

THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

MICROSOFT CORPORATION,

Plaintiff,

v.

DHL EXPRESS (USA), Inc.,

Defendant / Third-Party Plaintiff.

NO. C08-1495 JCC

DHL EXPRESS (USA), INC'S  
ANSWER TO COMPLAINT

DHL EXPRESS (USA), Inc. ("DHL") by its attorneys, Bauer Moynihan & Johnson LLP, responds to the Complaint of Plaintiff Microsoft Corporation ("Microsoft" or "Plaintiff") upon information and belief as follows:

**JURISDICTION**

1. DHL admits this action is within the Court's Admiralty jurisdiction but otherwise is without knowledge and/or information sufficient to either admit or deny the allegations contained in paragraph 1 of the Complaint.

2. DHL is without knowledge and/or information sufficient to either admit or deny the allegations contained in paragraph 2 of the Complaint.

**VENUE**

3. DHL is without knowledge and/or information sufficient to either admit or deny the allegations contained in paragraph 3 of the Complaint.

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ATTORNEYS AT LAW  
BAUER MOYNIHAN & JOHNSON LLP  
2101 FOURTH AVENUE, STE. 2400  
SEATTLE, WASHINGTON 98121  
TELEPHONE: (206) 443-3400

**FIRST CLAIM FOR RELIEF**

1           4.       DHL is without knowledge and/or information sufficient to either admit or  
2 deny the allegations contained in paragraph 4 of the Complaint.

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4           5.       Paragraph 5 of the Complaint contains conclusions of law to which no  
5 response is required. To the extent a response is deemed required, DHL is without  
6 knowledge and/or information sufficient to either admit or deny the allegations contained in  
7 paragraph 5 of the Complaint.

8           6.       DHL is without knowledge and/or information sufficient to either admit or  
9 deny the allegations contained in paragraph 6 of the Complaint.

10           7.       DHL denies the allegations contained in Paragraph 7 of the Complaint.

11           8.       DHL denies the allegations contained in Paragraph 8 of the Complaint.

12           9.       DHL denies the allegations contained in Paragraph 9 of the Complaint.

13           10.      DHL denies the allegations contained in Paragraph 10 of the Complaint.

14           11.      DHL denies Plaintiff's Prayer.

**SECOND CLAIM FOR RELIEF**

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18           12.      DHL repeats and realleges its response to each of the Paragraphs above as if  
19 set forth fully herein.

20           13.      DHL denies the allegations contained in Paragraph 12 of the Complaint.

21           14.      DHL denies the allegations contained in Paragraph 13 of Plaintiff's Complaint.

22           15.      DHL denies Plaintiff's Prayer.

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24           **WHEREFORE**, DHL requests judgment dismissing the Complaint with prejudice, an  
25 award of costs of suit and attorney fees, and for such other relief as the Court deems just.

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**AFFIRMATIVE DEFENSES**

**FIRST AFFIRMATIVE DEFENSE**

The Complaint fails to state causes of action or fails to state claims upon which relief can be granted as against DHL.

**SECOND AFFIRMATIVE DEFENSE**

The claims alleged in Complaint arose from the fault, neglect, negligence, and breach of express or implied contract of Third- Party Defendants CMA CGM, or CMA CGM (America) LLC, or BURLINGTON NORTHERN SANTA FE CORP or BNSF Railway Company, or other entities or a combination thereof for which DHL is not responsible.

**THIRD AFFIRMATIVE DEFENSE**

Plaintiffs' damages, if any, are subject to limitation by the United States Carriage of Goods by Sea Act of 1936, or other statutory enactment and therefore DHL is either without responsibility or its liability is limited by the \$500 package limitation, one-year suit time limitation, or other statutory limitation of liability, for the loss or damage alleged in the Complaint.

**FOURTH AFFIRMATIVE DEFENSE**

Any loss or damage is subject to limitation by law, statute, contract, tariff, standard terms and conditions or otherwise.

**FIFTH AFFIRMATIVE DEFENSE**

Any loss or damage to the subject cargo was due to inherent vice, acts of the shipper, consignee or owner of the cargo, or other deficiencies for which DHL is not responsible.

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**SIXTH AFFIRMATIVE DEFENSE**

If Plaintiff sustained any losses as alleged in the Complaint, said losses arose out of and were caused by risks, dangers and hazards, all of which were open, obvious and assumed by shipper, consignee or owners of the cargo.

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**SEVENTH AFFIRMATIVE DEFENSE**

If Plaintiff sustained any loss or damages, as alleged in the Complaint, said damages were caused solely by the negligence of the shipper, consignee or owner of the cargo, their agents, servants or employees, and were not caused or contributed to in any manner by the alleged negligence, breach of express or implied contract or breach of warranty of DHL.

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**EIGHTH AFFIRMATIVE DEFENSE**

Plaintiff and/or the shipper, consignee or owner of the cargo failed to take reasonable steps to minimize the alleged damages.

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**NINTH AFFIRMATIVE DEFENSE**

Plaintiff's claims are barred by the applicable statute of limitations and/or the doctrine of laches, or other applicable time limitation and the Complaint should be dismissed.

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**TENTH AFFIRMATIVE DEFENSE**

Plaintiff is not the real party in interest and/or the proper party to assert this claim.

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**ELEVENTH AFFIRMATIVE DEFENSE**

To the extent that the Plaintiff suffered any loss or damage as alleged in the Complaint, which is denied, that loss or damage occurred during a period of time when the goods were not under the care, custody or control of DHL.

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**TWELFTH AFFIRMATIVE DEFENSE**

DHL is entitled to all defenses in the applicable contract.

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**THIRTEENTH AFFIRMATIVE DEFENSE**

Plaintiff's damages, if any, are subject to limitation by contract, bill(s) of lading, tariff, contract of carriage, or otherwise.

**FOURTEENTH AFFIRMATIVE DEFENSE**

Plaintiff has failed to join one or more indispensable parties to the suit.

**FIFTEENTH AFFIRMATIVE DEFENSE**

Plaintiff failed to give written notice of loss or damage as and when required pursuant to COGSA and/or the terms of the contract.

**SIXTEENTH AFFIRMATIVE DEFENSE**

DHL acted reasonably and properly at all time and in accordance with the accepted practices of the industry.

**SEVENTEENTH AFFIRMATIVE DEFENSE**

Plaintiff's alleged damages were caused and brought about by intervening and superseding causes and were not caused by Defendant or by a person for whom DHL is responsible.

**EIGHTEENTH AFFIRMATIVE DEFENSE**

Any loss suffered by Plaintiff was occasioned by parties over whom DHL had no control or responsibility or by events for which DHL has no responsibility.

**NINETEENTH AFFIRMATIVE DEFENSE**

DHL reserves the right to amend this pleading to reflect additional affirmative defenses as may be revealed through discovery and further pleadings.

WHEREFORE, DHL demands judgment dismissing the Complaint with prejudice and with the award of costs and attorneys' fees and for such other relief as the Court deems proper.

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SEATTLE, WASHINGTON 98121  
TELEPHONE: (206) 443-3400

1 DATED this 15<sup>th</sup> day of October, 2008.

2 BAUER MOYNIHAN & JOHNSON LLP

3 /s/ James P. Moynihan  
4 James P. Moynihan WSBA No. 9358  
5 Attorneys for Defendant DHL Express (USA),  
6 Inc.  
7 Bauer Moynihan & Johnson LLP  
8 2101 Fourth Avenue, Suite 2400  
9 Seattle, WA 98121  
10 Telephone: (206) 443-3400  
11 Fax: (206) 448-9076  
12 E-mail: [jpmoynihan@bmjlaw.com](mailto:jpmoynihan@bmjlaw.com)

13 DUANE MORRIS, LLP

14 By: \_\_\_\_\_  
15 James W. Carbin, Esq.  
16 *of counsel*  
17 Attorneys for DHL Express (USA), Inc.

18 CERTIFICATE OF SERVICE

19 I declare under penalty of perjury of the laws of the state of  
20 Washington that on October 15, 2008, I electronically filed the  
21 foregoing document with the Clerk of the Court using the  
22 CM/ECF system which will send notification of such filing to  
23 the following:

24 James F. Whitehead  
25 Law Offices of James Whitehead  
26 2003 Western Ave, Suite 330  
27 Seattle, WA 98121  
Ph: (206) 448-0100  
Fax: (206) 448-2252

/s/ Justin Fodness  
By: Justin Fodness  
E-mail: [jkfodness@bmjlaw.com](mailto:jkfodness@bmjlaw.com)

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