

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

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

**MOTION OF MICROSOFT CORPORATION FOR RELIEF FROM THE AUTOMATIC
STAY IMPOSED BY 11 U.S.C. § 362 WITH RESPECT TO PENDING STATE COURT
LITIGATION**

I. INTRODUCTION

1. Microsoft Corporation (“Microsoft”) respectfully moves, pursuant to Bankruptcy Code § 362(d)(1), to modify the automatic stay in the jointly administered chapter 11 cases, to allow pending litigation to proceed in Washington State (“the Washington litigation”).

2. The Washington litigation involves claims against the self-proclaimed “Spam King” Scott Richter, and his company, OptInRealBig.com, LLC (“OptInRealBig”) (collectively, “the Debtors”). Microsoft’s claims arise, in part, from billions of “spam” e-mails sent by the Debtors, which exceeded 38 billion such e-mails in 2003 alone. Much of that spam was sent to e-mail addresses belonging to Microsoft’s MSN and MSN Hotmail e-mail services. The Debtors used a variety of techniques to misrepresent, obscure, and/or disguise their identity as senders of their spam and used false and misleading subject lines to induce recipients to open their spam.

Such conduct violates Washington's anti-spam statute and Washington's Consumer Protection Act.

3. The factors courts consider when deciding whether to modify the stay to allow pending litigation to proceed weigh strongly in favor of Microsoft's motion:

(a) The Washington litigation is near resolution. Cross-motions for summary judgment on Microsoft's primary claims were within two weeks of hearing when the Debtors filed for bankruptcy, and Microsoft and the Debtors have agreed to an early trial date of short duration. Trial will commence September 26, 2005, and will last five to six days.

(b) The primary claims in the Washington litigation arise under specialized Washington law designed to protect Washington businesses and consumers: the Washington Commercial Electronic Mail Act ("CEMA") and Consumer Protection Act ("CPA");

(c) The Washington litigation can most efficiently resolve Microsoft's claims. Through more than 1½ years of discovery and extensive motions practice, the Washington court, a specially-appointed Discovery Master, and trial counsel have learned the extensive and complex factual record and are well-versed in the claims and defenses in the case. Also, the Washington court and the Discovery Master already have made significant rulings regarding Microsoft's claims and the Debtors' defenses.

(d) The Debtors are neither insolvent nor in financial trouble. Their spamming business is growing and is extremely profitable, and the Debtors recently have stated that they plan to raise \$300 million through an initial public offering in 2005. The bankruptcy is simply a ploy to avoid resolution of Microsoft's claims for the Debtors' willful violations of Washington law. Throughout this litigation, the Debtors have sought to delay the day of reckoning for the billions of illegal spam e-mails they have sent to Washington residents, including Microsoft. Such efforts have been rejected by both federal and state courts in Washington. The Debtors are now using the Bankruptcy Code in an improper attempt to overrule the decisions of those courts and to engage in blatant forum shopping.¹

(e) The Debtors' defense presently is being funded by a non-wasting policy issued by their insurer, American Family Mutual Insurance Company ("American Family"). Although American Family disputes coverage, its motion for summary judgment in an action for declaratory relief recently was denied.

4. Modification of the stay will not prejudice appropriate administration of the bankruptcy cases because the Washington litigation is the most efficient manner of resolving Microsoft's claims. Microsoft will then return to this Court to collect any part of the judgment not covered by insurance and to request this Court's approval before seeking to enforce any injunction that might be entered by the Washington court.

¹ Concurrently with this motion, Microsoft has filed a motion to dismiss Richter's and OptInRealBig's chapter 11 cases. If the Court grants Microsoft's motion to dismiss, this motion will become moot.

II. BACKGROUND FACTS

A. **Microsoft's E-Mail Services and the Problem of "Spam."**

5. Microsoft owns and operates interactive computer services that enable its customers to, among other things, access the Internet and exchange electronic mail ("e-mail") on the Internet. Those services include MSN and MSN Hotmail, which provide free and subscription-based e-mail accounts.

6. As an e-mail service provider, Microsoft is concerned with the transmission of spam, especially deceptive and misleading spam of the type at issue in the Washington litigation, because such spam harms Microsoft's computer systems, e-mail servers, and customers. *See* Plaintiff Microsoft Corporation's Motion for Partial Summary Judgment Against Defendants Scott Richter and OptInRealBig.com, LLC for Violations of the Washington Commercial Electronic Mail Act and Consumer Protection Act ("Motion for Partial Summary Judgment") at 2.² To handle the voluminous spam, Microsoft has been forced to expend resources on, among other things, additional computers and computer systems, storage systems, bandwidth to process the flood of spam e-mail directed to MSN and MSN Hotmail; additional personnel time to attempt to block or filter spam, to respond to customer complaints, and to protect Microsoft's systems from being overloaded; and technological solutions to filter or block spam.

7. Spamming also has a significant impact on the recipients of spam. Individuals who receive spam incur the time and effort of sifting through voluminous received e-mail to distinguish spam from legitimate e-mail and ultimately to discard this unsolicited material. This burden is increased by spammers' deceptive methods, whereby they mislead e-mail recipients as to the sender and content of the spam. Those deceptive methods include placing false or misleading information in the e-mail headers and subject lines, as well as various practices designed to misrepresent or obscure the point of origin or transmission path of the e-mail. As noted by both federal and state authorities, a result of such deceptive practices is cost, inconvenience and frustration to spam recipients. S.Rep. No. 108-102, at 2-6 (2003) (describing increasing volume of spam, deceptive features of that spam, and the costs on users imposed by such spam, and stating that "[u]nsolicited commercial e-mail, commonly known as 'spam', has quickly become one of the most pervasive intrusions in the lives of Americans"); Federal Trade Comm'n, *False Claims in Spam* at 3-7 (Apr. 30, 2003), available at <www.ftc.gov/reports/spam/030429spamreport.pdf> (describing deception in headers and subject lines of spam); *State v. Heckel*, 143 Wn.2d 824, 835-37, 24 P.3d 404 (2001) (describing some of the costs imposed by deceptive spam).

B. **Filing of the Washington Litigation.**

² A copy of Microsoft's Motion for Partial Summary Judgment is attached as Exhibit A. Microsoft has not filed the declarations in support of its Motion for Partial Summary Judgment with this motion because those declarations are voluminous and because portions of them were filed under seal. Microsoft gladly will provide those declarations upon request of the Court.

8. In 2003, Microsoft's servers were inundated with billions of spam e-mails. MSN Hotmail accounts that Microsoft established to monitor and control incoming spam received massive volumes of e-mail that used deceptive practices to disguise, misrepresent, or obscure their origin, and the subjects in the e-mail, in violation of the Washington CEMA and Washington CPA.

9. Microsoft ultimately was able to link large quantities of this spam to the Debtors as well as four additional defendants: Synergy6, Inc. and Justin Champion ("the Synergy6 defendants") and Delta Seven Communications and Denny Cole ("the Delta Seven defendants"). To stop the onslaught of spam and recover damages, Microsoft filed a complaint for damages and injunctive relief on December 17, 2003, a copy of which is attached as Exhibit B.³

C. The Debtors' Campaign of Delay and Obfuscation and the Washington Court's Rulings Regarding the Scope of Microsoft's Claims.

10. From their first filings, the Debtors engaged in a campaign to prevent judicial review of their spamming activities through a course of meritless motions practice and repeated efforts to thwart reasonable discovery into the millions of e-mails the Debtors sent to MSN Hotmail each day.

11. Soon after the Washington litigation was filed, the Debtors removed the case to the U.S. District Court for the Western District of Washington and filed a motion to dismiss for lack of personal jurisdiction or alternatively to transfer the case to the U.S. District Court for the District of Colorado. Microsoft moved to remand the case and to stay the motions to dismiss to allow time for jurisdictional discovery. The Debtors objected to discovery, but the District Court granted Microsoft's motions, ruling that discovery would be allowed if the court did not remand the case to state court. The District Court ultimately remanded the case.

12. Despite the District Court's ruling, which was law of the case, the Debtors again refused to provide discovery when the case was returned to Washington state court. They also renewed their motions to dismiss for lack of personal jurisdiction and forum non conveniens, and they moved to stay all discovery. The Superior Court denied the motion to stay and again ordered that the requested discovery should proceed. Thereafter, the Debtors engaged in tactics to thwart access to reasonable discovery from them and third parties and to thwart the disposition of the action. For example, they refused to produce basic information that would allow Microsoft to identify all of the spam the Debtors sent, or assisted in sending, to MSN and MSN Hotmail, such as the Internet domain names and Internet Protocol addresses used to send the spam. They refused to identify their numerous aliases, and companies they own and/or control, many of which were used to send their spam. They also refused to produce the complaints their spam had generated or to produce records regarding the volume of e-mail they had sent.

³ Microsoft's claims against the Synergy6 defendants and Delta Seven defendants are pending in the Washington court. Those defendants are not represented by local counsel, but the Synergy6 defendants have participated in discovery through their New York and Florida counsel.

13. The Washington court ultimately appointed a Discovery Master to oversee the hotly contested discovery process, and Microsoft repeatedly was forced by the Debtors' tactics to secure orders from the Discovery Master compelling the Debtors to provide the requested discovery. Despite such orders, to further their campaign of delay, the Debtors appealed nearly every discovery order to the Superior Court and then sought discretionary review by the Washington Court of Appeals of many of these orders. Each of those appeals was denied, and on multiple occasions, the reviewing court assessed Microsoft's attorneys' fees and costs for the wasteful motions practice and warned of future sanctions against the Debtors should such tactics continue. Representative orders of the Washington court and the Discovery Master are attached as Exhibit C.

14. Through these motions, the Discovery Master and the Washington court—as well as the Washington litigation attorneys—became intimately familiar with the facts, including the numerous ways the Debtors sought to disguise the origin of the billions of spam e-mails they sent or assisted in sending and the nature of the harm spam causes to Microsoft. *See supra* ¶ 6. For example, through extensive briefing and multi-hour oral arguments, the parties presented the Washington court and Discovery Master with a detailed account of: the respective roles of Richer and OptInRealBig, the Synergy6 defendants, and the Delta Seven defendants in sending the spam at issue in this case; the aliases and foreign addresses (e.g. addresses in the Ukraine) the Debtors used to disguise the origin of their spam; the numerous companies owned or controlled by the Debtors and used to further disguise the origin of the spam they send; the role played in sending this spam by the Debtors' hundreds of "list hosting customers"; the spam sent by "affiliates" in the Debtors' CPA Empire affiliate program and the Synergy6 defendants' OfferStream affiliate program; and the nature of the harm spam causes to service providers such as Microsoft.

15. In the process of rejecting the Debtors' attempts to thwart the progress of this litigation, the Discovery Master, the Superior Court, and the Commissioner for the Washington Court of Appeals resolved critical issues regarding Microsoft's claims and the Debtors' defenses. For example:

(a) The Discovery Master ruled, and the Superior Court affirmed, that statutory damages under the Washington CEMA "remedy the 'cost-shifting—from deceptive spammers to businesses and e-mail users' that is 'inherent in the sending of deceptive spam.'" Protective Order Regarding Damages Discovery Prior to Ruling on Partial Summary Judgment at 2 (Ex. C10), *aff'd*, Order Denying Motion for Review of Discovery Master's Order Granting Protective Order (Ex. C11). They rejected the Debtors' primary defense—that the statutory damages in the Washington CEMA violate Due Process because they are disproportionate to actual harm. They held that "the statutory damages available in [the Washington Litigation] were 'not designed solely to compensate each private injury' caused by unsolicited electronic advertisements, but also 'to address and deter the overall public harm caused by such conduct.'" *Id.* at 3 (Ex. C10).

(b) Likewise, the Discovery Master, Superior Court, and Court of Appeals have addressed the scope of the provision in the Washington CEMA that imposes liability on

those who knowingly provide “substantial assistance or support’ to persons who sent illegal spam.” Order Granting Motion to Enforce Order Denying Protective Order and to Compel Production of Discovery at 1-2 (Ex. C9) (describing prior rulings). Specifically, they held that “OptIn[RealBig] does business with a number of companies who are directly involved in spam operations and there is evidence that Richter and/or OptIn[RealBig] have interests in or relationships with these companies that may make Richter and/or OptIn[RealBig] responsible for their activities.” *Id.* at 2 (quoting the Court of Appeals’ ruling and citing the Superior Court’s ruling upholding the Discovery Master’s ruling).

D. The Washington Court’s Rejection of the Debtors’ Attempts to Move the Litigation to Colorado or California.

16. In December 2004, the Superior Court denied the Debtors’ motions to dismiss the Washington litigation or to require it to proceed in Colorado or California. Applying Washington law,⁴ the Court ruled that “when a spammer sends millions of e-mails over the internet the spammer has reason to know that he could be hauled into a distant jurisdiction to answer for the ramifications” of that spamming in the affected jurisdiction. Court’s Oral Decision at 3:18-22 (Dec. 10, 2004) (attached as Exhibit D). Because the Debtors sent voluminous spam to Microsoft’s MSN Hotmail e-mail service, sent such spam to accounts included in a public registry co-sponsored by the Washington Attorney General and Washington Association of Internet Service Providers (“WAISP”),⁵ and caused harm to Washington residents, including Microsoft, Washington was the proper jurisdiction to hear Microsoft’s action. *Id.* at 3-5.

E. Microsoft’s Motion for Partial Summary Judgment.

17. On January 21, 2005, Microsoft moved for partial summary judgment against the Debtors for violations of the Washington CEMA and Washington CPA⁶ as to more than 45,000 e-mails that the Debtors sent to e-mail accounts belonging to Microsoft that were registered with the “WAISP registry.”⁷ (Hereafter referred to as Microsoft’s “WAISP accounts.”).

18. The Washington CEMA prohibits sending, or assisting in sending, to a Washington e-mail address, commercial e-mail messages that either: (a) misrepresent or obscure any information in identifying the point of origin or the transmission path of the e-mail; or (b) contain false or misleading information in the subject lines. RCW § 19.190.020(1)(a)-(b). A

⁴ See *State v. Heckel*, 143 Wn.2d 824, 24 P.3d 404 (2001) (“*Heckel I*”); *State v. Heckel*, 122 Wn. App. 60, 93 P.3d 189 (2004) (“*Heckel II*”).

⁵ Such registration is deemed to give notice to spammers that an account is held by a Washington resident. *Heckel I*, 143 Wn.2d at 837 n.13; *Heckel II*, 122 Wn. App. at 69.

⁶ Microsoft’s motion also sought summary judgment on the issue of personal jurisdiction over both the Debtors.

⁷ As used herein, “WAISP registry” refers to the public registry co-sponsored by the Washington Attorney General and WAISP.

violation of the Washington CEMA is a *per se* violation of the Washington CPA. *Id.* § 19.190.030. Microsoft's Motion for Partial Summary Judgment alleges thousands of violations of the Washington CEMA and CPA and seeks statutory damages, an award of the fees and costs of bringing the action, and injunctive relief. Motion for Partial Summary Judgment at 23-24.

19. The facts material to Microsoft's claims are not in dispute. Much of the e-mail at issue in Microsoft's motion for partial summary judgment is e-mail the Debtors admit they sent, admit is "commercial" under the Washington CEMA, and that was received by Microsoft's WAISP accounts. *See* Motion for Partial Summary Judgment at 14-15. The Debtors sent that spam using a variety of aliases deliberately designed to hide the origin of the spam. They used the aliases "Joseph Canoso," "John O.," "Jeff Gregory," "Rus Penkatar," "Ruslan Bynakoski," "Sprouts Kristen," and "Steve Reid." *Id.* at 5-7. Those personal aliases were used in conjunction with business aliases, including: "My Email Wizard," "Blue Rocket Media," "SCSMC," "Tek Mailing," and "Brightermail.com, LLC." *Id.* The Debtors claimed that these persons and entities were located in the Ukraine, Chicago, Valparaiso, San Diego, and Colorado. *Id.* In reality, all of this spam was sent by the Debtors or was sent by their customers using the misleading scheme established by the Debtors. *Id.* at 15-19. To further the scheme, Richter and his agent Karen Hoffman (using the name "Natasha Dorenkov") publicly denied any association with the most commonly-used aliases—"Joseph Canoso" and "My Email Wizard." *Id.* at 5-6.

20. These deceptive practices were present in 23,795 e-mail messages sent by the Debtors to Microsoft's WAISP accounts and in an additional 16,604 e-mail messages sent by the Debtors' "list hosting" customers to Microsoft's WAISP accounts using the same deceptive scheme.⁸ Motion for Partial Summary Judgment at 18-19. The Debtors authorized the list hosting customers to send spam from their domain names, thereby providing the assistance necessary for the list hosting customer to send their deceptive spam. *Id.* Among those "list hosting" customers were the Synergy6 defendants.

21. Microsoft's motion also addressed 4,252 admittedly commercial e-mail messages sent by the Debtors that contained false or misleading subject lines, such as: "re: your home loan," "Your Federal Stafford Loan," "fwd: we have to talk," "make sure you do this," "Quick question," and "Waiting to hear from you. Call me."⁹ Such subject lines repeatedly have been found to be deceptive. *See* S. Rep. No. 108-102, at 4 (2003) (providing samples of deceptive subject lines, including "Hi, it's me" and "Your order has been filled"); FTC, False Claims in Spam, *supra*, at 5 (describing the use of subject lines that falsely suggest a personal relationship or that use the term "re:" falsely to suggest that the e-mail is a response to a prior e-mail); *Heckel II*, 122 Wn. App. at 71 (ruling, on summary judgment, that the subject lines "Did I get the right e-mail address?" and "For your review--HANDS OFF!" are false or misleading as a matter of law).

⁸ The initial count of deceptive spam sent to Microsoft's WAISP accounts was incomplete because of errors in the Debtors' discovery responses. Once Microsoft received corrected discovery responses, the number of deceptive e-mails sent by the Debtors increased to 29,199, and the number of deceptive e-mails they assisted in sending increased to 19,614.

⁹ Once Microsoft received corrected discovery responses, the number of e-mails with false or misleading subject lines increased to 5,857.

22. Microsoft's motion for partial summary judgment also addressed a portion of the e-mail messages (1,756 messages) sent by the Delta Seven defendants in concert with the Debtors and the Synergy6 defendants, to Microsoft's WAISP accounts. Motion for Partial Summary Judgment at 8-9, 21-22. The Debtors were "affiliates" of the Synergy6 defendants' "affiliate program."¹⁰ After joining the Synergy6 affiliate program, the Debtors allowed the Delta Seven defendants to send spam using their affiliate identity.¹¹ *Id.* at 8. The spam was sent using numerous devices to misrepresent and obscure the points of origin and transmission paths, including false headers that made the spam appear as though it had been sent by the recipient. *Id.*; see also FTC, False Claims in Spam, *supra*, at 3 (explaining that one way spammers deceive recipients is by making a spam e-mail appear that it comes from the recipient). Additionally, the Delta Seven e-mail contains subject lines that use "re:" or "fwd:" at the beginning, subject lines that falsely suggest a personal relationship, such as "Hey! Fay," and subject lines unrelated to the advertisement, such as "2:50:07 PM." Soon after the first batches of spam were sent by the Delta Seven defendants, the Debtors received specific notice of the Delta Seven defendants' illegal practices. The Debtors nonetheless continued to assist the Delta Seven defendants in sending illegal spam. In fact, rather than attempting to stop the spam, Richter advised the Synergy6 defendants to lie about the spam in response to complaints. Motion for Partial Summary Judgment at 8-9, 21-22.¹²

23. Microsoft's motion for partial summary judgment was originally set for consideration by the state court on February 18, 2005. Just before their opposition to Microsoft's motion was due, the Debtors sought a continuance under Washington Civil Rule 56(f), requesting additional time to conduct discovery into the claims raised in Microsoft's motion. The state court granted, in part, the Debtors' request, and the summary judgment proceedings were continued until April 8. See Order Granting Motion to Continue Motion for Partial Summary Judgment at 2 (Ex. C7) (partially granting motion but warning of sanctions for further dilatory conduct). The Debtors scheduled and conducted depositions in Washington, Texas, and New York. They also filed a cross-motion for partial summary judgment regarding Microsoft's claims under the Washington CPA.

¹⁰ The Synergy6 defendants employed e-mail marketers, or "affiliates," which included Richter and OptInRealBig, to send commercial offers. Motion for Partial Summary Judgment at 8.

¹¹ The Richter defendants were assigned the affiliate code "CD32" to permit Synergy6 to identify the e-mail they sent. Motion for Partial Summary Judgment at 8 n.9. In turn, the Richter defendants assigned Delta Seven the affiliate identification code, "optionalinfo=wsb" to track e-mail sent by Delta Seven. *Id.* The e-mail received by the WAISP accounts contained these codes. *Id.*

¹² When a contractor complained to the Synergy6 defendants about this illegal spam, Richter advised the Synergy6 defendants to switch contractors and to claim that the illegal spam was sent from a customer whose account had been terminated. In reality, the senders of the illegal spam were Richter, OptInRealBig, and the Delta Seven defendants, and their account with the Synergy6 defendants was not terminated. To the contrary, the Debtors continued to use that account to assist the Delta Seven defendants in sending illegal spam. Motion for Partial Summary Judgment at 9.

24. Then, on the last judicial day before the deadline for Debtors' opposition to the Motion for Partial Summary Judgment and Microsoft's opposition to the cross-motions for partial summary judgment, and only two weeks prior to the hearing on those motions, the Debtors filed for bankruptcy.

F. Scheduled Trial Date.

25. Microsoft and the Debtors have agreed on September 26, 2005, as the trial date for this action. The trial has been scheduled for five to six judicial days. *See* Joint Pretrial Status Report of Plaintiff Microsoft and Defendants OptInRealBig.com LLC and Scott Richter at 2 (attached as Exhibit E).

G. Insurance Funding for the Washington Litigation, the Debtors' Financial Position, and Misuse of Bankruptcy to Overrule the Washington Courts and Engage in Forum Shopping.

26. The Debtors' defense costs for the Washington litigation and for other anti-spam litigation against them have been paid by American Family under a reservation of rights. A few months after Microsoft filed the Washington litigation, American Family filed a declaratory judgment action seeking a ruling that it is not obligated to defend and indemnify the Debtors. On March 18, 2005, the U.S. District Court for the District of Colorado denied American Family's motion for summary judgment on its claims.

27. Even without insurance funding, the Debtors' are fully able to fund their defense to the anti-spam claims against them. The Debtors' Statements of Financial Affairs make clear that their spam business is extremely profitable and growing significantly. According to an industry newsletter:

One of the "fastest growing" online marketing companies in the nation, OptInBig, is looking to go public in 2005. Scott Richter, self-proclaimed "Spam King" and president of the Colorado based e-mail marketing firm, has told AdBumb [the industry newsletter] that the company is looking to raise about "\$300 million" before the public bid takes place. "A lot is on the line for us," Richter remarked via email late last week.

See OptInBig Has Big Hopes for 2005, ADBUMB, Issue #135, 17 Nov. 2004, available at <<http://www.adbumb.com/adbumb135.htm>>. Moreover, the Debtors' own schedules indicate that OptInRealBig paid Scott Richter \$247,000 in salary in *the first three months* of 2005 alone.

28. The Debtors have publicly acknowledged their business's profitability and growth. Steven Richter, who is Richter's father and an attorney for the Debtors, has recently stated publicly that the Debtors' business is "absolutely profitable" and "financially viable." *Spam Firm Growing in Leaps*, THE DENVER POST, Apr. 13, 2005, at 1C, 4C, copy attached hereto as Exhibit F.

29. The Debtors have also stated that the purpose of their chapter 11 filings was to shield themselves from lawsuits, including the lawsuit filed by Microsoft. *See id.* The bankruptcy was filed as "essentially an effort to consolidate various lawsuits against the

company” and “just to get some breathing room.” *Alleged Spammer Files for Bankruptcy*, THE SEATTLE POST-INTELLIGENCER, Mar. 29, 2005, at C3 (quoting Steven Richter), copy attached hereto as Exhibit G.

III. RELIEF REQUESTED

30. Microsoft requests that this Court modify the automatic stay of Bankruptcy Code § 362(a) to permit the pending Washington litigation to resume, including any proceedings, orders, judgments, or appeals related thereto, so that liability on Microsoft’s claims can be established, and damages and other relief may be granted on Microsoft’s claims. The requested stay modification will not permit Microsoft to collect any part of the resulting judgment against the Debtors outside of the bankruptcy claims process unless covered by insurance. Further, any injunctive or other relief granted by the Washington court will not be enforced absent further order of this Court.

IV. ARGUMENT

31. Section 362(a) generally acts as a stay of the continuation of a judicial proceeding against a debtor that was commenced prior to the debtor’s petition date. *See* 11 U.S.C. § 362(a)(1). Congress has recognized that the automatic stay should be lifted in appropriate circumstances:

[I]t will often be more appropriate to permit proceedings to continue in their place of origin, when no great prejudice to the bankruptcy estate would result, in order to leave the parties to their chosen forum and to relieve the bankruptcy court from any duties that may be handled elsewhere.

See H.R. Rep. No. 95-595, at 341 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6297; S. Rep. No. 95-989, at 50 (1978), *reprinted in* 1978 U.S.C.C.A.N., 5787, 5836.

32. Pursuant to Bankruptcy Code § 362(d)(1), after a request is made by a party in interest, the Court shall grant relief from the automatic stay for “cause.” *See* 11 U.S.C. § 362(d)(1).

33. Pursuant to Bankruptcy Code § 362(g), the burden of proof in relief from stay matters is allocated to (1) the party requesting relief on the issue of the debtor’s equity in property and (2) the party opposing such relief for all other issues. *See* 11 U.S.C. § 362(g). “Absent any issues concerning the debtor’s equity in property, it follows that the debtor has the burden of proof in opposing motions for relief from stay.” *Wilson v. Unioil (In re Unioil)*, 54 B.R. 192, 194 (D. Colo. 1985). “Once the party seeking relief from stay establishes a legally sufficient basis, i.e., ‘cause,’ for such relief, the burden then lies with the debtor to demonstrate that it is entitled to the stay.” *Id.*

34. Whether the court should grant relief from stay with respect to pending litigation must be determined on a case by case basis. *See Pursifull v. Eakin*, 814 F.2d 1501, 1506 (10th Cir. 1987). To determine whether “cause” exists, courts in the Tenth Circuit have looked to the

twelve factors identified in *In re Curtis*, 40 B.R. 795, 799-800 (Bankr. D. Utah 1984), as some of the issues a bankruptcy court might consider when determining whether to lift the stay to permit pending litigation to resume in another forum. *See, e.g., Busch v. Busch*, 2003 Banks. LEXIS 557, *9-* 10 (B.A.P. 10th Cir. June 6, 2003) (applying seven of the *Curtis* factors and stating that the *Curtis* factors have been widely adopted by the bankruptcy courts); *Unioil*, 54 B.R. at 194-95. The *Curtis* factors include:

- (1) Whether the relief will result in a partial or complete resolution of the issues.
- (2) The lack of any connection with or interference with the bankruptcy case.
- (3) Whether the foreign proceeding involves the debtor as a fiduciary.
- (4) Whether a specialized tribunal has been established to hear the particular cause of action and that tribunal has the expertise to hear such cases.
- (5) Whether the debtor's insurance carrier has assumed full financial responsibility for defending the litigation.
- (6) Whether the action essentially involves third parties, and the debtor functions only as a bailee or conduit for the goods or proceeds in question.
- (7) Whether litigation in another forum would prejudice the interests of other creditors, the creditors' committee and other interested parties.
- (8) Whether the judgment claim arising from the foreign action is subject to equitable subordination under Section 510(c).
- (9) Whether the movant's success in the foreign proceeding would result in a judicial lien avoidable by the debtor under Section 522(f).
- (10) The interest of judicial economy and the expeditious and economical determination of litigation for the parties.
- (11) Whether the foreign proceedings have progressed to the point where the parties are prepared for trial.
- (12) The impact of the stay on the parties and the balance of hurt.

Curtis, 40 B.R. at 799-800.

35. Factors (1), (2), (4), (5), (7), (10), (11) and (12) of the *Curtis* factors are relevant here. These factors cut clearly in favor of granting Microsoft's request for relief from the automatic stay.

A. The Washington Court has Full Authority to Liquidate Microsoft’s Claim.

36. The first *Curtis* factor—whether relief from the stay will result in a partial or complete resolution of the issues—weighs strongly in favor of granting relief from stay. Microsoft’s claims arise under state law, and there is no question that the Washington court has full authority to liquidate those claims.

B. Relief from the Stay Furthers the Goal of Judicial Economy.

37. The second, seventh, tenth, and eleventh *Curtis* factors—which address interference with the bankruptcy case and judicial economy—also favor relief from the stay. *See generally Packerland Packing Co. v. Griffith Brokerage Co. (In re Kemble)*, 776 F.2d 802, 807 (9th Cir. 1985) (judicial economy considered in determining whether to modify an automatic stay). The Washington litigation will most quickly resolve Microsoft’s claims. The Washington courts are poised to rule on Microsoft’s claims through summary judgment or a short trial. *See supra* ¶¶ 3(a), 25-26. “Where the stayed non-bankruptcy litigation has reached an advanced stage, courts have shown a willingness to lift the stay to allow the litigation to proceed.” *IBM v. Fernstrom Storage & Van Co. (In re Fernstrom Storage & Van Co.)*, 938 F.2d 731, 737 (7th Cir. 1991); *In re Ice Cream Liquidation, Inc.*, 281 B.R. 154, 167 (D. Conn. 2002) (eleventh *Curtis* factor weighs in favor of modification of stay when case ready for determination on cross-motions for summary judgment).

38. Also, as discussed above, this case is factually complex, and through extensive litigation, the Washington court, the Discovery Master, and trial counsel, have become familiar with all of the tangled relationships between the defendants, the relationship between the Debtors and the entities they own and/or control, the technical evidence regarding the transmission of the Debtors’ spam to MSN Hotmail and the way in which the spam impacted Microsoft’s computers and related equipment. *See supra* ¶¶ 6, 14. In the unlikely event that Microsoft’s pending motion for summary judgment is not granted, the Debtors’ insurance-funded counsel in Washington are intimately familiar with the issues and facts in the case, and their knowledge will be important to the resolution of Microsoft’s claims at the short trial scheduled for September 2005. *See In re Ice Cream Liquidation, Inc.*, 281 B.R. at 167 (state court that is “more advanced on the ‘learning curve’” should be permitted to litigate matter outside of bankruptcy). *See generally Ozai v. Tabuena*, 34 B.R. 764, 766 (B.A.P. 9th Cir. 1983) (modification of stay appropriate where “no guarantee” bankruptcy court could decide case “more swiftly than the state court.”)

39. Denying Microsoft’s motion may lead to duplication and waste. The Washington litigation was filed in December 2003, and has been actively litigated since its filing. In that process, the Washington courts already have resolved critical issues regarding Microsoft’s claims and the Debtors’ defenses. *See supra* ¶15. If Microsoft’s case proceeded as a contested claim in this Court, some of the issues may need to be re-litigated. Such duplication is inefficient and detrimental to the public interest. *Peterson v. Cundy (In re Peterson)*, 116 B.R. 247, 250 (D. Colo. 1990). Moreover, Microsoft’s claims against the Debtors involve the same legal issues and facts as its claims against the Synergy6 defendants and Delta Seven defendants. *See supra*

¶¶ 20, 22. Because Microsoft’s claims against the Synergy6 defendants and Delta Seven defendants remain before the Washington court, Microsoft may be required to litigate the same issues in the Washington court and this Court.¹³ Such duplication is discouraged. *See In re Hoffman*, 33 B.R. 937, 941 (W.D. Okla. 1983) (requiring plaintiff to proceed against debtor in additional proceeding involving co-defendants would result in greater prejudice to plaintiff); *cf. In re McGraw*, 18 B.R. 140, 142 (W.D. Wis. 1982) (stay should be modified when “plaintiffs will be precluded from recovery against solvent co-defendants if the debtor is not a party for the purpose of determining liability”).

40. The Washington litigation quickly will establish a value for Microsoft’s claim and the terms of any injunction with which the Debtors will be required to comply. Accordingly, it will allow the bankruptcy case to move most efficiently and expeditiously toward resolution.

C. The Washington Courts are the Best Arbiters of Washington Law.

41. The fourth *Curtis* factor—the existence of a specialized tribunal to consider the claims raised in the litigation—likewise supports granting relief from the automatic stay. Because Microsoft’s claims in the Washington litigation arise from specialized Washington law designed to protect Washington businesses and consumers from illegal spam, Washington courts are best equipped to resolve Microsoft’s claim. It is well-established that such issues of state law should be resolved by state courts whenever possible. *See Thompson v. Magnolia Petroleum Co.*, 309 U.S. 478, 481-83, 60 S. Ct. 628 (1940) (litigation regarding unsettled questions of state law should proceed in state court). A “clear congressional policy exists to give state law claimants a right to have claims heard in state court.” *Piombo Corp. v. Castlerock Properties*, 781 F.2d 159, 163 (9th Cir. 1986). The claims raised by Microsoft in its motion for partial summary judgment address only two Washington State statutes: the Washington CEMA and CPA. The Washington CEMA has not yet been the subject of substantial appellate rulings in Washington State, and issues regarding the proper interpretation of certain provisions of the statute are presently being resolved by Washington courts in a significant number of anti-spam actions pending in those courts. The Washington courts are best equipped to interpret and apply the Washington CEMA.

D. The Debtors’ Insurance Coverage and Advantageous Financial Position Favor Modifying the Stay.

42. Because the Debtors’ insurance carrier, American Family, is funding the Washington litigation under reservation of rights pending resolution of its declaratory judgment action, the fifth factor generally weighs in favor of modification of the stay. *Holtkamp v. Littlefield*, 669 F.2d 505, 508-9 (7th Cir. 1982) (“Allowing the civil action to go forward did not

¹³ The Synergy6 defendants and the Delta Seven defendants presently are not active litigants. The Synergy6 defendants, however, have been active participants in discovery regarding Microsoft’s Motion for Partial Summary Judgment. It is not clear whether the Synergy6 defendants will plan to litigate more actively if the Debtors are no longer parties to the Washington litigation. Even if they do not, and if Microsoft seeks default judgment against those defendants, its request for relief will require resolution in the Washington court many of the issues that will need to be presented to this Court if the stay is not modified.

jeopardize Holtkamp's bankrupt estate because his insurance company assumed full financial responsibility for defending that litigation."'). Moreover, even if coverage ultimately is found not to exist, the Washington litigation will more quickly and efficiently liquidate Microsoft's claim and will reduce the total defense costs, regardless of whether such costs ultimately are borne by the insurer or the debtors. The fact that the Debtors are extremely profitable, *see supra* ¶¶ 27-29, removes any concern that they will be unable to mount a full defense in the Washington litigation.

E. The Balance of Harms Weighs In Favor of Modifying the Stay.

43. Finally, the twelfth *Curtis* factor—the balance of harms—favors modifying the stay. As discussed in detail above, Microsoft faces substantial injury if it is not permitted to move forward with the Washington litigation. The Washington courts and Washington counsel are familiar with the factual and legal issues in the case, and re-litigating those facts and issues in this Court would waste time and resources, as would litigating against the various defendants in this action in different forums. Moreover, Microsoft anticipates being met with continuing delay and obfuscation tactics similar to that encountered—and addressed—in the Washington litigation. Such tactics would work to delay further the bankruptcy proceedings and would prejudice other parties to the action. A decision not to modify the stay would also countenance forum shopping and an improper attempt to use the Bankruptcy Code to overrule the decisions of the Washington courts. Conversely, neither the debtors nor other creditors to this proceeding would be injured by permitting Microsoft to litigate its action in the Washington court. Because of the Debtors' non-wasting insurance coverage, which is funding their defense under reservation of rights, and the Debtors' advantageous financial position, there is no threat that they would be unable to defend themselves fully. Continuing the Washington litigation would permit Microsoft to liquidate its claim against the Debtors, would allow expeditious resolution of the Microsoft claim, and would permit more efficient administration of the bankruptcy cases.

44. For the foregoing reasons, Microsoft respectfully requests that the Court modify the automatic stay to permit the pending Washington litigation to resume, including any proceedings, orders, judgments, or appeals related thereto, so that liability on Microsoft's claims can be established, and damages and other relief may be granted on Microsoft's claims.

DATED this 27th day of April, 2005.

Respectfully submitted,

BALLARD SPAHR ANDREWS & INGERSOLL, LLP

By: \s\ Carl A. Eklund

Carl A. Eklund, No. 2299

Alan K. Motes, No. 33997

1225 17th Street, Suite 2300

Denver, Colorado 80202-5596

Tel: (303) 292-2400

Fax: (303) 296-3956

eklundc@ballardspahr.com

and

Marc L. Barreca
PRESTON GATES & ELLIS LLP
925 Fourth Avenue, Suite 2900
Seattle, WA 98104-1158
Phone: (206) 623-7580
Fax: (206) 623-7022
marcb@prestongates.com

Attorneys for Microsoft Corporation

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

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

NOTICE OF HEARING OR PRELIMINARY HEARING

YOU ARE HEREBY NOTIFIED that Microsoft Corporation (“Microsoft”) has filed a Motion for Relief from the Automatic Stay Imposed by 11 U.S.C. § 362 with respect to Pending State Court Litigation, a copy of which is herewith served on you, with the United States Bankruptcy Court for the District of Colorado (the “Court”). A hearing on the Motion has been set for **Tuesday, May 24, 2005 at 1:30 p.m.** in Courtroom B, located at 721 19th Street, United States Customs Building, Denver, Colorado. The hearing will be conducted in accordance with the provisions of Local Bankruptcy Rule 401.

If you desire to oppose the Motion, you are required to file with the Court and serve upon counsel for Microsoft, Carl A. Eklund of Ballard Spahr Andrews & Ingersoll, LLP, whose address is 1225 17th Street, Suite 2300, Denver, Colorado 80202-5596, a written response to the Motion on or before five (5) court days prior to the date of the scheduled hearing.

If you fail to file a response, an order granting the relief requested will be granted without further notice to you.

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

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

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of April, 2005, a copy of (i) the **MOTION OF MICROSOFT CORPORATION FOR RELIEF FROM THE AUTOMATIC STAY IMPOSED BY 11 U.S.C. § 362 WITH RESPECT TO PENDING STATE COURT LITIGATION** and (ii) the **NOTICE OF HEARING OR PRELIMINARY HEARING** were each deposited in the United States mail, postage prepaid and addressed to the parties indicated on the attached Exhibit A.

DATED this 27th day of April, 2005.

BALLARD SPAHR ANDREWS & INGERSOLL LLP

By: \s\ Carl A. Eklund

Carl A. Eklund, No. 2299
Alan K. Motes, No. 33997
1225 17th Street, Suite 2300
Denver, Colorado 80202-5596
Tel: (303) 292-2400
Fax: (303) 296-3956
eklundc@ballardspahr.com

and

Marc L. Barreca
PRESTON GATES & ELLIS LLP
925 Fourth Avenue, Suite 2900
Seattle, WA 98104-1158
Phone: (206) 623-7580
Fax: (206) 623-7022
marcb@prestongates.com

Attorneys for Microsoft Corporation

Exhibit A

<p>Leo M. Weiss U.S. Trustee 999 18th St., Ste. 1551 Denver, CO 80202</p>	<p>Harold G. Morris, Jr. Harrie F. Lewis John C. Smiley Lindquist & Venum PLLP 600 17th Street, Suite 1800-S Denver, CO 80202</p>
<p>Bonnie Bell Bond Harvey Sender Sender & Wasserman 1999 Broadway, Suite 2305 Denver, CO 80202</p>	<p>Steven S. Richter Goodman & Richter, LLP 501 West Broadway, Suite 1720 San Diego, CA 92101</p>
<p>Scott Allan Richter 10011 Lowell Way Westminster, CO 80031</p>	<p>OptInRealBig.com, LLC 1333 West 120th Avenue, Suite 1201 Westminster, CO 80234</p>
<p>Susan M. Freeman Lewis & Roca LLP 40 North Central Avenue, Suite 1900 Phoenix, AZ 85004-4429</p>	<p>Hilary Bonial CitiMortgage, Inc. PO Box 829009 Dallas, TX 75382-9009</p>
<p>Daniel F. Warden Bond & Morris 303 East 17th Avenue, Suite 888 Denver, CO 80203</p>	