termination.** You may terminate a Subscription at any time during its Term; however, you must pay all amounts due and owing before the termination is effective.
 - (i) **One-Month Subscription.** A Subscription having a one-month Term may be terminated anytime without any cancellation fee.
 - (ii) **Subscriptions of more than one-month.** If you terminate a Subscription to Microsoft Azure Services within 30 days of the date on which the Subscription became effective or was renewed, no refunds will be provided and you must pay for the initial 30 days of

the Subscription, but no payments will be due for the remaining portion of the terminated Subscription. If you terminate a Subscription to Microsoft Azure Services at any other time during the term, you must pay for the remainder of the Term, and no refunds will be provided.

For all other Online Services, if you terminate a Subscription before the end of the Term, you must pay a fee equal to one-month's Subscription fee and you will receive a refund of any portion of the Subscription fee you have paid for the remainder of the Term; provided, however, no refunds will be provided for partially unused months.

- c. **Suspension.** We may suspend your use of the Online Services if: (1) it is reasonably needed to prevent unauthorized access to Customer Data; (2) you fail to respond to a claim of alleged infringement under Section 5 within a reasonable time; (3) you do not pay amounts due under this agreement; or (4) you do not abide by the Acceptable Use Policy or you violate other terms of this agreement. If one or more of these conditions occurs, then:
- (i) For Limited Offerings, we may suspend your use of the Online Services or terminate your Subscription and your account immediately without notice.
 - (ii) For all other Subscriptions, a suspension will apply to the minimum necessary part of the Online Services and will be in effect only while the condition or need exists. We will give notice before we suspend, except where we reasonably believe we need to suspend immediately. We will give at least 30 days' notice before suspending for non-payment. If 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.

4. Warranties.

a. **Limited warranty.**

- (i) **Online Services.** We warrant that the Online Services will meet the terms of the SLA during the Term. Your only remedies for breach of this warranty are those in the SLA.
- (ii) **Software.** We warrant for one year from the date you first use the Software that it will perform substantially as described in the applicable user documentation. If Software fails to meet this warranty we will, at our option and as your exclusive remedy, either (1) return the price paid for the Software or (2) repair or replace the Software.

b. **Limited warranty exclusions.** This limited warranty is subject to the following limitations:

- (i) any implied warranties, guarantees or conditions not able to be disclaimed as a matter of law will last one year from the start of the limited warranty;
- (ii) this limited warranty does not cover problems caused by accident, abuse or use of the Products in a manner inconsistent with this agreement or our published documentation or guidance, or resulting from events beyond our reasonable control;
- (iii) this limited warranty does not apply to problems caused by a failure to meet minimum system requirements; and
- (iv) this limited warranty does not apply to Previews or Limited Offerings.

- c. **DISCLAIMER.** Other than this warranty, we provide no warranties, whether express, implied, statutory, or otherwise, including warranties of merchantability or fitness for a particular purpose. These disclaimers will apply except to the extent applicable law does not permit them.

5. Defense of claims.

a. **Defense.**

- (i) We will defend you against any claims made by an unaffiliated third party that a Product infringes that third party's patent, copyright or trademark or makes unlawful use of its trade secret.
 - (ii) You will defend us against any claims made by an unaffiliated third party that (1) any Customer Data, Customer Solution, or Non-Microsoft Products, or services you provide, directly or indirectly, in using a Product infringes the third party's patent, copyright, or trademark or makes unlawful use of its trade secret; or (2) arises from violation of the Acceptable Use Policy.
- b. **Limitations.** Our obligations in Section 5a won't apply to a claim or award based on: (i) any Customer Solution, Customer Data, Non-Microsoft Products, modifications you make to the Product, or services or materials you provide or make available as part of using the Product; (ii) your combination of the Product with, or damages based upon the value of, Customer Data, or a Non-Microsoft Product, data, or business process; (iii) your use of a Microsoft trademark without our express written consent, or your use of the Product after we notify you to stop due to a third-party claim; (iv) your redistribution of the Product to, or use for the benefit of, any unaffiliated third party; or (v) Products provided free of charge.
- c. **Remedies.** If we reasonably believe that a claim under Section 5.a.(i) may bar your use of the Product, we will seek to: (i) obtain the right for you to keep using it; or (ii) modify or replace it with a functional equivalent and notify you to stop use of the prior version of the Product. If these options are not commercially reasonable, we may terminate your rights to use the Product and then refund any advance payments for unused Subscription rights.
- d. **Obligations.** Each party must notify the other promptly of a claim under this Section. The party seeking protection must (i) give the other sole control over the defense and settlement of the claim; and (ii) give reasonable help in defending the claim. The party providing the protection will (1) reimburse the other for reasonable out-of-pocket expenses that it incurs in giving that help and (2) pay the amount of any resulting adverse final judgment or settlement. The parties' respective rights to defense and payment of judgments (or settlement the other consents to) under this Section 5 are in lieu of any common law or statutory indemnification rights or analogous rights, and each party waives such common law or statutory rights.

6. ***Limitation of liability.***

- a. **Limitation.** The aggregate liability of each party for all claims under this agreement is limited to direct damages up to the amount paid under this agreement for the Online Service during the 12 months before the cause of action arose; provided, that in no event will a party's aggregate liability for any Online Service exceed the amount paid for that Online Service during the Subscription. For Products provided free of charge, Microsoft's liability is limited to direct damages up to \$5,000.00 USD.
- b. **EXCLUSION.** Neither party will be liable for loss of revenue or indirect, special, incidental, consequential, punitive, or exemplary damages, or damages for lost profits, revenues, business interruption, or loss of business information, even if the party knew they were possible or reasonably foreseeable.
- c. **Exceptions to limitations.** The limits of liability in this Section apply to the fullest extent permitted by applicable law, but do not apply to: (1) the parties' obligations under Section 5; or (2) violation of the other's intellectual property rights.

7. ***Miscellaneous.***

- a. **Notices.** You must send notices by mail, return receipt requested, to the address below.

Notices should be sent to:	Copies should be sent to:
Microsoft Ireland Operations Limited Atrium Block B Carmenhall Road Sandyford Industrial Estate Dublin 18, Ireland	Microsoft Corporation Legal and Corporate Affairs Volume Licensing Group One Microsoft Way Redmond, WA 98052 USA Via Facsimile: (425) 936-7329

You agree to receive electronic notices from us, which will be sent by email to the account administrator you specify in the Portal. Notices are effective on the date on the return receipt or, for email, when sent. You are responsible for ensuring that the account administrator email address that you specify in the Portal is accurate and current. Any email notice that we send to that email address will be effective when sent, whether or not you actually receive the email.

- b. License Transfers and Assignment.** You may not assign this agreement either in whole or in part or transfer licenses without Microsoft's consent.
- c. Consent to partner fees.** When you place an order, you may be given the opportunity to identify a "Partner of Record" associated with your Subscriptions. By identifying a Partner of Record, directly or by authorizing a third party to do so, you consent to our paying fees to the Partner of Record. The fees are for pre-sales support and may also include post-sales support. The fees are based on, and increase with, the size of your order. Our prices for Online Services are the same whether or not you identify a Partner of Record.
- d. Severability.** If any part of this agreement is held unenforceable, the rest remains in full force and effect.
- e. Waiver.** Failure to enforce any provision of this agreement will not constitute a waiver.
- f. No agency.** This agreement does not create an agency, partnership, or joint venture.
- g. No third-party beneficiaries.** There are no third-party beneficiaries to this agreement.
- h. Applicable law and venue.** This agreement is governed by the laws of Ireland. 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. 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.
- i. Entire agreement.** This agreement is the entire agreement concerning its subject matter and supersedes any prior or concurrent communications. In the case of a conflict between any documents in this agreement that is not expressly resolved in those documents, their terms will control in the following order of descending priority: (1) this Microsoft Online Subscription Agreement, (2) the Online Services Terms, (3) the applicable Offer Details, and (4) any other documents in this agreement.
- j. Survival.** The terms in Sections 1, 2.e, 3.b, 4, 5, 6, 7, and 8 will survive termination or expiration of this agreement.
- k. U.S. export jurisdiction.** The Products are subject to U.S. export jurisdiction. You must comply with all applicable laws, including the U.S. Export Administration Regulations, the International Traffic in Arms Regulations, and end-user, end-use and destination restrictions issued by U.S. and other governments. For additional information, see <http://www.microsoft.com/exporting/>.
- l. Force majeure.** Neither party will be liable for any failure in performance due to causes beyond that party's reasonable control (such as fire, explosion, power blackout, earthquake, flood, severe storms, strike, embargo, labor disputes, acts of civil or military authority, war, terrorism (including cyber terrorism), acts of God, acts or omissions of Internet traffic carriers, actions or omissions of regulatory or governmental bodies (including the passage of laws or regulations or other acts of government that impact the delivery of

Online Services)). This Section will not, however, apply to your payment obligations under this agreement.

- m. **Contracting authority.** If you are an individual accepting these terms on behalf of an entity, you represent that you have the legal authority to enter into this agreement on that entity's behalf. If you specify an entity, or you use an email address provided by an entity you are affiliated with (such as an employer) in connection with a Subscription purchase or renewal, that entity will be treated as the owner of the Subscription for purposes of this agreement.
- n. **Waiver of right to void online purchases.** To the maximum extent permitted by applicable law, you waive your rights to void purchases under this agreement pursuant to any law governing distance selling or electronic or online agreements, as well as any right or obligation regarding prior information, subsequent confirmation, rights of withdrawal, or cooling-off periods.

8. Definitions.

Any reference in this agreement to "day" will be a calendar day.

"Acceptable Use Policy" is set forth in the Online Services Terms.

"Affiliate" means any legal entity that a party owns, that owns a party, or that is under common ownership with a party. "Ownership" means, for purposes of this definition, control of more than a 50% interest in an entity.

"Consumption Offering", "Commitment Offering", or "Limited Offering" describe categories of Subscription offers and are defined in Section 2.

"Customer Data" is defined in the Online Services Terms.

"Customer Solution" is defined in the Online Services Terms.

"End User" means any person you permit to access Customer Data hosted in the Online Services or otherwise use the Online Services, or any user of a Customer Solution.

"Managed Service Solution" means a managed IT service you provide to a third party that consists of the administration of and support for Microsoft Azure Services.

"Microsoft Azure Services" means one or more of the Microsoft services and features identified at <http://azure.microsoft.com/en-us/services>, except where identified as licensed separately.

"Non-Microsoft Product" is defined in the Online Services Terms.

"Offer Details" means the pricing and related terms applicable to a Subscription offer, as published in the Portal.

"Online Services" means any of the Microsoft-hosted online services subscribed to by Customer under this agreement, including Dynamics CRM Online Services, Office 365 Services, Microsoft Azure Services, or Microsoft Intune Online Services.

"Online Services Terms" means the terms that apply to your use of the Products available at <http://www.microsoft.com/licensing/onlineuserights>. The Online Services Terms include terms governing your use of Products that are in addition to the terms in this agreement.

"Previews" means preview, beta, or other pre-release version or feature of the Online Services or Software offered by Microsoft to obtain customer feedback.

"Portal" means the Online Services' respective web sites that can be found at <http://www.microsoft.com/licensing/online-services/default.aspx>, <http://azure.microsoft.com/en-us/pricing/>, or at an alternate website we identify.

"Product" means any Online Service (including any Software).

"SLA" means the commitments we make regarding delivery and/or performance of an Online Service, as published at <http://www.microsoft.com/volumelicensing.com/csla>, <http://azure.microsoft.com/en-us/support/legal/sla/>, or at an alternate site that we identify.

"Software" means Microsoft software we provide for installation on your device as part of your

Subscription or to use with the Online Service to enable certain functionality.

“Subscription” means an enrollment for Online Services for a defined Term as specified on the Portal. You may purchase multiple Subscriptions, which may be administered separately and which will be governed by the terms of a separate Microsoft Online Subscription Agreement.

“Term” means the duration of a Subscription (e.g., 30 days or 12 months).

THE HONORABLE JUDITH H. RAMSEYER
Hearing date: November 19, 2021
Hearing Time: 10:00 a.m.

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

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

Plaintiff,

v.

MICROSOFT CORPORATION,

Defendant.

No. 21-2-11021-1

**AMENDED MICROSOFT
CORPORATION'S MOTION TO DISMISS**

AMENDED MICROSOFT CORPORATION'S
MOTION TO DISMISS (No. 21-2-11021-1)

153759889.9

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I. INTRODUCTION

Plaintiff Culinary Ventures, Ltd, d/b/a Bitemojo's ("Bitemojo") Complaint (Dkt. 1; "Compl.") should be dismissed because Bitemojo has sued the wrong party in the wrong venue for conduct that, in any event, is neither unlawful nor actionable.

After contracting with Microsoft Ireland Operations Limited ("Microsoft Ireland") for data hosting services, Bitemojo stopped making payments and requested that its account be suspended three times in six months—conduct that gave Microsoft Ireland the express contractual right to delete Bitemojo's data. Microsoft Ireland warned Bitemojo that its data would be automatically deleted if the suspension was not lifted within 90 days, but twice deferred this deletion at Bitemojo's request. On September 5, 2020—four days before Bitemojo's data was again slated for automatic deletion, and six months after Bitemojo stopped paying for services—Bitemojo asked Microsoft Ireland's support staff to defer the scheduled deletion for a third time. Bitemojo received no response and made no further inquiry, and its data was automatically deleted as scheduled. Nearly a year later, Bitemojo sued the parent Microsoft Corporation, despite the fact that its contract was with the subsidiary Microsoft Ireland and required Bitemojo to bring its action in Ireland.

Pursuant to CR 12(b)(3) and 12(b)(6), the Court should dismiss this lawsuit with prejudice because : (1) Bitemojo is required to bring its claims in Ireland; (2) Microsoft Corporation was not involved in the conduct at issue and is not a proper party to this suit; and (3) Bitemojo has failed to state a claim for relief because each of its claims is either foreclosed by its contract with Microsoft Ireland or inconsistent with Washington law.

II. STATEMENT OF FACTS

A. The parties and the Agreement.

Microsoft Corporation is a global software company. See Compl. ¶¶ 9-10. Among the services offered by Microsoft Corporation and its various subsidiaries are "Azure" cloud-based data storage services. Id. ¶ 10. Bitemojo is a small company that markets a smartphone

1 application for self-guided food tours. *Id.* ¶ 1. It operates in the international tourism and travel
2 industry and had offices in Israel and Germany. *Id.* ¶¶ 14-15.

3 Bitemojo subscribed to Microsoft Azure’s “server-side hosting” to store “its code and
4 infrastructure.” *Id.* ¶ 19. To obtain this subscription, Bitemojo entered into a Microsoft Online
5 Subscription Agreement (the “Agreement”) with Microsoft Ireland, a subsidiary of Microsoft
6 Corporation and a distinct legal entity. *See* Compl. ¶¶ 1, 19; Declaration of Vikram Desai
7 (“Desai Decl.”) ¶ 2, Ex. A (Agreement). Microsoft Corporation is not a party to the Agreement.
8 Desai Decl., Ex. A (Agreement) at 1. *Id.*

9 The Agreement provides that Microsoft Ireland “may suspend your use of the Online
10 Services if . . . you do not pay amounts due under this agreement[] . . . or you violate the terms of
11 this agreement.” *Id.* at 4 (§ 3(c)). The Agreement further provides that “[i]f you do not fully
12 address the reasons for the suspension within 60 days after we suspend, we may terminate your
13 Subscription and delete your Customer Data without any retention period. We may also
14 terminate your Subscription if your use of the Online Services is suspended more than twice in
15 any 12-month period.” *Id.* (§ 3(c)(ii)). And it makes clear that Microsoft Ireland “does not and
16 will not assume any obligations with respect to the Customer Data . . . other than as expressly set
17 forth in this [A]greement or as required by applicable law. *Id.* at 1 (§ 1(d)).

18 Section 7(h) provides that the Agreement is “governed by the laws of Ireland” and states
19 that, “[i]f you [Bitemojo] bring an action to enforce this agreement, you will bring it in Ireland”
20 (the “Forum Selection Clause”). *Id.* at 6.

21 **B. Bitemojo stops making payments to Microsoft Ireland and repeatedly suspends its**
22 **account.**

23 In March 2020, the coronavirus pandemic and resulting worldwide shutdown “decimated
24 the travel industry” and harmed Bitemojo’s business. Compl. ¶ 21. In response, Bitemojo
25 “made the difficult decision to reduce Bitemojo’s monthly expenses to zero.” *Id.*
26

1 As a part of that effort, Bitemojo contacted two “Azure Subscription Support Engineers”
2 and asked to “suspend charges for the Azure service.” *Id.* ¶¶ 22-24. In response to this request,
3 support engineer “Ani Farkova confirmed ‘that the [Bitemojo] subscription is suspended’ and
4 informed [Bitemojo] that ‘the system will delete it after 90 days along with its data, if you do not
5 want to reactivate it and use it.’” *Id.* ¶ 24. Absent further action, Bitemojo’s data would be
6 “automatic[ally]” deleted by Microsoft’s “computerized systems.” *Id.* ¶ 67.

7 In early June 2020, Bitemojo requested “another extension” to its payment obligations.
8 *Id.* ¶ 26. In response, “Azure Subscription Support Engineer” Mihail Velinov informed
9 Bitemojo that Microsoft Ireland would “‘suspend your subscription’ and ‘delay your payment’”
10 for a second time. *Id.* ¶ 26. Bitemojo asked whether “all our data will be kept there as before,”
11 and Mr. Velinov responded that “there is no issue keeping your data safe just make sure to
12 contact me or another engineer within 3 months to postpone the data deletion.” *Id.*

13 Bitemojo did not contact Mr. Velinov again until September 5, 2020—5 days before its
14 data was set for automatic deletion—and requested a third suspension of its account. *Id.* ¶ 27.
15 Bitemojo “received no response” and made no other attempt to ensure Microsoft Ireland had
16 received its message and would take steps to delay the “automatic” deletion of Bitemojo’s data
17 set to occur in a matter of days. *Id.* As a result, Microsoft Ireland’s “computerized system”
18 “automatic[ally]” deleted Bitemojo’s data on September 9, 2021. *Id.* ¶¶ 27-28, 67.

19 **C. Bitemojo files this lawsuit against the wrong party in the wrong venue.**

20 On August 16, 2021, Bitemojo initiated this lawsuit. Although its Agreement was with
21 Microsoft Ireland, Bitemojo sued Microsoft Ireland’s parent company, Microsoft Corporation.
22 And although the Agreement clearly provides that Bitemojo was required to “bring an[y] action
23 to enforce this agreement . . . in Ireland,” Bitemojo brought suit in King County, Washington.

24 **III. STATEMENT OF ISSUES**

25 1. Whether Bitemojo’s claims should be dismissed with prejudice because the
26 proper venue for this dispute is outside the United States in Ireland.

1 2. Whether Bitemojo’s claims should be dismissed with prejudice because Microsoft
2 Corporation is not the correct party to this litigation.

3 3. Whether Bitemojo’s claims should be dismissed for failure to state a claim upon
4 which relief can be granted.

5 **IV. EVIDENCE RELIED UPON**

6 This motion is based upon the factual allegations contained in Bitemojo’s Complaint and
7 the Bitemojo’s Agreement with Microsoft Ireland. The Court can consider the Agreement for
8 three reasons.

9 **First**, the Court can consider the Agreement for purposes of addressing the question of
10 whether venue is improper under CR 12(b)(3). “Analysis under CR 12(b)(3) permits the court to
11 consider facts outside the pleadings, consistent with the applicable standard for resolving forum
12 selection cases that places the burden on the challenger to submit evidence of nonenforceability.”
13 *Voicelink Data Servs., Inc. v. Datapulse, Inc.*, 86 Wn. App. 613, 624-25, 937 P.2d 1158, 1164
14 (1997).

15 **Second**, this Court may take judicial notice of the Agreement because it is publicly
16 available and its authenticity cannot reasonably be disputed. *See Jackson v. Quality Loan Serv.*
17 *Corp.*, 186 Wn. App. 838, 844, 347 P.3d 487, 491 (2015); *see also id.* (“ER 201(b)(2) authorizes
18 the court to take judicial notice of a fact that is “not subject to reasonable dispute in that it is . . .
19 capable of accurate and ready determination by resort to sources whose accuracy cannot
20 reasonably be questioned.”). The Agreement is a publicly available document, and Bitemojo
21 cannot reasonably dispute its authenticity.¹

22 **Third**, this Court can consider the Agreement because the Complaint incorporates the
23 Agreement by reference. When “a plaintiff asserts allegations related to [a contract] but does not
24 physically attach [that contract] to the complaint,” the court may consider the contract as
25

26 ¹ The most recent versions of the Agreement are available online at << <https://azure.microsoft.com/en-us/support/legal/subscription-agreement/?country=il&language=en> >>. Desai Decl. ¶ 2.

1 incorporated by reference in ruling on a CR 12(b)(6) motion. *Bergman v. Alaska Airlines, Inc.*,
2 16 Wn. App. 2d 553, 557-58, 484 P.3d 480, 483 (2021) (holding that a contract was incorporated
3 by reference in plaintiff’s complaint and could be considered on a CR 12(b)(6) motion for
4 judgment on the pleadings where a plaintiff asserted allegations “related to” the contract but did
5 not physically attach it to the complaint); *see also Jackson*, 186 Wn. App. at 844 (2015) (holding
6 that where plaintiff’s complaint was based on specific documents, “the court’s consideration of
7 the documents was appropriate in this CR 12(b)(6) motion [to dismiss]”). Here, the Court can
8 consider the Agreement because it is not only “related to” Bitemojo’s Complaint—which is itself
9 sufficient, *Bergman*, 16 Wn. App. 2d at 557-58—but *central* to the Complaint. The Agreement
10 governs the key subject matters of this dispute: Bitemojo’s Microsoft Azure subscriptions, and
11 data deletion and retention on Microsoft Azure servers. Bitemojo cannot now avoid the
12 Agreement governing this dispute by simply refusing to attach it or call it by its name.

13 V. ARGUMENT

14 Bitemojo’s Complaint should be dismissed with prejudice because (1) the exclusive
15 venue for this lawsuit lies outside the United States in Ireland, (2) Microsoft Corporation is not a
16 proper party to this lawsuit, and (3) all four of Bitemojo’s claims against Microsoft
17 Corporation—promissory estoppel, breach of contract, conversion, and violation of
18 Washington’s Consumer Protection Act—fail as a matter of law.

19 A. Legal Standard.

20 Under CR 12(b)(3), a defendant may move to dismiss a case based on improper venue.
21 Venue is improper if an enforceable forum selection clause in a contract designates a different
22 venue as the place for disputes to be resolved. *See Voicelink*, 86 Wn. App. at 617. “In deciding
23 a motion based on a forum selection clause, the court does not accept the pleadings as true.
24 Rather, the party challenging the clause must present evidence to justify its nonenforcement.”
25 *Id.* at 618.
26

1 Under CR 12(b)(6), a defendant may move to dismiss a case for failure to state a claim
2 upon which relief may be granted. “CR 12(b)(6) and CR 8(a)(1) together provide that the
3 complaint shall contain a short and plain statement of the claim showing the pleader is entitled to
4 relief.” *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 122, 11 P.3d 726, 756
5 (2000). Although the Court must accept as true all of the plaintiff’s factual allegations and draw
6 all reasonable inferences in favor of the plaintiff, dismissal is appropriate if the complaint alleges
7 no facts that justify the relief requested by the plaintiff. *Gorman v. City of Woodinville*, 175
8 Wn.2d 68, 71, 283 P.3d 1082, 1083 (2012). This means that for plaintiff to present a viable
9 claim for relief, “the complaint must contain either direct allegations on every material point
10 necessary to sustain a recovery on any legal theory . . . or contain allegations from which an
11 inference fairly may be drawn that evidence on these material points will be introduced at trial.”
12 *Havsy v. Flynn*, 88 Wn. App. 514, 518, 945 P.2d 221, 223 (1997) (internal quotation marks and
13 citations omitted); *see id.* at 520 (dismissing intentional interference claim where complaint
14 failed to allege facts supporting an essential element of the claim).

15 **B. The Forum Selection Clause provides for exclusive venue in Ireland.**

16 The Complaint should be dismissed for improper venue under CR 12(b)(3) because the
17 Agreement contains a valid forum selection clause requiring Bitemojo to bring this action in
18 Ireland. Desai Decl., Ex. A (Agreement) at 6 (“If [Bitemojo] bring[s] an action to enforce this
19 agreement, [Bitemojo] will bring it in Ireland.”).

20 “Washington courts enforce forum selection clauses unless they are unreasonable and
21 unjust.” *Maplehurst Bakeries, LLC v. John Bean Techs. Corp.*, 2021 WL 1700808, at *2 (Wash.
22 Ct. App. April 26, 2021) (unpublished) (citing *Voicelink*, 86 Wn. App. at 617). This is true
23 “even if [the clause] is in a standard form consumer contract not subject to negotiation,” *W.*
24 *Consultants, Inc. v. Davis*, 177 Wn. App. 33, 41, 310 P.3d 824, 828 (2013) (quoting *Dix v. ICT*
25 *Grp., Inc.*, 160 Wn.2d 826, 834, 161 P.3d 1016, 1021 (2007)), and “even where a forum
26 selection clause establishes a remote forum for resolution of conflicts,” *Voicelink*, 86 Wn. App.

1 at 618. When evaluating the enforceability of a forum selection clause, Washington courts do
2 “not accept the pleadings as true[;]” rather, “the challenging party must present evidence to
3 justify nonenforcement.” *Id.* “[A] ‘party arguing that the forum selection clause is unfair or
4 unreasonable bears a heavy burden of showing that trial in the chosen forum would be so
5 seriously inconvenient as to deprive the party of a meaningful day in court.’” *Dix*, 160 Wn.2d at
6 835 (quoting *Bank of Am., N.A. v. Miller*, 108 Wn. App. 745, 748, 33 P.3d 91, 93 (2001)). And
7 “non-parties [can] enforce [a] forum selection clause if their alleged conduct was ‘closely related
8 to the contractual relationship’ between” the signatories. *AMA Multimedia, LLC v. Sagan Ltd.*,
9 807 F. App’x 677, 679 (9th Cir. 2020) (quoting *Manetti-Farrow, Inc. v. Gucci Am., Inc.*, 858
10 F.2d 509, 514 n.5 (9th Cir. 1988)).

11 The Forum Selection Clause designates Ireland as the exclusive venue for this dispute.
12 *See* Desai Decl., Ex. A (Agreement). It applies to Bitemojo’s claims here because they are solely
13 premised on the deletion of Bitemojo’s data—conduct expressly governed by the Agreement. *Id.*
14 §§ 1(d), 3(c). Bitemojo’s Complaint does not even address the Forum Selection Clause, let alone
15 establish that it is unenforceable. *See Voicelink*, 86 Wn. App. at 618 (“[T]he challenging party
16 must present evidence to justify nonenforcement”). And Microsoft Corporation can enforce the
17 clause because the conduct at issue “took place as part of the larger contractual relationship
18 between” Bitemojo and Microsoft Ireland. *Holland Am. Line Inc. v. Wartsila N. Am., Inc.*, 485
19 F.3d 450, 456 (9th Cir. 2007); *see also AMA*, 807 F. App’x at 679. Thus, the Forum Selection
20 Clause should be enforced, and the case should be dismissed with prejudice for improper venue.

21 **C. Microsoft Corporation is not a proper party.**

22 While *Microsoft Corporation* is the lone named defendant in this suit, the Complaint
23 exclusively describes the actions of *Microsoft Ireland*—a subsidiary of Microsoft Corporation
24 and a distinct legal entity with which Bitemojo contracted for the services at issue in this dispute.
25 *See* Desai Decl., Ex. A (Agreement) at 1 (“This Microsoft Online Subscription Agreement is
26 between the entity you represent . . . and Microsoft Ireland Operations Limited.”).

1 Microsoft Corporation is not a party to the Agreement, *see id.*, and Bitemojo has not
2 suggested that Microsoft Corporation should somehow be held liable for its subsidiary's actions.
3 It cannot do so. "It is a general principle of corporate law deeply ingrained in our economic and
4 legal systems that a parent corporation . . . is not liable for the acts of its subsidiaries." *Minton v.*
5 *Ralston Purina Co.*, 146 Wn.2d 385, 398, 47 P.3d 556, 562 (2002) (quoting *United States v.*
6 *Bestfoods*, 524 U.S. 51, 61 (1998)) (cleaned up). This rule is subject only to the "rare exception,
7 applied in the case of fraud or certain other exceptional circumstances," of "piercing the
8 corporate veil." *Dole Food Co. v. Patrickson*, 538 U.S. 468, 475 (2003); *see also Minton*, 146
9 Wn.2d at 398. "[C]ourts are reluctant to disregard the separate existence of related corporations
10 by piercing the corporate veil, and have consistently given substantial weight to the presumption
11 of separateness." *McKesson HBOC, Inc. v. N.Y. State Common Ret. Fund, Inc.*, 339 F.3d 1087,
12 1094 (9th Cir. 2003).

13 To prevail on a corporate veil theory under Washington law, a plaintiff must establish
14 (1) that "the corporate form [was] intentionally used to violate or evade a duty," and (2) that
15 piercing the corporate veil is "necessary and required to prevent unjustified loss to the injured
16 party." *Meisel v. M & N Modern Hydraulic Press Co.*, 97 Wn.2d 403, 409–10 (1982) (internal
17 quotations and citations omitted). This requires, among other things, "intentional misconduct,"
18 *id.*, and either "an abuse of the corporate form" (such as "fraud, misrepresentation, or some form
19 of manipulation"), *id.* (citation omitted), or an "alter ego" scenario (where "the corporate entity
20 has been disregarded by the principals"), *Columbia Asset Recovery Grp., LLC v. Kelly*, 177 Wn.
21 App. 475, 486, 312 P.3d 687, 693 (2013) (quoting *Grayson v. Nordic Constr. Co.*, 92 Wn.2d
22 548, 553, 599 P.2d 1271, 1273-74 (1979)) (internal quotations omitted).

23 Bitemojo's Complaint—which, again, ignores Microsoft Ireland's involvement
24 altogether—includes no allegations that would support piercing the corporate veil or otherwise
25 holding Microsoft Corporation responsible for its subsidiary's conduct. Microsoft Corporation
26 is, therefore, not a proper party and this case should be dismissed with prejudice.

1 **D. Bitemojo's claims fail as a matter of law.**

2 Even putting aside that Bitemojo sued the wrong party in the wrong venue, all four of
3 Bitemojo's claims—for promissory estoppel, breach of contract, conversion, and violation of
4 Washington's Consumer Protection Act—fail as a matter of law.

5 **1. Bitemojo has not adequately pled promissory estoppel.**

6 Bitemojo mischaracterizes Microsoft Ireland's attempt to accommodate Bitemojo's
7 pandemic-related struggles as an enforceable promise that Bitemojo justifiably relied on. Compl.
8 ¶¶ 36-43. But the law is clear that the uncompensated assistance of Microsoft Ireland's "Support
9 Engineers" does not establish an enforceable promise.

10 Promissory estoppel requires "(1) a promise which (2) the promisor should reasonably
11 expect to cause the promisee to change his position and (3) which does cause the promisee to
12 change his position (4) justifiably relying upon the promise, in such a manner that (5) injustice
13 can be avoided only by enforcement of the promise." *Clipse v. Com. Driver Servs., Inc.*, 189
14 Wn. App. 776, 796, 358 P.3d 464, 474 (2015) (cleaned up). Further, "promissory estoppel does
15 not apply where a contract governs" the conduct at issue. *Spectrum Glass Co., Inc. v. Pub. Util.*
16 *Dist. No. 1 of Snohomish Cty.*, 129 Wn. App. 303, 317, 119 P.3d 854, 861 (2005); *see also* *Bardy*
17 *v. Cardiac Sci. Corp.*, 2013 WL 5588313, at *7 (W.D. Wash. Oct. 10, 2013) (granting
18 defendant's motion to dismiss plaintiff's promissory estoppel claim because "[w]here there is a
19 valid, enforceable contract governing the parties' dispute, there can be no claim for promissory
20 estoppel.").

21 Bitemojo's promissory estoppel claim fails for several reasons. **First**, "promissory
22 estoppel does not apply" because the Agreement governs Microsoft Ireland's retention and
23 deletion of Bitemojo's data. *Spectrum Glass*, 129 Wn. App. at 317; *see* Desai Decl. ¶ 2, Ex. A
24 (Agreement) at 1. Specifically, the Agreement provides that in the case of an account
25 suspension:
26

1 If you [Bitemojo] do not fully address the reasons for the
2 suspension within 60 days after we suspend, ***we [Microsoft***
3 ***Ireland] may terminate your Subscription and delete your***
4 ***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.

5 *Id.* at 1 (§ 3(c)(ii)) (emphasis added).

6 Bitemojo concedes that it did not agree to resume payments for its account—the reason
7 for the account’s suspension—“within 60 days after” the suspension began. Compl. ¶¶ 23, 26.
8 And it further concedes that its data was not deleted until after its *third* requested suspension
9 within a twelve-month period. *Id.* ¶¶ 22, 26, 27. Accordingly, the Agreement *expressly*
10 *permitted* Microsoft Ireland to delete Bitemojo’s data. Desai Decl., Ex. A at 1 (§ 3(c)(ii)).
11 Regardless, the mere fact that the Agreement governs this conduct precludes Bitemojo’s estoppel
12 claim. *Spectrum Glass*, 129 Wn. App. at 317.

13 ***Second***, Mr. Velinov made no “promise” to Bitemojo. “Obviously, promissory estoppel
14 requires a promise.” *Elliott Bay Seafoods, Inc. v. Port of Seattle*, 124 Wn. App. 5, 13, 98 P.3d
15 491, 495 (2004). And to warrant estoppel, a promise must be “clear and definite” and “worded
16 consistently with an intent for it to be enforceable.” *Doron v. E. Washington Univ.*, 184 Wn.
17 App. 1058 (2014) (unpublished) (citing *Havens v. C & D Plastics, Inc.*, 124 Wn.2d 158, 173,
18 876 P.2d 435, 443 (1994); *Washington Educ. Ass’n v. Washington Dep’t of Ret. Sys.*, 181 Wn. 2d
19 212, 225, 332 P.3d 428, 435 (2014)). “A statement of future intent is not sufficient to constitute a
20 promise for the purpose of promissory estoppel[.]” and [a]n intention to do a thing is not a
21 promise to do it.” *Elliott Bay*, 124 Wn. App. at 13; *see also Meissner v. Simpson Timber Co.*, 69
22 Wn.2d 949, 956, 421 P.2d 674, 679 (1966). Mr. Velinov did not *promise* anything, he merely
23 told Bitemojo that “there is no issue keeping your data safe[.]” Compl. ¶ 26. Because “no
24 formal commitment was ever made, . . . the terms were not discussed, and the issue was one to
25 be worked out in the future,” these alleged statements do not warrant estoppel. *Moberg v.*
26 *Terraqua, Inc.*, 199 Wn. App. 1059 (2017) (unpublished).

1 **Third**, Mr. Velinov had no authority to bind Microsoft Corporation to the purported
2 “promise.” The elements of promissory estoppel are “not satisfied if the promise is made by an
3 unauthorized agent.” *McCormick v. Lake Washington Sch. Dist.*, 99 Wn. App. 107, 118, 992
4 P.2d 511, 517 (1999). And Bitemojo cannot establish that Mr. Velinov had actual or apparent
5 authority to bind Microsoft Ireland, let alone Microsoft Corporation.

6 Under Washington law, “[b]oth actual and apparent authority depend upon objective
7 manifestations *made by the principal*,” not the purported agent. *Steadman v. Green Tree*
8 *Servicing, LLC*, 2015 WL 2085565, at *6 (W.D. Wash. May 5, 2015) (quoting *King v. Riveland*,
9 125 Wn.2d 500, 507, 886 P.2d 160, 165 (1994) (en banc) (emphasis added), *superseded by*
10 *statute on other grounds, Dependency of Q.L.M. v. State Dept. of Social and Health Servs.*, 105
11 Wn. App. 532, 20 P.3d 465 (2001)). “With actual authority, the principal’s objective
12 manifestations are made to the agent; with apparent authority, they are made to a third person.”
13 *King*, 125 Wn.2d at 507. “Such manifestations will support a finding of apparent authority only
14 if . . . [they] cause the one claiming apparent authority to actually, or subjectively, believe that
15 the agent has authority to act for the principal . . . [and] the claimant’s actual, subjective belief is
16 objectively reasonable.” *Id.* The burden of establishing apparent authority “rests on the [party]
17 asserting its existence.” *See State v. French*, 88 Wn. App. 586, 595, 945 P.2d 752, 757 (1997).

18 The Complaint identifies no conduct that could support actual or apparent authority here.
19 Bitemojo alleges only that Mr. Velinov—a “*Subscription Support Engineer*,” Compl. ¶ 23
20 (emphasis added)—had actual or apparent “*authority to activate and suspend Azure accounts*,”
21 Compl. ¶¶ 46-48 (emphasis added). This is plainly insufficient. Of course, “Support Engineers”
22 like Mr. Velinov can activate and suspend accounts—that is their job. Mr. Velinov’s alleged
23 authority to perform this quotidian function does nothing to establish any authority to make
24 binding commitments on his employer’s behalf. Even if it did, because Bitemojo’s contract was
25 with Microsoft Ireland, Mr. Velinov’s “support” for that contract was also on behalf of Microsoft
26

1 Ireland; his statements could not possibly extend liability to *Microsoft Corporation*. *McCormick*,
2 99 Wn. App. at 118; *see also supra*, § V(C).

3 **Fourth**, Bitemojo could not justifiably rely on an alleged promise that was inconsistent
4 with the terms of the Agreement. *See Fawn Lake Maint. Com'n v. Abers*, 149 Wn. App. 318,
5 328, 202 P.3d 1019, 1024 (2009) (equitable estoppel claimant could not reasonably rely on
6 “alleged oral statement” that other party would not enforce clear contractual right to collect
7 dues). Again, the Agreement is clear that Microsoft Ireland had the express right to delete
8 Bitemojo’s data either: (a) sixty days after suspension; or (b) if the account was suspended more
9 than twice in a twelve month period—both conditions that occurred here. *Desai Decl.*, Ex. A at
10 1 (§ 3(c)(ii)); *supra*, § II(A). A promise to the contrary, therefore, cannot be the basis for a
11 promissory estoppel claim because the Agreement legally justifies the data deletion. The Court
12 should dismiss Bitemojo’s promissory estoppel claim.

13 **2. Bitemojo has not adequately pled breach of contract.**

14 For Bitemojo’s contract claim to proceed, the Court must ignore Bitemojo’s *actual*
15 contract with Microsoft Ireland in favor of a *separate*, imagined contract with Microsoft
16 Corporation. But Bitemojo cannot establish any such contract because there was no
17 consideration and no mutual assent.

18 It goes without saying that to establish a claim for breach, Bitemojo must first allege “the
19 existence of a valid contract.” *Wells Fargo Bank N.A. v. Genung*, 2013 WL 6061592, at *3
20 (W.D. Wash. 2013). “Every contract must be supported by a consideration to be enforceable.”
21 *King*, 125 Wn.2d at 505. And, to form a contract, the parties must “manifest to each other their
22 mutual assent to the same bargain at the same time,” which “generally takes the form of an offer
23 and an acceptance.” *Yakima Cty. (W. Valley) Fire Prot. Dist. No. 12 v. City of Yakima*, 122
24 Wn.2d 371, 388, 858 P.2d 245, 255 (1993) (internal quotations and citation omitted). These
25 requirements “avoid trapping parties in surprise contractual obligations.” *Keystone Land & Dev.*
26

1 *Co. v. Xerox Corp.*, 152 Wn.2d 171, 178, 94 P.3d 945, 949 (2004) (quoting *Teachers Ins. &*
2 *Annuity Ass'n v. Tribune Co.*, 670 F.Supp. 491, 497 (S.D.N.Y.1987)).

3 ***There was no consideration.*** “Consideration is any act, forbearance, creation,
4 modification or destruction of a legal relationship, or return promise given in exchange.” *King*,
5 125 Wn.2d at 505. “Before an act or promise can constitute consideration, it must be bargained
6 for and given in exchange for the promise.” *Id.* Further, “the existence of a preexisting
7 [contractual] relationship does not excuse the consideration requirement.” *FDIC v. Uribe, Inc.*,
8 171 Wn. App. 683, 689, 287 P.3d 694, 697 (2012), *as amended on denial of reconsideration*
9 (Jan. 8, 2013) (rejecting argument that consideration is not needed to support a contract where
10 the parties had a preexisting contractual relationship).

11 Bitemojo could not have formed a new contract to store its data because it offered
12 absolutely no consideration. Bitemojo did not offer to undertake any act or forbearance; it did
13 not create, modify, or destroy any legal relationship; it did not offer Microsoft Corporation or
14 Mr. Velinov anything of value; and it made neither Microsoft Corporation nor Mr. Velinov any
15 promises. To the contrary, the alleged new “contract” was only necessary because Bitemojo
16 wanted to *stop making contractually required payments* to Microsoft Ireland. Compl. ¶¶ 21-22.
17 Absent consideration from Bitemojo, there can be no new, valid contract between Bitemojo and
18 Microsoft Corporation.

19 ***There was no mutual assent.*** Just as Mr. Velinov had no actual or apparent authority to
20 bind Microsoft Corporation to any “*promises*,” he had no authority to bind Microsoft
21 Corporation to any *contracts*. *See supra*, § V(D)(1). The Complaint is further devoid of
22 allegations establishing any offer and acceptance of relevant terms. *See Access the USA, LLC v.*
23 *State*, 3 Wn. App. 2d 1012 (2018) (unpublished) (“[T]erms that were prospective in nature, such
24 as ‘would be able to’” were not the type of “objective manifestation” that could establish a
25 contract). Because Bitemojo’s contract claim would improperly “trap[Microsoft] in surprise
26

1 contractual obligations,” *Keystone*, 152 Wn.2d at 178, the claim should be dismissed with
2 prejudice.

3 **3. Bitemojo has not adequately pled conversion.**

4 Bitemojo’s claim that Microsoft Corporation converted Bitemojo’s data by deleting it
5 also fails. *See* Compl. ¶¶ 54-62. “Conversion involves three elements: (1) willful interference
6 with chattel belonging to the plaintiff, (2) by either taking or unlawful retention, and (3) thereby
7 depriving the owner of possession.” *Burton v. City of Spokane*, 16 Wn. App. 2d 769, 773, 482 P.
8 3d 968, 970 (2021). A plaintiff cannot recover on a conversion claim where the defendant had
9 lawful justification to destroy the property. *See Jenkins v. Puckett & Redford PLLC*, 2020 WL
10 4517933, at *7 (W.D. Wash. Aug. 3, 2020).

11 Bitemojo’s conversion claim fails for two reasons. **First**, Bitemojo’s own allegations
12 show that the deletion was not “willful”—which under Washington law, means “voluntary and
13 intentional.” *In re Mastro*, 2017 WL 2889659, at *13 (Bankr. W.D. Wash. July 6, 2017)
14 (quoting Black’s (2) Law Dictionary 1737 (9th ed. 2009)); *cf. Schilling v. Radio Holdings, Inc.*,
15 136 Wn.2d 152, 159–60, 961 P.2d 371, 375 (1998) (en banc) (“Willful means merely that the
16 person knows what he is doing, intends to do what is doing, and is a free agent.”) (citations
17 omitted). Bitemojo concedes that its data was deleted as part of an “automatic” process
18 completed by Microsoft Ireland’s “computerized systems.” Compl. ¶ 67 (emphasis added); *see*
19 *also id.* ¶ 24 (“[T]he system will delete [the subscription], after 90 days along with its data[.]”
20 (emphasis added)).

21 **Second**, Microsoft Ireland had lawful justification under the parties’ Agreement to delete
22 Bitemojo’s data. *See supra*, §§ II(A), V(D)(1); *see also Brown v. JP Morgan Chase Bank N.A.*,
23 2020 WL 2041747, at *3 (W.D. Wash. April 28, 2020) (dismissing conversion claim based on
24 defendant restricting plaintiff’s access to bank account funds because the “[d]efendant’s actions
25 were contractually authorized.”). Microsoft Ireland’s express contractual right to delete
26

1 Bitemojo's data precludes Bitemojo's conversion claim as a matter of law. The Court should
2 dismiss Bitemojo's conversion claim with prejudice.

3 **4. Bitemojo has not adequately pled a violation of the Washington Consumer**
4 **Protection Act.**

5 Finally, Bitemojo's claim under the Washington Consumer Protection Act ("CPA"), *see*
6 Compl. ¶¶ 63-74—which is intended to prevent and redress harm to the *public interest*—also
7 fails as a matter of law.

8 Bitemojo must prove five elements to succeed on its CPA claim: "(1) an unfair or
9 deceptive act or practice, (2) occurring in trade or commerce, (3) that impacts the public interest,
10 (4) causes injury to the plaintiff in his or her business or property, and (5) causation." *Handlin v.*
11 *On-Site Manager Inc.*, 187 Wn. App. 841, 847, 351 P.3d 226, 229 (2015). An act is unfair if it
12 "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by
13 consumers themselves and not outweighed by countervailing benefits." *Rush v. Blackburn*, 190
14 Wn. App. 945, 963, 361 P.3d 217, 225 (2015) (quotations omitted). A private dispute satisfies
15 the public interest element only in narrow circumstances: when there is a "likelihood that
16 additional plaintiffs have been or will be injured in exactly the same fashion." *Hangman Ridge*
17 *Training Stables, Inc. v. Safeco Tit. Ins. Co.*, 105 Wn.2d 778, 790, 719 P.2d 531, 538 (1986).

18 Bitemojo's CPA claim fails for at least three reasons. **First**, Bitemojo has not alleged an
19 actionable "unfair or deceptive" practice because it cannot show that "the alleged act had the
20 capacity to deceive a substantial portion of the public." *McClellon v. Bank of Am., N.A.*, 2018
21 WL 4852628, at *5 (W.D. Wash. Oct. 5, 2018) (quoting *Hangman Ridge*, 105 Wn.2d at 785).
22 As the court explained in *McClellon*, "[a]n alleged deceptive act or practice does not meet this
23 requirement if it is 'unique to the relationship between plaintiff and defendant.' Thus, '[t]o
24 establish an unfair or deceptive act, there must be shown a real and substantial potential for
25 repetition, as opposed to a hypothetical possibility of an isolated unfair or deceptive act's being
26 repeated.'" *Id.* (quoting *Behnke v. Ahrens*, 172 Wn. App. 281, 293, 295, 294 P.3d 729, 736, 737

1 (2012)). Bitemojo has failed to show that there is “a real and substantial potential for repetition”
2 of the alleged conduct or that the conduct has the capacity to deceive “a substantial portion of the
3 public.” *Id.* Indeed, Bitemojo’s allegations—that an automatic deletion protocol kicked in after
4 Microsoft Ireland gave Bitemojo *six months of free data storage* when Bitemojo could not make
5 its contractually required payments—belie any suggestion that the conduct was part of some
6 pattern or practice with a “real and substantial potential for repetition.”

7 **Second**, Bitemojo cannot establish that the alleged conduct was “unfair” because it was
8 “reasonably avoidable” by Bitemojo, *Rush*, 190 Wn. App. at 963. Washington courts look to
9 federal law to test whether a practice is “unfair,” and under federal law, “[a]n injury is
10 reasonably avoidable if consumers ‘have reason to anticipate the impending harm and the means
11 to avoid it,’ or if consumers are aware of, and are reasonable capable of pursuing, potential
12 avenues towards mitigating the injury after the fact.” *Alpert v. Nationstar Mortg. LLC*, 2019 WL
13 1200541, at *6 (W.D. Wash. Mar. 14, 2019) (quoting *Davis v. HSBC Bank Nevada, N.A.*, 691
14 F.3d 1152, 1168-69 (9th Cir. 2012)) (holding that force-placement of an insurance policy was
15 reasonably avoidable because plaintiff was “free, at any time, to choose his own insurance
16 policy,” and plaintiff “had reason to anticipate the impending harm and there is no indication he
17 did not have the means to avoid it”). Here, Bitemojo had reason to anticipate that its data could
18 be deleted: it had stopped paying Microsoft Ireland to store the data, and Microsoft Ireland
19 specifically and repeatedly warned Bitemojo of the risk of deletion. Because Bitemojo could
20 have easily avoided any loss by backing up or migrating its data prior to the deletion date, the
21 alleged conduct is not “unfair.”

22 **Third**, Bitemojo cannot prove that this private dispute has any impact on the public
23 interest. “[A] breach of a private contract affecting no one but the parties to the contract is not an
24 act or practice affecting the public interest,” *Jolley v. Regence Blueshield*, 153 Wn. App. 434,
25 451-52, 220 P.3d 1264, 1272 (2009) (quoting *Hangman Ridge*, 105 Wn.2d at 790), unless there
26 is a “likelihood that additional plaintiffs have been or will be injured in exactly the same

fashion,” *Hangman Ridge*, 105 Wn.2d at 790. Bitemojo’s allegations concern a private business dispute; they do not suggest that other individuals “will be injured in exactly the same fashion,” and do not implicate any public interest. The Court should, accordingly, dismiss Bitemojo’s CPA claim.

E. Dismissal should be with prejudice.

A complaint should be dismissed with prejudice when repleading would be futile. *Cf. Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 142, 937 P.2d 154, 176 (1997) (holding that motion for leave to amend is properly denied when amendment would be futile). Here, dismissal with prejudice is appropriate because any attempt by Bitemojo to amend its complaint would be futile. Bitemojo has sued the wrong party in the wrong venue, and Bitemojo has not and cannot make allegations that would support any of its four claims.

VI. CONCLUSION

For the reasons set forth herein, the Complaint should be dismissed with prejudice.

RESPECTFULLY SUBMITTED this
7th day of October, 2021.

I certify that this motion/memorandum
contains 5,698 words, in compliance with
the Local Civil Rules.

s/ David A. Perez

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on October 7, 2021 I caused to be served upon counsel of record at the
3 address and in the manner described below a copy of the document to which this certificate is
4 attached for delivery to the following:

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

21 EXECUTED at Poulsbo, Washington on October 7, 2021.

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June Starr

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THE HONORABLE JUDITH H. RAMSEYER
Department 46
Hearing Date: November 19, 2021
Hearing Time: 10:00 a.m.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
COUNTY OF KING

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

Plaintiff,

v.

MICROSOFT CORPORATION,

Defendant.

NO. 21-2-11021-1 SEA

**PLAINTIFF'S RESPONSE TO DEFENDANT
MICROSOFT CORPORATION'S AMENDED
MOTION TO DISMISS**

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20	RCW 19.86.010	9
21	RCW 19.86.090	9, 10
22	RCW 19.86.093(3)	22

OTHER AUTHORITIES

25	Restatement (Second) of Contracts § 2(1) (1981)	15
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1 I. INTRODUCTION

2 Microsoft Corporation authorizes subcontractors to handle customer accounts,
3 including customers of its server and data services known as Microsoft Azure. These agents
4 addressed customers' requests for forbearance on Azure subscription payments during the
5 pandemic. Like others in the travel industry, Plaintiff Culinary Ventures, Ltd., developer of the
6 travel app Bitemojo, experienced a significant loss of revenue at the height of the pandemic.
7 Plaintiff contacted Microsoft and was serviced by one of Microsoft's agents, who agreed to
8 temporarily excuse Plaintiff's inability to make payments, and assured Plaintiff that its data
9 would remain secure. Microsoft did so because it did not "want to lose [a] loyal client." Weiss
10 Decl. Ex. I. Microsoft then deleted all of Plaintiff's critical company data because of non-
11 payment despite promising that would not happen.

12 In its motion to dismiss, Microsoft attempts to leverage its complex corporate form to
13 evade responsibility for its mistake. First, it wants the dispute transferred to Ireland, the
14 location of a subsidiary of the Irish holding company Microsoft uses for tax purposes that has
15 little connection to the underlying dispute. But the forum selection clause Microsoft relies upon
16 applies to "an action to enforce" the Microsoft Online Subscription Agreement (MOSA), and
17 this case does not seek to enforce the MOSA. Another court rejected a similar effort by
18 Microsoft based on the same forum selection language. *See Quinstreet Inc. v. Parallel Networks,*
19 *LLC*, No. CIV 06-495-SLR, 2009 WL 1505610, at *2 (D. Del. May 28, 2009). Enforcing the clause
20 would also deprive Plaintiff of its Washington Consumer Protection Act claim and is thus
21 unenforceable. *See Acharya v. Microsoft Corp.*, 189 Wn. App. 243, 255-56, 354 P.3d 908 (2015)
22 (refusing to transfer dispute to Switzerland where plaintiff would have no WLAD claim).

23 Microsoft also moves to dismiss the complaint under CR 12(b)(6) based on unpersuasive
24 arguments about the scope and effect of the MOSA and the authority it grants to Microsoft's
25 agents. Microsoft's core argument is that it can delete customer data for non-payment using
26 the procedure outlined in the MOSA imposing penalties for various account infractions
27 (including non-payment), a suspension with 30-days' notice, and termination if the reasons for

1 the suspension are not fully addressed. See Desai Decl. Ex. A § (3)(c). But that procedure bears
2 no resemblance to what happened in this case. There were no “amounts due” because
3 Microsoft’s agent agreed Plaintiff’s payments would be excused until it had “fully recovered”
4 from the unprecedented global pandemic. Microsoft never provided 30-days’ notice of a
5 suspension of Plaintiff’s use of Azure for non-payment because Microsoft agreed that Plaintiff
6 did not have to make payments. And there was no reason for Plaintiff to “fully address” the
7 reasons for suspension because, whether characterized as a suspension or not, the forbearance
8 of payments was expressly agreed to by Microsoft.

9 Microsoft contends that its Irish subsidiary is the proper defendant because the MOSA is
10 a contract between Plaintiff and Microsoft Ireland. But none of Plaintiff’s claims involve
11 Microsoft Ireland’s conduct and they are not based on the MOSA’s terms. The agreement
12 Microsoft Corporation—not Microsoft Ireland—struck with Plaintiff to retain its business during
13 the pandemic is separate from the MOSA. Microsoft now wants to disclaim responsibility for its
14 agent’s promises even though those agents are its sole contact with its customers. The Court
15 should not permit Microsoft to evade liability with these unfair shell games. Microsoft made
16 promises it did not keep and it is responsible for the consequences of those broken promises.

17 II. STATEMENT OF FACTS

18 A. Plaintiff is a leader in the app-based travel industry.

19 Plaintiff is a software development company that created and developed Bitemojo, a
20 popular smartphone application that offers interactive, self-guided food tours. ¶¶ 1, 14;¹ Weiss
21 Decl. ¶ 2.² Bitemojo allows users to access curated tour itineraries and, through partnerships
22 with local small businesses, access to the best local dishes. ¶ 14; Weiss Decl. ¶ 2.

23
24 ¹ References to “¶ _” are to Plaintiff’s Complaint, Sub. No. 1.

25 ² The Court may consider evidence extrinsic to the complaint in deciding Microsoft’s CR 12(b)(3)
26 motion. *Voicelink Data Servs., Inc. v. Datapulse, Inc.*, 86 Wn. App. 613, 624-25, 937 P.2d 1158
27 (1997). The evidence is also relevant to the 12(b)(6) motion as a source of hypothetical facts.
See ADCI Corp. v. Nguyen, 16 Wn. App. 2d 77, 88 n.4, 479 P.3d 1175 (2021) (considering
declarations and documents attached to appellant’s opening brief in reviewing CR 12(b)(6)

1 Bitemojo was successful. ¶¶ 15–18; Weiss Decl. ¶ 3. Less than three years after launch,
2 Plaintiff was offering tours in 12 cities across Europe, Asia, and the United States with a dozen
3 new destinations in the works. ¶ 15; Weiss Decl. ¶ 3. Plaintiff developed hundreds of tours
4 offering unique ways to experience local culture and cuisine. ¶ 20.b; Weiss Decl. ¶ 3. Because
5 of Bitemojo’s popularity, Plaintiff was able to foster strategic partnerships with other
6 businesses, including a partnership with NYC Sightseeing—one of the largest providers of
7 double decker bus tours—to offer tailored ‘Bus&bite’ tours in New York City and London.
8 ¶¶ 15, 20.b; Weiss Decl. ¶ 4. Plaintiff built a robust customer base. ¶¶ 18, 20.e; Weiss Decl. ¶ 3.

9 **B. Plaintiff built Bitemojo on Azure’s infrastructure and relied on Microsoft to protect its**
10 **valuable data.**

11 After considering several alternatives, Plaintiff chose to use Microsoft Azure’s server and
12 data services to build and run Bitemojo because of the platform’s flexibility, security, and
13 reliability. ¶¶ 1, 11–13, 19. In 2016, Plaintiff applied for and was accepted into Microsoft’s
14 BizSpark program, which provides start-ups with free access to Microsoft Azure cloud services,
15 software, and support. Weiss Decl. ¶ 6, Exs. A-C; Microsoft, My BizSpark FAQ (June 16, 2018),
16 <https://portal.startups.microsoft.com/en-us/about/faq>.

17 Plaintiff relied on Microsoft Azure not only to host and protect its data, but also to
18 provide the infrastructure to run Bitemojo on a global scale. Plaintiff subscribed to Azure’s
19 dedicated Web App and SQL Database services, which offer tools for businesses to “build,
20 deploy, and scale web apps and APIs”³ and “automatically scale [computing and storage]
21 resources based on demand.”⁴ ¶¶ 11–13, 20; Weiss Decl., Ex. O. And Azure’s reliable high-
22 speed Content Delivery Network allowed Plaintiff to make dynamic updates to Bitemojo’s
23 content and deliver customized tours within minutes. ¶ 20; Weiss Decl. ¶ 7.

24 motion “[b]ecause we consider the declarations for the limited purpose of envisioning ...
25 hypothetical facts”).

26 ³ Microsoft, Azure SQL Database, <https://azure.microsoft.com/en-us/products/azure-sql/database/> (last visited Nov. 3, 2021).

27 ⁴ Microsoft, App Service, <https://azure.microsoft.com/en-us/services/app-service/> (last visited Nov. 3, 2021).

1 Since 2016, Plaintiff stored all of the information and data critical to Bitemojo's
2 operation on its Azure server, including:

- 3 • **User data** from more than 50,000 customers worldwide, including contact
4 information, food preferences, and travel interests.
- 5 • **Supplier and proprietary tour ratings** received from customers across the globe,
6 including detailed data about customers' tour ratings, reviews of suppliers' food
7 quality and level of service, and information collected when users recommend
8 suppliers to other customers.
- 9 • **Tour products**, including all individually crafted tours across its twelve destination
10 cities and specially designed products for business-to-business customers, with
11 ready-made tour specifications, logs, and images.
- 12 • **Textual content** for each tour, which was updated and revised dynamically on Azure
13 and used to quickly create customized tours.
- 14 • **Visual content**, consisting of thousands of tour photos, vendor locations, dishes
15 offered, and points of interest, all cropped and edited to meet exacting, app-specific
16 specifications.
- 17 • **biteCoin data** including coin balance and data showing how biteCoins were spent.

18 ¶ 20; Weiss Decl. ¶ 8. Plaintiff trusted that Microsoft would provide the flexible, secure
19 infrastructure and reliable data protection systems for which Azure is known. Weiss Decl. ¶ 9.
20 Plaintiff never imagined it would need to back up its data in addition to using Microsoft's
21 infrastructure. *Id.*

22 **C. Microsoft deleted Plaintiff's data despite promising to keep it safe.**

23 When Covid-19 decimated the travel industry in March 2020, Plaintiff lost its second
24 round of investment funding and made the difficult decision to shut down until tourism
25 improved. ¶ 21; Weiss Decl. ¶ 11. On March 15, Plaintiff's co-founder Michael Weiss submitted
26 a ticket to Microsoft Support to ask "to hold monthly payments" while its business was shut
27 down. ¶ 22; Weiss Decl. Ex. D. He received a sympathetic response from Azure Subscription

1 Support Engineer Mihail Velinov, who said, “As most of the world is suffering from the disease
2 it’s understandable to stop your services temporar[il]y.” ¶¶ 22-23; Weiss Decl. ¶ 13, Ex. E. Mr.
3 Velinov said the account had “a charge of 375.82” but he “waived it off” and that he
4 “suspended your subscription ... to avoid any future charges.” ¶ 23; Weiss Decl. Ex. E.

5 A few days later Mr. Weiss received an email from another Azure Subscription Support
6 Engineer, Ani Farkova, confirming Plaintiff’s “subscription is suspended” and explained that
7 “the system will delete it after 90 days, along with its data, if you do not want to reactivate it
8 and use it.” ¶ 24. When Mr. Weiss asked who to contact to reactivate, Ms. Farkova said he
9 could email her or Mr. Velinov. *Id.*; Weiss Decl. Ex. F. Following this instruction, Mr. Weiss
10 emailed Ms. Farkova, copying Microsoft’s general support email on June 5, 2020 to request
11 another “extension in keeping our server down and our data secured.” ¶ 26; Weiss Decl. Ex. ; G.
12 Three days later, before hearing back from Microsoft, Mr. Weiss received an automated notice
13 that Plaintiff’s data “will be deleted on June 15, 2020” because “you cancelled your Azure
14 subscription on March 17, 2020.” *Id.* Ex. H.

15 Mr. Velinov responded to Mr. Weiss’s June 5 email the next day, saying he had
16 “reactivated your service as it was suspended.” ¶ 26; Weiss Decl. ¶ 20. When Mr. Weiss
17 expressed confusion, Mr. Velinov said he misunderstood and could “hold on to your overdue
18 payments and keep the information inside your subscription” if that’s what Mr. Weiss wanted.
19 Weiss Decl. ¶ 20, Ex. I. Mr. Weiss responded, “Yes, as our business is unfortunately still under a
20 complete shutdown,” and reiterated that he wanted “to extend the period of the last three
21 months where we fr[oze] our due payment and had zero uses of your infrastructure for another
22 period of 3 months.” *Id.* Mr. Velinov agreed, and told Mr. Weiss that he would “suspend
23 [Plaintiff’s] subscription” and “delay your payment.” *Id.*; ¶ 26. Mr. Weiss asked Mr. Velinov to
24 confirm that “all our data will be kept there as before,” and that “both suspension periods
25 would be with [n]o outstanding balance.” ¶ 26; Weiss Decl. ¶ 21, Ex. I. Mr. Velinov assured Mr.
26 Weiss that “[t]here is no issue keeping your data safe” as long as you “contact me or another
27 engineer again within 3 months to postpone the data deletion.” *Id.* Mr. Velinov added, “As you

1 said you will be needed to [pay] only when fully recovered,” because Microsoft does not “want
2 to lose [a] loyal client.” Weiss Decl. Ex. I.

3 On September 2, 2020, Mr. Weiss received another automated reminder that Plaintiff’s
4 data would be deleted on September 9, 2020 because Plaintiff “cancelled” its subscription on
5 June 11. Weiss Decl. ¶ 22; Ex. J. On September 5, Mr. Weiss contacted Mr. Velinov, copying the
6 general Microsoft Support email, to request another extension of the forbearance, exactly as he
7 had done in June. Weiss Decl. ¶ 23, Ex. K.

8 Mr. Weiss was shocked to receive an email on September 9 stating that the data
9 Plaintiff spent years creating and compiling was “deleted ... because you cancelled your
10 subscription 90 days ago.” ¶ 27; Weiss Decl. ¶ 24, Ex. L. Mr. Weiss immediately submitted a
11 ticket to Microsoft support. ¶ 28; Weiss Decl. Ex. M. Although Microsoft initially told Mr. Weiss
12 that it was not possible to retrieve his data, Microsoft later told him that it was contacting an
13 engineering team to identify options “to recover your information and reinstate your
14 subscription.” ¶ 30. During the course of Microsoft’s investigation, Microsoft customer service
15 agents apologized to Mr. Weiss at least five times. ¶¶ 31-35. Microsoft also told Mr. Weiss,
16 “Rest assured we will be reviewing internally to help prevent this in the future.” ¶ 35.

17 **D. Microsoft and its subcontractors were responsible for managing Plaintiff’s**
18 **subscription, not Microsoft Ireland.**

19 Tek Experts is a Microsoft subcontractor that works directly with Microsoft Corporation
20 personnel to support and maintain Microsoft’s services. Murray Decl. Ex. 1 (listing Tek Experts
21 among Microsoft Commercial Support Subcontractors who provide contact and/or call center
22 services); Ex. 2 (listing Tek Experts among subprocessors who provide contract staff that “work
23 in close coordination with Microsoft employees to help support, operate, and maintain the
24 Microsoft Core Online Services”).

25 Plaintiff’s server and the Microsoft servers that hosted its data are located in the United
26 States. Weiss Decl. ¶ 10. All of Plaintiff’s communications about applying to the BizSpark
27 program and setting up its access to Azure were with Microsoft Corporation, not Microsoft

1 Ireland. *Id.* ¶ 6, Exs. A-C. Microsoft Ireland’s only involvement, as far as Plaintiff is aware, is
2 sending invoices and processing payments. *Id.* ¶ 27, Ex. O.

3 By contrast, Plaintiff regularly communicated with Microsoft Corporation and its
4 subcontractors. Weiss Decl. ¶ 28. Product and services updates were all sent by Microsoft
5 Corporation. *Id.* Exs. P-Q. Microsoft Corporation sent “telemetry” reports with data relating to
6 the operation of Bitemojo’s API. *Id.* Ex. R. If there were server-side problems affecting access to
7 Azure, it was Microsoft Corporation, not Microsoft Ireland, that notified Plaintiff. *Id.* Exs. S-T.

8 III. EVIDENCE RELIED UPON

9 This motion relies on the Declarations of Michael Weiss and Jennifer Rust Murray and
10 attached exhibits, and the balance of records and pleadings on file with the Court.

11 IV. ISSUES PRESENTED

12 1. Whether Microsoft’s CR 12(b)(3) motion should be denied because the forum
13 selection clause in the MOSA does not apply to Plaintiff’s claims and is unenforceable?

14 2. Whether Microsoft’s CR 12(b)(6) motion should be denied because Plaintiff
15 states claims for promissory estoppel, breach of contract, conversion, and violation of the CPA?

16 V. ARGUMENT AND AUTHORITY

17 A. Microsoft Corporation’s motion to dismiss for improper venue should be denied.

18 Microsoft Corporation’s motion to dismiss under CR 12(b)(3) should be denied because
19 the forum selection clause only applies to actions to enforce the MOSA; the clause is
20 unenforceable because Plaintiff has no CPA claim in Ireland; and Microsoft has not shown this
21 dispute is closely related to the MOSA.

- 22 1. The forum selection clause only applies to actions seeking to enforce the MOSA.
23 Plaintiff is not seeking to enforce the MOSA.

24 As a matter of straightforward contract interpretation, the forum selection clause in
25 Microsoft Ireland’s form subscription agreement does not apply to Plaintiff’s claims. The clause
26 states: “If you bring an action to enforce this agreement, you will bring it in Ireland.” Desai Decl.
27 Ex. A § 7(h). Plaintiff has not brought an action to enforce the MOSA. Plaintiff does not rely on

1 any provisions of the MOSA or any actions by Microsoft Ireland as the basis for any claim, even
2 indirectly. Instead, Plaintiff's claims turn on promises Microsoft Corporation's agents made to
3 forbear on payments during the pandemic (promissory estoppel and contract), to be
4 compensated for the destruction of its property under common law rules (conversion), and to
5 achieve the justice that Washington law provides for Microsoft's unfair and deceptive conduct
6 (CPA). None of these claims relate to the MOSA, and none are brought against Microsoft
7 Ireland. Indeed, Plaintiff's claims would be the same if the Court found the MOSA was
8 unenforceable—or if it had never existed. *See Quinstreet*, 2009 WL 1505610, at *2 (refusing to
9 enforce a forum selection clause in a Microsoft software licensing agreement using the "if you
10 bring an action to enforce" language because Microsoft could not "explain how the action at
11 bar can be construed as one to enforce" the agreement). Microsoft Ireland chose not to use a
12 broader forum selection clause, such as a clause encompassing claims that "arise under" or
13 "relate to" the contract. *See Acharya v. Microsoft Corp.*, 189 Wn. App. 243, 247, 354 P.3d 908
14 (2015) (analyzing forum selection clause in a Microsoft Corporation subsidiary's employment
15 agreement that encompassed "[a]ny dispute, controversy or claim arising under, out of or in
16 relation to" the agreement).

17 Microsoft argues that Plaintiff's lawsuit is really an action to enforce the MOSA because
18 two MOSA provisions address data. But neither provision could form the basis for a breach of
19 contract claim because neither imposes any actual obligation on Microsoft Ireland. The first
20 provision explains that Microsoft Ireland lacks obligations with respect to the content of
21 Customer Data and forecloses new data obligations. Desai Decl. Ex. A § 1(d). The other gives
22 Microsoft Ireland the right to delete data if an account is suspended with notice, the
23 accountholder fails to address the reason for the suspension, and Microsoft terminates the
24 subscription. *Id.* § 3(c). Moreover, because Plaintiff does not seek to enforce these provisions—
25 and asserts no claims whatsoever against Microsoft Ireland—they are irrelevant to Microsoft
26 Corporation's CR 12(b)(3) motion.

1 2. The forum selection clause is unenforceable.

2 Even if it did apply, it would be unreasonable to enforce the forum selection clause.

3 Courts may refuse to enforce forum selection clauses when “the contractually selected forum is
4 so unfair and inconvenient as, for all practical purposes, to deprive the plaintiff of a remedy or
5 of its day in court, or ... enforcement would contravene a strong public policy of the State
6 where the action is filed.” *Acharya*, 189 Wn. App. at 254. (citation omitted). Washington courts
7 do not enforce forum selection clauses that prevent litigants from obtaining relief under the
8 CPA. *See Dix v. ICT Group, Inc.*, 160 Wn.2d 826, 837, 161 P.3d 1016, 1022 (2007). If this Court
9 found that the forum selection clause applied because this is an action to enforce the
10 agreement, under the contract’s choice-of-law clause the action would be “governed by the
11 laws of Ireland.” Desai Decl. Ex. A §7(h); *see Wireless Warehouse, Inc. v. Boost Mobile, LLC*, No.
12 SACV 09-1436-MLG, 2011 WL 92984, at *4 (C.D. Cal. Jan. 11, 2011) (explaining that the
13 language “[t]his agreement is governed by the laws of” means that the chosen law applies to all
14 causes of action related to the agreement), *aff’d*, 479 F. App’x 58 (9th Cir. 2012).

15 Ireland does not have a law comparable to Washington’s CPA that can be enforced by
16 businesses. The Irish government explains that “Irish and EU consumer laws only apply to
17 transactions between a consumer (a person who buys a good or service for personal use or
18 consumption) and a trader (a person acting for purposes related to their trade, business or
19 profession).”⁵ For example, Ireland’s Consumer Protection Act of 2007 protects “consumers,”
20 defined as any “natural person (whether in the State or not) who is acting for purposes
21 unrelated to the person’s trade, business or profession.” Consumer Protection Act of 2007 (Act
22 No. 19/2007) (Ir.). It does not apply to businesses that are the victims of unfair or deceptive
23 practices like Washington’s CPA does. *See* RCW 19.86.090 (providing a private cause of action
24 to any “person” injured in her business or property by a CPA violation) & RCW 19.86.010
25 (defining “person” to include, *inter alia*, corporations and partnerships).

26 _____
27 ⁵ Citizens Information Board, Your rights as a consumer in Ireland (May 20, 2021)
citizensinformation.ie/en/consumer/consumer_laws/your_rights_as_consumer_in_ireland.html.

1 If the forum selection clause is enforced, Plaintiff would lose its ability to obtain CPA
2 relief from Microsoft, including treble damages and injunctive relief to end Microsoft's broader
3 practices of authorizing subcontractors using Microsoft.org email addresses to make promises
4 to customers that Microsoft later disclaims and automatically deleting customer data with no
5 backups. See RCW 19.86.090. As the Washington Supreme Court has explained, "Given the
6 importance of the private right of action to enforce the CPA for the protection of all the citizens
7 of the state, we conclude that a forum selection clause that seriously impairs a plaintiff's ability
8 to bring suit to enforce the CPA violates the public policy of this state." *Dix*, 160 Wn.2d at 837.

9 3. Microsoft has not shown this case is sufficiently closely related to the MOSA to
10 justify enforcement by a non-party.

11 Even if the forum selection clause did apply and was enforceable in Washington,
12 Microsoft has not shown it can enforce the clause as a non-party to the MOSA. Microsoft must
13 show that the conduct underlying Plaintiff's complaint is "'closely related to the contractual
14 relationship' between the signatories." *AMA Multimedia, LLC v. Sagan Ltd.*, 807 F. App'x 677,
15 679 (9th Cir. 2020) (citation omitted). Microsoft cannot make this showing because Plaintiff
16 does not seek to enforce the MOSA and its claims do not arise from any MOSA provision.
17 Plaintiff's claims do not involve Microsoft Ireland's conduct at all. Microsoft contends the MOSA
18 is the source of the parties' relationship in the first place, but Plaintiff initially enrolled in
19 Microsoft Azure because of the Bizspark program. Weiss Decl., ¶ 6, Exs. A-C. The only
20 connection the MOSA has to this dispute is Microsoft's argument that it was entitled to delete
21 Plaintiff's data as a penalty for non-payment under § 3(c) of the MOSA—an argument that has
22 no merit. Plaintiff sought and received from Microsoft a forbearance on its payments due to the
23 extraordinary circumstances of the pandemic. Microsoft had no basis for imposing any
24 penalties.⁶

25 ⁶ Microsoft also references § 1(d) in passing but never explains why. It doesn't apply for at least
26 four reasons: (1) it is merely a disclaimer of liability requiring customers to "secure and
27 maintain all rights in Customer Data" so Microsoft Ireland can provide services without
"violating the rights of any third party"; (2) Plaintiff's claim is that Microsoft Corporation, not

1 **B. Plaintiff sufficiently pleaded all four of its claims against Microsoft.**

2 In resolving a motion to dismiss under CR 12(b)(6), courts must accept the factual
3 allegations in the complaint as true and draw all reasonable inferences in favor of the non-
4 moving party. *Tenore v. AT&T Wireless Servs.*, 136 Wn.2d 322, 329–30, 962 P.2d 104 (1998). “A
5 complaint survives a CR 12(b)(6) motion if any state of facts could exist under which the court
6 could sustain the claim for relief.” *Haberman v. Washington Pub. Power Supply Sys.*, 109 Wn.2d
7 107, 120, 744 P.2d 1032 (1987). “[A]ny hypothetical situation conceivably raised by the
8 complaint defeats a 12(b)(6) motion if it is legally sufficient to support plaintiff’s claim.”
9 *Halvorson v. Dahl.*, 89 Wn.2d 673, 674, 574 P.2d 1190 (1978); *see also Haberman*, 109 Wn.2d at
10 120. Accordingly, a CR 12(b)(6) motion must be denied unless “it appears beyond a reasonable
11 doubt that no facts exist that would justify recovery.” *J.S. v. Village Voice Media Holdings, LLC*,
12 184 Wn.2d 95, 100, 359 P.3d 714 (2015) (citation omitted). “Given this high standard, CR
13 12(b)(6) motions should be granted sparingly and with care” and only “where plaintiff’s
14 allegations show on the face of the complaint an insuperable bar to relief.” *Daniels v. State*
15 *Farm Mut. Auto. Ins., Co.*, 193 Wn.2d 563, 571, 444 P.3d 582 (2019).

16 1. Microsoft is the proper defendant.

17 Microsoft claims, incorrectly, that it is not a proper defendant because it is not a party
18 to the MOSA and “the Complaint exclusively describes the actions of *Microsoft Ireland*.” Motion
19 at 7-8. But Plaintiff is not seeking to enforce the MOSA and Plaintiff’s Complaint describes the
20 actions of *Microsoft Corporation* and its agents, not Microsoft Ireland. For the purposes of
21 Microsoft’s CR 12(b)(6) motion, the Court must assume the truth of Plaintiff’s allegations.
22 Although Microsoft implies that Tek Experts was working on Microsoft Ireland’s behalf, the

23 _____
24 Microsoft Ireland, made promises it did not keep; (3) the promises Microsoft made to Plaintiff
25 through its agents were, as Microsoft acknowledges, “payment obligations” that required
26 Microsoft to continue to protect Plaintiff’s data; and (4) the provision does not prevent
27 Microsoft from entering into a new agreement due to changed circumstances. *See Berg v.*
Stromme, 79 Wn.2d 184, 193-196, 484 P.2d 380 (1997) (refusing to enforce a general disclaimer
of obligations in an adhesion contract over individually and expressly negotiated terms and
conditions).

1 company is listed as a Microsoft Corporation subprocessor and commercial support
2 subcontractor. Microsoft Corporation subprocessors work “in close coordination with Microsoft
3 employees to help support, operate, and maintain Microsoft Core Online Services,” Murray
4 Decl. Ex. 2 (emphasis added). And Microsoft “regularly review[s]” the operations of
5 subcontractors providing commercial support services. *Id.* Ex. 1.

6 Microsoft owns the U.S.-based servers where Plaintiff’s data was hosted, implemented
7 and maintained the protocol that deleted the data, and controlled the subcontractor who
8 promised that Microsoft would grant Plaintiff forbearance from payments. ¶¶ 46-48; Weiss
9 Decl. ¶¶ 10; Exs. E-F. Because Plaintiff alleges that Microsoft’s conduct caused its injury,
10 Microsoft is the proper defendant. *See Singley v. Aacres/Allvest, LLC*, No. C09-5443 RBL, 2010
11 WL 2990886, at *1–3 (W.D. Wash. Jul. 28, 2010) (proper defendant was the entity that ended
12 the services the plaintiff alleged were wrongfully terminated).

13 2. Plaintiff states a claim for promissory estoppel.

14 “There are five prerequisites for a recovery in promissory estoppel: (1) A promise which
15 (2) the promisor should reasonably expect to cause the promise to change his position and
16 (3) which does cause the promisee to change his position (4) justifiably relying upon the
17 promise, in such a manner that (5) injustice can be avoided only by enforcement of the
18 promise. *King v. Riveland*, 125 Wn.2d 500, 506, 886 P.2d 160 (1994). As the elements reflect,
19 promissory estoppel renders a promise enforceable even if it is made without consideration. *Id.*
20 Plaintiff has alleged facts sufficient to show that the promise made by Microsoft’s agent
21 justifiably induced Plaintiff to refrain from moving its data to another host. Nothing more is
22 required. *See Greaves v. Medical Imaging Sys., Inc.*, 124 Wn.2d 389, 400, 879 P.2d 276, 283
23 (1994) (Washington courts authorize enforcement of a promise that induces action or
24 forbearance by a promisee).

25 a. *The MOSA does not foreclose a promissory estoppel claim.*

26 Microsoft argues that the MOSA’s terms addressing data foreclose any promissory
27 estoppel claim. The provision Microsoft cites, however, governs suspensions initiated by

1 Microsoft and issued as penalties for things like failing to respond to a claim of infringement or
2 not making payments that are due. Desai Decl. Ex. A § (3)(c). Under that procedure, Microsoft
3 suspends a customer's use of the services after providing 30-days' notice, and then after 60
4 days terminates the account if "you do not fully address the reasons for the suspension." *Id.*
5 Although Mr. Weiss and Mr. Velinov used the word "suspension" in their discussions, the
6 notice-suspension-explanation process described in § (3)(c) is nothing like what happened in
7 this case. There were no "amounts due"—Microsoft's agent agreed that Plaintiff would not
8 have to make payments because of the disastrous impact of the pandemic on its business.
9 ¶¶ 21-23, 26; *see also* Weiss Decl. Ex. F. There was no 30-days' notice of a suspension—
10 Microsoft had no reason to unilaterally suspend Plaintiff's use of the Azure services because
11 Microsoft and Plaintiff agreed that the account was suspended due to the pandemic and not as
12 a penalty for non-payment. ¶¶ 23-24, 26; Weiss Decl. ¶¶ 13-21, Exs. E-I. There was no failure to
13 "fully address the reasons"—Plaintiff had nothing to explain as Microsoft had agreed to the
14 forbearance of payments. ¶¶ 23-24, 26; Weiss Decl. ¶¶ 13-21, Exs. E-I. Accordingly, the MOSA
15 provision Microsoft claims gave it unfettered discretion to delete Plaintiff's data is simply
16 inapplicable.

17 Microsoft's reliance on *Spectrum Glass* is misplaced. There, the contract's provisions
18 unquestionably governed the subject of the parties' dispute: the applicable rate for electricity.
19 *Spectrum Glass Co., Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cty.*, 129 Wn. App. 303, 317, 119
20 P.3d 854, 861 (2005). The dispute in this case concerns post-contractual promises about
21 deferral of payments as the result of the global pandemic, a subject not addressed in any way
22 by the MOSA. *See Darland v. Snoqualmie Pass Utility Dist.*, 9 Wn. App. 2d 1063, 2019 WL
23 3202463, at *12 (2019) (unpublished) (distinguishing *Spectrum Glass* because the plaintiff relied
24 on "promises not contained in the writings").

1 b. *Mr. Velinov promised to grant forbearance of payments and secure*
2 *Plaintiff's data.*

3 The terms of Mr. Velinov's promise were clear and enforceable. "A promise is a
4 manifestation of intention to act or refrain from acting in a specified way, so made as to justify
5 a promisee in understanding that a commitment has been made." *Wash. Educ. Ass'n v. Wash.*
6 *Dept. of Ret. Sys.*, 181 Wn.2d 212, 225, 332 P.3d 428 (2014). Mr. Weiss requested to be excused
7 from the consequences of non-payment until Plaintiff was operational again. ¶¶ 22-23, 26;
8 Weiss Decl. Exs. G, I. Mr. Velinov agreed and said that Microsoft would refrain from exercising
9 its right to demand payments and would instead "hold on to your overdue payments and keep
10 the information inside your subscription." ¶¶ 23, 26; Weiss Decl. Ex. I. To make sure the terms
11 of Microsoft's promise were clear, Mr. Weiss asked Mr. Velinov to confirm: (1) that "all our data
12 will be kept there as before"; and (2) that the "suspension periods would be with no
13 outstanding balance that we would need to pay." Weiss Decl. Ex. I. Mr. Velinov confirmed that
14 understanding and assured Mr. Weiss that "[t]here is no issue keeping your data safe" and
15 payments would resume "only when [Plaintiff] is fully recovered." *Id.*; ¶ 26. These
16 communications are exactly the kind of explicit "display of intent" to make a promise that is the
17 hallmark of promissory estoppel claims. *See Tacoma Auto Mall, Inc. v. Nissan North Am. Inc.*,
18 169 Wn. App. 111, 128, 279 P.3d 487 (2012) (a promise requires a "demonstration or display of
19 the promisor's intent").

20 Mr. Velinov's promise was not "[a] statement of future intent" as Microsoft contends.
21 Mr. Velinov promised forbearance of payments for Plaintiff's existing subscription, deferring
22 payments that would otherwise be owed immediately, and assured Mr. Weiss that this would
23 result in Microsoft keeping the data Plaintiff was storing on Microsoft's servers secure. Mr.
24 Velinov provided a present and express promise to defer Plaintiff's payment and continue to
25 secure its data so long as Plaintiff resumed contact within three months. ¶ 26; Weiss Decl. ¶ 21,
26 Ex. I.
27

1 The cases Microsoft relies on are inapposite. Neither involved an actual promise—future
2 or otherwise. In *Elliott Bay Seafoods, Inc. v. Port of Seattle*, the court concluded that “the Port’s
3 [mere] expression of its vision of the pier project was not a legally binding promise.” 124 Wn.
4 App. 5, 13, 98 P.3d 491 (2004). And in *Meissner v. Simpson Timber Co.*, the court refused to
5 require the defendant to pay royalties to the plaintiff based on a discussion about “what
6 [defendant’s] executive committee had agreed to do.” 69 Wn.2d 949, 956, 421 P.2d 674 (1966)
7 (“Plaintiff himself testified that Devlin’s statement to him . . . was ‘like a good friend passing
8 along some good news that he had received. Devlin’s report to plaintiff of what the executive
9 committee had agreed to do does not rise to the dignity of a promise.”). Mr. Velinov promised
10 Microsoft would “act or refrain from acting in a specified way”: deferring amounts Plaintiff
11 owed, keeping the existing data stored on Microsoft’s servers safe. No more is required. *See*
12 *Wash. Educ. Ass’n*, 181 Wn.2d at 225 (quoting Restatement (Second) of Contracts § 2(1)
13 (1981)).

14 c. *Mr. Velinov had authority to make the promises for Microsoft*

15 Microsoft argues that Mr. Velinov did not have authority to act on Microsoft’s behalf.
16 Because whether an agency relationship exists is generally a question of fact for the jury, the
17 Court should not dismiss on this basis. *Unruch v. Cacchiotti*, 172 Wn.2d 98, 115, 257 P.3d 631
18 (2011); *see also Smith v. Hansen, Hansen & Johnson, Inc.*, 63 Wn. App. 355, 363, 818 P.2d 1127
19 (1991) (whether an agent has apparent authority is a question of fact).

20 Plaintiff’s allegations establish Mr. Velinov’s actual and apparent authority to act on
21 Microsoft’s behalf. Actual authority is authority the principal expressly or impliedly invests in an
22 agent. *King*, 125 Wn.2d at 507. Apparent authority exists when the principal “has placed the
23 agent in such position that persons of ordinary prudence ... are thereby led to believe and
24 assume that the agent is possessed of certain authority, and to deal with him in reliance upon
25 such assumption.” *Hoglund v. Meeks*, 139 Wn. App. 854, 867, 170 P.3d 37 (2007) (citation
26 omitted). “Both actual and apparent authority depend upon objective manifestations” that can
27 be gleaned “from documents or other indicia of authority given by the principal to the agent,”

1 *Smith*, 63 Wn. App. at 364-65, and “from authorized statements of the agent.” *Hartman v.*
2 *United Bank Card Inc.*, No. C11-1753JLR, 2012 WL 4758052, at *5-7 (W.D. Wash. Oct. 4, 2012).

3 Mr. Velinov communicated directly with Mr. Weiss, in writing, about suspending
4 Plaintiff’s account payments because of the pandemic and ensuring that its data would be
5 preserved. ¶¶ 23-27; *see also* Weiss Decl. Exs. E-G, I. He and his colleague, Ms. Farkova, used
6 Microsoft email addresses, responded to inquiries sent to a Microsoft support email address,
7 and their titles included Microsoft’s server and data service “Azure.” ¶¶ 23-24; *see also* Weiss
8 Decl. Exs. E-G, I. Mr. Velinov told Mr. Weiss he had authority to adjust payment schedules,
9 suspend subscriptions to avoid “future charges,” and “delay” or “write off” amounts due, and
10 they exercised that authority to waive amounts Plaintiff owed. ¶¶ 23-26; *see also* Weiss Decl.
11 Exs. E (Mr. Velinov reviewed Plaintiff’s account, “found out there’s a charge of 375.82 USD and
12 waived it off”), I.

13 Mr. Velinov’s emails responding to the support tickets Mr. Weiss submitted are the
14 digital equivalent of a Microsoft uniform, granting a “general appearance of authority” to act on
15 Microsoft’s behalf that a reasonable person would have no reason to question. *See Hogland*,
16 139 Wn. App. at 867–68 (citing *Walker v. Pac. Mobile Homes, Inc.*, 68 Wn.2d 347, 350-51, 413
17 P.2d 3 (1966)). Washington courts have routinely held that similar manifestations are sufficient
18 to establish apparent authority. In *Hoglund*, an agent’s use of law firm stationary, signature
19 block on pleadings, and use of the principal’s business forms supported a finding of apparent
20 authority. 139 Wn. App. at 868. And in *Walker*, the court found a salesman had apparent
21 authority where the dealer had placed the salesman on a mobile home lot displaying the
22 dealer’s name, in circumstances such that there was no reason for a prudent person to
23 question the salesman’s authority. 68 Wn.2d at 350–51.

24 Viewed in the light most favorable to Plaintiff, Plaintiff’s allegations establish that Mr.
25 Velinov had authority to make binding payment decisions for Microsoft—without it, he would
26 not have been able to access Microsoft’s systems to make those changes. *Id.* at 866 (explaining
27 that actual authority to perform certain services on a principal’s behalf results in implied

1 authority to perform the usual and necessary acts associated with the authorized services). And
2 Plaintiff had every reason to believe (and did believe) that Mr. Velinov was authorized to
3 provide the “Azure Subscription Management Support” he offered: a payment forbearance.
4 ¶¶ 46–48; Weiss Decl. ¶¶ 14-15.

5 *d. Plaintiff’s reliance on the promise was justified.*

6 Microsoft’s accommodation made perfect sense given the extraordinary circumstances
7 of the pandemic. ¶ 21; Weiss Decl. ¶ 14. Under the circumstances, Plaintiff reasonably believed
8 that Mr. Velinov had authority to act on Microsoft’s behalf and justifiably relied on his promise
9 to defer payments. *See Walker*, 68 Wn.2d at 350–51. Microsoft argues that Plaintiff could not
10 justifiably rely on a promise inconsistent with § 3(c) of the MOSA. But the MOSA penalty
11 suspension procedure simply does not apply. And nothing about Microsoft’s promise to excuse
12 Plaintiff’s non-payment during the pandemic was inconsistent with the MOSA. Indeed,
13 Microsoft’s agreement to excuse Plaintiff’s non-payment is among the many reasons § 3(c)
14 irrelevant, since it only applies when a customer has “amounts due” that are not “fully
15 addressed.”

16 The only case Microsoft cites does not support its argument because the court of
17 appeals affirmed the trial court’s ruling on summary judgment that the defendants had failed to
18 prove equitable estoppel and justifiable reliance “by clear and convincing evidence.” *Fawn Lake*
19 *Maintenance Com’n v. Abers*, 149 Wn. App. 318, 202 P.3d 1019 (2009) (citation in unpublished
20 text); *see also Klinke v. Famous Recipe Fried Chicken, Inc.*, 94 Wn.2d 255, 258, 616 P.2d 644
21 (1980) (“That case is inapplicable inasmuch as it addresses equitable estoppel, not promissory
22 estoppel.”). The “general appearance of authority” Mr. Velinov possessed made it reasonable
23 (and justifiable) for Plaintiff to rely on his promises about how Microsoft would handle its
24 account. *See Hogle*, 139 Wn. App. at 868. Because Plaintiff justifiably relied on the extra-
25 contractual promise of Microsoft’s agent, Microsoft’s motion to dismiss Plaintiff’s promissory
26 estoppel claim must be denied.

1 3. Plaintiff states a claim for breach of contract.

2 Contrary to Microsoft's assertions, the Court does not have to ignore the MOSA to deny
3 the motion to dismiss Plaintiff's breach of contract claim. The agreement Plaintiff contends
4 Microsoft breached is separate from the MOSA and was created when Microsoft's agent agreed
5 that Microsoft would suspend Plaintiff's payments for 90 days because of the global pandemic
6 and keep its data safe neither of which are contemplated by the MOSA. Microsoft argues that
7 the contract is not supported by consideration but, in exchange for Microsoft's agreement to
8 suspend payments for 90 days, Plaintiff agreed to keep its data with Microsoft and remain a
9 Microsoft customer. *See, e.g., Storti v. Univ. of Wash.*, 181 Wn.2d 28, 37, 330 P.3d 159 (2014)
10 (recognizing that "[c]onsideration exists in any bargained for legal detriment, no matter how
11 seemingly small," like an employee agreeing to not pursue employment elsewhere); *Emberson*
12 *v. Hartley*, 52 Wn. App. 597, 601, 762 P.2d 364 (1988) ("A promise for a promise is sufficient
13 consideration."). Viewed in the light most favorable to Plaintiff, this agreement constitutes
14 consideration. *See Fish Net, Inc. v. ProfitCenter Software, Inc.*, No. 09-5466, 2011 WL 1235204,
15 at *8 (E.D. Penn. Mar. 31, 2011) (denying motion to dismiss breach of alleged oral contract
16 where the defendant "received consideration, i.e., 'something of value,'" when it induced the
17 plaintiff to remain a client of its subsidiary). Indeed, this was the very basis for the bargain
18 expressed by Mr. Velinov. Weiss Decl. Ex. I.

19 Microsoft argues that there was no mutual assent because the terms were "prospective
20 in nature." Motion at 13. But Microsoft's forbearance of Plaintiff's payments was an agreement
21 to present terms, not merely "preliminary negotiations and informal discussions" as in the
22 cases Microsoft cites. *See Access the USA, LLC v. State*, 3 Wn. App. 2d 1012, 2018 WL 1709674,
23 at *6-7 (2018) (unpublished decision) (there was no mutual assent where the plaintiff merely
24 "expressed optimism about opening accounts and placing orders"); *see also Keystone Land &*
25 *Dev. Co. v. Xerox Corp.*, 152 Wn.2d 171, 178-79, 94 P.3d 945 (2004) ("At most," Xerox
26 manifested an intent "to negotiate with Keystone," and its "statement evidences an intent not
27 to be bound by expressly referencing the need for further negotiations"). As discussed in

1 section V.B.2.c above, there is no merit to Microsoft’s argument that mutual assent was lacking
2 because Mr. Velinov lacked authority to bind Microsoft to a contract. And “[w]hether there was
3 mutual assent is normally a question of fact for the jury.” *Keystone*, 152 Wn.2d at 178 n.10.

4 Microsoft’s motion to dismiss Plaintiff’s breach of contract claim should be denied.

5 4. Plaintiff states a claim for conversion.

6 Neither of Microsoft’s challenges to Plaintiff’s conversion claim has merit. First,
7 Microsoft argues that even if it had no legal right to destroy Plaintiff’s data, its conduct was not
8 willful because Microsoft programmed a piece of software to delete the data automatically. But
9 the law of intent does not excuse a party who programs computer software to automatically
10 take an action any more than it excuses the homeowner who rigs a shotgun to a tripwire
11 instead of pulling the trigger. “Wrongful intent is not an element of conversion, and good faith
12 is not a defense.” *Brown v. Brown*, 157 Wn. App. 803, 818, 239 P.3d 602 (2010). As Microsoft’s
13 own authorities acknowledge, an act is willful if the actor “intend[s] to do what [she] is doing.”
14 *In re Mastro*, No. 09-16841-MLB, 2017 WL 2889659, at *13 (Bnkr. W.D. Wash. Jul. 6, 2017)
15 (quoting *Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 159–160, 961 P.2d 371, 375 (1998)).
16 Microsoft developed and implemented an automatic process it intended would delete data
17 from its servers. Microsoft’s failure to ensure that the protocol was not applied to data it had
18 agreed to not delete does not negate the willful nature of the deletion. *See Jackson Family*
19 *Wines, Inc. v. Diageo N.A., Inc.*, No. 11-5639 EMC, 2014 WL 595912, at *5 (N.D. Cal. 2014)
20 (failure to suspend automatic email destruction policy was willful spoliation); *Apple v. Samsung*
21 *Electronics Co., Ltd.*, 881 F. Supp. 2d 1132, 1147 (N.D. Cal. 2012) (same).

22 Second, Microsoft claims it had lawful justification to delete Plaintiff’s data under the
23 MOSA. As explained above, however, the suspension provision described in § 3(c)—and the
24 corresponding terms about data deletion—does not apply to the facts of this case which
25 involved excusing non-payment, lacked any 30-day notice of suspension, and by its nature
26 could not have involved a failure to explain the suspension. Accordingly, Microsoft had no
27 “lawful justification” for deleting Plaintiff’s data. *U.S. Bank Nat’l Assoc. v. Roosild*, 17 Wn. App.

1 2d 589, 599, 487 P.3d 212 (2021) (“A condition precedent is an event that must occur before
2 there is a right to immediate performance of the contract.”). Microsoft’s motion to dismiss
3 Plaintiff’s conversion claim should be denied.

4 5. Plaintiff states a claim for violation of the CPA.

5 Plaintiff has pled a viable CPA claim. To prevail on a CPA claim, a plaintiff must establish
6 that the defendant engaged in (1) an unfair or deceptive act or practice; (2) occurring in trade
7 or commerce; (3) a public interest impact; (4) an injury to plaintiff in its business or property;
8 and (5) causation. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778,
9 780, 719 P.2d 531 (1986). “The legislature has directed that the CPA ‘be liberally construed that
10 its beneficial purposes may be served.’” *Young v. Toyota Motor Sales, U.S.A.*, 196 Wn.2d 310,
11 316, 472 P.3d 990 (2020). And the Supreme Court has emphasized that the CPA is intended to
12 be flexible so it may “reach unfair or deceptive conduct that inventively evades regulation.”
13 *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 49, 204 P.3d 885 (2009). “A central purpose
14 of the CPA is to provide ‘an efficient and effective method of filling the gaps’ in the common
15 law and statutes.” *Id.* at 54 (citation omitted).

16 Microsoft contends that it did not engage in a deceptive or unfair act or practice. An act
17 or practice is deceptive if it “is likely to mislead a reasonable consumer.” *Panag*, 166 Wn.2d at
18 50. While the Washington Supreme Court has not “explore[d] in detail how to define unfair
19 acts,” it is established that “an act or practice can be unfair without being deceptive.” *Klem v.*
20 *Wash. Mut. Bank*, 176 Wn.2d 771, 787, 295 P.3d 1179 (2013). Indeed, “[t]he universe of ‘unfair’
21 business practices is broader than, and encompasses, the universe of ‘deceptive’ business
22 practices.” *Panag*, 166 Wn.2d at 47. As a general rule, a practice is unfair if it “causes or is likely
23 to cause substantial injury to consumers which is not reasonably avoidable by consumers
24 themselves and is not outweighed by countervailing benefits,” or if it is “unethical, oppressive,
25 or unscrupulous, among other things.” *Klem*, 176 Wn.2d at 787 (citations omitted).

26 Plaintiff alleges that Microsoft’s agent promised Plaintiff that Microsoft would excuse its
27 non-payment and continue to retain Plaintiff’s data if Plaintiff followed up within 90 days—

1 which Plaintiff did. ¶¶ 24, 26-27, 67. Yet Microsoft’s computerized systems deleted Plaintiff’s
2 data anyway, purportedly for non-payment, and Microsoft had no procedures for retaining data
3 in an archived format so it could be recovered if improperly deleted. ¶ 67. This conduct is
4 deceptive because a reasonable consumer is likely to be misled by Microsoft’s unfulfilled
5 promise to grant forbearance of payments. Moreover, Microsoft’s practice of allowing
6 subcontractors operating with Microsoft.org email addresses to make promises to its
7 customers about payment and activating and suspending accounts that Microsoft then refuses
8 to honor is likely to mislead a reasonable consumer, as consumers may not know they are not
9 communicating directly with Microsoft or that Microsoft may choose to disclaim its
10 subcontractor’s promises. Microsoft’s deletion of Plaintiff’s data despite its agent’s promises is
11 also unfair because it caused substantial harm that Plaintiff could not reasonably avoid and that
12 was not outweighed by any countervailing benefit, and because it was unethical and oppressive
13 given the promises Microsoft’s agent made about preserving the data due to the financial
14 impact of the pandemic.

15 Microsoft argues that the alleged acts and practices are exclusive to Plaintiff and there is
16 no potential for repetition. But Microsoft Azure is used by thousands of businesses, from large,
17 established companies to smaller startups like Plaintiff.⁷ And the conduct at issue arose from a
18 global pandemic that significantly impacted many businesses—not circumstances unique to
19 Plaintiff. It is highly likely that discovery will reveal that other Microsoft customers faced similar
20 hardships and relied on similar promises from Microsoft subcontractors. This is not a case like
21 *McClellon v. Bank of America, N.A.*, where the plaintiff did not allege that BOA acted
22 deceptively in allowing an allegedly fraudulent wire transfer from his account or that “BOA’s
23 failure to verify the unauthorized transfers” had “a real and substantial potential to be
24 repeated.” No. C18-0829-JCC, 2018 WL 4952628, at *5 (W.D. Wash. Oct. 5, 2018).

25 _____
26 ⁷ See, e.g., Microsoft Customer Stories, [https://customers.microsoft.com/en-](https://customers.microsoft.com/en-us/search?sq=&ff=story_product_categories%26%3EAzure&p=0)
27 [us/search?sq=&ff=story_product_categories%26%3EAzure&p=0](https://customers.microsoft.com/en-us/search?sq=&ff=story_product_categories%26%3EAzure&p=0) (describing more than 2,500
customers’ use of Azure, sortable by language, industry, and organization size).

1 Microsoft's argument that Plaintiff could have reasonably avoided the deletion of its
2 data highlights a disputed factual issue that cannot be resolved on a motion to dismiss. Plaintiff
3 alleges that Microsoft's subcontractor's promises induced Plaintiff to refrain from moving its
4 data to another server. ¶¶ 2, 23-24, 26-27, 37-40, 67. Microsoft contends that Plaintiff should
5 have done so anyway. Motion at 17. This case is therefore nothing like the summary judgment
6 decision Microsoft cites, where the plaintiff unilaterally stopped making mortgage payments
7 and ignored Nationstar's warnings over several years that it would force-place an insurance
8 policy that could be more expensive than one the plaintiff obtained on his own. *Alpert v.*
9 *Nationstar Mortg. LLC*, No. C15-1164 RAJ, 2019 WL 1200541, at *1-2, 7 (W.D. Wash. Mar. 14,
10 2019).

11 Microsoft's argument that Plaintiff has not pled a public interest impact ignores the
12 applicable standard. An act or practice impacts the public interest if it "has the capacity to
13 injure other persons." RCW 19.86.093(3); *see also Rush v. Blackburn*, 190 Wn. App. 945, 976,
14 361 P.3d 217 (2015). Microsoft markets its Azure services to the general public and has many
15 other customers who are also directed to work with Microsoft's subcontractors to resolve
16 account issues, so this is far from a "private business dispute," as Microsoft claims.

17 Indeed, even when a plaintiff's CPA claim is based on "essentially a private dispute,"
18 courts may find a public interest impact after considering several factors: "(1) Were the alleged
19 acts committed in the course of defendant's business? (2) Did defendant advertise to the public
20 in general? (3) Did defendant actively solicit this particular plaintiff, indicating potential
21 solicitation of others? (4) Did plaintiff and defendant occupy unequal bargaining positions?"
22 *Rush*, 190 Wn. App. at 969 (quoting *Hangman Ridge*, 105 Wn.2d at 790-91). The relevant acts
23 were committed in the course of Microsoft's business, Microsoft advertises to the public (as
24 evidenced by its website cited above), and Microsoft and Plaintiff were in unequal bargaining
25 positions since Plaintiff is a small startup company. *See Svendsen v. Stock*, 143 Wn.2d 546, 559,
26 23 P.3d 455 (2001) (public interest requirement established where the alleged concealment of
27 a house's drainage problem occurred in the defendant's real estate business and the defendant

1 advertised the property); *Bund v. Safeguard Properties LLC*, No. C16-920 MJP, 2018 WL
2 3917930, at *6 (W.D. Wash. Aug. 16, 2018) (public interest satisfied where the acts were
3 committed in the course of the defendant's business and the parties were in unequal
4 bargaining positions).⁸

5 6. If the Court grants any part of Microsoft's motion, Plaintiff should be given leave
6 to amend.

7 "The purposes of Rule 15 are to 'facilitate a proper decision on the merits,' and to
8 provide each party with adequate notice of the basis of the claims or defenses asserted against
9 him." *Herron v. Tribune Pub. Co., Inc.*, 108 Wn.2d 162, 165, 736 P.2d 249 (1987) (citations
10 omitted). "Leave to amend should be freely given 'except where prejudice to the opposing
11 party would result.'" *Id.* (citation omitted). If the Court concludes that Plaintiff's allegations are
12 insufficient, Plaintiff should be granted leave to amend. This case is in its earliest stages and
13 Microsoft would suffer no prejudice as a result.

14 VI. VI. CONCLUSION

15 Plaintiff respectfully requests that the Court deny Microsoft's motion to dismiss.

16 VII. VII. LCR 7(B)(5)(B)(VI) CERTIFICATION

17 I certify that this motion contains 8,231 words in compliance with the Local Civil Rules.

18 //

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20 //

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25 ⁸ In the summary judgment decision Microsoft cites, the appellate court found the physician
26 plaintiff did not have standing to pursue his CPA claim and he failed to establish that others
27 would likely be injured by the defendant insurance company failing to follow its appeal process.
Jolley v. Regence Blueshield, 153 Wn. App. 434, 451-52, 220 P.3d 1264, 1272 (2009).

1 RESPECTFULLY SUBMITTED AND DATED this 8th day of November, 2021.

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THE HONORABLE JUDITH H. RAMSEYER

Department 46

Hearing Date: November 19, 2021

Hearing Time: 10:00 a.m.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
COUNTY OF KING

CULINARY VENTURES, LTD
d/b/a BITEMOJO,

Plaintiff,

v.

MICROSOFT CORPORATION,

Defendant.

NO. 21-2-11021-1 SEA

**DECLARATION OF MICHAEL WEISS IN
SUPPORT OF PLAINTIFF'S RESPONSE TO
DEFENDANT'S AMENDED MOTION TO
DISMISS**

I, Michael Weiss, declare the following

1. My name is Michael Weiss and I am over eighteen (18) years of age. This declaration is based upon my personal knowledge.

2. I am one of the owners and co-founders of Culinary Ventures, L.T.D. d/b/a Bitemojo. Our company developed an innovative mobile application that delivers interactive, self-guided food tours to users' smartphones. Bitemojo's curated tour itineraries and partnerships with local small businesses offer unique ways for customers to experience local culture and cuisine, and access to the best local food.

3. Bitemojo grew quickly and built a robust customer base. Within three years of launching, the Bitemojo app offered hundreds of tours in 12 cities across Europe, Asia, and the

DECLARATION OF MICHAEL WEISS IN SUPPORT OF
PLAINTIFF'S RESPONSE TO DEFENDANT'S AMENDED MOTION
TO DISMISS - 1
CASE NO. 21-2-11021-1 SEA

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1 United States. Bitemojo was preparing to launch in a dozen more cities and planned to leverage
2 our substantial user database to strategically scale up the business to more than 60
3 destinations by 2023. Bitemojo reached \$1 million in revenue and raised \$1 million dollars from
4 investors, including personal investments from leading venture capitalists in Israel.

5 4. Bitemojo developed strategic partnerships with some of the largest business-to-
6 business organizations in the market, including a partnership with NYC Sightseeing to create
7 tailored “Bus&bite” tours in New York City in London.

8 5. After looking at other options, Bitemojo chose to use Microsoft Azure’s server
9 and data services to build and run the Bitemojo app because of the platform’s flexibility,
10 security, and reliability.

11 6. When the app was in development in 2016, Bitemojo applied for Microsoft’s
12 BizSpark Program, which gave us to access to the services offered by Microsoft Azure. All of our
13 communications about applying to the program and setting up access to Azure were with
14 Microsoft Corporation. I have attached as Exhibits A–C examples of the emails I exchanged with
15 Microsoft about using Microsoft’s services, including emails about BizSpark and Microsoft
16 Azure. The emails indicated that I was communicating with Microsoft Corporation in Redmond,
17 Washington, not Microsoft Ireland. I have redacted the attorney-client communication that
18 precedes the email correspondence.

19 7. Bitemojo chose Microsoft Azure’s server and data services to build and run the
20 Bitemojo App because of Azure’s reputation as a flexible, secure, and reliable platform. Azure’s
21 high-speed Content Delivery Network allowed us to provide our customers with customized
22 tours within minutes.

23 8. Bitemojo subscribed to Azure’s Web App and SQL Database services, which
24 included the tools and infrastructure we needed to build and run the Bitemojo app. Since 2016,
25 all of Bitemojo’s data has been stored in Microsoft Azure, including:
26
27

- User data collected from more than 50,000 customers worldwide, including contact and location information, the countries and cities each customer visited, the tours they took, and their food preferences and travel interests.
- Supplier and proprietary tour ratings received from customers across the globe, including detailed data about customers' tour ratings, reviews of suppliers' food quality and level of service, and data collected when users recommend suppliers to other customers.
- All of Bitemojo's tour products, including all of its individually crafted tours across all twelve of its destination cities and its specially designed products for business-to-business customers, with ready-made tour specifications, logs, and images.
- Textual content for each tour, which was updated and revised dynamically on Azure and used to quickly create customized tours.
- Visual content, consisting of thousands of photos of Plaintiff's tours, vendor locations, the dishes offered, and points of interest along each tour, all of which were cropped and edited to meet exacting, app-specific specifications.
- biteCoin data, including coin balance and data showing how our users spent biteCoins.

9. We trusted that Microsoft would provide the flexible, secure infrastructure and reliable data protection systems Microsoft Azure is known for. No one at Bitemojo ever imagined the data would need to be backed up elsewhere once it had chosen to use Microsoft's secure infrastructure.

10. Bitemojo's data and platform were stored on Microsoft's servers located in the United States.

11. When Covid-19 shut the travel industry down in March 2020, Bitemojo lost its second round of investment funding and made the difficult decision to shutter the company until the tourism industry improved.

12. On March 15, I submitted a Microsoft support ticket asking Microsoft to put a hold on payments while Bitemojo got back on its feet. Attached to this Declaration as Exhibit D is a true and correct copy of the email I sent to Microsoft. I have redacted the attorney-client communication that precedes the email correspondence with Microsoft.

1 13. A person named Mihail Velinov responded to my request. Mr. Velinov's email
2 said that he was a Support Engineer for Azure Subscription Management Support. His email
3 used the Microsoft.com domain. The email said that it was from Mihail Velinov (Tek Experts) via
4 Contact and copied Microsoft's support team at support@mail.support.microsoft.com.
5 Attached to this Declaration as Exhibit E is a true and correct copy of the email exchange I had
6 with Mr. Velinov in March 2020. I have redacted the attorney-client communication that
7 precedes the email correspondence with Mr. Velinov.

8 14. I believed that Mr. Velinov had the authority to put a hold on payments on
9 behalf of Microsoft. In fact, the accommodation made perfect sense given the extraordinary
10 circumstances of the pandemic. No one at Microsoft or TekExperts ever told me Mr. Velinov did
11 not have that authority.

12 15. My belief that Mr. Velinov had the authority to suspend my account was
13 confirmed a few days later when I received another email from Ani Farkova, who confirmed
14 that Bitemojo's "subscription is suspended" and explained that "the system will delete [the
15 account] after 90 days, along with its data" if I did not want to reactivate and use it. Again I had
16 no reason to doubt Ms. Farkova's authority and the accommodation seemed very reasonable in
17 light of the world-wide pandemic.

18 16. Concerned that my data could be deleted, I specifically asked Ms. Farkova who I
19 should contact to reactivate the subscription. Ms. Farkova told me that I could email her or Mr.
20 Velinov—whom she described as the "original case owner." Attached to this Declaration as
21 Exhibit F is a true and correct copy of my email correspondence with Ms. Farkova, dated March
22 18 and 19, 2020. I have redacted the attorney-client communication that precedes the email
23 correspondence with Microsoft.

24 17. I was pleased that Microsoft agreed to accommodate my request.

25 18. As instructed, I emailed Ms. Farkova on June 5, 2020 to request another
26 "extension in keeping our server down and our data secured." To make sure it reached
27 someone, I also copied Microsoft's general support team. Attached to this Declaration as

1 Exhibit G is a true and correct copy of my email with Ms. Farkova and Microsoft support. I have
2 redacted the attorney-client communication that precedes the email correspondence.

3 19. Three days later, I received an automatically-generated email stating that the
4 Bitemojo data "will be deleted on June 15, 2020" because "you cancelled your Azure
5 subscription on March 17, 2020." Attached as Exhibit H to this Declaration is a true and correct
6 copy of that email dated June 8, 2020. I have redacted the attorney-client communication that
7 precedes the email correspondence from Microsoft. I also have redacted Bietmojo's
8 subscription ID number.

9 20. Mr. Velinov responded to my June 5, 2020 email on June 9. He told me that he
10 had "reactivated" my subscription. I was confused because I had not asked Mr. Velinov to
11 reactivate my subscription. I sent him an email expressing my confusion and he responded that
12 he had misunderstood and that he would "hold on" to my overdue payments and "keep the
13 information inside the subscription." In response, I reiterated that I was requesting that
14 Microsoft extend the period where we would not use Microsoft's infrastructure and Microsoft
15 would freeze our due payments. Mr. Velinov agreed and told me that he would suspend
16 Bitemojo's subscription" and "delay your payment."

17 21. Again, I was pleased with Microsoft's response but I wanted to make sure that
18 our data would not be deleted and that Bitemojo had no outstanding balance to pay. Mr.
19 Velinov told me that Bitemojo would only need to pay when it was further recovered because
20 Microsoft does not "want to lose [a] loyal client." Mr. Velinov reassured me that "[t]here is no
21 issue keeping your data safe" as long as you "contact me or another engineer again within 3
22 months to postpone the data deletion." Attached to this declaration as Exhibit I is a true and
23 correct copy of email correspondence between Microsoft and me dated June 9 and 10, 2020. I
24 have redacted the attorney-client communication that precedes the email correspondence with
25 Mr. Velinov.

26 22. Attached to this Declaration as Exhibit J is a true and correct copy of an email I
27 received on September 2, 2020. I have redacted the attorney-client communication that

1 precedes the email correspondence from Microsoft. I also have redacted the Bitemojo
2 subscription ID number.

3 23. On September 5, 2020 I contacted Mr. Velinov, copying the general Microsoft
4 Support email, to ask that Microsoft continue to excuse Bitemojo's payments for another three
5 months. I copied Mr. Velinov and the general Microsoft Support email address just as I had
6 done in June. Attached to this Declaration as Exhibit K is a true and correct copy of the
7 September 5, 2020 correspondence. I have redacted the attorney-client communication that
8 precedes the email correspondence.

9 24. When I received the email on September 9 informing me that our data had been
10 deleted I was shocked. I had followed the process I had been instructed to take—and that had
11 worked in June—to ensure that Bitemojo's data would be kept safe and Microsoft deleted the
12 data anyway. Attached to this Declaration as Exhibit L is a true and correct copy of the email I
13 received from Microsoft on September 9, 2020. I have redacted the attorney-client
14 communication that precedes the email correspondence.

15 25. Attached to this Declaration as Exhibit M is a true and correct copy of the email I
16 received from Microsoft on September 9, 2020. The email indicated it came from Redmond,
17 Washington. I have redacted the attorney-client communication that precedes the email
18 correspondence. I also have redacted Bitemojo's Azure Subscription ID number.

19 26. Attached to this Declaration as Exhibit N are true and correct copies of email
20 correspondence between Microsoft and me after Bitemojo's data was deleted in September
21 2020. The emails show that Microsoft's customer service agents apologized repeatedly after
22 they deleted Bitemojo's data. They also said they would be conducting an internal review "to
23 help prevent this in the future." I have redacted the attorney-client communication that
24 precedes the email correspondence.

25 27. As far as Bitemojo is aware, Microsoft Ireland's only involvement with Bitemojo's
26 Azure services is sending the invoices and processing payments. Attached to this Declaration as
27

1 Exhibit O is a true and correct copy of an invoice from Microsoft Ireland. I have redacted the
2 subscription ID number from this invoice.

3 28. Bitemojo's communications regarding Microsoft's Azure services have been with
4 Microsoft Corporation and Microsoft's subcontractors. Attached hereto as Exhibits P-Q are
5 examples of Microsoft product update emails dated July 20 and August 23, 2018. Attached
6 hereto as Exhibit R is a true and correct copy of an example API Telemetry report dated June
7 18, 2018. Attached hereto as Exhibits S-T are true and correct copies of server response time
8 degradation notifications dated May 30 and June 14, 2018. All of these emails reference
9 Microsoft Corporation, not Microsoft Ireland. For each of these exhibits, I have redacted the
10 attorney-client communication that precedes the email correspondence.

11 I, Michael Weiss, declare under penalty of perjury under the laws of Washington and
12 the United States that I have read the foregoing declaration and know the contents thereof,
13 and that the matters contained in the declaration are true to my own knowledge.

14 Executed this 8th day of November, 2021.

15
16 By: _____
17 Michael Weiss
18
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27

DECLARATION OF MICHAEL WEISS IN SUPPORT OF
PLAINTIFF'S RESPONSE TO DEFENDANT'S AMENDED MOTION
TO DISMISS - 7
CASE NO. 21-2-11021-1

TERRELL MARSHALL LAW GROUP PLLC
936 North 34th Street, Suite 300
Seattle, Washington 98103-8869
TEL 206.816.6603 • FAX 206.319.5450
www.terrellmarshall.com

Exhibit A

----- Forwarded message -----

From: '**Microsoft BizSpark**' via Contact <contact@bitemojo.com>

Date: Sun, May 29, 2016 at 8:48 PM

Subject: Microsoft BizSpark

To: <contact@bitemojo.com>

Microsoft BizSpark
Dear Michael Weiss,

Thank you for applying for the BizSpark Program.

Your enrollment is pending and due to the high volume of applications may take up to ten business days to process. Thank you for your patience.

We will notify you when the review process is complete.

If you have any questions, please contact us at <http://trainingsupport.microsoft.com/lang/tcbizspark>.

We'll be happy to help.
(This message comes from an unmonitored alias. Please do not reply directly.)

The BizSpark Team

Microsoft Corporation
One Microsoft Way
Redmond, WA 98052

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Exhibit B

----- Forwarded message -----

From: **bzsadmin via Contact** <contact@bitemojo.com>

Date: Mon, May 30, 2016 at 12:14 PM

Subject: Startup Enrollment Period Complete

To: <contact@bitemojo.com>

Startup Enrollment Period Complete

Dear Michael Weiss,

Congratulations! bitemojo is now a member of the Microsoft BizSpark program!

You can learn more about the many benefits of the BizSpark program when you login to the My BizSpark page on the [BizSpark Website](#). There are a number of resources available to build your business including the opportunity to:

1. Get your free software
2. Profile your solutions
3. Market your stuff
4. Find funding
5. Find offers and connect with others

6. Build your team
7. Access Training and support
8. Let us know what you think

We know you are anxious to access and download software but you must first activate your MSDN Subscription.

To activate your MSDN Subscription, you will need to do the following:

1. Go to the My BizSpark page on the [BizSpark Website](#) and login with the following Microsoft account: contact@bitemojo.com
2. Click on the “Get your free software” link in the middle of the page
3. Click on “Download Microsoft Software (via MSDN)”

Once the enrollment process is complete, you can download software and get product keys, access Windows Azure, get Technical Support and subscribe to MSDN Magazine. (Please note, however, that there is a short processing period and it may take up to 6 hours before your subscription is activated).

Join us on these social platforms to discuss your new startup, your developer ideas, and to link and sync with other great innovators:

Facebook

- www.facebook.com/bizspark

Twitter

- www.twitter.com/bizspark

LinkedIn

- www.linkedin.com/groups/Microsoft-BizSpark-1790961/about

We also encourage you to keep your BizSpark Profile updated on your My BizSpark page so we let you know about offers and promotions that best suit your startup.

If you have any questions, please [check our FAQs](#) or contact us at <http://trainingsupport.microsoft.com/lang/tcbizspark>.

(This message comes from an unmonitored alias. Please do not reply directly.)

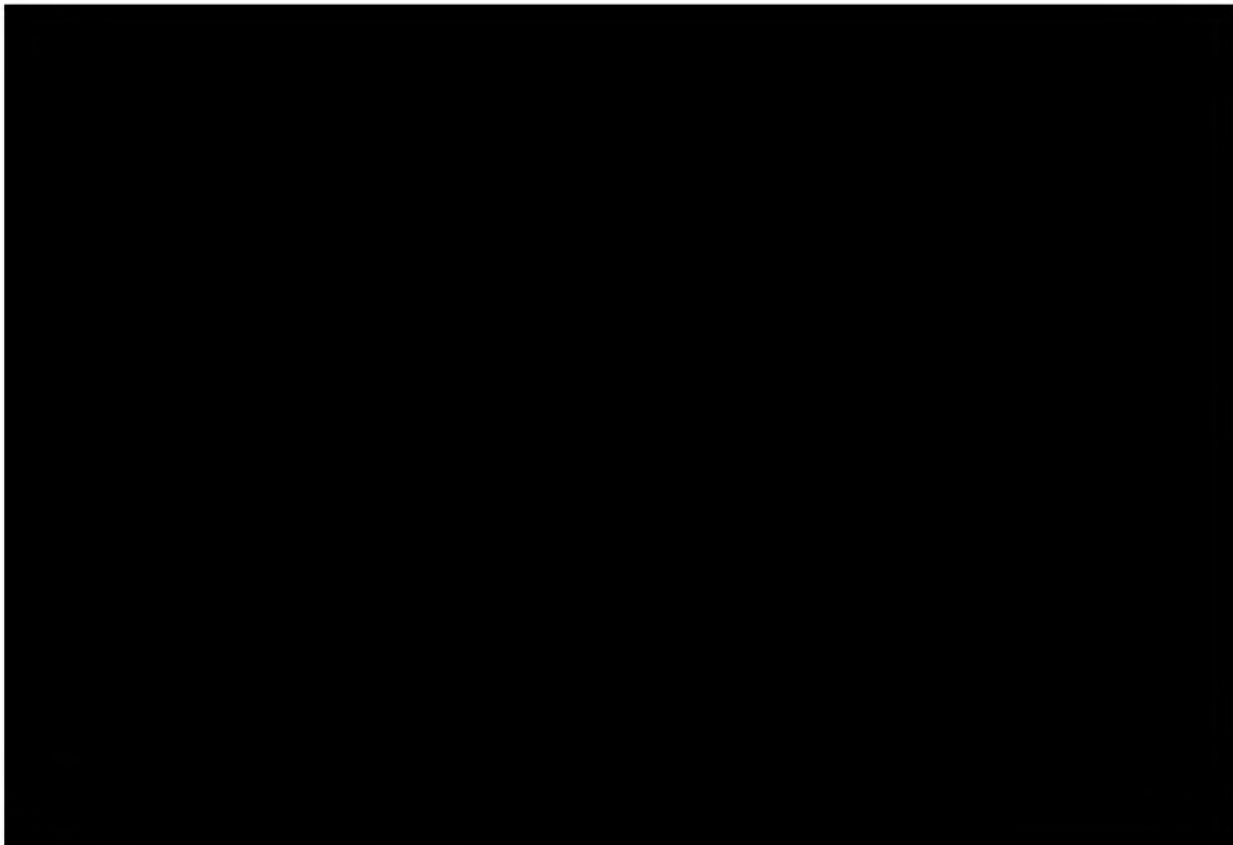
The BizSpark Team

Microsoft Corporation
One Microsoft Way
Redmond, WA 98052 USA

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Exhibit C



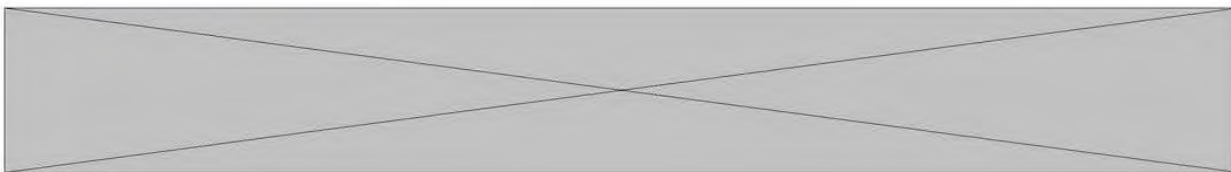
----- Forwarded message -----

From: **Microsoft Azure Accounts Team** <azure-accounts-noreply@mail.microsoftazure.com>

Date: Wed, Jun 1, 2016 at 10:22 AM

Subject: Your Azure subscription is ready

To: <contact@bitemojo.com>



Welcome to your new Azure
subscription!

Subscription name: Pay-As-You-Go

Subscription ID: [REDACTED]

Feel free to access your subscription at the [Azure Account Center](#).

[Contact us](#) if you have questions or need help accessing your subscription.

Thanks,

The Microsoft Azure team

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One Microsoft Way, Redmond, WA 98052 USA



Exhibit D

----- Forwarded message -----

From: 'Microsoft Support' via Contact <contact@bitemojo.com>

Date: Sun, Mar 15, 2020 at 8:43 AM

Subject: Case 120031522000051 Your question was successfully submitted to Microsoft Support

To: <contact@bitemojo.com>

Having trouble viewing this email? [View your request online](#)

Support

Your question was successfully submitted to Microsoft Support using your Azure Support Plan - Developer Free plan. A Microsoft support professional will contact you within 8 business hours*.

Incident title:

Our business is in shut-down, askign to hold monthly payments

Support request number:	120031522000051
Severity rating:	C
Expect response within:	8 business hours*
Contact preference:	Email
Name:	Michael Weiss
Email address:	contact@bitemojo.com
Contact numbers:	

* Business hours exclude weekends and holidays. [Learn More](#) about support response times.

You can contact us again about this incident at any time on the [Microsoft Azure portal](#). See the [Azure Support FAQ](#) for additional information about Azure Support, including terms and conditions.

This email is generated from an unmonitored account. Please do not reply.

Thank you,
Microsoft Azure Support

Additional Information

Product: Billing

Azure Subscription: Pay-As-You-Go

Azure Subscription ID: [REDACTED]

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One Microsoft Way, Redmond, WA 98052 USA

refid-4294256

Exhibit E

----- Forwarded message -----

From: 'Mihail Velinov (Tek Experts)' via Contact <contact@bitemojo.com>

Date: Mon, Mar 16, 2020 at 8:09 AM

Subject: [REG:120031522000051] Our business is in shut-down, askign to hold monthly payments

To: contact@bitemojo.com <contact@bitemojo.com>

Cc: support <support@mail.support.microsoft.com>

Hello Michael,

Thank you for contacting us!

I am really sorry about your business interruption. As most of the world is suffering from the disease it's understandable to stop your services temporary.

I have suspended your subscription ([REDACTED]) to avoid any future charges. When you want to reactivate just open up another support ticket and you will be assisted quickly.

Also after reviewing your account found out there's a charge of 375.82 USD and waived it off.

There are pending actions required from you regarding the billing.

Is there anything else or shall I close the case?

Wish you happy and healthy months ahead!

Best Regards,

Mihail Y Velinov | Support Engineer | Azure Subscription Management Support

Email: v-mivel@microsoft.com | Manager: v-peevti@microsoft.com

Working Hours: 9 AM – 6 PM (Mon-Fri) UTC +2 | [Local Time](#)

To reach Azure Support outside of my working hours, please email asmstek1@microsoft.com with your support request number.

Note: Support is English-only outside of local business hours.

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Exhibit F

----- Forwarded message -----

From: **Ani Farkova (Tek Experts)** <v-anfark@microsoft.com>

Date: Thu, Mar 19, 2020 at 10:06 AM

Subject: RE: [EXTERNAL] Re: 120031522000051

To: Michael Weiss <michael@bitemojo.com>, Mihail Velinov (Tek Experts) <v-mivel@microsoft.com>

Cc: support <support@mail.support.microsoft.com>

Hello Michael,

Thank you for the email.

Yes, you can send the email here, or to my colleague [@Mihail Velinov](#) since he is the original case owner. We will assist you in activating the subscription.

Best Regards,

Ani Farkova | Support Engineer | Azure Subscription Management Support

Email: v-anfark@microsoft.com | Manager: v-nibojk@microsoft.com

Working hours: 09:00 AM - 06:00 PM (Mon- Fri) UTC+2| [Local Time](#)

To reach Azure Support outside of my working hours, please email asmstek1@microsoft.com with your support request number.

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From: Michael Weiss <michael@bitemojo.com>
Sent: Thursday, March 19, 2020 9:58 AM
To: Ani Farkova (Tek Experts) <v-anfark@microsoft.com>
Cc: support <support@mail.support.microsoft.com>
Subject: Re: [EXTERNAL] Re: 120031522000051

Hi Ani,

Thank you, so should I just sent through this thread a request in the future?

--

Michael Weiss

Co-founder

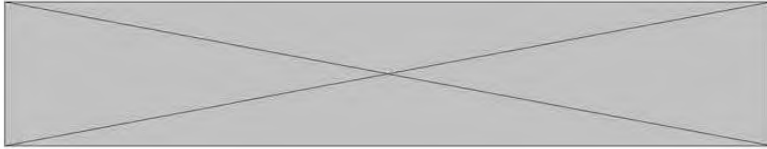
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On Thu, Mar 19, 2020 at 9:51 AM Ani Farkova (Tek Experts) <v-anfark@microsoft.com> wrote:

Hello Michael,

Thank you for the email.

I can activate the subscription from my end, with your approval.

Best Regards,

Ani Farkova | Support Engineer | Azure Subscription Management Support

Email: v-anfark@microsoft.com | Manager: v-nibojk@microsoft.com

Working hours: 09:00 AM - 06:00 PM (Mon- Fri) UTC+2| [Local Time](#)

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From: Michael Weiss <michael@bitemojo.com>
Sent: Wednesday, March 18, 2020 6:36 PM
To: Ani Farkova (Tek Experts) <v-anfark@microsoft.com>
Cc: support <support@mail.support.microsoft.com>
Subject: [EXTERNAL] Re: 120031522000051

Hi Ani,

Thanks for the info.

So should I contact you prior to reactivate or you Can set that manually?

בֹּתְאֵרִיךְ יוֹם ד', 18 בִּמְרָץ 2020, 17:55, מֵאֵת Ani Farkova (Tek Experts) <v-anfark@microsoft.com>:

Hello Michael,

I hope all is well. I trust you are well. My name Is Ani and I am the support professional who will be assisting with the case while my colleague Mihail is out of the office.

Please accept my apologies for the delay and the inconvenience this might have caused.

Just wanted to confirm that the subscription is suspended and inform you that the system will delete it, after 90 days along with its data, if you do not want to reactivate it and use it.

Best Regards,

Ani Farkova | Support Engineer | Azure Subscription Management Support

Email: v-anfark@microsoft.com | Manager: v-nibojk@microsoft.com

Working hours: 09:00 AM - 06:00 PM (Mon- Fri) UTC+2| [Local Time](#)

To reach Azure Support outside of my working hours, please email asmstek1@microsoft.com with your support request number.

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Exhibit G

----- Forwarded message -----

From: **Michael Weiss** <michael@bitemojo.com>
Date: Fri, Jun 5, 2020 at 8:03 AM
Subject: Re: 120031522000051
To: Ani Farkova (Tek Experts) <v-anfark@microsoft.com>
Cc: support <support@mail.support.microsoft.com>

Hello Ani,

We have been in touch in March following the impact of the COVID-19 crisis on the tourism industry and our mobile application in particular.

Unfortunately our business is still under a complete shut down. All our employees are sent home, and all our business customers are in a shut down as well.

Due to these unfortunate circumstances I would like to ask for another extension in keeping our server down and our data secured.

Thank you and looking forward to hear from you,
Michael

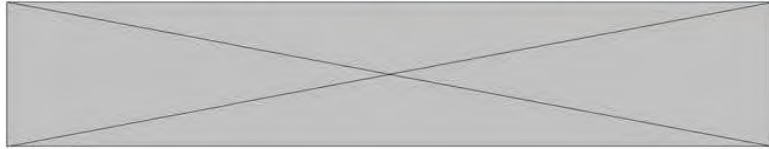
--

Michael Weiss
Co-founder

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Website: www.bitemojo.com

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On Wed, Mar 18, 2020 at 5:55 PM Ani Farkova (Tek Experts) <v-anfark@microsoft.com> wrote:

Hello Michael,

I hope all is well. I trust you are well. My name Is Ani and I am the support professional who will be assisting with the case while my colleague Mihail is out of the office.

Please accept my apologies for the delay and the inconvenience this might have caused.

Just wanted to confirm that the subscription is suspended and inform you that the system will delete it, after 90 days along with its data, if you do not want to reactivate it and use it.

Best Regards,

Ani Farkova | Support Engineer | Azure Subscription Management Support

Email: v-anfark@microsoft.com | Manager: v-nibojk@microsoft.com

Working hours: 09:00 AM - 06:00 PM (Mon- Fri) UTC+2| [Local Time](#)

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Exhibit H



----- Forwarded message -----

From: 'Microsoft Azure' via Contact <contact@bitemojo.com>

Date: Mon, Jun 8, 2020 at 8:00 AM

Subject: Back up your data while there's still time

To: <contact@bitemojo.com>



Back up your data while there's still time

You're receiving this email because you cancelled your Azure subscription on March 17, 2020. If you have data stored in this subscription, it will be deleted on June 15, 2020. **Please log in and save any important data before then.**

[Save your data >](#)

Learn more about the [cancellation process](#). Submit a [support ticket](#) if you need more help.

Account information

Subscription ID:



Subscription name: Pay-As-You-Go



[Privacy Statement](#)

Microsoft Corporation, One Microsoft Way, Redmond, WA 98052



Exhibit I

----- Forwarded message -----

From: **Mihail Velinov (Tek Experts)** <v-mivel@microsoft.com>

Date: Wed, Jun 10, 2020 at 10:13 AM

Subject: RE: [EXTERNAL] Re: Online update from customer for the case # 120031522000051

To: Michael Weiss <michael@bitemojo.com>

Hey Michael,

I must have been more cautious when replying.

As you said you will be needed to only when fully recovered. Just make sure to contact us again in month or two so we keep your data safe.

Of course we don't want to lose loyal client due to a little delay. It's pleasure working with you Michael.

If there's anything else feel free to drop an email.

I will remain at your disposal.

Kind Regards,

Mihail Y Velinov |Support Engineer |Azure Subscription Management Support

Email: v-mivel@microsoft.com | Manager: v-peevti@microsoft.com

Working Hours: 9 AM – 6 PM (Mon-Fri) UTC +2 | [Local Time](#)

To reach Azure Support outside of my working hours, please email asmstek1@microsoft.com with your support request number.

Note: Support is English-only outside of local business hours.

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*Azure Support will never ask for your account password or full credit card number.
For your privacy and security, NEVER send your login credentials or full credit card number in email.*

From: Michael Weiss <michael@bitemojo.com>
Sent: Wednesday, June 10, 2020 9:55 AM
To: Mihail Velinov (Tek Experts) <v-mivel@microsoft.com>
Cc: support <support@mail.support.microsoft.com>
Subject: Re: [EXTERNAL] Re: Online update from customer for the case # 120031522000051

Hi Mihail,

I think we have a gap here.

To my understanding, both suspension periods would be with no outstanding balance that we would need to pay.

Otherwise that doesn't make sense to me at all.

We are in financial crisis that led us to shut down our servers in order to reduce costs to zero in order to be able to recover from this situation.

We are not using any of your resources so there is no sense to ask us to pay anything until we fully recover.

Kind regards,

Michael

--

Michael Weiss

Co-founder

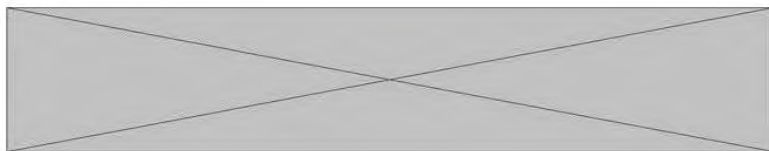
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Email: michael@bitemojo.com

Website: www.bitemojo.com

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On Wed, Jun 10, 2020 at 7:58 AM Mihail Velinov (Tek Experts) <v-mivel@microsoft.com> wrote:

Hi Michael,

Thanks for your responsiveness!

There is no issue keeping your data safe just make sure to contact me or another engineer again within 3 months to postpone the data deletion.

As for the payments they will be reinstated in write off state and will just waiting to be covered once you are ready to use Azure again.

I will be at your disposal if there's anything else. Is there anything else needed for the moment or should I close the ticket for the moment?

Kind Regards,

Mihail Y Velinov | Support Engineer | Azure Subscription Management Support

Email: v-mivel@microsoft.com | Manager: v-peevti@microsoft.com

Working Hours: 9 AM – 6 PM (Mon-Fri) UTC +2 | [Local Time](#)

To reach Azure Support outside of my working hours, please email asmstek1@microsoft.com with your support request number.

Note: Support is English-only outside of local business hours.

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*Azure Support will never ask for your account password or full credit card number.
For your privacy and security, NEVER send your login credentials or full credit card number in em*

From: Michael Weiss <michael@bitemojo.com>
Sent: Wednesday, June 10, 2020 7:50 AM
To: Mihail Velinov (Tek Experts) <v-mivel@microsoft.com>
Cc: support <support@mail.support.microsoft.com>

Subject: Re: [EXTERNAL] Re: Online update from customer for the case # 120031522000051

Dear Mihail,

I thank you deeply for that.

I just Want to be sure all our data will be kept there as before?

Michael

בִּתְאָרִיךְ יוֹם ד', 10 בִּיּוֹנִי 2020, 7:40, מֵאֵת Mihail Velinov (Tek Experts) <v-mivel@microsoft.com>:

Hello Michael,

Thank you for the quick response!

I will suspend your subscription then and we will delay your payment.

Is there anything else you require or assistance with at the moment or shall archive this request and pick it up once needed again?

I will be at your disposal.

Kind Regards,

Mihail Y Velinov |Support Engineer |Azure Subscription Management Support

Email: v-mivel@microsoft.com | Manager: v-peevti@microsoft.com

Working Hours: 9 AM – 6 PM (Mon-Fri) UTC +2 | [Local Time](#)

To reach Azure Support outside of my working hours, please email asmstek1@microsoft.com with your support request number.

Note: Support is English-only outside of local business hours.

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*Azure Support will never ask for your account password or full credit card number.
For your privacy and security, NEVER send your login credentials or full credit card number in email*

From: Michael Weiss <michael@bitemojo.com>
Sent: Wednesday, June 10, 2020 7:33 AM
To: Mihail Velinov (Tek Experts) <v-mivel@microsoft.com>
Subject: Re: [EXTERNAL] Re: Online update from customer for the case # 120031522000051

Hi Mihail,

Yes, as our business is unfortunately still under a complete shutdown, and as the travel industry that we are part of is still bleeding from the crisis, I have asked to extend the period of the last 3 months where we froze our due payment and had zero uses of your infrastructure for another period of 3 months, with the hope that by then things will look better for us.

Thank you,

Michael

--

Michael Weiss

Co-founder

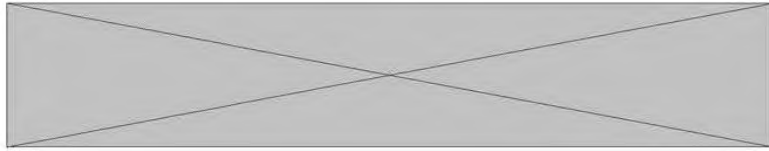
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Tel: +972-52-6664775

Email: michael@bitemojo.com

Website: www.bitemojo.com

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On Wed, Jun 10, 2020 at 7:20 AM Mihail Velinov (Tek Experts) <v-mivel@microsoft.com> wrote:

HI Michael,

I hope I have not misunderstood. Can you confirm you wanted me to activate your subscription?

If that's not the case shall I understand you require us only to hold on to your overdue payments and keep the information inside your subscription.

Please excuse me for the misunderstanding and inconvenience created. Let me know how should I assist further and I'll be happy to help.

Thank you for your time!

Kind Regards,

Mihail Y Velinov | Support Engineer | Azure Subscription Management Support

Email: v-mivel@microsoft.com | Manager: v-peevti@microsoft.com

Working Hours: 9 AM – 6 PM (Mon-Fri) UTC +2 | [Local Time](#)

To reach Azure Support outside of my working hours, please email asmstek1@microsoft.com with your support request number.

Note: Support is English-only outside of local business hours.

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From: Michael Weiss <michael@bitemojo.com>
Sent: Tuesday, June 9, 2020 10:58 PM
To: Mihail Velinov (Tek Experts) <y-mivel@microsoft.com>
Subject: [EXTERNAL] Re: Online update from customer for the case # 120031522000051

Hi Mihail,

Thank you for your email, I only now saw your response.

I didn't fully understand your answer, can you please let me know what exactly you did? :)

Regards,

Michael

--

Michael Weiss

Co-founder

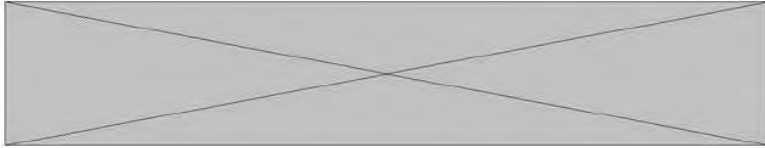
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Tel: +972-52-6664775

Email: michael@bitemojo.com

Website: www.bitemojo.com

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On Tue, Jun 9, 2020 at 8:47 AM 'Mihail Velinov (Tek Experts)' via Contact <contact@bitemojo.com> wrote:

Hello Michael,

Thank you for informing me on this!

I have reactivated your service as it was suspended. The subscription ID is: [REDACTED]

Hope you get back on your feet soon. Feel free to contact me again if any issue occurs.

Wish you successful week ahead!

Kind Regards,

Mihail Y Velinov | Support Engineer | Azure Subscription Management Support

Email: y-mivel@microsoft.com | Manager: v-peevti@microsoft.com

Working Hours: 9 AM – 6 PM (Mon-Fri) UTC +2 | [Local Time](#)

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For your privacy and security, NEVER send your login credentials or full credit card number in email.*

Hello, I'm contacting you again before our grace period will soon come to an end.
Unfortunately like most businesses in travel we are still facing a dramatic crisis and have zero income and customers. All our B2B customers who are our main market - i.e travel agencies, tour operators etc are still closed and we see no orders coming.
I would like to ask, under these extreme circumstances, that you will extend our hold of payments for another 9 month duration with the hope things will get better, even slightly, by then.
Thank you and looking forward to your answer.
Michael ...

Exhibit J

----- Forwarded message -----

From: 'Microsoft Azure' via Contact <contact@bitemojo.com>

Date: Wed, Sep 2, 2020 at 6:40 AM

Subject: Back up your data while there's still time

To: <contact@bitemojo.com>



Back up your data while there's still time

You're receiving this email because you cancelled your Azure subscription on June 11, 2020. If you have data stored in this subscription, it will be deleted on September 9, 2020. **Please log in and save any important data before then.**

[Save your data >](#)

Learn more about the [cancellation process](#). Submit a [support ticket](#) if you need more help.

Account information

Subscription ID: [REDACTED]

Subscription name: Pay-As-You-Go



[Privacy Statement](#)

Microsoft Corporation, One Microsoft Way, Redmond, WA 98052



Exhibit K

----- Forwarded message -----

From: **Michael Weiss** <michael@bitemojo.com>

Date: Sat, Sep 5, 2020 at 6:36 AM

Subject: Re: [EXTERNAL] Re: Online update from customer for the case # 120031522000051

To: Mihail Velinov (Tek Experts) <v-mivel@microsoft.com>

Cc: support <support@mail.support.microsoft.com>

Hi Mihail,

I hope this email finds you well.

I am contacting you again as the suspension of our subscription is about to expire, and we need

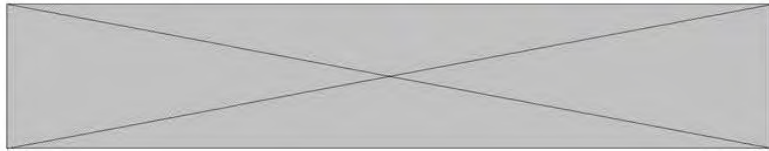
another extension.
As of March 2020 and up to date we are in a complete shutdown and have zero customers.
It's very unfortunate to be in this situation for nearly 6 months now, but that's where we are.
Thank you in advance,
Michael

--
Michael Weiss
Co-founder

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Email: michael@bitemojo.com
Website: www.bitemojo.com

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On Wed, Jun 10, 2020 at 7:40 AM Mihail Velinov (Tek Experts) <v-mivel@microsoft.com>
wrote:

Hello Michael,

Thank you for the quick response!

I will suspend your subscription then and we will delay your payment.

Is there anything else you require or assistance with at the moment or shall archive this request and pick it up once needed again?

I will be at your disposal.

Kind Regards,

Mihail Y Velinov | Support Engineer | Azure Subscription Management Support

Email: v-mivel@microsoft.com | Manager: v-peevti@microsoft.com

Working Hours: 9 AM – 6 PM (Mon-Fri) UTC +2 | [Local Time](#)

To reach Azure Support outside of my working hours, please email asmstek1@microsoft.com with your support request number.

Note: Support is English-only outside of local business hours.

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*Azure Support will never ask for your account password or full credit card number.
For your privacy and security, NEVER send your login credentials or full credit card number in email.*

From: Michael Weiss <michael@bitemojo.com>
Sent: Wednesday, June 10, 2020 7:33 AM
To: Mihail Velinov (Tek Experts) <v-mivel@microsoft.com>
Subject: Re: [EXTERNAL] Re: Online update from customer for the case # 120031522000051

Hi Mihail,

Yes, as our business is unfortunately still under a complete shutdown, and as the travel industry that we are part of is still bleeding from the crisis, I have asked to extend the period of the last 3 months where we froze our due payment and had zero uses of your infrastructure for another period of 3 months, with the hope that by then things will look better for us.

Thank you,

Michael

--

Michael Weiss

Co-founder

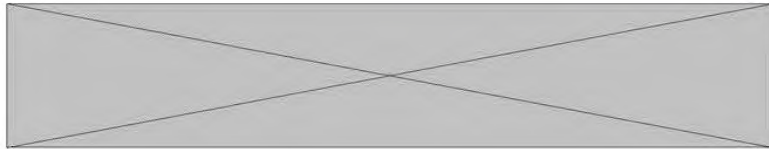
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Email: michael@bitemojo.com

Website: www.bitemojo.com

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On Wed, Jun 10, 2020 at 7:20 AM Mihail Velinov (Tek Experts) <v-mivel@microsoft.com> wrote:

HI Michael,

I hope I have not misunderstood. Can you confirm you wanted me to activate your subscription?

If that's not the case shall I understand you require us only to hold on to your overdue payments and keep the information inside your subscription.

Please excuse me for the misunderstanding and inconvenience created. Let me know how should I assist further and I'll be happy to help.

Thank you for your time!

Kind Regards,

Mihail Y Velinov | Support Engineer | Azure Subscription Management Support

Email: v-mivel@microsoft.com | Manager: v-peevti@microsoft.com

Working Hours: 9 AM – 6 PM (Mon-Fri) UTC +2 | [Local Time](#)

To reach Azure Support outside of my working hours, please email asmstek1@microsoft.com with your support request number.

Note: Support is English-only outside of local business hours.

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*Azure Support will never ask for your account password or full credit card number.
For your privacy and security, NEVER send your login credentials or full credit card number in em*

From: Michael Weiss <michael@bitemojo.com>

Sent: Tuesday, June 9, 2020 10:58 PM

To: Mihail Velinov (Tek Experts) <v-mivel@microsoft.com>

Subject: [EXTERNAL] Re: Online update from customer for the case # 120031522000051

Hi Mihail,

Thank you for your email, I only now saw your response.

I didn't fully understand your answer, can you please let me know what exactly you did? :)

Regards,

Michael

--

Michael Weiss

Co-founder

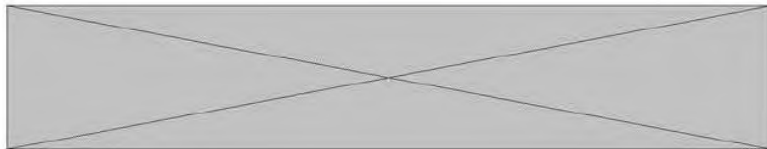
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Email: michael@bitemojo.com

Website: www.bitemojo.com

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On Tue, Jun 9, 2020 at 8:47 AM 'Mihail Velinov (Tek Experts)' via Contact
<contact@bitemojo.com> wrote:

Hello Michael,

Thank you for informing me on this!

I have reactivated your service as it was suspended. The subscription ID is: [REDACTED]

Hope you get back on your feet soon. Feel free to contact me again if any issue occurs.

Wish you successful week ahead!

Kind Regards,

Mihail Y Velinov | Support Engineer | Azure Subscription Management Support

Email: v-mivel@microsoft.com | Manager: v-peevti@microsoft.com

Working Hours: 9 AM – 6 PM (Mon-Fri) UTC +2 | [Local Time](#)

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Note: Support is English-only outside of local business hours.

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*Azure Support will never ask for your account password or full credit card number.
For your privacy and security, NEVER send your login credentials or full credit card number in em*

Hello, I'm contacting you again before our grace period will soon come to an end.
Unfortunately like most businesses in travel we are still facing a dramatic crisis and have zero income and customers. All our B2B customers who are our main market - i.e travel agencies, tour operators etc are still closed and we see no orders coming.
I would like to ask, under these extreme circumstances, that you will extend our hold of payments for another 9 month duration with the hope things will get better, even slightly, by then.
Thank you and looking forward to your answer.
Michael ...

Exhibit L

----- Forwarded message -----

From: 'Microsoft Azure' via Contact <contact@bitemojo.com>

Date: Wed, Sep 9, 2020 at 6:40 AM

Subject: We're sorry to see you go

To: <contact@bitemojo.com>



We're sorry to see you go

Your data and services were deleted on September 9, 2020 because you cancelled your subscription 90 days ago.

If you want to start using Azure again, just sign up for a new pay-as-you-go subscription any time.



[Sign up for a new subscription >](#)

[Submit a support ticket](#) if you need more help.

Account information

Subscription ID:



Subscription name: Pay-As-You-Go



[Privacy Statement](#)

Microsoft Corporation, One Microsoft Way, Redmond, WA 98052



Exhibit M

----- Forwarded message -----

From: 'Microsoft Support' via Contact <contact@bitemojo.com>

Date: Wed, Sep 9, 2020 at 8:49 PM

Subject: Case 120090924008364 Your question was successfully submitted to Microsoft Support

To: <contact@bitemojo.com>

Having trouble viewing this email? [View your request online](#)

Support

Your question was successfully submitted to Microsoft Support using your Azure Support Plan - Developer Free plan. A Microsoft support professional will contact you within 8 business hours*.

Incident title:

You have deleted my account!!

Support request number:	120090924008364
Severity rating:	C
Expect response within:	8 business hours*
Contact preference:	Email
Name:	Michael Weiss
Email address:	contact@bitemojo.com
Contact numbers:	

* Business hours exclude weekends and holidays. [Learn More](#) about support response times.

You can contact us again about this incident at any time on the [Microsoft Azure portal](#). See the [Azure Support FAQ](#) for additional information about Azure Support, including terms and conditions.

This email is generated from an unmonitored account. Please do not reply.

Thank you,
Microsoft Azure Support

Additional Information

Product: Subscription management

Azure Subscription: Pay-As-You-Go

Azure Subscription ID: [REDACTED]

This message from Microsoft is an important part of a program, service, or product that you or your company purchased or participates in. Microsoft respects your privacy. Please read our [Privacy Statement](#).

One Microsoft Way, Redmond, WA 98052 USA

refid-4294256

Exhibit N

----- Forwarded message -----

From: <v-evlop@microsoft.com>

Date: Wed, Sep 23, 2020 at 8:44 PM

Subject: RE: Re: Re: [EXTERNAL] Re: Re: Re: Re: 120090924008364

To: <michael@bitemojo.com>

Cc: <v-alc0r@microsoft.com>, <contact@bitemojo.com>

Dear Michael

I hope you're all right.

As for your request to retrieve the information contained in your account and subscriptions, I must unfortunately inform you that we exhaust all available resources, have scaled to multiple instances and once cancelled and deleted it is not possible to recover it. I'm sorry for the inconvenience this can cause.

But there is a possibility that if you want to create a new account, we could give you credits to be used in the new account and subscribe to this as a way to help you build new resources.

This with Microsoft's commitment to business continuity and creating a new business relationship with you.

For my part I reiterate our apologies wishing for the continuity of business with Microsoft.

Best regards

[Evert Mauricio L Monger](#) | Support Engineer| Azure Subscription Management Support

Email: y-evlop@microsoft.com | Manager: Alexander Cordero v-alcor@microsoft.com

Working Hours: 09:00 AM - 06:00 PM (Mon-Fri) CT | [Local Time](#)

To reach Azure support outside of my working hours, please email asmstek1@microsoft.com referencing your support request number

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From: michael@bitemojo.com

Sent : Tue, Sep 22nd 20, 10:11 pm

To: support@mail.support.microsoft.com; y-evlop@microsoft.com

Cc: v-alcor@microsoft.com; contact@bitemojo.com

Subject Re: Re: [EXTERNAL] Re: Re: Re: Re: 120090924008364

Hi Evert,

Still waiting, thank you for the update.

--

Michael Weiss

Co-founder

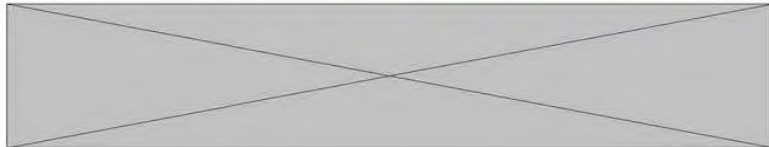
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Email: michael@bitemojo.com

Website: www.bitemojo.com

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On Tue, Sep 22, 2020 at 8:21 PM <y-evlop@microsoft.com> wrote:

Dear Michael,

Hope you are doing fine

I am writing today to let you know as per our technical advisors we have engaged another internal team to help retrieve the account information and I will have an update within the next 24 hours, again thanks for your time and understanding

Best regards

Evert Mauricio L Monger | Support Engineer| Azure Subscription Management Support
Email: v-evlop@microsoft.com | Manager: Alexander Cordero v-alcor@microsoft.com
Working Hours: 09:00 AM - 06:00 PM (Mon-Fri) CT | [Local Time](#)
To reach Azure support outside of my working hours, please email asmstek1@microsoft.com referencing your support request number
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From: v-evlop@microsoft.com
Sent: : Mon, Sep 21st 20, 2:26 pm
To: michael@bitemojo.com
Cc: v-alcor@microsoft.com; contact@bitemojo.com
Subject RE: Re: [EXTERNAL] Re: Re: Re: Re: 120090924008364

Dear Michael,

Thanks again for your understanding and patience, as soon as I get an answer I will reach for you.

Kind regards,

Evert Mauricio L Monger | Support Engineer| Azure Subscription Management Support
Email: v-evlop@microsoft.com | Manager: Alexander Cordero v-alcor@microsoft.com
Working Hours: 09:00 AM - 06:00 PM (Mon-Fri) CT | [Local Time](#)
To reach Azure support outside of my working hours, please email asmstek1@microsoft.com referencing your support request number
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From: michael@bitemojo.com
Sent: : Sat, Sep 19th 20, 4:21 am
To: v-evlop@microsoft.com
Cc: support@mail.support.microsoft.com; v-alcor@microsoft.com; contact@bitemojo.com
Subject Re: [EXTERNAL] Re: Re: Re: Re: 120090924008364

Hi Evert,
Thank you for your email, I will wait to hear from you within the next 2 days with hopefully good news.
Regards,
Michael

--
Michael Weiss

Co-founder

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Email: michael@bitemojo.com

Website: www.bitemojo.com

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On Fri, Sep 18, 2020 at 10:57 PM Evert Lopez Monge (Tek Experts) <v-evlop@microsoft.com> wrote:

Hello Michael,

Hope you are doing fine,

We are actually waiting for a response from our technical leads on your request of retrieving the account and subscriptions information, herein find my kind request to provide us some more time they usually reply within 24-48 hours thus, your issue was escalated and we are just expecting a good resolution for your case.

Once again thanks for your understanding

Kind regards

[Evert Mauricio L Monger](#) | Support Engineer| Azure Subscription Management Support

Email: v-evlop@microsoft.com | Manager: Alexander Cordero v-alcor@microsoft.com

Working Hours: 09:00 AM - 06:00 PM (Mon-Fri) CT | [Local Time](#)

To reach Azure support outside of my working hours, please email asmstek1@microsoft.com referencing your support request number

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your own privacy and security NEVER send your credentials or credit card number in email

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Thanks for your prompt response, we received the information and shortly we will process your request.

From: Michael Weiss <michael@bitemojo.com>
Sent: Friday, September 18, 2020 1:50 PM
To: support <support@mail.support.microsoft.com>; Evert Lopez Monge (Tek Experts) <v-evlop@microsoft.com>
Cc: Alexander Cordero (Tek Experts) <v-alcor@microsoft.com>; BiteMojo <contact@bitemojo.com>
Subject: [EXTERNAL] Re: Re: Re: Re: 120090924008364

Hi we are now at the end of another dsy, I find it odd that you still dont have a clear answer about this situation. Please let me know where we are standing in regards to this situation?

Michael

ה' <v-evlop@microsoft.com>: מאת, 20:05, 17 בספט' 2020, בתאריך יום ה'

Dear Michael

Hope you are doing fine

In regards of your request, we are still working on it, as soon as I get some news I will let you know later today

Thanks for your understanding

Evert Mauricio L Monger | Support Engineer| Azure Subscription Management Support

Email: v-evlop@microsoft.com | Manager: Alexander Cordero v-alcor@microsoft.com

Working Hours: 09:00 AM - 06:00 PM (Mon-Fri) CT | [Local Time](#)

To reach Azure support outside of my working hours, please email asmstek1@microsoft.com referencing your support request number

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Thanks for your prompt response, we received the information and shortly we will process your

request.

From: michael@bitemojo.com

Sent: : Wed, Sep 16th 20, 11:46 pm

To: support@mail.support.microsoft.com; v-evlop@microsoft.com

Cc: v-alc0r@microsoft.com; contact@bitemojo.com

Subject Re: Re: Re: 120090924008364

Hi Evert and Alex,

Can you provide me a clear answer or status about your success to retrieve our data?

We are one week from this accident and our entire company and investors are still in the dark here.

Michael

--

Michael Weiss

Co-founder

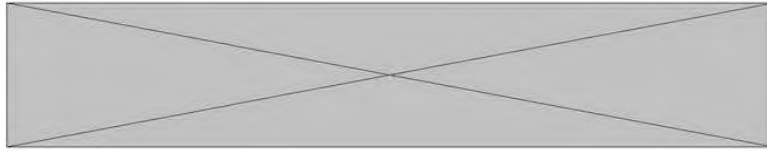
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Website: www.bitemojo.com

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On Wed, Sep 16, 2020 at 10:46 PM <v-evlop@microsoft.com> wrote:

Hello Michael,

Hope you are doing fine,

Thank you for contacting Microsoft Support. My name is Evert Lopez. I am the Support Professional who will be working with you on this Service Request. You may reach me using the contact information listed below, referencing the SR number 120090924008364. Today we are engaging our technical advisor team in order to have your issue escalated and have an answer as soon as possible.

Please do not hesitate to contact me if you have further questions

Best regards

[Evert Mauricio L. Monger](#) | Support Engineer | Azure Subscription Management Support

Email: v-evlop@microsoft.com | Manager: Alexander Cordero v-alc@r@microsoft.com

Working Hours: 09:00 AM - 06:00 PM (Mon-Fri) CT | [Local Time](#)

To reach Azure support outside of my working hours, please email asmstek1@microsoft.com referencing your support request number

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Thanks for your prompt response, we received the information and shortly we will process your request.

From: michael@bitemojo.com

Sent: : Tue, Sep 15th 20, 11:24 am

To: support@mail.support.microsoft.com; y-alcort@microsoft.com

Cc: contact@bitemojo.com

Subject Re: Re: 120090924008364

Hello Alex,

This is the end of Tuesday and I've still haven't heard a word from Microsoft in regards to the poor mistake which caused a 5 years development to be erased.

I'm very disappointed by this communication.

I would like to know ASAP if our data has been restored.

Michael

בתאריך שבת, 12 בספט' 2020, 8:45, מאת Michael Weiss <michael@bitemojo.com>:

Hello Alex,

I'm looking forward to hearing about your success in retrieving our data, I cannot describe how crucial this is for us!!!

Please let me know the status of it.

Michael

--

Michael Weiss

Co-founder

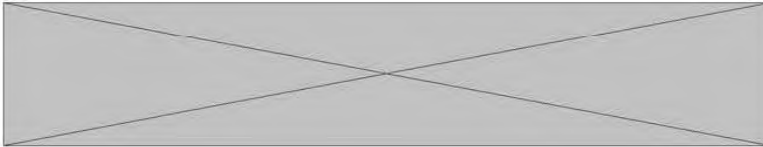
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Email: michael@bitemojo.com

Website: www.bitemojo.com

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On Fri, Sep 11, 2020 at 3:49 AM Alexander Cordero <v-alc@microsoft.com> wrote:

Hello!

Alex checking in. Please accept my apologies for the inconvenience. Rest assured we will be reviewing internally to help prevent this in the future.

Records shows subscription was cancelled on 6/10/2020 and deleted on 9/9/2020, we are going to contact engineering team looking for the option to recover your information and reinstate your sbuscription.

I can completely understand if this has soured the support experience here. I remain at your disposal for any feedback you might have regarding the support experience in this case.

Again, I'm terribly sorry on behalf of the team for the frustration and inconvenience caused.

Thank you for your patience with us.

Alexander Cordero Solano | Business Lead | Azure Subscription Management Support

Email: v-alc@microsoft.com | Manager: Randall Barrantes v-ranb@microsoft.com

Working Hours: 8 AM – 5 PM (Mon-Fri) UTC -6 | [Local Time](#)

To reach Azure Support outside of my working hours, please email asmstek1@microsoft.com with your support request number.

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Azure Support will never ask for your account password or full credit card number.

For your privacy and security, NEVER send your login credentials or full credit card number in email.

From: michael@bitemojo.com

Sent: : Thu, Sep 10th 20, 1:24 am

To: support@mail.support.microsoft.com; y-deji@microsoft.com

Cc: contact@bitemojo.com

Subject Re: 120090924008364

I'm sorry Debbie, but this answer is totally unacceptable!

You have deleted our entire platform, 5 years of work and hundreds thousands of USD, there is absolutely no way we can accept this answer.

Your colleague that I was twice in touch with has specifically asked me to contact her prior several days before the end of the last grace period and this is exactly what I did. Attached is the email I've sent on Sep 5th!

There is absolutely NO way that we can retrieve these files from anywhere else as also our test server was held in your platform and everything was deleted.

I'm absolutely sure Microsoft can retrieve this information from older backups or else so please let me know APAP how you can support and solve this matter.

Looking forward to your reply.

Michael

--

Michael Weiss

Co-founder

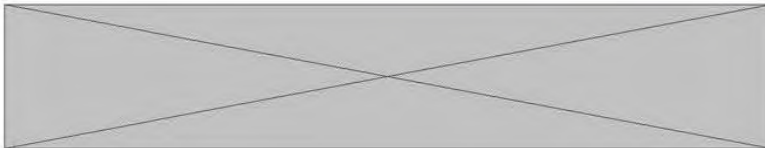
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Tel: +972-52-6664775

Email: michael@bitemojo.com

Website: www.bitemojo.com

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On Thu, Sep 10, 2020 at 5:15 AM v-deji via Contact <contact@bitemojo.com> wrote:

Support

Hello Michael,

Thank you for contacting Microsoft Azure Support! My name is Debbie and I will be the Support Professional that you will be working with to resolve this service request #120090924008364. All my contact information along with my manager and backups can be found in my signature at the end of this email. Please do not hesitate to contact me at any point with questions regarding this ticket. I understand how important this is to you and I want to assure you that we will work together in any way we can to solve this problem for you.

Based on my understanding of your issue I am providing you with the following Scope Agreement:

Issue Definition:

I understand that you requested to extend the payment date because of the economic situation your company is facing due to Covid-19 crisis and now your subscription [REDACTED] appears as deleted.

Scope Agreement:

I regret to inform you that one the subscription has been deleted, there is no possible way to retrieve the resources and information. Therefore, at this point I am unable to reactivate your subscription. Please accept our sincere apologies. What I can do now to help, at this moment, is to grant you a \$1000 credit for your next subscription. I am truly sorry for the inconvenience this may have caused you. If there is anything else I can do to make your experience with us better, do not hesitate to let me know and I will be happy to help you.

Kind regards,

Debbie Jimenez Pierce | Support Engineer | Azure Subscription Management Support

Email: v-deji@microsoft.com | Manager: Alexander Cordero v-alcor@microsoft.com

Working Hours: 01:00 PM - 09:00 PM (Mon-Fri) CT | [Local Time](#)

To reach Azure support outside of my working hours, please

email asmstek1@microsoft.com referencing your support request number

Microsoft Azure will never ask for your account password nor your full credit card number.

For your own privacy and security NEVER send your credentials or credit card number in email

[Service Dashboard](#) | [Create a Case](#)

Exhibit O

**Bill to**

Michael
pob 4631 jerusalem 91046
91046 jerusalem
Israel
Attn:Michael Weiss

Customer PO No.**Invoice No.**

E0300AEGWY

Billing Cycle

01/02/2020 to 29/02/2020

Invoice Date

02/03/2020

Pay-As-You-Go**Payment Method**

Credit Card

Account Owner Email

contact@bitemojo.com

Invoice Summary

Pay-As-You-Go

Previous balance	780.94
Payment - Thank you!	-780.94
Outstanding balance (from previous billing cycle)	0.00

Current Charges

Usage charges	727.83
---------------	--------

Total Pre-Tax Charges

727.83

(0.000%)

0.00

Total Amount**727.83**USD

*Payment instructions on page 2

Detailed usage[Click here to view detailed usage and charges](#)

Subscription ID

Order ID

83435f9a-b7c6-4bfe-ae12-ebdb536ba9c0

Microsoft Ireland Operations Ltd, One Microsoft Place, South County Business Park, Leopardstown, Dublin 18, D18 P521, Ireland

VAT Regn No. IE 8256796 U

Clerk's Papers 159

1/4

Additional Info

Microsoft Azure offers flexible support options. Click here for more info.
Discover, purchase, and provision services from Microsoft partners on the Microsoft Azure Marketplace.

Useful Resources

Understand your bill	azure.microsoft.com/en-us/support/understand-your-bill/
Support	azure.microsoft.com/en-us/support/options/
Connect with us	facebook.com/microsoftazure
Visit Microsoft Azure blog	azure.microsoft.com/blog/

Sold to

Michael
pob 4631 jerusalem 91046
91046 jerusalem
Israel
Attn:Michael

Payment Instructions

Please DO NOT PAY. You will be charged the amount due through your selected method of payment.

Subscription ID

[REDACTED]

Order ID

83435f9a-b7c6-4bfe-ae12-ebdb536ba9c0

Microsoft Ireland Operations Ltd, One Microsoft Place, South County Business Park, Leopardstown, Dublin 18, D18 P521, Ireland

VAT Regn No. IE 8256796 U

Usage Charges

Name	Type	Resource	Region	Consumed	Included	Billable	Rate	Value
Bandwidth		Data Transfer Out	Zone 1	8.7477	5.0000	3.7477	0.0870	0.33
Azure App Service	Standard Plan	S2		697.0000	0.0000	697.0000	0.2000	139.40
Storage	General Block Blob	GRS Data Stored		13.5196	0.0000	13.5196	0.0480	0.65
SQL Database	Single Standard	S1 DTUs		28.9583	0.0000	28.9583	0.9677	28.02
SQL Database	Single Standard	S3 DTUs		29.0000	0.0000	29.0000	4.8387	140.32
Storage	General Block Blob	List and Create Container Operations		0.0002	0.0000	0.0002	0.0004	0.00
Storage	Tables	GRS Data Stored		0.0063	0.0000	0.0063	0.0600	0.00
Storage	General Block Blob	Read Operations		6.1788	0.0000	6.1788	0.0004	0.00
Storage	Tables	GRS Batch Write Operations		0.8745	0.0000	0.8745	0.0004	0.00
Storage	General Block Blob	GRS Write Operations		0.1658	0.0000	0.1658	0.0004	0.00
Storage	General Block Blob	Delete Operations		0.0180	0.0000	0.0180	0.0004	0.00
Content Delivery Network	Azure CDN from Verizon	Standard Data Transfer	Zone 5	0.0117	0.0000	0.0117	0.1580	0.00
Content Delivery Network	Azure CDN from Verizon	Standard Data Transfer	Zone 4	0.0177	0.0000	0.0177	0.1300	0.00

Subscription ID

Order ID

83435f9a-b7c6-4bfe-ae12-ebdb536ba9c0

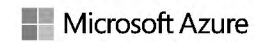
Microsoft Ireland Operations Ltd, One Microsoft Place, South County Business Park, Leopardstown, Dublin 18, D18 P521, Ireland

VAT Regn No. IE 8256796 U

Michael

Invoice No.

E0300AEGWY



Usage Charges

Name	Type	Resource	Region	Consumed	Included	Billable	Rate	Value
Content Delivery Network	Azure CDN from Verizon	Standard Data Transfer	Zone 3	0.0301	0.0000	0.0301	0.2330	0.01
Content Delivery Network	Azure CDN from Verizon	Standard Data Transfer	Zone 1	22.0561	0.0000	22.0561	0.0810	1.79
Content Delivery Network	Azure CDN from Verizon	Standard Data Transfer	Zone 2	0.0755	0.0000	0.0755	0.1290	0.01
Azure App Service	Basic Plan	B3		1,391.0000	0.0000	1,391.0000	0.3000	417.30

Sub-Total

727.83

Grand Total

727.83 USD

Subscription ID

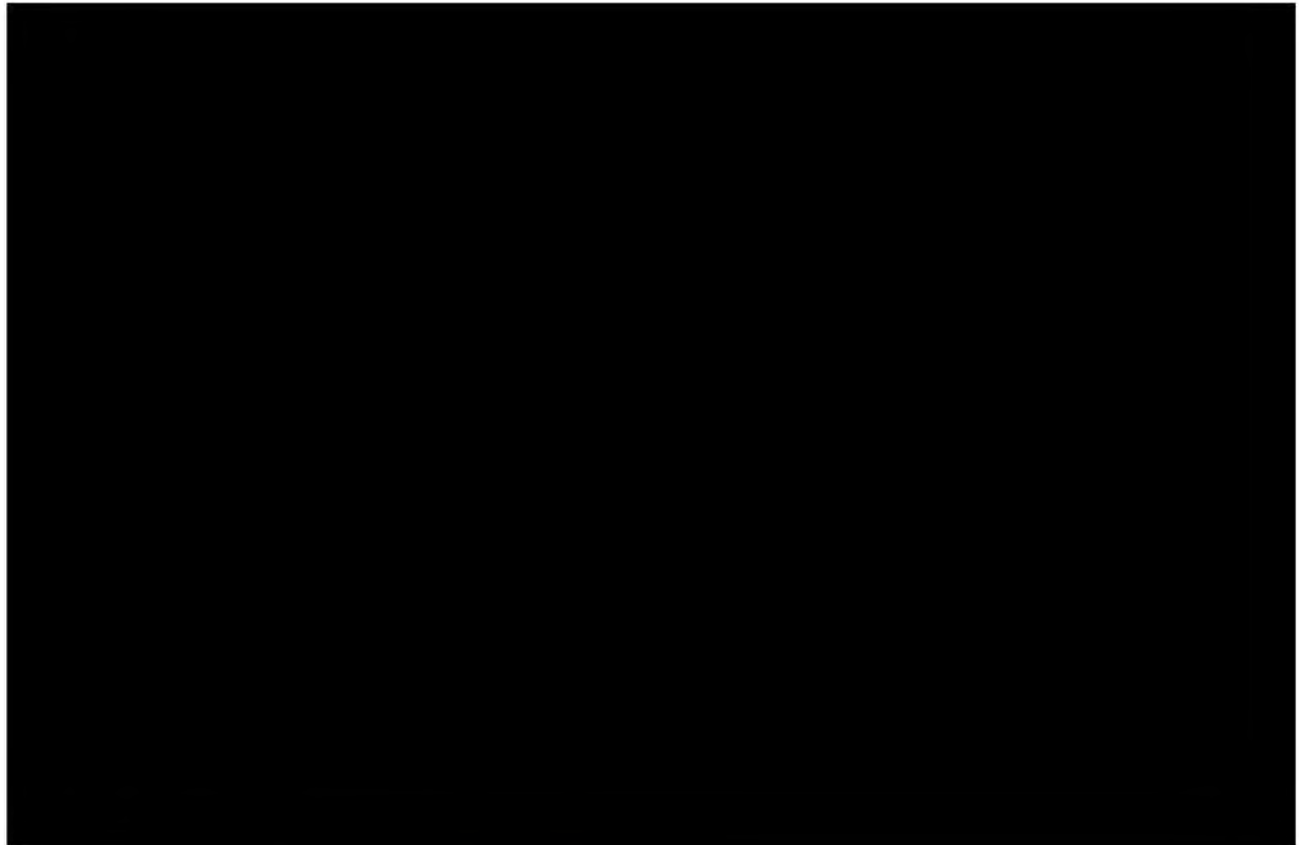
Order ID

83435f9a-b7c6-4bfe-ae12-ebdb536ba9c0

Microsoft Ireland Operations Ltd, One Microsoft Place, South County Business Park, Leopardstown, Dublin 18, D18 P521, Ireland

VAT Regn No. IE 8256796 U

Exhibit P



----- Forwarded message -----

From: 'Azure Team' via Contact <contact@bitemojo.com>

Date: Fri, Jul 20, 2018 at 1:39 AM

Subject: Azure product announcements and updates

To: <contact@bitemojo.com>

Having trouble viewing this email? [View as a webpage.](#)



Read about important Azure product updates and announcements.

Azure File Sync generally available

[Pricing](#) | [Azure Files webpage](#)

Azure File Sync extends Windows file servers to the cloud by seamlessly synchronizing on-premises file share data with Azure Files cloud storage. Tier file server data to the cloud so that

only the newest and most recently accessed files are kept locally.

Azure File Sync is generally available, and general availability pricing will be effective September 1, 2018.

Learn more about Azure File Sync on the [overview](#), [documentation](#), and [pricing](#) webpages.

Zone-redundant storage in Azure Storage available in more regions

[Pricing](#) | [Storage webpage](#)

Offload the heavy lifting of datacenter management with Azure Storage, and then simplify development of highly available apps using zone-redundant storage. It stores three replicas of data synchronously across multiple Azure Availability Zones.

[Zone-redundant storage](#) is now available in the West US 2 and East US regions.

Learn more about Storage on the [overview](#) and [pricing](#) webpages.

Azure Data Lake Storage Gen2 in preview

[Pricing](#) | [Azure Data Lake Storage webpage](#)

With Azure Data Lake Storage Gen2 Preview, get secure, scalable data lake storage for big data analytics.

Data Lake Storage Gen2 is in preview and is initially available in the West US 2 and West Central US regions. During the preview, usage charges will show as "ADFS" on invoices until September 1, 2018, and then they'll appear as "ADLS G2." [Learn more](#).

Learn more about Data Lake Storage Gen2 on the [overview](#) and [pricing](#) webpages.

Azure Container Instances generally available

[Pricing](#) | [Container Instances webpage](#)

With Azure Container Instances, get a serverless way to run both Linux and Windows containers. Receive an on-demand compute service delivering rapid deployment of containers with no virtual machine (VM) management and automatic, elastic scale.

Container Instances is now generally available in [additional regions](#).

Learn more about Container Instances on the [overview](#) and [pricing](#) webpages.

Azure App Service Environment for Linux in preview

[Pricing](#) | [App Service webpage](#)

Quickly build, deploy, and scale enterprise-grade web, mobile, and API apps running on any platform with Azure App Service. With App Service Environment for Linux (preview), deploy web apps into an Azure virtual network by bringing your own container or Linux-based code.

The App Service Environment for Linux isolated plan is in preview. Apps deployed into an App

Service Environment are available on the isolated plan, which lets you scale up to 100 Dv2-series VMs per App Service Environment and provide network isolation that meets your compliance needs.

Learn more about App Service on the [overview](#) and [pricing](#) webpages.

Windows 10 IoT Core Services in preview

[Pricing](#) | [Windows 10 IoT Core Services webpage](#)

Get long-term operating system support and services to manage device updates and assess device health for your Windows 10 IoT Core devices with Windows 10 IoT Core Services Preview. Use Windows 10 IoT Core Services to:

- Keep devices stable and secure with 10 years of operating system security and reliability updates.
- Manage device updates with Device Update Center and push them from the cloud using the same content distribution network as Windows Update, which is used daily by millions of Windows customers around the world.
- Evaluate a device's trustworthiness using Device Health Attestation (DHA).

Windows 10 IoT Core Services is now available in preview.

Learn more about Windows 10 IoT Core Services on the [overview](#), [documentation](#), and [pricing](#) webpages.

Azure Maps standard tier updates

[Pricing](#) | [Azure Maps webpage](#)

Using Azure Maps and its geospatial services APIs, add maps, search, routing, and traffic capabilities to your apps.

Several new features are now available in the standard tier, enabling you to more easily move your geospatial workloads from on-premises to Azure and build applications that take advantage of the power of location intelligence. Features include the IP to location API (preview), advanced routing services, and satellite/hybrid vector map tiles. [Learn more](#).

Learn more about Azure Maps on the [overview](#) and [pricing](#) webpages.

Azure Virtual WAN in preview

[Pricing](#) | [Azure Virtual WAN webpage](#)

Get optimized and automated branch-to-branch connectivity through Azure with Azure Virtual WAN Preview, a networking service. Connect your branches to each other and Azure, centralizing your network and security needs with virtual appliances like firewalls, the Azure network, and security services.

Azure Virtual WAN is in preview.

Learn more about Azure Virtual WAN on the [overview](#), [documentation](#), and [pricing](#) webpages and via the [Azure Blog](#).

Azure Firewall in preview

[Pricing](#) | [Azure Firewall webpage](#)

With Azure Firewall Preview, get native, fully stateful firewalling capabilities with built-in high availability and unrestricted cloud scalability that will autoscale as traffic grows, along with zero maintenance. Create and enforce connectivity policies to protect your Azure Virtual Network resources using app and network filtering rules.

Azure Firewall is in preview.

Learn more about Azure Firewall on the [overview](#), [documentation](#), and [pricing](#) webpages and via the [Azure Blog](#).

Azure DNS SLA updated to 100 percent

[Pricing](#) | [Azure DNS webpage](#)

Use Azure DNS to host your Domain Name System (DNS) domains in Azure. Seamlessly integrate Azure-based services with corresponding DNS updates and streamline your end-to-end deployment process.

Azure DNS is now being offered at a [100-percent availability service-level agreement \(SLA\)](#), up from the previously offered 99.99 percent. With this update, we guarantee that valid DNS requests will receive a response from at least one Azure DNS name server 100 percent of the time. There is no pricing impact from this change.

Learn more about Azure DNS on the [overview](#) and [pricing](#) webpages.

Azure Content Delivery Network unit of measure updates

[Pricing](#) | [Content Delivery Network webpage](#)

Reduce load times, save bandwidth, and increase speed and responsiveness using Azure Content Delivery Network.

You currently receive 1,024 bytes in every KB of data when you use Content Delivery Network (Verizon and Akamai). Starting September 1, 2018, you'll receive 1,000 bytes in every KB of data. We're migrating GUIDs to align with Azure Content Delivery Network in China and with content delivery network (CDN) offerings from some of the biggest commercial CDN providers. [This change](#) will be accompanied with a corresponding price decrease because of the data reduction in the packets.

Learn more about Content Delivery Network on the [overview](#) and [pricing](#) webpages.

Visit [Azure updates](#) for a complete list of announcements and updates.

Note: As an Azure customer, you are receiving this email because we are required to notify you

of product changes that may affect your subscription. This is the only communication that you will receive directly from Microsoft regarding these product changes.

Thank you,

Your Azure team

Please help us improve our communication by telling us what you think about this email:

Timely? ☐ ☐ ☐ ☐ ☐ Helpful? ☐ ☐ ☐ ☐ ☐

This message from Microsoft is an important part of a program, service, or product that you or your company purchased or participates in. Microsoft respects your privacy. Please read our [Privacy Statement](#).

One Microsoft Way, Redmond, WA 98052 USA



Exhibit Q

----- Forwarded message -----

From: 'Microsoft Azure' via Contact <contact@bitemojo.com>

Date: Thu, Aug 23, 2018 at 3:06 AM

Subject: Azure product announcements and updates

To: <contact@bitemojo.com>

Azure product announcements and updates

You're receiving this email because these product changes may affect your Azure subscription.

In this email:

- [Compute Optimized Gen2 tier for Azure SQL Data Warehouse is generally available in more regions](#)
- [Managed instance general purpose tier in Azure SQL Database will be generally available](#)

- [Improvements to usage meter names](#)

For a complete list of announcements and updates, visit [Azure updates](#).

Compute Optimized Gen2 tier for Azure SQL Data Warehouse is generally available in more regions

[Pricing](#) | [SQL Data Warehouse webpage](#)

Quickly implement a high-performance, globally available, and lower cost secure cloud data warehouse with Azure SQL Data Warehouse.

Now, get five times better performance than previously available with the Compute Optimized Gen2 tier for SQL Data Warehouse, which uses adaptive caching and instant data movement. The tier is now available in Australia Central, Australia Central 2, and France Central for a [total of 23 regions](#).

Learn more about SQL Data Warehouse on the [overview](#) and [pricing](#) webpages.

Managed instance general purpose tier in Azure SQL Database will be generally available

[Pricing](#) | [SQL Database webpage](#)

If you're using Azure SQL Database—an intelligent, fully managed, relational cloud database service—take advantage of the managed instance general purpose tier. With it, get balanced and scalable compute and storage options that fit most business workloads.

Effective October 1, 2018, the managed instance general purpose tier in SQL Database will be generally available and [meter names and their attributes will change](#). General availability pricing will also be effective October 1, 2018, and you'll see this change in your November 2018 bill. Use your SQL Server licenses and active Software Assurance to save up to 55 percent—versus license-included pricing—with [Azure Hybrid Benefit for SQL Server](#).

Learn more about SQL Database on the [overview](#) and [pricing](#) webpages.

Improvements to usage meter names

We've made [improvements to usage meter names in Azure](#) that won't affect the usage data, rates, or unique identifier, but you'll need to adjust reports to accommodate the new names.

By the end of this month, improved standardized usage meter names for Azure Virtual Machines will be available. Usage meter name changes for all other services will be effective by the end of October 2018. [Download](#) a spreadsheet with all meters and their new attributes. We'll update the spreadsheet monthly until all changes are in production. If you have questions, [contact us](#).

[Unsubscribe](#) | [Privacy Statement](#)

Microsoft Corporation, One Microsoft Way, Redmond, WA 98052

Exhibit R

----- Forwarded message -----

From: **Application Insights** <ai-noreply@applicationinsights.io>

Date: Mon, Jun 18, 2018 at 11:10 AM

Subject: Your Weekly Application Insights digest email

To: <contact@bitemojo.com>

Note: The weekly telemetry report is being deprecated after June 18, 2018. See [this](#) for information on setting up custom reports.

Your weekly telemetry report 6/18/18

The following data shows insights based on telemetry from last week compared to the week

prior.

bitemojo-api

[View in portal](#)

Query Analytics

[Server requests](#)

	2 weeks ago	1 week ago	% change
Total requests	14,297	15,368	7 %
Failed requests	122	209	71 %
Average response time	488.38 ms	641.09 ms	31 %

[Dependencies](#)

Failed dependencies	2	4	100 %
Average dependency time	1.85 ms	1.83 ms	1 %

[Client Side](#)

Total views	0	0	— no change
Average page load time	0 ms	0 ms	— no change

[Exceptions](#)

Total exceptions	3	1	67 %
------------------	---	---	----------------------

[Availability](#)

Overall Availability	0	0	— no change
	0 ms	0 ms	

Average Response Time

— [no change](#)

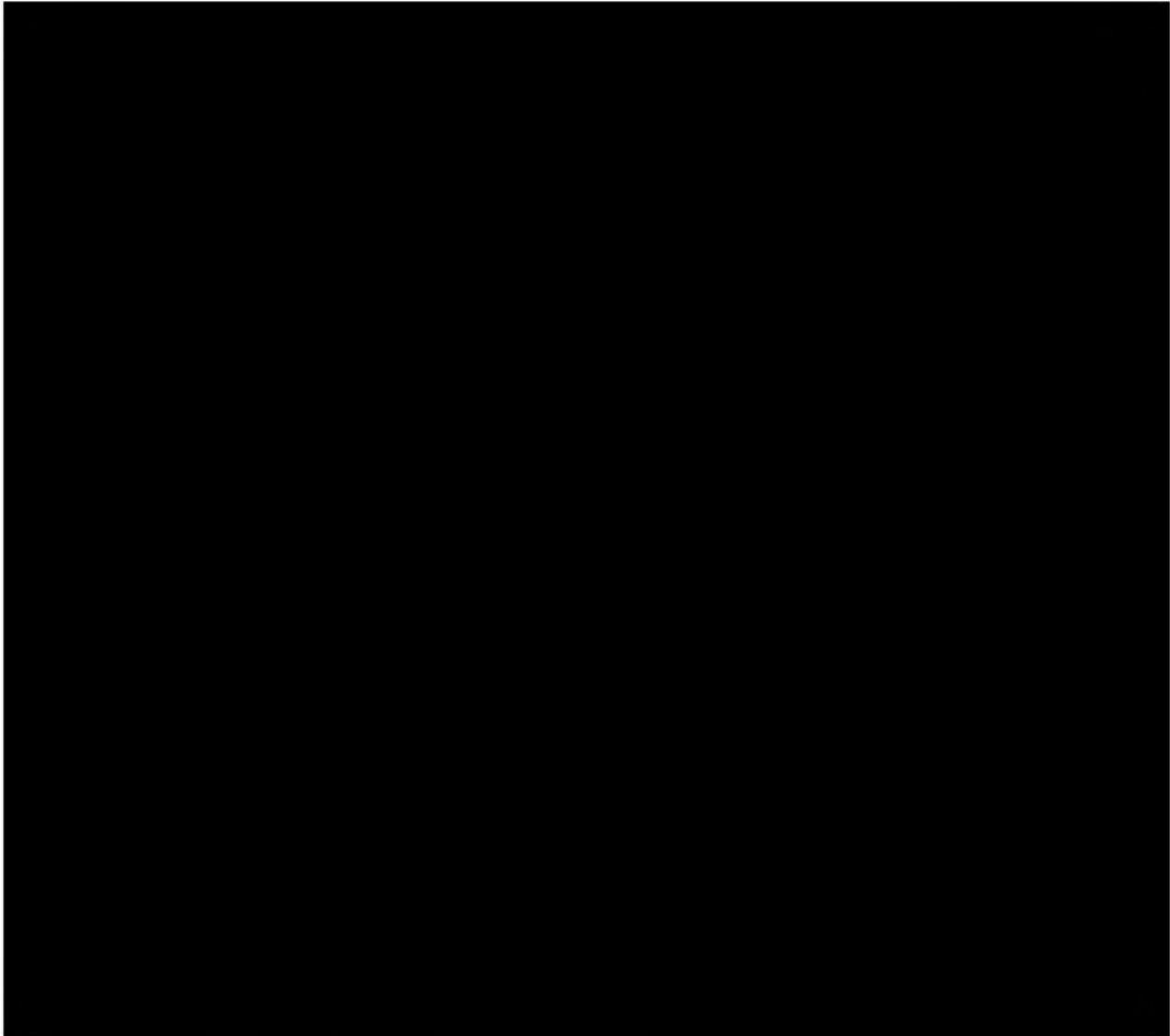
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Exhibit S



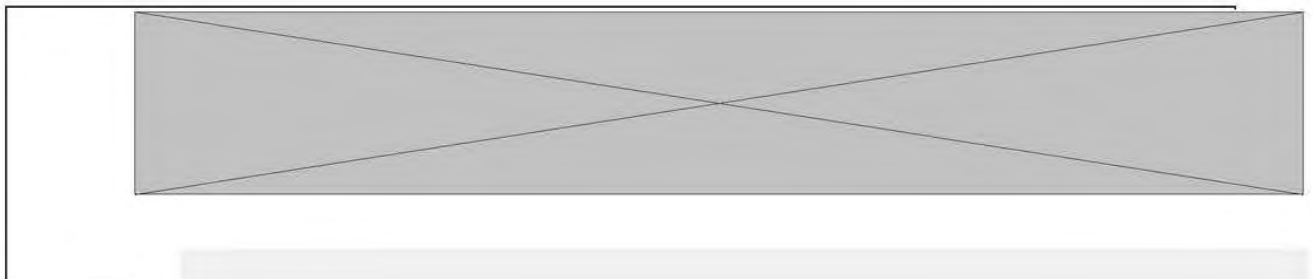
----- Forwarded message -----

From: **Application Insights** <ai-noreply@applicationinsights.io>

Date: Wed, May 30, 2018 at 10:14 AM

Subject: Server response time degradation in "bitemojo-api" (Smart Detection)

To: <contact@bitemojo.com>





Server response time degradation for "POST /Tours/startTour" requests in bitemojo-api

When did this happen:	May 29, 2018 (UTC)
What went wrong:	28.89 sec server response time, 141% slower than normal response time
Normal response time over 7 days:	11.99 sec
Things to note:	3% of all requests were affected

[See more details](#)

Was this notification helpful? [Yes](#), [No](#)

[Configure](#) email recipients for this notification.

Questions or feedback? Visit the [Application Insights Forum](#).

Learn more about [this type of alerts](#).

You received this email because you are an owner, contributor or reader of the PAY-AS-YOU-GO Azure subscription that monitors bitemojo-api, or you were set as a recipient.

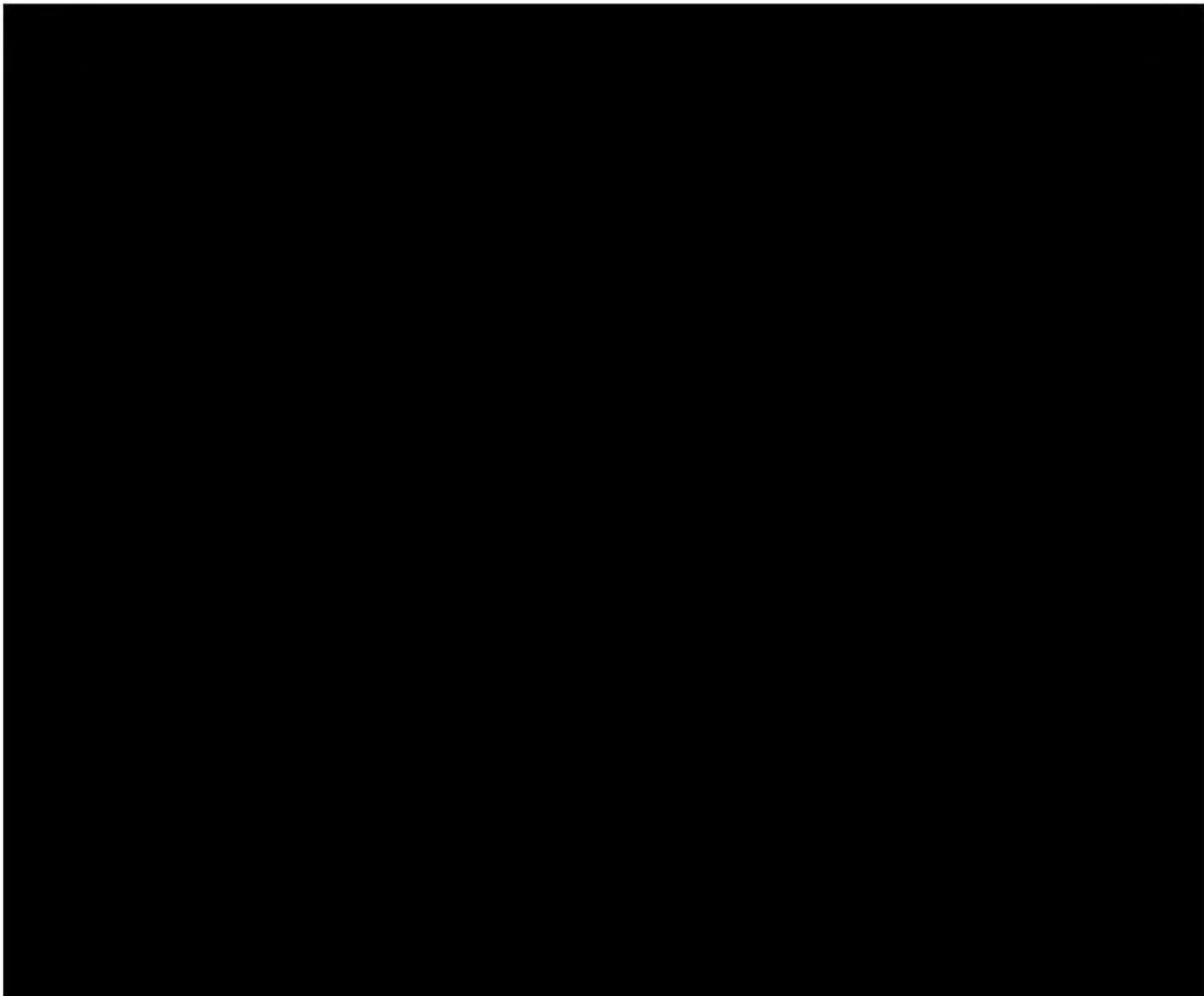
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Exhibit T



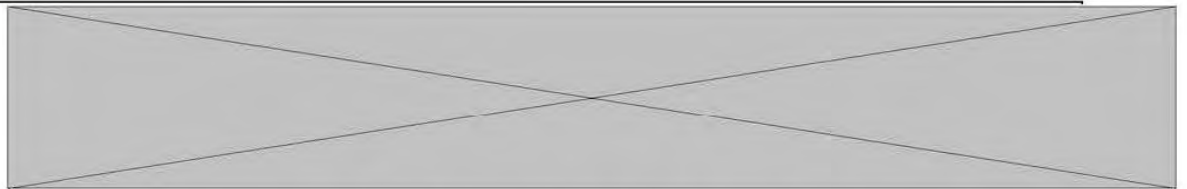
----- Forwarded message -----

From: **Application Insights** <ai-noreply@applicationinsights.io>

Date: Thu, Jun 14, 2018 at 7:30 AM

Subject: Server response time degradation in "bitemojo-api" (Smart Detection)

To: <contact@bitemojo.com>



Server response time degradation for "POST /Tours/startTour" requests in bitemojo-api

When did this happen:

June 13, 2018 (UTC)

What went wrong:

25.39 sec server response time, 103%

Normal response time over 7 days: slower than normal response time
12.47 sec

[See more details](#)

Was this notification helpful? [Yes](#), [No](#)

[Configure](#) email recipients for this notification.
Questions or feedback? Visit the [Application Insights Forum](#).
Learn more about [this type of alerts](#).

You received this email because you are an owner, contributor or reader of the PAY-AS-YOU-GO Azure subscription that monitors bitemojo-api, or you were set as a recipient.

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Microsoft Corporation, One Microsoft Way, Redmond, WA 98052

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
COUNTY OF KING

CULINARY VENTURES, LTD
d/b/a BITEMOJO,

Plaintiff,

v.

MICROSOFT CORPORATION,

Defendant.

NO. 21-2-11021-1 SEA

**DECLARATION OF JENNIFER RUST
MURRY IN SUPPORT OF PLAINTIFF'S
RESPONSE TO DEFENDANT'S AMENDED
MOTION TO DISMISS**

I, Jennifer Rust Murray, declare as follows:

1. I am a member of the law firm of Terrell Marshall Law Group PLLC, counsel of record for Plaintiff in this matter. I am admitted to practice before this Court and am a member in good standing of the bar of the states of Washington and Oregon. I respectfully submit this declaration in support of Plaintiff's Response to Defendant's Motion to Dismiss. Except as otherwise noted, I have personal knowledge of the facts set forth in this declaration and could testify competently to them if called upon to do so.

2. Attached as Exhibit 1 is a copy of Microsoft's Commercial Support Subcontractors List.

3. Attached as Exhibit 2 is a copy of Microsoft's Core Online Services Subprocessor List.

DECLARATION OF JENNIFER RUST MURRY IN SUPPORT OF
PLAINTIFF'S RESPONSE TO DEFENDANT'S AMENDED MOTION
TO DISMISS - 1
CASE NO. 21-2-11021-1 SEA

TERRELL MARSHALL LAW GROUP PLLC
936 North 34th Street, Suite 300
Seattle, Washington 98103-8869
TEL. 206.816.6603 • FAX 206.319.5450
www.terrellmarshall.com

1 I declare under penalty of perjury under the laws of the State of Washington and the
2 United States that the foregoing is true and correct.

3

4 DATED this 8th day of November, 2021.

5

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

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DECLARATION OF JENNIFER RUST MURRY IN SUPPORT OF
PLAINTIFF'S RESPONSE TO DEFENDANT'S AMENDED MOTION
TO DISMISS - 2
CASE NO. 21-2-11021-1 SEA

TERRELL MARSHALL LAW GROUP PLLC
936 North 34th Street, Suite 300
Seattle, Washington 98103-8869
TEL. 206.816.6603 • FAX 206.319.5450
www.terrellmarshall.com

Exhibit 1

Microsoft Commercial Support Subcontractors

Last update: 13 August 2021

The **Commercial Support Organization** ("Commercial Support") within Microsoft Corporation and its affiliates operates the Microsoft Services Support offerings, including Premier support and Microsoft Unified support. Commercial Support uses subcontractors for certain limited functions.

Note: Subcontractors **bolded** are the recent additions to the list.

1. Outsourced to provide contact/call center services.

When these outsourcers store data in their systems, they are subject to equivalent levels of protection and certification as Microsoft facilities and systems. Their operations are regularly reviewed by Microsoft:

AUSTRALIA	RHIPE SOLUTIONS	CONVERGYS
CANADA	SHERWEB INC	EXPERIS (MANPOEduWER GROUP)
ENGLAND	SUBFERO LTD	MURAL CONSULTING CORPORATION
GERMANY	MAJOREL(ARVATO)	N3 LLC
INDIA	GIGMO SOLUTIONS PVT LTD	TEK EXPERTS GLOBAL LTD
	MINDTREE CONSULTING PVT LTD	TEKSYSTEMS
	INFOSYS LIMITED	TELEPERFORMANCE
	WIPRO LIMITED	VALOREM CONSULTING LLC
JAPAN	CONCENTRIX	VMC CONSULTING CORPORATION
	NTT COMMUNICATIONS	ZONES INC
	RELIA	
	TRANSCOSMOS	
SWITZERLAND	ADECCO STAFFING & OUTSOURCING SDN	
	BHD	
TAIWAN	MANPOWERGROUP	
UNITED STATES	APEX SYSTEMS INC	
	ALLEGIS GLOBAL SOLUTIONS	
	AVANADE	
	BLUEPRINT TECHNOLOGIES	
	COLLABERA INC	
	CONCENTRIX CORPORATION	

In addition, Commercial Support utilizes services from AT&T (United States) and NEXIDIA INC (United States) in support of contact/call centres services.

2. Subsidiary Affiliates

Microsoft has subsidiaries that may provide services to Commercial Support in these countries:

MICROSOFT AB (SWEDEN)	MICROSOFT DE ARGENTINA SA (ARGENTINA)
MICROSOFT ALGÉRIE (ALGERIA)	MICROSOFT DE GUATEMALA SA (GUATEMALA)
MICROSOFT AZERBAIJAN	MICROSOFT DE URUGUAY SA
MICROSOFT BANGLADESH LIMITED (BANGLADESH)	MICROSOFT DEUTSCHLAND GMBH (GERMANY)
MICROSOFT BELGIÉ (BELGIUM)	MICROSOFT DOMINICANA SRL (DOMINICAN REPUBLIC)
MICROSOFT BILGISAYAR YAZILIM (TURKEY)	MICROSOFT DOO LJUBLJANA (SLOVENIA, REPUBLIC OF)
MICROSOFT BOLIVIA	MICROSOFT DOOEL SKOPJE (MACEDONIA)
MICROSOFT BRUNEI DARUSSALAM (BRUNEI)	MICROSOFT ECUADOR
MICROSOFT CANADA INC	MICROSOFT EESTI (ESTONIA)
MICROSOFT CASABLANCA (MOROCCO)	MICROSOFT EGYPT
MICROSOFT CHILE SA	MICROSOFT EL SALVADOR SA (EL SALVADOR)
MICROSOFT COLOMBIA	MICROSOFT FRANCE
MICROSOFT CORPORATION (I) PVT LTD (INDIA)	MICROSOFT GULF FZ LLC (UNITED ARAB EMIRATES)
MICROSOFT COSTA RICA	MICROSOFT HONDURAS
MICROSOFT CRNA GORA (MONTENEGRO)	MICROSOFT HONG KONG LIMITED
MICROSOFT CYPRUS	MICROSOFT HRVATSKA DOO (CROATIA)
MICROSOFT DANMARK APS (DENMARK)	MICROSOFT IBÉRICA (SPAIN)

Microsoft Commercial Support Subcontractors

MICROSOFT INDIAN OCEAN ISLANDS (MAURITIUS)	MICROSOFT PUERTO RICO SA
MICROSOFT INDONESIA	MICROSOFT ROMANIA
MICROSOFT INFORMATICA LTDA (BRAZIL)	MICROSOFT S DE RL DE CV (MEXICO)
MICROSOFT IRELAND	MICROSOFT SAUDI ARABIA
MICROSOFT ITALIA (ITALY)	MICROSOFT SCHWEIZ (SWITZERLAND)
MICROSOFT IVORY COAST (CÔTE D'IVOIRE)	MICROSOFT SINGAPORE OPERATIONS PTE LTD
MICROSOFT JORDAN PSC (JORDAN)	MICROSOFT SLOVAKIA SRO
MICROSOFT KENYA	MICROSOFT SOFTWARE DOO (SERBIA)
MICROSOFT LATVIA SIA	MICROSOFT SOUTH AFRICA
MICROSOFT LEBANON SARL	MICROSOFT SP Z OO (POLAND)
MICROSOFT LIETUVA (LITHUANIA)	MICROSOFT SRI LANKA (PVT) LTD (SRI LANKA)
MICROSOFT LIMITED (UNITED KINGDOM)	MICROSOFT SRO (CZECH REPUBLIC)
MICROSOFT LUXEMBOURG	MICROSOFT TRINIDAD AND TOBAGO
MICROSOFT MAGYARORSZÁG KFT (HUNGARY)	MICROSOFT TUNISIA
MICROSOFT MALAYSIA (MALAYSIA)	MICROSOFT UNITED STATES
MICROSOFT MALTA (MALTA)	MICROSOFT VENEZUELA
MICROSOFT MOLDOVA	MICROSOFT VIỆT NAM (VIETNAM)
MICROSOFT NEDERLAND (NETHERLANDS)	MICROSOFT ΕΛΛΑΣ AE (GREECE)
MICROSOFT NEW ZEALAND	MICROSOFT БЪЛГАРИЯ (BULGARIA)
MICROSOFT NIGERIA	MICROSOFT РОССИЯ (RUSSIA)
MICROSOFT NORGE AS (NORWAY)	MICROSOFT УКРАЇНА (UKRAINE)
MICROSOFT ÖSTERREICH GMBH (AUSTRIA)	MICROSOFT יִשְׂרָאֵל בֶּע"מ (ISRAEL)
MICROSOFT OY (SUOMI) (FINLAND)	MICROSOFT ليبيا (LIBYA)
MICROSOFT PAKISTAN	MICROSOFT บริษัท ไมโครซอฟท์ (ประเทศไทย) จำกัด (THAILAND)
MICROSOFT PANAMA	MICROSOFT 마이크로소프트사 (KOREA)
MICROSOFT PERU SRL	MICROSOFT 台灣微軟公司 (TAIWAN)
MICROSOFT PHILIPPINES INC	MICROSOFT 微软 (中国) 有限公司 (CHINA)
MICROSOFT PORTUGAL	MICROSOFT 日本マイクロソフト株式会社 (JAPAN)
MICROSOFT PTY LIMITED (AUSTRALIA)	

3. Contract Staff

Sometimes referred to as staff augmentation or external staff, Contract Staff work alongside Microsoft employees to help deliver certain support services. In such cases, the systems used to store and process data are Microsoft.

AUSTRALIA	DATA GLOVE IT SOLUTIONS PTY LTD	LAUNCH IT CONSULTING INDIA PRIVATE
CHINA	MANPOWER CHINA GROUP (CHINA) HUMAN RESOURCE CO. LTD.	QUANTUM LEAP CONSULTING PRIVATE LIMITED
	PACTERA TECHNOLOGIES INC	RANDSTAD
	WAI QI REN LI ZI YUAN FU WU LTD	ROBERT BOSCH ENGINEERING AND BUSINE
	WAN BAO SHENG HUA QI YE GUAN LI ZI	SONATA SOFTWARE LIMITED
	WU XI WEN SI HAI HUI XIN XI JI SHU	SPECTRUM CONSULTANTS INDIA PVT LTD
	ZHONG RUAN GUO JI(SHANG HAI)KE JI F	TATA CONSULTANCY SERVICES LIMITED
		TECH MAHINDRA LTD.
CZECH REPUBLIC	BPO EUROPE SRO	USHTA TE CONSULTANCY SERVICES LLP
DENMARK	ATOS IT SOLUTIONS AND SERVICES INC	WIPRO LIMITED
EGYPT	IBS INTERNATIONAL BUSINESS SERVICES	ZEN3 INFOSOLUTIONS PRIVATE LIMITED
	INTERNATIONAL BUSINESS SERVICES	CPL SOLUTIONS LTD
GERMANY	HAYS AG	ISRAEL
	LM IT SERVICES AG	CALANIT CARMON LTD
GREECE	SOFIA	SQLink Group
HOLLAND	MAVENTION B.V.	ADECCO ITALIA S P A
HUNGARY	PROHUMAN 2004 KFT.	AIZOON CONSULTING
INDIA	AFFLUENT GLOBAL SERVICES PRIVATE LIMITED	MICROSYS
	ATHIYA ORGANIZATIONAL COMPETENCIES (P) LIMITED	RANDSTAD ITALIA S P A
	CYBAGE SOFTWARE PVT LTD	RETI S P A
	KELLY SERVICES IT SOLUTIONS	PASONA INC
		RECRUIT STAFFING CO LTD
		TRANSCOSMOS
		JORDAN
		MIGRATE HUMAN RESOURCES CONSULTING
		KOREA
		ADECCO KOREA

Microsoft Commercial Support Subcontractors

MEXICO	EXPERTOS EN SOLUCIONES TI SC	DESIGN LABORATORY INC. DBA DLI CONSULTING
	MOBIK S A DE C V	EDUCATION AT WORK, LLC
	MXP INDUSTRIAL S A DE C V	H10 CAPITAL
	OPTIMIZACION EN PROCESOS Y PLATAFOR	HARMAN CONNECTED SERVICES
	SIGMATAO FACTORY S A DE C V	HARMAN CONNECTED SERVICES (F/K/A ADITI TECHNOLOGIES PVT LTD)
POLAND	RANDSTAD POLSKA SP. Z.O.O.	HCL AMERICA INC
PORTUGAL	AXIANSEU DIGITAL SOLUTIONS S A (F/K/A NOVABASE IIS - INFRAESTRUTURAS E INTEGRAÇÃO DE SISTEMAS INFORMÁTICOS S A)	IFG-INTERNATIONAL FINANCIAL GROUP
	BIZDIRECT	INSIGHT GLOBAL INC
	GFI PORTUGAL	INVISIO CORPORATION
	ITEN SOLUTIONS SISTEMAS DE INFORMAGAO	IP SERVICES, INC. DBA INTELLECTUAL PROPERTY SERVICES
	NOVABASE – NEOTALENT	JDA PARTNERS TECHNICAL SERVICES GROUP
	UNIPARTNER IT SERVICES SA	KALLES GROUP
ROMANIA	LUGERA & MAKLER	KFORCE
	RINF TEMPS	LIONBRIDGE TECHNOLOGIES INC
	RODAX MANAGEMENT SRL	MANPOWER AG ZUG
SERBIA	E-SEARCH	MAQ SOFTWARE
SPAIN	EO	MOTIV INC
	KABEL S L	MURPHY & ASSOCIATES INC
SWITZERLAND	ADECCO	N3 LLC
TURKEY	DONPER DANISMANLIK HIZMETLERI LIMİ	NATIONAL COMMUNICATIONS SERVICES IN (NCS)
UNITED KINGDOM	CURO RESOURCING LIMITED	NEUDESIC
UNITED STATES	110 CONSULTING INC	OSLO SOLUTIONS LLC
	2RBCONSULTING INC	PLUMBLINE CONSULTING LLC
	ACCENTURE	QUADRANT RESOURCES LLC
	ACCENTURE SOLUTIONS PRIVATE LIMITED	RATIONAL INTERACTION
	AFFIRMA CONSULTING, LLC	RAZOR CONSULTING SOLUTIONS
	ALLYIS INC	REDCLEY LLC
	ALORICA INC	REVEL CONSULTING
	APTLY TECHNOLOGY CORPORATION	SADA SYSTEMS
	AQUENT LLC	SOGETI USA LLC
	BEYONDSOFT CONSULTING INC	SONATA SOFTWARE NORTH AMERICA INC
	BEYONDSOFT CORPORATION	TELEION CONSULTING LLC
	BLACKBOX ADVERTISING D O O	TELEPERFORMANCE
	BRIDGE PARTNERS	THE MATH COMPANY
	BRILLIO LLC	THE SPUR GROUP INC
	COGNIZANT TECHNOLOGY SOLUTIONS	VMC CONSULTING CORPORATION
	CONVERGYS	WICRESOFT CO LTD
	CORPORATE EMPLOYMENT RESOURCES INC DBA CORESTAFF	WIMMER SOLUTIONS CORPORATION
	COVESTIC INC	XTREME CONSULTING GROUP INC
	DATA GLOVE INCORPORATED DBA TRIMAX	YEAR UP PROFESSIONAL RESOURCES DBA YUPRO INC

4. Product Organizations

Subcontractor's **personnel** that are not regularly involved in providing Professional Services may occasionally be necessary for troubleshooting or to resolve certain particularly complex issues. These subcontractors are subject to Supplier Security and Privacy Assurance (SSPA) and contractual commitments, but may not be subject to heightened requirements for subcontractors that regularly provide Professional Services:

AMSTERDAM	AGI GLOBAL HOLDINGS COOPERATIE	RIGHTCROWD SOFTWARE PTY LTD
AUSTRALIA	RETAIL SAFARI	ESPRESSO COMMUNICATIONS
	CANADA	

Microsoft Commercial Support Subcontractors

	UNLIMITEDVIZ INC	AEGIS COMPANY
CHILE	POLICOMP	AEROTEK
CHINA	AGENDA HK LIMITED	AG CONSULTING PARTNERS INC
	BO YAN KE JI GU FEN YOU XIAN GONGSI	AIM CONSULTING
	INSPUR WORLDWIDE SERVICES LTD	ALORICA INC
	RUAN TONG DONG LI XIN XI	AMPLIFY CONSULTING PARTNERS
	SHAG HAI WEI CHUANG RUAN JIAN	ARAS CORPORATION
	SHANG HAI FU QUAN WANG LUO JI	ARCHWAY MARKETING SERVICES INC
	SUI RUI KE JI GU FEN	ARTECH CONSULTING LLC
	TA TA XIN XI JI SHU	ARUBA NETWORKS INC
	ZHONG RUAN SHANG HAI ZI YUAN	ARUP USA INC
CZECH REPUBLIC	AXIAL PERSONNEL AGENCY SRO	AT&T
FINLAND	INLINE MARKET EVOLUTION	AVANADE INC
FRANCE	REDSSEN CONSULTING FRANCE	AVIE INC
	SODEXO	AVORA HOLDINGS LTD
GERMANY	CABSOL DEUTSCHLAND GMBH	BDO USA LLP
	CREAKOM GMBH	BRICKRED SYSTEMS LLC
	HR FACTORY GMBH	BUILDING INFORMATION SYSTEMS LLC
INDIA	ANNIK INC	C H ROBINSON WORLDWIDE INC
	CSS	CADENCE PREFERRED
	DUSTERS TOTAL SOLUTION SERVICES	CAMPFIRE LLC
	ENTHRALLTECH PRIVATE LIMITED	CASABA SECURITY LLC
	LAUNCH IT CONSULTING INDIA PRIVATE	CENTRIC CONSULTING LLC
	LIQUIDHUB ANALYTICS PVT LTD	CENTURYLINK
	V5 GLOBAL SERVICES PVT LTD	CISCO SYSTEMS INC
IRELAND	SURESKILLS LTD	CLOUDMOYO INC
	TRICYCLE V O F	COMGROUP INC
JAPAN	CREATIVEBANK INC	COMPASS GROUP NAD-EVENT
	SYSTEMA CORP	MANAGEMENT
	TOSHIBA	COPPEI CREEK INC
KOREA	CASTNET	CORTAC GROUP INC
	HYUNAM INFORMATION	CPA GLOBAL LIMITED
	MCCAN ERICKSON	CSI INTERFUSION INC
	WUNDERMAN	DATA VISION GROUP LLC
KUWAIT	AH AL SAGAR & BROS PROJECT	DECISIVE DATA
LUXEMBOURG	AJILON LUXEMBOURG SA	DELL
MEXICO	NEAL ANALYTICS LLC	DELOITTE
NEW ZEALAND	INTERGEN LIMITED	DIRECT APPS INC DBA LAUNCH
PAKISTAN	OUTSOURCING	CONSULTING (FKA MATRIX RESOURCE
PHILIPPINES	VIVENTIS INTERIM MANAGEMENT INC	PARTNERS INC D/B/A AVERRO)
PUERTO RICO	IRON MOUNTAIN	DUFF & PHELPS LLC
QATAR	Q SHIELD	ECHO SERVICES INC
SPAIN	ADAVAN SISTEMAS S L	ELEVEN 11 SOLUTIONS
SWITZERLAND	ERNST & YOUNG	ENTIRENET
TAIWAN	KPMG	ESAGE GROUP LLC
UNITED KINGDOM	ALEXANDER MANN SOLUTIONS	EXCELL A DIVISION OF COMPUCOM
	PROJECT PEOPLE	EXELA ENTERPRISE SOLUTIONS INC
	THE CHANGING WORKPLACE LIMITED	EXPRESS SERVICES
UNITED STATES	425 CONSULTING GROUP LLC	FIVEBY
	ADAQUEST INC	FLEXIBLE ROAD LLC
	ADISYS CORPORATION	GETTING TO GREEN LLC
	ADOBE SYSTEMS INC	GP STRATEGIES CORPORATION
		GREENLIGHT TECHNOLOGIES INC

Microsoft Commercial Support Subcontractors

HANSON CONSULTING GROUP	RIVET CONSULTING LLC
HARMAN CONNECTED SERVICES	ROBERT HALF INTERNATIONAL INC
HARMAN CONNECTED SERVICES (F/K/A	RUN STUDIOS LLC
ADITI TECHNOLOGIES PVT LTD)	SAP AMERICA
INCONSULTING INC	SCHNEIDER ELECTRIC
INDIGO SLATE	SEARCH WIZARDS
INTEGREON MANAGED SOLUTIONS INC	SECURITAS SECURITY SERVICES
INTERACTION	SHIPLEY ASSOCIATES
JEFFREYM CONSULTING LLC	SIMPLE CONCEPTS CONSULTING LLC
KALVI CONSULTING SERVICES INC	SIMPLICITY CONSULTING INC
LATENTVIEW ANALYTICS CORP	SOLANITE CONSULTING INC
LENATI LLC	SPRINKLR
LG CONSULTING SERVICES	TECHNOSOFT CORPORATION
LMC CONSULTING GROUP	TEN GUN DESIGN
LUXOFT USA INC	THE KAVI GROUP LLC
MEDIAPLANT	THE SEATTLE WUNDERMAN NETWORK
MOSS ADAMS LLP	THE SUDDATH COMPANIES
MOVINGWORLDS	TRIEX TECHNOLOGIES INC
MU SIGMA INC	TRILLIUM CREATIVE SOLUTIONS
MURDOCH SERVICES	TROY CONSULTING LLC
MV PUBLIC TRANSPORTATION INC	UNIFY CONSULTING LLC
MYRIAD CONSULTING INC	UNIFYCLOUD LLC
NAYAMODE INC	UNIFY SQUARE
NEXTANT LLC	VALENTE GLOBAL
NFOLKS LLC	VIDYATECH SOFTWARE LLC
NIPPUR LLC	VIRTUOSITY CONSULTING
NYTEC INC	VTEAM LABS LLC
OFFPISTE CONSULTING	WAFERWIRE CLOUD TECHNOLOGIES
ONE DIVERSIFIED LLC	WAGGENER EDSTROM
ORANGE LV HOLDINGS INC	WALLERO TECHNOLOGIES INC
PHENOM PEOPLE INC	WARNER MARKETING INC
PRICE WATERHOUSE COOPERS	WORLD WIDE TECHNOLOGY
PRIME 8	WTIA WORKFORCE INSTITUTE
PROJECTLINE SERVICES INC	XEROX CORPORATION
PROSYS INFORMATION SYSTEMS	YEAR UP INC
PROTIVITI INC	YESLER
REDCLOUD	ZENSA INC
RESOURCES ONLINE	ZS ASSOCIATES

5. Strategic Alliance

Microsoft may work with companies to provide additional support services. In such scenarios, subcontractors are subject to equivalent levels of protection and certification as Microsoft facilities and systems.

CANADA	BIT QUILL TECHNOLOGIES INC
UNITED STATES	CLOUDSIMPLE
	HEWLETT PACKARD ENTERPRISE
	COMPANY
	PIVOTAL SOFTWARE INC
	VIRTUSTREAM

Microsoft Commercial Support Subcontractors

NOTICE AND DISCLAIMER This document is for informational purposes only. This document is subject to change at any time. MICROSOFT MAKES NO WARRANTIES, EXPRESS, IMPLIED OR STATUTORY, AS TO THE INFORMATION IN THIS DOCUMENT. This Microsoft Commercial Support Subcontractors list covers the subcontractors used by our global support organization to provide technical support for all Microsoft products, including Microsoft Online Services. These subcontractors have access to support data, which includes customer data or personal data that customers choose to share during their support interactions. For subcontractors used by Commercial Support to regularly provide support, Microsoft will add the names of any new suppliers at least 30 days in advance of their authorization to perform services that may involve access to such data. For data shared with subcontractors that do not regularly provide Professional Services, Microsoft will make commercially reasonable efforts to maintain up to date information upon changes to these suppliers. To receive notification of updates to this list, please send an email requesting notifications to [MS Services Supplier List Notifications \(msservsuppnote@microsoft.com\)](mailto:msservsuppnote@microsoft.com) from the email address you would like to receive the notification emails. Please include the word "Subscribe" in the subject line.

Exhibit 2

Microsoft Core Online Services Subprocessor List

This list identifies the subprocessors authorized to access customer data (including personal data **contained therein**) in Microsoft's Core Online Services, as defined in the [Online Services Terms](#) (Appendix A). Any such subprocessors will be permitted to process customer data only to deliver the services Microsoft has retained them to provide, and they are prohibited from using customer data for any other purpose. These subprocessors (including their subsidiaries) may provide services to one or more of the Core Online Services. The list below does not apply to previews or other services not yet in general release.

Subprocessors who provide technologies to power certain Microsoft Core Online Services

The following subprocessors provide technologies used to deliver specific Microsoft Core Online **Services. If you deploy one** of the services below, the subprocessor(s) identified for that service may process, store, or otherwise access customer data (including personal data contained therein) in the course of helping to provide that service.

Subprocessor	Service Provided	Corporate Location
Accenture LLC	SAP HANA on Azure (Large Instances)	Ireland
Akamai CDN	Content Delivery Network (CDN)	United States
Databricks, Inc	Azure DataBricks	United States
TeleSign	Multi-factor Authentication	United States
Twilio Inc	Multi-factor Authentication	United States
Verizon Digital Media Services (f/k/a Edgecast Networks)	Content Delivery Network (CDN)	United States

Subprocessors who provide ancillary services to support Microsoft Core Online service

The following subprocessors provide ancillary services to help support, operate, and maintain the online service. In such cases, the subprocessor(s) identified may process, store, or otherwise access limited customer data (including personal data contained therein) in the course of providing their ancillary services.

Subprocessor	Service Provided	Corporate Location
Binary Tree Inc	FastTrack - Migration for specific scenarios	United States
Mover Inc	FastTrack - Migration for specific scenarios	Canada
Quest	FastTrack - Migration for specific scenarios	United States
Sentry (Added to the list November 20, 2018)	StaffHub - Customer Support	United States
TeleSign	Multi-factor Authentication and invitations	United States
UserVoice (Added to the list November 20, 2018)	Process customer feedback	United States
Valorem Consulting Group LLC	FastTrack - Migration for specific scenarios	United States

Subprocessors who provide contract staff

The following subprocessors provide contract staff that work in close coordination with Microsoft employees to help support, operate, and maintain the Microsoft Core Online Services and in the course of doing so may be exposed to customer data (including personal data contained therein). In all such cases, customer data still resides only in Microsoft facilities, on Microsoft systems, and subject to **Microsoft policies and supervision. For example, a subprocessor** may perform remote troubleshooting on a Microsoft server and in the course of doing so may be exposed to snippets of customer data in a server crash dump log. Activities of these subprocessors are in scope for the applicable third party audits covering Core Online Services

Subprocessor	Corporate Location
2rbConsulting, Inc	United States
Accenture LLP (d/b/a Avanade Inc.)	Ireland
Addison Professional Financial Group LLC (dba AIM Consulting Group) (Added to the list November 20, 2018)	United States
Adecco Recursos Humanos S.A.	Switzerland
Affluent Global Services Private Limited	India
AgileSight	Argentina
Akvelon Inc	United States
APEX Systems Inc	United States
Aquent LLC (Added to the list November 20, 2018)	United States
Artech Consulting (f/k/a Vega Consulting LLC) (Added to the list November 20, 2018)	United States
Arvato Digital Services LLC	Germany
Atos IT Solutions and Services Inc	France
Avara Holdings Ltd	United States
Axelerate LLC (fka MP Tech Consulting)	United States
Axianseu Digital Solutions S.A (f/k/a Novabase IIS - Infraestruturas e Integração de Sistemas Informáticos, S.A.)	Portugal
Beyondsoft	China
Biblioso Corporation (Added to the list November 20, 2018)	United States
Binary Tree Inc	United States
Bluehawk LLC (Added to the list November 20, 2018)	United States
Blueprint Consulting Services	United States
Brillio LLC	United States
Business Builders	United States
Casaba Security, LLC	United States

Cascade Business Group LLC	United States
Catalysis Corporation	United States
Chameleon Technologies Inc	United States
Ciber Inc	United States
Cloudfit Software, LLC (f/k/a Composable Systems, LLC)	United States
Cognizant Technology Solutions	United States
Collabera	United States
CompuCom Systems Inc (Excell)	United States
Convergys (Convergys Customer Management Group Inc.)	United States
Covestic Inc	United States
CSI Interfusion Inc aka ChinaSoft International Technology Services Limited	China
CSRA Inc (Added to the list November 20, 2018)	United States
Cybage Software PVT Ltd	India
Daher Acquisitions Inc dba Denali Advanced Integration (f/k/a 3MD TECHNOLOGIES INC (Denali))	United States
Data Glove IT Solutions Pvt Ltd (Trimax Americas)	India
Design Laboratory Inc. dba DLI Consulting	United States
Digital Intelligence Systems, LLC (dba DISYS)(f/k/a XTREME CONSULTING GROUP INC)	United States
Direct Apps Inc., dba Launch Consulting, 110 Consulting (fka Matrix Resource Partners, Inc. d/b/a Averro)	United States
E-Search (Added to the list June 12, 2018)	Serbia
Experis (Manpower Group)	United States
FA Talent (f/k/a Person Consulting) (Added to the list November 20, 2018)	China
First Information Technology Services Inc.	United States
Grant Thornton LLP (f/k/a Arryve)	United States
H10 CAPITAL	United States
Harman Connected Services (f/k/a ADITI TECHNOLOGIES PVT LTD)	United States
Harvey Nash	United Kingdom
HCL Technologies Ltd (HCL America Inc)	India
HEWLETT-PACKARD SERVICE/SPARES	United States
InConsulting Inc. (Added to the list June 12, 2018)	United States
Infosys Ltd	India
InsideView Technologies, Inc.	United States
Insight Global Inc	United States
Inspur Worldwide Services Ltd	China
International Business Services	Egypt
Japan Business Systems	Japan

(Added to the list November 20, 2018)	
Karmahub Inc (Added to the list February 22, 2019)	United States
Konkasoft LLC	United States
Leidos Inc	United States
LG CONSULTING SERVICES LLC	United States
Lincoln Bay Company LLC	United States
Lionbridge Technologies Inc	United States
MAQ, LLC (MAQ Software) (Added to the list November 20, 2018)	United States
Matchpoint	Israel
Microland Limited	India
MindSource Inc	United States
Mindtree Limited	India
Moravia IT s.r.o. (Added to the list November 20, 2018)	Czech Republic
Murphy & Associates	United States
MXP Industrial S.A. DE C.V.	Mexico
Myriad System (Added to the list November 20, 2018)	United States
NATIONAL COMMUNICATIONS SERVICES IN (NCS)	United States
NTT (NTT Communication)	Japan
Pactera Technologies Inc	China
Pasona Inc.	Japan
Persistent Systems Ltd (Added to the list November 20, 2018)	India
Prohumán 2004 Kft. (Added to the list November 20, 2018)	Hungary
Protiviti Inc (Added to the list November 20, 2018)	United States
Ramp Technology Group LLC	United States
RECEIVABLE MANAGEMENT SERVICES	United States
Recruitment Estonia OÜ (Added to the list November 20, 2018)	Estonia
Red Door Collaborative, LLC. (Added to the list November 20, 2018)	United States
REDMOND TECHNOLOGY PARTNERS LLC	United States
Resources Global Professionals	United States
REVEL CONSULTING	United States
RINF Temps	Romania
Robert Bosch Engineering and Business	India
Siemens	Germany
Slalom Consulting	United States
Capgemini (Sogeti USA LLC)	France

Sonata Software North America Inc	India
Statera Inc (Added to the list November 20, 2018)	United States
Tata Consultancy Services Ltd	India
Tech Mahindra Ltd	India
Tek Experts	Bulgaria
TEKsystems	United States
Teleion Consulting LLC (Added to the list November 20, 2018)	United States
Teleperformance (Teleperformance USA)	France
The Evergreen Group LLC	United States
Tyler Technologies (Added to the list November 20, 2018)	United States
Valorem Consulting Group LLC	United States
VEDA Software Solutions (India)	India
Vitalyst LLC (Added to the list November 20, 2018)	United States
VMC Consulting Corporation	United States
Waferwire LLC (WaferWire Cloud Technologies) (Added to the list November 20, 2018)	United States
Wicresoft, Co. Ltd (Wicresoft North America Ltd)	China
WIMMER SOLUTIONS CORPORATION	United States
Wipro Ltd	India
Zen3 Infosolutions Private Limited (Added to the list November 20, 2018)	United States

Microsoft controlled subsidiaries and affiliates

The following Microsoft controlled subsidiaries and affiliates support, operate, deliver, and maintain the online services and in the course of doing so may process, store, or otherwise access customer data (including personal data contained therein) in the course of providing the online services. Customer data still resides only in Microsoft facilities, on Microsoft systems, and subject to Microsoft policies and supervision.

Subsidiary Affiliates	Location(s)
3288212 Nova Scotia Limited	Canada
Europäisches Microsoft Innovations Center GmbH	Germany
Microsoft MCIO Schweiz GmbH	Switzerland
Microsoft (China) Company Limited	China
Microsoft 1968 South Africa (Pty) Limited	South Africa
Microsoft 1985 France SARL	France
Microsoft Canada Development Centre Co.	Canada
Microsoft Corporation (Abu Dhabi branch)	United Arab Emirates
Microsoft Corporation (India) Pvt Ltd	India

Microsoft Datacenter (Australia) Pty Limited	Australia
Microsoft Datacenter (Austria) GmbH	Austria
Microsoft Datacenter Chile S.A.	Chile
Microsoft Datacenter Holdings (HK) Limited	Hong Kong
Microsoft Datacenter Netherlands B.V.	Netherlands
Microsoft Deutschland MCIO GmbH	Germany
Microsoft Development Center Copenhagen ApS	Denmark
Microsoft Development Center Serbia	Serbia
Microsoft do Brasil Importação e Comércio de Software e Vídeo Games LTDA	Brasil
Microsoft Egypt, a Limited Liability Company	Egypt
Microsoft Ireland Operations Ltd.	Ireland
Microsoft Israel Research and Development (2002) Ltd.	Israel
Microsoft Japan Co., Ltd.	Japan
Microsoft Korea, Inc. (Added to the list April 2, 2018)	South Korea
Microsoft Licensing, GP	USA
Microsoft Ltd.	United Kingdom
Microsoft Operations Pte Ltd	Singapore
Microsoft Oy	Finland
Microsoft Payments (Malaysia) Sdn Bhd	Malaysia
Microsoft Research & Development France SAS	France
Microsoft Research Lab India Private Ltd.	India
MSFT MCIO Limited	United Kingdom

Change Description

This update includes several changes from the previously published Microsoft Core Online Services Subprocessors List.

- Binary Tree Inc and Valorem, subprocessors already on the list, were added to the ancillary services section.
- Karmahub Inc, was added to the staff augmentation section.
- Subprocessors no longer used were removed from the list.

NOTICE AND DISCLAIMER: This document is subject to change at any time. Last updated on February 22, 2019.

1 THE HONORABLE JUDITH H. RAMSEYER

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8 SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

9
10 CULINARY VENTURES, LTD, d/b/a
BITEMOJO,

11 Plaintiff,

12 v.

13 MICROSOFT CORPORATION,

14 Defendant.

No. 21-2-11021-1

**MICROSOFT CORPORATION'S
REPLY IN SUPPORT OF
MOTION TO DISMISS**

Hearing date:
10:00am on November 19, 2021

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MICROSOFT CORPORATION'S REPLY IN
SUPPORT OF MOTION TO DISMISS

(No. 21-2-11021-1)

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154558898.6

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MICROSOFT CORPORATION'S REPLY IN
SUPPORT OF MOTION TO DISMISS

(No. 21-2-11021-1) – i

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<i>Walker v. Pac. Mobile Homes, Inc.</i> , 68 Wn.2d 347 (1966)	4

MICROSOFT CORPORATION'S REPLY IN
SUPPORT OF MOTION TO DISMISS
(No. 21-2-11021-1) – ii

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I. INTRODUCTION

Bitemojo's Response ("Response") to Microsoft Corporation's Motion to Dismiss ("Motion") confirms the Complaint should be dismissed with prejudice. Bitemojo does not dispute it is bound by the Microsoft Online Subscription Agreement with Microsoft Ireland ("Agreement" or "MOSA") and its attempts to evade the Agreement's Forum Selection Clause are legally deficient and factually inaccurate. Bitemojo implicitly concedes the Complaint does not state a claim against Microsoft Corporation by exclusively and erroneously relying on supplemental evidence. Even if Bitemojo could overcome these flaws, its claims all suffer from fatal and irremediable defects. The Court should dismiss the Complaint with prejudice.

II. ARGUMENT

A. The Forum Selection Clause precludes this lawsuit

Bitemojo does not dispute it entered the Agreement and its attempts to disregard the Forum Selection Clause are unpersuasive. *First*, Bitemojo's claims directly "relate[] to the contractual relationship" Response at 10, because they arise from Bitemojo's use of Azure services—specifically, the storage and deletion of its data—which the Agreement governs. Motion at 7-8.

Second, "[t]hough the language ['an action to enforce this agreement'] . . . is not exceedingly broad, it is nevertheless broad enough to encompass all plaintiffs' claims, which arise from the contractual relationship between the parties." *LTVN Holdings LLC v. Odeh*, 2009 WL 3736526, at *5 (D. Md. Nov. 5, 2009) ("Any action to enforce this agreement" included claims "that are not purely contractual" including conversion, unjust enrichment, copyright infringement, and invasion of privacy). Moreover, Bitemojo's contract and estoppel claims—that Microsoft agreed to "suspend Plaintiff's payments for 90 days . . . and keep its data safe," Response at 18—would "directly modif[y] the Agreement's terms" and are unquestionably subject to the Forum Selection Clause. *Auld v. Daugherty Sys., Inc.*, 2015 WL 5970731, at *2 (D. Minn. Oct. 13, 2015). The lone case Bitemojo relies on, *Quinstreet Inc. v. Parallel Networks*,

1 *LLC*, is inapposite: holding that a *narrower* forum selection clause—covering “an action to
2 enforce any . . . license agreement entered into with *any affiliate of ours located outside of*
3 *Europe*” did not extend to an indemnification claim against *Microsoft Corporation*. 2009 WL
4 1505610, at *2 (D. Del. May 28, 2009) (emphasis added).

5 **Third**, the absence of a CPA claim in Ireland, Response at 9, is irrelevant. Bitemojo has
6 no viable CPA claim even under Washington law. Motion at 15-17; *infra* § II(C)(4). And
7 Bitemojo’s cited authority applies only where “*citizens of the state*” cannot invoke the CPA and
8 “there is no feasible alternative for seeking relief.” *Dix v. ICT Group, Inc.*, 160 Wn.2d 826, 837,
9 161 P.3d 1016 (2007); *see also Acharya v. Microsoft Corp.*, 189 Wn. App. 243, 255, 354 P.3d
10 908, 914 (2015) (“Preventing a *Washington plaintiff* from enforcing Washington law is contrary
11 to public policy.” (emphasis added)). Here the involved entities are Israeli (Bitemojo) and Irish
12 (Microsoft Ireland), and the CPA claim is derivative of others providing “feasible alternative”
13 relief. There is no public policy interest at play.

14 **B. Bitemojo implicitly concedes Microsoft Corporation was improperly sued**

15 Implicitly conceding the Complaint’s inadequacy, Bitemojo attempts to justify suing
16 Microsoft Corporation solely with evidence that is outside the Complaint and improper on a
17 motion to dismiss. Response at 11-12; *Jackson v. Quality Loan Serv. Corp.*, 186 Wn. App. 838,
18 844, 347 P.3d 487, 491 (2015). The Court should dismiss the Complaint without considering
19 this evidence.

20 Moreover, the evidence only *supports* dismissal with prejudice. Bitemojo concedes
21 Support Engineer Velinov was employed by a third-party contractor, Tek Experts, Response at
22 11-12; Weiss Decl. ¶ 13. Bitemojo’s evidence does not establish Tek Experts contracted with
23 Microsoft Corporation, Murray Decl., Ex. 1 (listing Tek Experts as a subcontractor of not only
24 Microsoft Corporation but “Microsoft Corporation *and its affiliates*”). In fact, Velinov’s services
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MICROSOFT CORPORATION’S REPLY IN
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1 were offered pursuant to a contract with *Microsoft Ireland*, not Microsoft Corporation.

2 Declaration of Kim Nelson ¶¶ 2-3.

3 **C. Bitemojo's Claims Fail as a Matter of Law**

4 **1. Promissory estoppel**

5 Bitemojo's Response does nothing to resolve four fatal defects in its promissory estoppel
6 claim. *First*, the Agreement governs the Azure services and conduct at issue and, therefore,
7 precludes estoppel. Motion at 7-8. Bitemojo's assertion that the Agreement did not expressly
8 authorize the deletion of Bitemojo's data, Response at 13, is legally irrelevant. Bitemojo's claim
9 fails because the conduct is "governed" by the Agreement regardless of whether it is *authorized*.
10 Motion at 9 (citing *Spectrum Glass Co., Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cty.*, 129 Wn.
11 App. 303, 317, 119 P.3d 854 (2005)); *see also Percival-Birchard v. Caldwell*, 16 Wn. App. 2d
12 1018 (2021) ("Because there was an executed contract . . . we affirm . . . dismissal of [the]. . .
13 promissory estoppel [claim]."). *Darland v. Snoqualmie Pass Util. Dist.*, 9 Wn. App. 2d 1063
14 (2019), an unpublished Division III case, does not alter this clear authority.

15 Nonetheless, Bitemojo is also factually incorrect; the preconditions for deletion were
16 satisfied:

- 17 1. In March 2020, Microsoft Ireland notified Bitemojo that its account "is
18 suspended" to defer amounts due and, unless "reactivate[d]," "the system will
19 delete it, after 90 days along with its data." Compl. ¶ 24; *compare to* Desai Decl.,
20 Ex. A ("Agreement") § 3(a)(ii) ("We may suspend your account if . . . [Bitemojo]
do[es] not pay amounts due");
- 21 2. The reason for the suspension—Bitemojo's inability to pay—remained
22 unresolved for six months, Motion at 10; *compare to* Agreement § 3(a)(ii) ("[I]f
23 you don't fully address the reasons for the suspension within 60 days . . . we may
terminate your Subscription and delete your Customer Data"); and
- 24 3. Bitemojo's account was suspended more than twice in twelve months. Motion at
25 10; *compare to* Agreement § 3(a)(ii) ("We may also terminate your Subscription
26 if your use of the Online Services is suspended more than twice in any 12-month
period.").

MICROSOFT CORPORATION'S REPLY IN
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(No. 21-2-11021-1) – 3

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1 **Second**, Velinov made no “promise” to Bitemojo. Motion at 10. Bitemojo cites no case
2 suggesting Velinov’s indefinite statements support estoppel. The only cases Bitemojo cites all
3 *rejected* promissory estoppel claims. Response at 14-15.

4 **Third**, Velinov had no apparent authority. Bitemojo’s sole assertion otherwise—that
5 Velinov “used [a] Microsoft email address[], responded to inquiries sent to a Microsoft support
6 email address, and [had a] title[that] included Microsoft’s server and data service Azure,”
7 Response at 16—is legally insufficient. *See, e.g., Spam Arrest, LLC v. Replacements, Ltd.*, 2013
8 WL 12108077, at *9 (W.D. Wash. Aug. 20, 2013) (corporate email address did not create
9 apparent authority). Bitemojo further concedes Velinov’s email clarified he was employed by
10 Tek Experts, a third-party that “provide[s] contact and/or call center services.” Response at 6;
11 Weiss Decl. ¶ 13.

12 ----- Forwarded message -----
13 From: 'Mihail Velinov (Tek Experts)' via Contact <contact@bitemojo.com>
14 Date: Mon, Mar 16, 2020 at 8:09 AM
15 Subject: [REG:120031522000051] Our business is in shut-down, askign to hold monthly payments
16 To: contact@bitemojo.com <contact@bitemojo.com>
17 Cc: support <support@mail.support.microsoft.com>

18 Weiss Decl., Ex. E (highlighting added).

19 Moreover, the Response confirms Velinov could not have apparent authority for the
20 statements at issue. Bitemojo’s Azure services were governed by the Agreement with Microsoft
21 Ireland, and Bitemojo concedes Microsoft Ireland “sen[t] invoices and process[ed] payments.”
22 Response at 7; Weiss Decl. ¶ 27; Ex. O. Bitemojo, therefore, owed payments to *Microsoft*
23 *Ireland*, not Microsoft Corporation. If Velinov was acting for Microsoft Corporation he had no
24 authority to modify Microsoft Ireland’s contractual rights; if he were acting for Microsoft
25 Ireland, his statements could not be imputed to Microsoft Corporation. Motion at 7-8.
26 Regardless, Bitemojo’s claim fails.

MICROSOFT CORPORATION’S REPLY IN
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1 Bitemojo's cited cases are plainly distinguishable, involving manifestations of authority
2 absent here. *See Hoglund v. Meeks*, 139 Wn. App. 854, 868, 170 P.3d 37 (2007) (attorney was
3 given "exclusive control over [a] litigation" including to negotiate and modify agreements and
4 "obtain . . . services,"); *Walker v. Pac. Mobile Homes, Inc.*, 68 Wn.2d 347, 350-51, 413 P.2d 3
5 (1966) (trailer salesman was the "solitary presence in the company office. . . beneath a sign
6 conspicuously proclaiming the whole to be an enterprise of [the dealer], and . . . tow[ed]
7 plaintiff's trailer to the trailer lot and put[] it on display there.").

8 **Fourth**, Bitemojo's reliance was not justified because the alleged promise contradicted
9 the Agreement. Motion at 12 (citing *Fawn Lake Maint. Com'n v. Abers*, 149 Wn. App. 318, 328,
10 202 P.3d 1019 (2009)). Though *Fawn Lake* concerned equitable rather than promissory
11 estoppel, Response at 17, that distinction is irrelevant to reliance.

12 **2. Breach of contract**

13 In addition to Velinov's lack of authority, the Complaint alleges no consideration or
14 mutual assent. Motion at 12-13. Bitemojo's only asserted consideration—that it "agreed to keep
15 its data with Microsoft and remain a Microsoft customer"—appears nowhere in the Complaint or
16 Response's attachments. And Bitemojo's vague claim of mutual assent, Response at 18, fails to
17 identify the required offer or acceptance of terms. Motion at 13-14.

18 **3. Conversion**

19 Bitemojo's conversion claims fails because the deletion resulted from an inadvertent
20 "failure to ensure that the [automatic deletion] protocol was not applied to [Bitemojo's] data,"
21 Response at 19, not a "willful" action, Motion at 14. This alleged accidental omission cannot
22 support a claim for conversion. *Id.*

23 Further, Bitemojo does not dispute that a contractual right to delete Bitemojo's data
24 would foreclose conversion. *Id.* Microsoft had that right. *Infra*, § II(C)(1).
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1 RESPECTFULLY SUBMITTED this
2 15th day of November, 2021.

3 I certify that this motion/memorandum
4 contains 1,749 words, in compliance with
5 the Local Civil Rules.

s/ David A. Perez

David A. Perez, WSBA #43959

s/ Ian Rogers

Ian Rogers, WSBA #46584

s/ Paige L. Whidbee

Paige L. Whidbee, WSBA #55072

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Attorneys for Defendant

Microsoft Corporation

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MICROSOFT CORPORATION'S REPLY IN
SUPPORT OF MOTION TO DISMISS
(No. 21-2-11021-1) – 7

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CERTIFICATE OF SERVICE

I hereby certify that on November 15, 2021 I caused to be served upon counsel of record at the address and in the manner described below a copy of the document to which this certificate is attached for delivery to the following:

Jennifer Rust Murray, WSBA #36983
Beth E. Terrell, WSBA #26759
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PLLC**
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***Attorneys for Plaintiff
Culinary Ventures, Ltd. d/b/a Bitemojo***

- | |
|---|
| <input checked="" type="checkbox"/> Via ECF/Filing
<input checked="" type="checkbox"/> Via Electronic Mail
<input type="checkbox"/> Via Facsimile
<input type="checkbox"/> Via Legal Messenger
<input type="checkbox"/> Via Overnight Courier
<input type="checkbox"/> Via U.S. Mail |
|---|

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

EXECUTED at Poulsbo, Washington on November 15, 2021.


June Starr

MICROSOFT CORPORATION'S REPLY IN
SUPPORT OF MOTION TO DISMISS
(No. 21-2-11021-1) – 8

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1 THE HONORABLE JUDITH H. RAMSEYER

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8 SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

9
10 CULINARY VENTURES, LTD, d/b/a
BITEMOJO,

11 Plaintiff,

12 v.

13 MICROSOFT CORPORATION,

14 Defendant.

No. 21-2-11021-1

**DECLARATION OF KIM NELSON IN
SUPPORT OF MICROSOFT
CORPORATION'S MOTION TO DISMISS**

15
16
17 Kim Nelson declares:

18 1. I am a Worldwide Support Leader for Delivery Partner Management at Microsoft
19 Corporation. I have personal knowledge of, and am competent to testify to, the matters
20 discussed in this declaration.


21 2. In 2020, Mihail Velinov was an employee of Tek Experts Bulgaria.

22 3. Tek Experts Bulgaria offered call center services pursuant to Statement of Work
23 with Microsoft Ireland.
24
25
26

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

3 Executed this 12th day of November, 2021.

4 
5 Kim Nelson
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THE HONORABLE JUDITH H. RAMSEYER
Hearing date: November 19, 2021
Hearing Time: 10:00 a.m

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

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

Plaintiff,

v.

MICROSOFT CORPORATION,

Defendant.

No. 21-2-11021-1

**PROPOSED ORDER GRANTING
MICROSOFT CORPORATION'S
MOTION TO DISMISS**

CLERK'S ACTION REQUIRED

The Court, having considered Defendant Microsoft Corporation's Motion to Dismiss (the
"Motion"), the Complaint ("Complaint") filed in this action by Plaintiff Culinary Ventures Ltd,
d/b/a Bitemojo ("Bitemojq"), and all papers filed in support of and in opposition to the Motion,
and being fully advised in the premises, now, therefore, it is hereby


ORDERED that the Motion is GRANTED, and it is further

ORDERED that Bitemojo's Complaint is DISMISSED with prejudice.

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1 The Court declines to rule on Defendant's motion on issues
2 brought pursuant to CR 12(b)(6). The Court's findings made
3 on this record are incorporated herein by reference. JR

4 DATED this 19 day of November, 2021

5 
6 The Honorable Judith H. Ramsey
7 Washington Superior Court Judge

8 Presented By:

9 s/ David A. Perez

10 David A. Perez, WSBA #43959

11 s/ Ian Rogers

12 Ian Rogers, WSBA #46584

13 s/ Paige L. Whidbee

14 Paige L. Whidbee, WSBA #55072

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
COUNTY OF KING

CULINARY VENTURES, LTD
d/b/a BITEMOJO,

Plaintiff,

v.

MICROSOFT CORPORATION,

Defendant.

NO. 21-2-11021-1 SEA

NOTICE OF APPEAL

Plaintiff Culinary Ventures, LTD d/b/a Bitemojo seeks review by Division I of the Washington Court of Appeals of the Order Granting Microsoft Corporation's Motion to Dismiss entered on November 19, 2021.

A copy of the referenced order is attached to this Notice of Appeal as Exhibit 1.

RESPECTFULLY SUBMITTED AND DATED this 7th day of December, 2021.

TERRELL MARSHALL LAW GROUP PLLC

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- Exhibit 1 -

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THE HONORABLE JUDITH H. RAMSEYER
Hearing date: November 19, 2021
Hearing Time: 10:00 a.m

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

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

Plaintiff,

v.

MICROSOFT CORPORATION,

Defendant.

No. 21-2-11021-1

**PROPOSED ORDER GRANTING
MICROSOFT CORPORATION'S
MOTION TO DISMISS**

CLERK'S ACTION REQUIRED

The Court, having considered Defendant Microsoft Corporation's Motion to Dismiss (the "Motion"), the Complaint ("Complaint") filed in this action by Plaintiff Culinary Ventures Ltd, d/b/a Bitemojo ("Bitemojq"), and all papers filed in support of and in opposition to the Motion, and being fully advised in the premises, now, therefore, it is hereby


ORDERED that the Motion is GRANTED, and it is further

ORDERED that Bitemojo's Complaint is DISMISSED with prejudice.

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1 The Court declines to rule on Defendant's motion on issues
2 brought pursuant to CR 12(b)(6). The Court's findings made
3 on this record are incorporated herein by reference. JR

4 DATED this 19 day of November, 2021

5 
6 The Honorable Judith H. Ramsey
7 Washington Superior Court Judge

8 Presented By:

9 s/ David A. Perez

10 David A. Perez, WSBA #43959

11 s/ Ian Rogers

12 Ian Rogers, WSBA #46584

13 s/ Paige L. Whidbee

14 Paige L. Whidbee, WSBA #55072

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TERRELL MARSHALL LAW GROUP PLLC

May 10, 2023 - 1:39 PM

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Appellate Court Case Title: Culinary Ventures, LTD, Appellant v. Microsoft Corporation, Respondent

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