

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF COLORADO**

In re:	)	Case No. 05-16304-HRT
	)	
OPTINREALBIG.COM, LLC	)	Chapter 11
EIN: 88-0508281,	)	
	)	
Debtor.	)	
<hr style="border: 0.5px solid black;"/>		
In re:	)	Case No. 05-16340-HRT
	)	
SCOTT ALLEN RICHTER,	)	Chapter 11
SS No. XXX-XX-4865	)	
	)	Jointly Administered Case No. 05-16304 HRT
Debtor.	)	
<hr style="border: 0.5px solid black;"/>		
MICROSOFT CORPORATION,	)	
	)	
Movant,	)	
v.	)	
	)	
OPTINREALBIG.COM, LLC AND	)	
SCOTT ALLEN RICHTER,	)	
	)	
Respondents.	)	

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**MICROSOFT CORPORATION’S REPLY IN SUPPORT OF MOTION FOR RELIEF  
FROM THE AUTOMATIC STAY IMPOSED BY 11 U.S.C. § 362**

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**I. INTRODUCTION**

1. Debtors OptInRealBig.com, LLC and Scott Richter (“the Debtors”) largely ignore the central issue in Microsoft’s motion for relief from the automatic stay (“Motion for Relief”). Microsoft’s claims are poised for prompt determination in the pending litigation in Washington State (“the Washington litigation”). The Washington litigation is the most expeditious, efficient, and appropriate venue for liquidating Microsoft’s claims under the factors set forth in *In re Curtis*. Through 1½ years of discovery and motions practice, the Washington court has learned the complex and extensive factual record and the claims and defenses in the case, and the court has issued important rulings regarding those claims and defenses. When the Debtors filed for bankruptcy, the Washington court was within two weeks of a hearing on Microsoft’s and the Debtors’ pending dispositive motions on the primary issues in the case: Microsoft’s claims under the Washington Commercial Electronic Mail Act (“CEMA”) and Washington Consumer Protection Act (“CPA”). Any issues not resolved on the pending summary judgment motions

will be resolved at a short trial that Microsoft and the Debtors have previously agreed will occur in late September of this year. The significant savings of time and resources offered in the Washington litigation and the lack of prejudice to the Debtors and other creditors makes clear that the balance of harms weighs in favor of Microsoft's Motion for Relief.

2. The Debtors spend much of their Joint Objection mischaracterizing Microsoft's extensive efforts to crack down on the illegal spammers who prey upon Microsoft and its customers. The Debtors, using a wide variety of assumed names and addresses from around the world, in an admitted effort to disguise themselves, unleashed a deluge of spam promoting products such as "male sexual enhancement" pills, "herbal breast enhancement" pills, a "female arousal" product, invitations to "meet your kinkiest sex partner," and loans and dating services of various kinds. Some of the Debtors' spam contained false and misleading information in the subject lines. The Debtors had actual notice of Microsoft's anti-spam policies, but they nonetheless sent, and assisted others in sending, massive quantities of deceptive and offensive e-mails to MSN and MSN Hotmail. Microsoft vigorously has pursued, and will continue to pursue, claims against such illegal spammers. Microsoft's unabashed goal—like that of the Washington legislature, the Washington Supreme Court, and the Federal Trade Commission—is to change the economics of illegal spam and to "remedy the 'cost-shifting—from deceptive spammers to businesses and e-mail users' that is 'inherent in the sending of deceptive spam.'"<sup>1</sup>

## II. ARGUMENT

### A. **The Debtors' Arguments Regarding Judicial Efficiency Are Based on Misstatements.**

3. The Debtors' primary judicial efficiency argument—that maintaining the stay is necessary to avoid litigating thirteen pending cases—rests on misstatements about the magnitude and posture of the litigation as well as misstatements and speculation about the overlap between the Washington litigation and other pending and potential claims.<sup>2</sup>

4. The Eight Utah Cases Are Essentially Complete and Are Small in Relation to the Size of the Debtors' Estates. The Debtors have confessed judgment either on behalf of themselves or their clients in each of the active Utah cases, and the sole pending issue in those cases is the amount of attorneys fees to be awarded: whether \$1,000 per case as requested by defendants' counsel or approximately \$3,000 to \$4,000 per case as requested by plaintiffs' counsel.<sup>3</sup> See Exhibit H (attaching sample confession of judgment and attorneys' fees pleadings and a sample docket from the Utah cases). The total judgment in each case will be very small in

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<sup>1</sup> See Protective Order Regarding Damages Discovery Prior to Ruling on Partial Summary Judgment at 2 (Ex. C10 to Motion for Relief) (quoting *State v. Heckel*, 143 Wn.2d 824, 835-36 ("*Heckel I*") and the legislative history of the CEMA).

<sup>2</sup> The Debtors' Joint Objection asserts efficiencies in resolution of various cases listed on OptInRealBig's Statement of Financial Affairs Question 4. The discussion below gives an analysis of the status of those listed cases.

<sup>3</sup> That issue is not pending in the *Somers v. Rochel* matter, however, because that case was dismissed in December 2003.

relation to the Debtors' multi-million dollar estates. In fact, OptInRealBig<sup>4</sup> has listed each case as a liability of only \$6,500. See OptInRealBig's Amended Schedule F, at 1, 4, 8, 16, 18. Moreover, the automatic stay applies in only one of the cases identified in OptInRealBig's SOFA, because OptInRealBig is not the named defendant in the other cases.<sup>5</sup>

5. The Two Non-Microsoft Washington Cases are Small in Relation to the Size of the Debtors' Estates. The Debtors erroneously state that the automatic stay protects them from two Washington cases other than Microsoft's action. The *Robertson* action against OptInRealBig appears not to be a liability for the Debtors because it evidently was dismissed on September 1, 2004, and there is no evidence of an appeal. See Exhibit I (*Robertson v. OptInRealBig* docket sheet); Exhibit J (Order Dismissing Case). The other Washington case is not subject to the automatic stay because neither one of the Debtors is named as a defendant. Moreover, the case involves a claim for \$50,000, which is approximately 1% of the Debtors' monthly gross income. See Exhibit K (Docket showing damages sought in the amount of \$50,000); OptInRealBig's Amended Schedule F, at 16 (listing the *Robertson* litigation as a \$50,000 claim); see also Exhibit L (Excerpts from Transcript of § 341 Creditors' Meetings, Apr. 29, 2005) at 28:23 to 29: 6 (testimony that OptInRealBig receives \$4 to \$5 million a month in gross income).

6. The California Litigation Involves Different Law and Facts. The Debtors argue that the *Balsam* claims should be considered in conjunction with Microsoft's claims. The two cases, however, raise different claims under different states' laws. The Debtors' own opposition brief makes clear that the primary issue in the Washington litigation is the application of the Washington CEMA and CPA. See Joint Objection Ex. D (devoting 75% of the argument section to the Washington CEMA and CPA and Washington cases interpreting them). In contrast, a primary issue in the *Balsam* litigation is whether the Debtors sent "unsolicited" e-mail without including "ADV:" in the subject line of e-mail as required by Cal. Bus. & Prof. Code § 17538.4, a factual issue of no relevance to the Washington litigation.<sup>6</sup> See Exhibit M (Verified First Amended Complaint ¶¶ 82, 102, 104, 111, 113). Moreover, the claims in the *Balsam* case appear to arise from e-mail not at issue in Microsoft's pending dispositive motion. See Exhibit L, Tr. 341 Creditors' Mtg. at 72-73, 76-77 (discussing e-mail promoting Print Pal, Red Brick Media, and T-REX Media, which appears not to be at issue in Microsoft's pending dispositive motion).

7. The Insurer's Arguments Regarding Microsoft's Motion for Relief Are Irrelevant and a Misuse of the Automatic Stay. There is no dispute that defense costs related to Microsoft's claims currently are being paid by the Debtors' insurer, American Family Mutual Insurance Company, under reservation of rights. Whether or not coverage is ultimately found, the

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<sup>4</sup> Scott Richter is not a named defendant in any of the Utah cases.

<sup>5</sup> Although OptInRealBig is a named defendant in *Amyx v. OptInRealBig*, No. 020412904, OptInRealBig has not listed that case in its Statement of Financial Affairs.

<sup>6</sup> The Debtors imply that Mr. Balsam's claim is potentially large because he "has indicated an intent to pursue that lawsuit as a class action." Joint Objection at 5 ¶ 17. They fail to mention that the "class action" anticipated is a defendants' rather than a plaintiffs' class. See Exhibit M (Verified First Amended Complaint ¶¶ 74-77). Thus, the Debtors would be liable only for the spam sent to Mr. Balsam.

Washington litigation is the most efficient vehicle for liquidating Microsoft's claims, and the Debtors are well able to afford the costs related to liquidating Microsoft's claims. The insurer complains that relief from stay might impact its plan to resolve the coverage dispute prior to resolution of the underlying claims. The coverage dispute, however, is irrelevant to the issue of comparative efficiencies in liquidating Microsoft's claims. Moreover, under Colorado law, resolution of coverage disputes typically is postponed until after trial on the underlying litigation. *Hecla Mining Co. v. New Hampshire Ins. Co.*, 811 P.2d 1083, 1089-90 (Colo. 1991). American Family's arguments are irrelevant and an attempt to misuse the automatic stay for its own benefit.

8. Speculation Regarding Additional Claims. The Debtors speculate that additional claims may be submitted that also arise from their spam. There is no basis for believing that any additional claims would raise the same legal and factual issues addressed in the Washington litigation, and any attempt to resolve different states' laws applied to different conduct in a single proceeding is more likely to produce confusion than efficiency. Microsoft's claims must be liquidated, and the Washington litigation is the most efficient and appropriate means for doing so.

9. The Debtors' Other Efficiency Arguments Are Unsupported. The Debtors argue that the Washington litigation is a less efficient means for liquidating Microsoft's claim because if the Washington litigation proceeds, they will pursue appeals. Litigation in the Bankruptcy Court, however, is not without a right to due process or appeal. Moreover, as Microsoft's primary claims involve issues regarding the Washington CEMA and CPA, there is a significant probability that this Court, or a reviewing court, would find it appropriate to certify those issues to the Washington appellate courts. The Debtors also argue that modification of the automatic stay is unwarranted because their bankruptcy filings—on the eve of their deadline to respond to Microsoft's dispositive motion at an advanced stage of the Washington litigation—is a “fluke of timing” or “happenstance.” Joint Objection at 15 ¶ 48. That argument cannot survive scrutiny. The Debtors are extremely profitable. Their only reason to file bankruptcy at that time was to avoid answering for their illegal spam and to cause further litigation delay.

## **B. The Debtors' Personal Jurisdiction Arguments are Not Meritorious.**

10. The Debtors speculate that an appellate court may overrule the Washington court's assertion of personal jurisdiction over Scott Richter, which would limit the efficiencies of the Washington litigation. They neglect to mention that discovery occurring after the Washington court's ruling removed all doubt of the Washington court's personal jurisdiction over Scott Richter. In a Rule 30(b)(6) deposition, the Debtors conceded the primary role Mr. Richter played in designing the illegal spamming scheme at issue in Microsoft's case. *See* Motion for Relief Ex. A, at 1-13, 15-20, 21-22 (describing Richter's role). The courts that have considered the issue of personal jurisdiction over spammers have concluded that persons such as Mr. Richter, who oversee day-to-day operations and have personal involvement in spamming, are subject to personal jurisdiction. *Verizon Online Servs. v. Ralsky*, 203 F. Supp. 2d 601, 611-23 (E.D. Va. 2002); *Internet Doorway v. Parks*, 138 F. Supp. 2d 773, 779-80 (S.D. Miss. 2001); *State v. Heckel*, 122 Wn. App. 60, 69, 93 P.3d 189 (2004) (*Heckel II*) (holding that a spammer sending millions of e-mails had reason to know “that he could be ‘ha[u]led into court in

[Washington] to answer for the ramifications of that solicitation”); *Fenn v. MLeads Enterprises, Inc.*, 2004 Utah App. 412, ¶ 30, 103 P.3d 156 (2004) (“Sending one email to a resident of Utah is sufficient ‘contact’ to establish personal jurisdiction over claims arising from that e-mail.”). There is no reasonable probability that the Washington court lacks personal jurisdiction over Scott Richter.

**C. The Debtors’ Purported Federal Defenses are an Insubstantial Part of the Washington Litigation.**

11. The Debtors argue that federal law issues<sup>7</sup> that may be raised counter the strong policy of having state law issues decided in that state’s courts. *See, e.g., Pursifull v. Eakin*, 814 F.2d 1501, 1506 (10th Cir. 1987). Yet the Debtors’ constitutional claims have repeatedly and consistently been rejected in spam and junk fax cases, and they have been rejected in the Washington litigation each time they have arisen. *See Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of NY*, 447 U.S. 557, 566 (misleading speech not protected); *Heckel II*, 122 Wn. App. at 71 (*Heckel II*) (same); *State v. Heckel*, 143 Wn.2d 824, 832-40, 24 P.3d 404 (2001) (*Heckel I*) (Washington CEMA does not violate the Dormant Commerce Clause); *Heckel II*, 122 Wn. App. at 67-68 (same); Motion for Relief Exs. C10 & C11 (rejecting the Debtors’ Due Process claims).<sup>8</sup> Debtors’ preemption argument is likewise without merit. The CAN-SPAM Act specifically does not preempt any state statute, such as the Washington CEMA, that “prohibits falsity or deception in any portion of a commercial electronic mail message or information attached thereto.” 15 U.S.C. § 7707(b)(1). Moreover, all but a handful of the 57,000 e-mails at issue in Microsoft’s dispositive motion were sent before January 1, 2004, the day the CAN-SPAM Act took effect.

**D. The Debtors’ Repeated References to the New York Litigation Are an Attempt to Mislead This Court.**

12. Debtors argue that their settlement with the New York Attorney General somehow undermines Microsoft’s claims. The e-mail at issue in the New York litigation is a tiny fraction—less than four percent—of the e-mail at issue in Microsoft’s pending dispositive motion. They also neglect to mention that, rather than pursue substantial damages, the New York Attorney General’s office ultimately decided to pursue a comprehensive Consent Order that enjoins the Debtors and all of their various companies from engaging in the fraudulent, deceptive, and illegal practices described in the Attorney General’s pleadings. *See* Consent Order and Judgment at 5 ¶ 3 (Exhibit N). The Consent Order also imposes three years of detailed monitoring and reporting requirements.

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<sup>7</sup> The Debtors mention the First Amendment, due process issues, the Commerce Clause, and the CAN-SPAM Act.

<sup>8</sup> *See also Texas v. American Blastfax, Inc.*, 121 F. Supp.2d 1085, 1090 (W.D. Tex. 2000) (statutory damages do not violate Due Process); *Accounting Outsourcing, LLC v. Verizon Wireless Personal Communications, L.P.*, 329 F. Supp.2d 789 (M.D. La. 2004) (same); *DirecTV Inc. v. Cantu*, 2004 WL 2623932 (W.D. Tex. 2004) (same); *Lowry’s Reports, Inc. v. Legg Mason, Inc.*, 302 F. Supp.2d 455, 459-60 (D. Md. 2004) (same).

**E. There Is No Factual Issue that Would Justify a Delay in Ruling on Microsoft’s Motion for Relief to Allow Discovery.**

13. The Debtors ask the Court to delay ruling on Microsoft’s Motion for Relief so that they can conduct discovery. Joint Objection at 9 ¶ 33. Microsoft’s Motion for Relief, however, raises no factual issues requiring discovery. It is based on the fact that the Washington litigation has progressed to the point where it is the most efficient and fastest means to liquidate Microsoft’s claims. Motion for Relief at 2 ¶ 3, 11-14. The evidence in support of Microsoft’s Motion for Relief consists of the pleadings and orders issued in the Washington litigation. Discovery would serve no purpose other than delaying the Court’s ruling unnecessarily. In fact, the Debtors have not identified a single disputed factual issue material to Microsoft’s Motion for Relief.<sup>9</sup>

**F. The Bankruptcy Issues Debtors Raise Are Irrelevant to the Motion for Relief.**

14. The Debtors argue that allowing the Washington litigation to proceed will thwart the “breathing spell” they need to reorganize their business. The Debtors, however, have no need to undertake such financial restructuring. As they themselves have said, they are “absolutely profitable.” Motion for Relief at 9 ¶ 28. OptInRealBig receives \$4 million to \$5 million in income each month.<sup>10</sup> The only changes Debtors plan to make to their business are those necessary to comply with future changes in governing law. Exhibit L, Tr. 341 Creditors Mtg. at 16:22 to 17:4 (Apr. 29, 2005); *see also id.* at 15:23 to 16:1. To the extent that any “reorganization” will occur, it must await liquidation of Microsoft’s claims to be meaningful.

15. Debtors also argue that the Motion for Relief should be denied because the Court ultimately will need to rule on a possible motion under Bankruptcy Code § 726(a)(4) that will overlap with Microsoft’s claims. Section 726 does not apply in a Chapter 11 proceeding: “Section 726 applies directly only in liquidation cases under chapter 7.” 6 COLLIER ON BANKRUPTCY ¶ 726.01 (Alan N. Resnick & Henry J. Sommer, eds., 15th ed. rev.). The statutory damages Microsoft seeks are not penalties or punitive damages, but even if they were, such damages “cannot be subordinated to other claims in chapter 11 cases, even though they are subordinated in chapter 7 by section 726(a)(4) . . . .” *Id.* (discussing *United States v. CF&I Fabricators*, 518 U.S. 213 (1996)). More importantly, bankruptcy issues regarding treatment of

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<sup>9</sup> Discovery in the Washington litigation related to the pending dispositive motions was essentially complete on the day Debtors filed their bankruptcy petitions. Microsoft’s motion for partial summary judgment was originally scheduled to be heard in February, but the Court granted a substantial extension of the original deadline to allow the Debtors to conduct discovery. The Debtors squandered much of that time, but the discovery they sought essentially was complete by March 25, the day the Debtors filed their petitions. The only pending discovery was the deposition of the American Registry of Internet Numbers, whose testimony was needed only to confirm that the Debtors registered Internet Protocol addresses using aliases and addresses in the Ukraine, among other places.

<sup>10</sup> Exhibit L, Tr. 341 Creditors Mtg. at 28:23 to 29: 6 (Apr. 29, 2005); OptInRealBig’s Forms 2-B and 2-D (Dkt. 94) (showing total cash receipts for March 26 to April 30 of \$5.8 million and Net Operating Income of \$2.13 million). Richter likewise has received substantial sums. *See* Amended Statement of Financial Affairs for Debtor Scott Richter at 1 (Dkt. 36).

Microsoft's claim can be determined efficiently after liquidation of the claim, and the Washington litigation is the most efficient vehicle for liquidating the claim.

### **III. CONCLUSION**

16. Microsoft respectfully requests that the Court grant the relief requested in its Motion for Relief. Microsoft's claims arise primarily under Washington law, and the Washington court before which those claims have long been pending is the most efficient and appropriate venue for liquidating them. Microsoft's claims do not overlap in any meaningful way with other pending litigation and there is no basis for the Debtors' speculation that potential future claims will overlap with Microsoft's claims. The priority and other bankruptcy issues raised by the Debtors will be resolved by this Court after Microsoft's claim is liquidated.

DATED this 20th day of May, 2005.

Respectfully submitted,

BALLARD SPAHR ANDREWS & INGERSOLL, LLP

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 20<sup>th</sup> day of May, 2005, a true and correct copy of the foregoing document, **MICROSOFT CORPORATION’S REPLY IN SUPPORT OF MOTION FOR RELIEF FROM THE AUTOMATIC STAY IMPOSED BY 11 U.S.C. § 362**, was deposited in the United States Mail, postage pre-paid, first class, addressed to the following:

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