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WESTERN DISTRICT OF WASHINGTON
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MICROSOFT CORPORATION, INC., a
Washington corporation,

Plaintiff,

v.

SYNERGY6, INC., a Delaware corporation;
JUSTIN CHAMPION, a New York resident;
OPTINREALBIG.COM, LLC, a Nevada
limited liability company; SCOTT
RICHTER, a Colorado resident; DELTA
SEVEN COMMUNICATIONS, LLC, a
Texas limited liability company; DENNY
COLE, a Texas resident; and JOHN DOES
1-50,

Defendants.

No. **C04-0116C**

NOTICE OF REMOVAL OF CIVIL
ACTION PURSUANT TO 28 U.S.C.
§ 1441 (Federal Question and Diversity)



04-CV-00116-NFC

TO: CLERK OF THE COURT
AND TO: Plaintiff
AND TO: David Bateman, Attorneys for Plaintiff

PLEASE TAKE NOTICE that pursuant to 28 U.S.C. §§ 1441 and 1446, defendants
OptinRealBig.com, LLC ("OptIn"), and Scott Richter hereby remove the King County
Superior Court Action described below to the United States District Court for the Western
District of Washington at Seattle. In support thereof, defendants OptIn and Scott Richter
state as follows:

ORIGINAL

1 1. Plaintiff Microsoft Corporation ("plaintiff") filed a civil action in King County
2 Superior Court entitled *Microsoft Corporation v. Synergy6, Inc., et al.*, King County Superior
3 Cause Number 03-2-12559-8 SEA on December 17, 2003.

4 2. The action referred to above is a civil action for unlawful conduct, trespass to
5 chattels, conversion, violation of the Washington Commercial Electronic Mail Act, violation
6 of the Washington Consumer Protection Act, Violation of the federal Computer Fraud and
7 Abuse Act (18 U.S.C. § 1030(a)(5),(g) and (4),(g)), Violation of New York Gen. Bus. Law
8 §§ 349 and 350, violation of the Lanham Act (15 U.S.C. § 1125(a)) seeking actual,
9 liquidated, and statutory damages, attorneys' fees and costs, and injunctive relief.

10 3. This action is a civil action of which the United States District Court is given
11 original jurisdiction under 28 U.S.C. § 1331, and is one which may be removed to the United
12 States District Court by the defendants pursuant to the provisions of 28 U.S.C. § 1441(b) in
13 that it arises under 18 U.S.C. § 1030(a)(5),(g) and (4),(g) and 15 U.S.C. § 1125(a).

14 4. The action is one in which the United States District Court is given original
15 jurisdiction by reason of diversity of citizenship and the requisite amount in controversy
16 pursuant to Title 28 U.S.C. § 1332 and 28 U.S.C. § 1367 (Supplemental Jurisdiction).

17 5. The suit is between plaintiff, Microsoft Corporation, which at the time of filing
18 was and still is a citizen of Washington as a Washington corporation with its principal place
19 of business in King County, Washington, and defendant Synergy6, Inc., which at the time of
20 filing was and still is, a Delaware citizen as a Delaware corporation with its principal place
21 of business in New York, defendant Justin Champion, which at the time of filing was and
22 still is, a New York citizen and resident, defendant OptinRealBig.com, L.L.C, which at the
23 time of filing was and still is, a Nevada and Colorado citizen as a Nevada limited liability
24 company with its principal place of business in Colorado, defendant Scott Richter, which at
25 the time of filing was and still is, a Colorado citizen and resident, defendant Delta Seven
26 Communications, LLC, which at the time of filing was and still is, a Texas citizen as a Texas

1 | limited liability company with its principal place of business in Texas, and Denny Cole
2 | which at the time of filing was and still is, a Texas citizen and resident. (Complaint ¶¶ 4-10)

3 | 6. Defendants OptIn and Scott Richter have a good faith belief that the matter in
4 | controversy exceeds \$75,000 exclusive of interest and cost. Plaintiff, who in its complaint
5 | did not specify a dollar amount of damages sought, has alleged that it is entitled to the
6 | following damages: (a) actual damages for trespass to chattels; (b) actual damages for
7 | conversion; (c) actual damages or statutory damage of \$1,000 per violation, whichever is
8 | greater; (d) treble damages and increased damage awards pursuant to the Washington
9 | Consumer Protection Act; (e) damages under the federal Computer Fraud and Abuse Act,
10 | which exceeds \$5,000; and (f) actual damages or statutory damages of \$50 per violation,
11 | which ever is greater, treble damages and attorneys' fees and costs under the NY Gen. Bus.
12 | Law. While denying liability for said claims, defendants OptIn and Scott Richter believe in
13 | good faith that the plaintiff's claims exceed \$75,000 exclusive of interest and costs.

14 | 7. Removal to federal court is appropriate in any civil action brought in state
15 | court over which the federal district court has original jurisdiction. 28 U.S.C. § 1441.

16 | 8. As of the date of the filing of this Notice of Removal of Civil Action, 30 days
17 | have not elapsed from the time this matter first became removable. Defendants OptIn and
18 | Scott Richter received service of Summons and Complaint on December 17, 2003.

19 | 9. The process, pleadings, and orders served upon defendant OptIn and Scott
20 | Richter in this action consist of the Summons, Complaint, Declaration of Service of Order
21 | Setting Civil Case Schedule and Order Setting Civil Case Schedule. True copies of these
22 | pleadings are attached hereto and by this reference incorporated herein.

23 | 10. Pursuant to 28 U.S.C. § 1446(d), copies of this Notice of Removal of Civil
24 | Action are being served upon plaintiff's attorney and filed with the Clerk of the Superior
25 | Court of the State of Washington for King County.

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11. By filing this Notice of Removal, defendants OptIn and Scott Richter do not waive, and expressly reserve all rights, defenses, or objections of any nature that it may have to plaintiff's claims, including but not limited to, lack of jurisdiction over the person, improper venue, insufficiency of service of process, *forum non conveniens*, and change of venue.

12. Defendants Synergy6, Inc. and Justin Champion consent to removal. Defendants OptIn and Scott Richter have attempted to contact the defendants Delta Seven Communications, LLC, and Denny Cole, who have not filed a notice of appearance or removal. *See Lewis v. Rego Co.*, 757 F.2d 66 (3d Cir. 1985). In response to messages, Delta Seven Communication and Denny Cole have not objected to the removal of this matter. Further, on information and belief, Delta Seven Communication and Denny Cole have indicated that they do not intend to appear at all in this action or will allow a default to be taken. Thus, they are nominal (in that, on information and belief, they will not be participating in the action), the other defendants are unknown, or, on information and belief, have not been served.

DATED this 15th day of January, 2004.

BULLIVANT HOUSER BAILEY PC

By 
Troy Greenfield, WSBA #21578
Pamela Salgado, WSBA #22741

Attorneys for Defendants
OptinRealBig.com, LLC, and Scott Richter

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KING COUNTY
SUPERIOR COURT CLERK
SEATTLE, WA.

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

MICROSOFT CORPORATION, a
Washington corporation,

Plaintiff,

v.

SYNERGY6, INC., a Delaware corporation,
JUSTIN CHAMPION, a New York resident,
OPTINREALBIG.COM, LLC, a Nevada
limited liability company,
SCOTT RICHTER, a Colorado resident,
DELTA SEVEN COMMUNICATIONS,
LLC, a Texas limited liability company,
DENNY COLE, a Texas resident, and
JOHN DOES 1-50,

Defendants.

03-2-12 559-8SEA
No.

SUMMONS

PARIS K. KALLAS

TO: OPTINREALBIG.COM, LLC
Trudy Debell, Registered Agent
1333 W.120th Avenue, Suite 101
Westminster, CO 80234

TO THE DEFENDANT(S): A lawsuit has been started against you in the above-entitled court by Microsoft Corporation, plaintiff. Plaintiff's claim is stated in the written complaint, a copy of which is served upon you with this summons.

SUMMONS - 1
K309103024MDCABICAR_P229V

ORIGINAL

PRESTON GATES & ELLIS LLP
925 FOURTH AVENUE
SUITE 2500
SEATTLE, WASHINGTON 98104-1151
TELEPHONE: (206) 421-7500
FACSIMILE: (206) 421-7022

1 In order to defend against this lawsuit, you must respond to the complaint by stating
2 your defense in writing, and serve a copy upon the person signing this summons within 20
3 days after the service of this summons (or within 60 days after service if served outside the
4 state of Washington), excluding the day of service, or a default judgment may be entered
5 against you without notice. A default judgment is one where plaintiff is entitled to what he
6 asks for because you have not responded. If you serve a notice of appearance on the
7 undersigned person, you are entitled to notice before a default judgment may be entered.


8 You may demand that the plaintiff file this lawsuit with the court. If you do so, the
9 demand must be in writing and must be served upon the person signing this summons.
10 Within 14 days after you serve demand, the plaintiff must file this lawsuit with the court, or
11 the service on you of this summons and complaint will be void.

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

14 This summons is issued pursuant to Rule 4 of the Superior Court Civil Rules of the
15 State of Washington.

16
17 DATED this 15th day of December, 2003.

18 PRESTON GATES & ELLIS LLP

19
20 By 
21 David A. Bateman, WSBA # 14262
22 Robert J. Dzielak, WSBA #26178
Theodore J. Angelis, WSBA #30300

23 Attorneys for Plaintiff
24 Microsoft Corporation
25
26

1 FILED
2 03 DEC 17 PM 4:13
3 KING COUNTY
4 SUPERIOR COURT CLERK
5 SEATTLE, WA.

7 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
8 IN AND FOR THE COUNTY OF KING

9 **03-2-12 559-8SEA**

10 MICROSOFT CORPORATION, a
11 Washington corporation,

No.

12 Plaintiff,

COMPLAINT FOR DAMAGES AND
INJUNCTIVE RELIEF

13 v.

14 SYNERGY6, INC., a Delaware corporation,
15 JUSTIN CHAMPION, a New York resident,
16 OPTINREALBIG.COM, LLC, a Nevada
17 limited liability company,
18 SCOTT RICHTER, a Colorado resident,
19 DELTA SEVEN COMMUNICATIONS,
20 LLC, a Texas limited liability company,
21 DENNY COLE, a Texas resident, and
22 JOHN DOES 1-50,

23 Defendants.

24 Plaintiff Microsoft Corporation ("Microsoft") brings this action against

25 SYNERGY6, INC., JUSTIN CHAMPION, OPTINREALBIG.COM, LLC, SCOTT
26 RICHTER, DELTA SEVEN COMMUNICATIONS, LLC, DENNY COLE, and JOHN
DOES 1-50.

COMPLAINT FOR DAMAGES AND
INJUNCTIVE RELIEF - 1

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ORIGINAL

PRESTON GATES & HILLIS LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1138
TELEPHONE: (206) 623-7380
FACSIMILE: (206) 623-7022

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I. JURISDICTION AND VENUE

1. This is an action for trespass to chattels, conversion, and for violations of the Washington Commercial Electronic Mail Act (RCW Ch. 19.190), the Washington Consumer Protection Act, the Computer Fraud and Abuse Act (18 U.S.C. § 1030(a)), the New York Deceptive Practices and False Advertising Acts (NY Gen. Bus. Law §§ 349 and 350), and the Lanham Act (15 U.S.C. § 1125). Microsoft seeks damages and injunctive relief to remedy defendants' unauthorized use of Microsoft's computers and computer systems to send significant volumes of misleading and deceptive unsolicited commercial e-mail messages, or "spam," in violation of Microsoft's policies and state and federal law.

2. This Court has personal jurisdiction over the defendants, who have engaged in business activities in and directed to Washington, have committed a tortious act within the state, and have used personal property in the state.

3. Venue is proper in this Court pursuant to RCW § 4.12.020 to .025 in that a substantial part of the events or omissions giving rise to the claims pled herein occurred in King County, the causes of action arose in King County, and work was performed in King County.

II. THE PARTIES

4. Plaintiff Microsoft is a Washington corporation with its principal place of business in Redmond, Washington.

5. Defendant SYNERGY6, INC. is a Delaware corporation with its principal place of business in New York City, New York. Microsoft is informed and believes, and on that basis alleges, that Synergy6 operates a number of e-mail marketing services. One such service is the "OfferStream Network," which is described at Synergy6's website <http://www.synergy6.com>. Synergy6 markets the OfferStream service to "advertisers looking for the impact of a high-volume [e-mail] campaign without the associated risks." Microsoft is

1 informed and believes, and on that basis alleges, that Synergy6 employs "publishers" to send
2 e-mail on its behalf.

3 6. Defendant JUSTIN CHAMPION is a New York resident. Champion is
4 president of defendant Synergy6, Inc.

5 7. Defendant OPTINREALBIG.COM, LLC, is a Nevada limited liability
6 company with its principal place of business in Westminster, Colorado. Microsoft is
7 informed and believes, and on that basis alleges, that OptInRealBig.com, LLC, served as an e-
8 mail "publisher" for Synergy6's OfferStream marketing service.

9 8. Defendant SCOTT RICHTER is a Colorado resident. Richter is president of
10 defendant OptInRealBig.com, LLC. Microsoft is informed and believes, and on that basis
11 alleges, that Richter served as an e-mail "publisher" for Synergy6's OfferStream marketing
12 service.

13 9. Defendant DELTA SEVEN COMMUNICATIONS, LLC is a Texas limited
14 liability company.

15 10. Defendant DENNY COLE is a Texas resident. Cole is a member of defendant
16 Delta Seven Communications, LLC.

17 11. Microsoft is unaware of the true names and capacities of defendants sued
18 herein as DOES 1-50, inclusive, and therefore sues these defendants by such fictitious names.
19 Microsoft will amend this complaint to allege their true names and capacities when
20 ascertained. Microsoft is informed and believes and therefore alleges that each of the
21 fictitiously named defendants is responsible in some manner for the occurrences herein
22 alleged, and that Microsoft's injuries as herein alleged were proximately caused by such
23 defendants. These fictitiously named defendants, along with the above-named defendants, are
24 herein referred to collectively as "defendants."

25 12. The actions alleged herein to have been undertaken by the defendants were
26 undertaken by each defendant individually, were actions that each defendant caused to occur,

COMPLAINT FOR DAMAGES AND
INJUNCTIVE RELIEF - 3

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PRESTON GATES & ELLIS LLP
225 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

1 were actions that each defendant authorized, controlled, directed, or had the ability to
2 authorize, control or direct, and/or were actions each defendant assisted, participated in,
3 otherwise encouraged, or knew or consciously avoided knowing about, and are actions for
4 which each defendant is liable. Each defendant aided and abetted the actions of the
5 defendants set forth below, in that each defendant had knowledge of those actions, provided
6 assistance and benefited from those actions, in whole or in part. Each of the defendants was
7 the agent of each of the remaining defendants, and in doing the things hereinafter alleged, was
8 acting within the course and scope of such agency and with the permission and consent of
9 other defendants.

10 III. NATURE OF PLAINTIFF'S INTERNET E-MAIL SERVICES

11 13. Microsoft owns and operates interactive computer services that enable its
12 customers to, among other things, access the Internet and exchange e-mail on the Internet.
13 Microsoft owns and maintains computers and other equipment, including specialized
14 computers or "servers" that process e-mail messages and otherwise support its e-mail
15 services. Microsoft maintains this equipment in Washington and California, among other
16 states. E-mail sent to and from Microsoft's customers is processed through and stored on
17 these computers. Microsoft is an internet service provider ("ISP") and is an "interactive
18 computer service" as defined by RCW § 19.190.010. Microsoft's computers and computer
19 systems are "protected computers" under the federal Computer Fraud and Abuse Act, 18
20 U.S.C. § 1030(e)(2).

21 14. One of Microsoft's services is "MSN Hotmail" which provides free and
22 subscription-based e-mail on the Internet through a web-based e-mail service that can be
23 accessed at www.hotmail.com. MSN Hotmail allows account-holders to exchange e-mail
24 messages with any other e-mail user who has an Internet e-mail address throughout the world.
25 MSN Hotmail has millions of registered accounts, whose users all have unique e-mail
26 addresses ending in "@hotmail.com."

COMPLAINT FOR DAMAGES AND
INJUNCTIVE RELIEF - 4

FILED 01/15/2004

PRESTON GATES & ELLIS LLP
323 FOURTH AVENUE
SUITE 2700
SEATTLE, WASHINGTON 98104-1154
TELEPHONE: (206) 423-7380
FACSIMILE: (206) 423-7072

1 15. Another of Microsoft's services is "MSN Internet Access" (referred to herein
2 as "MSN") which provides free and subscription-based e-mail services that can be accessed
3 on the web or via Microsoft's proprietary network. MSN allows account-holders to exchange
4 e-mail messages with any other e-mail user who has an Internet e-mail address throughout the
5 world. MSN has millions of registered accounts, whose users all have unique e-mail
6 addresses ending in "@msn.com."

7 **IV. THE NATURE OF UNSOLICITED E-MAIL OR "SPAM"**

8 16. Unsolicited commercial e-mail is often referred to as "spam." The
9 transmission of spam, a practice referred to as "spamming," by persons known as
10 "spammers," is widely condemned in the Internet community, and is of significant concern
11 and economic detriment to Microsoft and its customers.

12 17. By using the Internet to send commercial e-mail messages, spammers not only
13 obtain significant cost savings, but also impose significant economic burdens on ISPs such as
14 Microsoft. Although it costs very little for a spammer to transmit innumerable e-mail
15 messages, handling the enormous volume of e-mail initiated by spammers places a
16 tremendous burden on Microsoft.

17 18. Microsoft's computers and computer systems are designed and created solely
18 for the benefit and the non-commercial personal use of its customers. The computers and
19 computer systems have finite capacity and are not designed to accommodate innumerable
20 mass mailings from spammers. Microsoft has been required to expend substantial amounts
21 for new equipment to handle the mass mailings by spammers.

22 19. Spamming also can and does result in the degradation and disruption of
23 Microsoft's computers and computer systems. Spam demands storage space and processing
24 capacity of Microsoft's computers and computer systems, making those resources unavailable
25 to serve the legitimate needs of Microsoft's customers. The diversion of these resources from
26

1 processing authorized e-mail impairs the normal operation of the computers and computer
2 systems. Therefore, the value of that equipment is diminished by spamming.

3 20. Spamming also has significant impact on the recipients of spam. Individuals
4 who receive spam must take the time and effort to sort through larger volumes of received e-
5 mail, must attempt to distinguish spam from legitimate e-mail, and ultimately discard this
6 unsolicited material. In an effort to mislead e-mail recipients, to make it more difficult for
7 them to identify the sender of the e-mail and to discard these unsolicited advertisements,
8 spammers frequently use deceptive methods. Those deceptive methods include false or
9 misleading information in the e-mail headers and subject lines, as well as various practices
10 designed to misrepresent or obscure the point of origin or transmission path of the e-mail.
11 When a spammer uses deceptive information to disguise spam as legitimate personal or
12 business e-mail, it causes additional inconvenience and frustration to spam recipients.

13 21. Spam frequently involves products or services of questionable value, or
14 materials of an adult or pornographic nature. Unsolicited advertisements for such products or
15 services, often disguised, are a particularly obtrusive form of spam and are often the subject of
16 customer complaints.

17 22. Spammers know that their bulk e-mailing practices inevitably lead to a
18 significant portion of their e-mail being undeliverable. When an e-mail message is
19 undeliverable, additional e-mail messages ("bounce-back messages") are generated to advise
20 the sender and the ISP of this fact. Rather than have their own computer equipment burdened
21 with voluminous bounce-back messages, spammers craft their messages to direct the bounce-
22 back messages to others. Thus, a spammer who sends spam by using a MSN or MSN
23 Hotmail return address can be assured that the inevitable, innumerable bounce-back messages
24 will be returned to that address, not to the spammer's own computer system. This adds to
25 Microsoft's burdens, as its computers must process and store the bounce-back messages from
26 these spam mailings.

COMPLAINT FOR DAMAGES AND
INJUNCTIVE RELIEF - 6

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PRESTON GATES & ELLIS LLP
825 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 422-7500
FACSIMILE: (206) 422-7022

1 23. In an attempt to protect itself and its customers from spam, Microsoft has
2 expended significant resources to developing technologies and practices to prevent its
3 subscribers from sending or receiving spam. Spammers, however, continue to adopt practices
4 and technological devices to evade Microsoft's technologies and to frustrate Microsoft's
5 efforts.

6 24. Courts, state legislatures, and Congress have all recognized that spamming is a
7 matter that vitally affects the public interest, and they have made clear that sending illegal
8 spam constitutes an unfair or deceptive business practice.

9 25. Microsoft has invested substantial time and money in efforts to disassociate
10 itself from spam and the spammers who promote and profit from spam, as well as in seeking
11 to protect its registered users worldwide from receiving spam.

12 26. Microsoft has a clearly articulated policy prohibiting the use of its services for
13 junk email, spamming, or any unsolicited messages (commercial or otherwise). Microsoft's
14 policies also prohibit automated queries of any sort, harvesting or collection of e-mail
15 addresses, and any use of the services that is not personal and non-commercial. These
16 policies are included in the Terms of Use for MSN and MSN Hotmail, which can be accessed
17 via a clearly marked link on www.msn.com, as well as on the home pages for each of
18 Microsoft's MSN services.

19 **V. DEFENDANTS' UNLAWFUL CONDUCT**

20 27. Microsoft is informed and believes, and on that basis alleges, that defendants
21 have been—and are currently involved in—widespread spamming by sending misleading,
22 deceptive and unsolicited commercial email to MSN Hotmail account holders.

23 28. Microsoft is informed and believes, and on the basis alleges, that its MSN
24 Hotmail service has received billions of unsolicited e-mail messages from defendants, which
25 advertise defendants' websites and the products advertised on those websites. Those e-mail
26

COMPLAINT FOR DAMAGES AND
INJUNCTIVE RELIEF - 7

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PRESTON GATES & ELLIS LLP
929 POKER AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TEL: (206) 423-7330
FACSIMILE: (206) 423-7022

1 messages offered "free" items in exchange for personal information and consent to receive
2 future marketing offers.

3 29. Microsoft is informed and believes, and on the basis alleges, that many of
4 those e-mail messages contain false or misleading information in the "From" lines, including
5 falsified e-mail addresses and sender names. By placing false names or e-mail addresses in
6 place of the name of the true sender, defendants obscure the point of origin and transmission
7 path of the e-mail.

8 30. Many of defendants' e-mails messages purport to originate from computers
9 associated with Microsoft's hotmail.com domain, but they did not so originate. Defendants
10 did not have permission to use Microsoft's domain name in this manner. Similarly, many of
11 defendants' e-mail messages purport to originate from computers associated with other
12 parties' domain names, such as Hotmail.com, AOL.com, Earthlink.net, and Yahoo.com, but
13 Microsoft is informed and believes, and on that basis alleges, that the e-mail did not originate
14 from those parties' computers and defendants did not have permission to use those parties'
15 domain names in that manner.

16 31. Many of defendants' e-mail messages contain false and misleading subject
17 lines, which falsely state that they are responses to a prior message or forwarded information,
18 or which falsely suggest an ongoing business or personal relationship with the recipient.
19 Examples include "[Recipient], why?," "Hey! [Recipient]," "Re: your requested samples,"
20 and "re: hotmail.com."

21 32. Microsoft is informed and believes, and on that basis alleges, that many of
22 defendants' messages use deceptive practices to falsify or obscure the information in the e-
23 mail's transmission path. For example, defendants placed the domain names of well-known
24 Internet Service Providers, such as Hotmail.com, AOL.com, Earthlink.net, and Yahoo.com, in
25 the transmission path even though the e-mail was not sent through those providers' servers.
26

COMPLAINT FOR DAMAGES AND
INJUNCTIVE RELIEF - 8

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PRESTON GATES & ELLIS LLP
925 POLKITE AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 625-7980
FACSIMILE: (206) 625-7922

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**COUNT II
(Conversion)**

40. Microsoft realleges and incorporates by this reference each and every allegation set forth in paragraphs 1 through 39 above.

41. Defendants have willfully interfered with and converted Microsoft's personal property, without lawful justification, as a result of which Microsoft has been deprived of possession and use of its property.

42. As a result of defendants' actions, Microsoft has been damaged in an amount to be proven at trial.

**COUNT III
(Violation of the Washington Commercial Electronic Mail Act (RCW Ch. 19.190) and the Washington Consumer Protection Act (RCW Ch. 19.86))**

43. Microsoft realleges and incorporates by this reference each and every allegation set forth in paragraphs 1 through 42 above.

44. Defendants initiated the transmission, conspired to initiate the transmission, or assisted in the transmission of commercial e-mail messages from a computer located in Washington and/or to an e-mail address that they knew, or had reason to know, is held by a Washington resident. Those commercial e-mail messages:

a) used Microsoft's or another third party's internet domain names without permission;

b) misrepresented or obscured information identifying the point of origin or the transmission path of a commercial electronic e-mail message; or

c) contained false or misleading information in the subject line.

45. As a result of defendants' actions, Microsoft has been damaged in an amount to be proven at trial.

46. Defendants' actions violated RCW § 19.190.020, and entitle Microsoft to actual damages or statutory damages of \$1,000 per violation, whichever is greater.

COMPLAINT FOR DAMAGES AND
INFUNCTIVE RELIEF - 10

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PRESTON GATES & ELLIS LLP
923 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 622-7590
FACSIMILE: (206) 622-7023

1 47. Defendants' actions affected the public interest, are unfair or deceptive acts in
2 trade or commerce and unfair methods of competition, and violated the Washington
3 Consumer Protection Act, RCW Ch. 19.86. Microsoft is entitled to treble damages and an
4 award of its attorneys' fees and costs under that Act.

5 **COUNT IV**
6 **(Violation of the federal Computer Fraud and Abuse Act – 18 U.S.C. § 1030(a)(4), (g))**

7 48. Microsoft realleges and incorporates by this reference each and every
8 allegation set forth in paragraphs 1 through 47 above.

9 49. By the actions alleged above, defendants knowingly and with intent to defraud,
10 accessed Microsoft's protected computer system, without authorization and/or in excess of
11 authorized access.

12 50. By the actions alleged above, defendants furthered the intended fraud and
13 obtained unauthorized use of Microsoft's protected computer system, and the value of that use
14 exceeds more than \$5,000 in any 1-year period.

15 51. Defendants' activity constitutes a violation of the federal Computer Fraud and
16 Abuse Act, 18 U.S.C. § 1030(a)(4), and Microsoft is entitled to damages under that Act.
17 Microsoft is also entitled under the Act to injunctive and equitable relief against defendant.

18 **COUNT V**
19 **(Violation of the federal Computer Fraud and Abuse Act – 18 U.S.C. § 1030(a)(5), (g))**

20 52. Microsoft realleges and incorporates by this reference each and every
21 allegation set forth in paragraphs 1 through 51 above.

22 53. By the actions alleged above, defendants intentionally and knowingly accessed
23 Microsoft's protected computer system, and knowingly caused the transmission of a program,
24 information, code, or command, without authorization and/or in excess of authorized access.

25 54. By the actions alleged above, defendants intentionally caused damage, without
26 authorization, to Microsoft's protected computer system, and the aggregate loss resulting
therefrom exceeds at least \$5,000 in value.

COMPLAINT FOR DAMAGES AND
INJUNCTIVE RELIEF - 11

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FRESTON GATES & ELLIS LLP
820 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1138
TELEPHONE: (206) 424-7383
FACSIMILE: (206) 423-7622

1 55. Defendants' activity constitute a violation of the federal Computer Fraud and
2 Abuse Act, 18 U.S.C. § 1030(a)(5), and Microsoft is entitled to damages under that Act.
3 Microsoft is also entitled under the Act to injunctive and equitable relief against defendant.

4 **COUNT VI**
5 **(Violation of New York Gen. Bus. Law § 349)**

6 56. Microsoft realleges and incorporates by this reference each and every
7 allegation set forth in paragraphs 1 through 55 above.

8 57. By the actions alleged above, defendants willfully or knowingly engaged in
9 deceptive acts or practices in the conduct of a business, trade or commerce or in the furnishing
10 of a service.

11 58. Defendants' actions were directed at members of Microsoft's MSN and MSN
12 Hotmail services.

13 59. Defendants' actions were misleading in a material way, affected the public
14 interest, and constitute unfair methods of competition.

15 60. As a result of defendants' actions, Microsoft has been damaged in an amount
16 to be proven at trial.

17 61. Defendants' violations of NY Gen. Bus. Law § 349 entitle Microsoft to actual
18 damages or statutory damages of \$50 per violation, whichever is greater. Microsoft is also
19 entitled to treble damages and an award of its attorneys' fees and costs.

20 **COUNT VII**
21 **(Violation of New York Gen. Bus. Law § 350)**

22 62. Microsoft realleges and incorporates by this reference each and every
23 allegation set forth in paragraphs 1 through 61 above.

24 63. By the actions alleged above, defendants willfully or knowingly engaged in
25 false advertising in the conduct of a business, trade or in commerce or in the furnishing of a
26 service.

1 64. Defendants' violations of NY Gen. Bus. Law § 350 entitle Microsoft to actual
2 damages or statutory damages of \$50 per violation, whichever is greater. Microsoft is also
3 entitled to treble damages and an award of its attorneys' fees and costs.

4 **COUNT VIII**
5 **(False Designation of Origin, in Violation of the Lanham Act – 15 U.S.C. § 1125(a))**

6 65. Microsoft realleges and incorporates by this reference each and every
7 allegation set forth in paragraphs 1 through 64 above.

8 66. Defendants used the designations "hotmail.com" and "msn.com," which
9 incorporate Microsoft's registered trademarks and service marks, and which, when used in
10 spoofed e-mail headers, are words, terms, names, or combinations thereof, or false
11 designations of origin, or false or misleading descriptions or representations of fact, which are
12 likely to cause confusion, mistake, or deception as to defendants' affiliations, connection, or
13 association with Microsoft, or as to the origin, sponsorship, or approval of his goods or
14 services, or commercial activities.

15 67. Defendants' activities involved interstate commerce in connection with goods
16 and services.

17 68. Microsoft has been damaged by these acts in an amount to be proved at trial.
18 Microsoft is also entitled under the Act to injunctive and equitable relief against defendants.

19 **PRAYER FOR RELIEF**

20 WHEREFORE, Microsoft respectfully requests that the Court enter judgment against
21 defendants, jointly and severally, as follows:

- 22 1. That the Court issue temporary and permanent injunctive relief against
23 defendants, and that defendants, their officers, agents, representatives, servants, employees,
24 attorneys, successors and assignees, and all others in active concert or participation with
25 defendants, be enjoined and restrained from:
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- a) establishing any accounts with Microsoft's MSN or MSN Hotmail services;
- b) using Microsoft's computers and computer systems in connection with sending commercial e-mail messages;
- c) making unauthorized use of Microsoft's computers and computer systems or intellectual property;
- d) continuing to violate Microsoft's Terms of Service; and
- e) assisting, aiding, or abetting any other person or business entity in engaging in or performing any of the activities referred to in subparagraphs a) through d) above.

- 2. That the Court award Microsoft actual damages, liquidated damages, and statutory damages, in amount to be proven at trial;
- 3. That the Court award Microsoft its attorneys' fees and costs incurred herein; and
- 4. That the Court grant Microsoft such other or additional relief as is just and proper.

DATED this 15th day of December, 2003.

PRESTON GATES & ELLIS LLP

By 
 David A. Bateman, WSBA # 14262
 Robert J. Dzielak, WSBA #26178
 Theodore J. Angelis, WSBA #30300

Attorneys for Plaintiff
Microsoft Corporation

FILED

Honorable Paris K. Kallas

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

MICROSOFT CORPORATION,

Plaintiff,

v.

SYNERGY6, INC., et al.,

Defendants.

No. 03-2-12559-8 SEA

DECLARATION OF SERVICE OF
ORDER SETTING CIVIL CASE
SCHEDULE

Rhonda Hinman, under penalty of perjury of the laws of the State of Washington,
declares as follows:

I am and at all times hereinafter mentioned was a citizen of the United States, a
resident of the State of Washington, over the age of 21 years, and competent to be a
witness in the above action, and not a party thereto. On December 23, 2003, I served, via
U.S. Postal Service, properly addressed and prepaid, a true copy of the Order Setting Civil
Case Schedule, to the following:

Linda Goodman
Goodman & Richter, LLP
501 West Broadway, Suite 1335
San Diego, CA 92101
Attorneys for OptInRealBig.com, LLC
and Scott Richter

D. Reed Freeman, Jr.
Collier Shannon Scott, PLLC
Washington Harbor, Suite 400
3050 K Street, NW
Washington, DC 20007
Attorneys for Synergy6, Inc.
and Justin Champion

DECLARATION OF SERVICE OF ORDER
SETTING CIVIL CASE SCHEDULE - 1

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ORIGINAL

PRESTON GATES & ELLIS LLP
425 FOURTH AVENUE
SUITE 1500
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 422-7580
FACSIMILE: (206) 422-7022

12/29/2003 10:15 FAX 2066237022

Preston Gates & Ellis

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**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING**

MICROSOFT CORP.,
Plaintiff(s),
vs.
SYNERGYX, INC., et al.,
Defendant(s).

NO. **03-2-12559-8SEA**
ORDER SETTING CIVIL CASE SCHEDULE
ASSIGNED JUDGE: **PARIS K. KALLAS**
TRIAL DATE: Mon 6/16/03
(ORSCS)

On Wed 12/17/03, a civil case has been filed in the King County Superior Court and will be managed by the Case Schedule on Page 3 as ordered by the King County Superior Court Presiding Judge.

I. NOTICES

NOTICE TO PLAINTIFF:

The Plaintiff may serve a copy of this Order Setting Case Schedule (Schedule) on the Defendant(s) along with the *Summons and Complaint/Petition*. Otherwise, the Plaintiff shall serve the Schedule on the Defendant(s) within 10 days after the later of: (1) the filing of the *Summons and Complaint/Petition* or (2) service of the Defendant's first response to the *Complaint/Petition*, whether that response is a *Notice of Appearance*, a response, or a Civil Rule 12 (CR 12) motion. The Schedule may be served by regular mail, with proof of mailing to be filed promptly in the form required by Civil Rule 5 (CR 5).

"I understand that I am required to give a copy of these documents to all parties in this case."

Theodore J. Kallias
Print Name


Sign Name

ORDER SETTING CIVIL CASE SCHEDULE

Revised June 2003

E. NOTICES (continued)

NOTICE TO ALL PARTIES:

All attorneys and parties should make themselves familiar with the King County Local Rules (KCLR) -- especially those referred to in this Schedule. In order to comply with the Schedule, it will be necessary for attorneys and parties to pursue their cases vigorously from the day the case is filed. For example, discovery must be undertaken promptly in order to comply with the deadlines for joining additional parties, claims, and defenses, for disclosing possible witnesses (See KCLR 25), and for meeting the discovery cutoff date (See KCLR 37(g)).

SHOW CAUSE HEARINGS FOR CIVIL CASES (King County Local Rule 4(g))

A Show Cause Hearing will be held before the assigned judge if the case is not at issue. The Order to Show Cause will be mailed to all parties. The parties or counsel are required to attend. A Confirmation of Joinder, Claims and Defenses must be filed by the deadline in the schedule.

PENDING DUE DATES CANCELED BY FILING PAPERS THAT RESOLVE THE CASE:

When a final decree, judgment, or order of dismissal of all parties and claims is filed with the Superior Court Clerk's Office, and a courtesy copy delivered to the assigned judge, all pending due dates in this Schedule are automatically canceled, including the scheduled Trial Date. It is the responsibility of the parties to 1) file such dispositive documents within 45 days of the resolution of the case, and 2) strike any pending motions by notifying the bailiff to the assigned judge.

Parties may also authorize the Superior Court to strike all pending due dates and the Trial Date by filing a Notice of Settlement pursuant to KCLR 41, and forwarding a courtesy copy to the assigned judge. If a final decree, judgment or order of dismissal of all parties and claims is not filed by 45 days after a Notice of Settlement, the case may be dismissed with notice.

If you miss your scheduled Trial Date, the Superior Court Clerk is authorized by KCLR 41(b)(2)(A) to present an Order of Dismissal, without notice, for failure to appear at the scheduled Trial Date.

NOTICES OF APPEARANCE OR WITHDRAWAL AND ADDRESS CHANGES:

All parties to this action must keep the court informed of their addresses. When a Notice of Appearance/Withdrawal or Notice of Change of Address is filed with the Superior Court Clerk's Office, parties must provide the assigned judge with a courtesy copy.

ARBITRATION FILING AND TRIAL DE NOVO POST ARBITRATION FEES:

A Statement of Arbitrability must be filed by the deadline on the schedule if the case is subject to mandatory arbitration and is at issue. If mandatory arbitration is required after the deadline, parties must obtain an order from the assigned judge transferring the case to arbitration. Any party filing a statement must pay a \$226 arbitration fee (effective 10/1/2002). If a party seeks a trial de novo when an arbitration award is appealed, a fee of \$250 and the request for trial de novo must be filed with the Clerk's Office Cashiers.

NOTICE OF NON-COMPLIANCE FEES: All parties will be assessed a fee authorized by King County Code 4.71.050 whenever the Superior Court Clerk must send notice of non-compliance of schedule requirements under Local Rule 41.

II. CASE SCHEDULE

CASE EVENT	DEADLINE or EVENT DATE
Case Filed and Schedule Issued	Wed 12/17/03
✓ Confirmation of Service [See KCLR 4.1]	Wed 1/14/04
✓ Last Day for Filing Statement of Arbitrability without a Showing of Good Cause for Late Filing [See KCLMAR 2.1(a) and Notices on Page 2] \$220 arbitration fee must be paid — OR [Consult Local Rules to determine which document applies for your case.]	Wed 6/26/04
✓ Confirmation of Joinder of Parties, Claims and Defenses [See KCLR 4.2(a)(2)] <i>NOTE: If "Joinder" document applies to the case and is not filed, the parties may be required to appear at the Show Cause Hearing.</i>	Wed 5/25/04
DEADLINE for Hearing Motions to Change Case Assignment Area [KCLR 83(a)]	Wed 6/09/04
DEADLINE for Disclosure of Possible Primary Witnesses [See KCLR 26(b)]	Mon 12/13/04
✓ Joint Pretrial Report [See attached order]	
DEADLINE for Disclosure of Possible Reputal Witnesses [See KCLR 28(c)]	Mon 1/24/05
✓ DEADLINE for Jury Demand [See KCLR 34(b)(2)]	Mon 2/07/05
DEADLINE for a Change in Trial Date [See KCLR 40(a)(2)]	Mon 2/07/05
DEADLINE for Discovery Cutoff [See KCLR 37(g)]	Mon 3/28/05
DEADLINE for Engaging in Alternative Dispute Resolution [See attached Order]	Mon 4/18/05
DEADLINE: Exchange Witness & Exhibit Lists & Documentary Exhibits [KCLR 16(a)(3)]	Mon 4/25/05
DEADLINE for Hearing Dispositive Pretrial Motions [See KCLR 56; CR 56]	Mon 5/02/05
✓ Joint Statement of Evidence [See KCLR 16(a)(4)]	Mon 5/09/05
Trial Date [See KCLR 40]	Mon 6/16/05

✓ Indicates a document that must be filed with the Superior Court Clerk's Office by the date shown.

III. ORDER

Pursuant to King County Local Rule 4 [KCLR 4], IT IS ORDERED that the parties shall comply with the schedule listed above. Penalties, including but not limited to sanctions set forth in Local Rule 4(g) and Rule 37 of the Superior Court Civil Rules, may be imposed for non-compliance. It is FURTHER ORDERED that the party filing this action must serve this Order Setting Civil Case Schedule and attachment on all other parties.

DATED: 12/17/2003

Richard D. Eadie
Richard D. Eadie
 PRESIDING JUDGE

IV. ORDER ON CIVIL PROCEEDINGS FOR ASSIGNMENT TO JUDGE

READ THIS ORDER PRIOR TO CONTACTING YOUR ASSIGNED JUDGE

This case is assigned to the Superior Court Judge whose name appears in the caption of this Schedule. The assigned Superior Court Judge will preside over and manage this case and will conduct trials, motions, and conferences in this matter until completion of all issues.

COMPLEX LITIGATION: If you anticipate an unusually complex or lengthy trial, please notify the assigned court as soon as possible.

The following procedures hereafter apply to the processing of this case:

APPLICABLE RULES:

Except as specifically modified below, all the provisions of KCLR 4-26 shall apply to the processing of civil cases before Superior Court Judges.

CASE SCHEDULE AND REQUIREMENTS:

- A. **Trial:** Trial is confirmed for 9:00 a.m. on the date on the Schedule. The Friday before trial, the assigned court will contact the parties to determine the status of the case and inform the parties of any adjustments to the Trial Date.
- B. **Show Cause Hearing:** A Show Cause Hearing will be held before the assigned judge if the case is not at issue. If the case is not at issue or in accordance with the attached case schedule, all parties will receive an Order to Show Cause that will set a specific date and time for the hearing. All parties and/or counsel are required to attend.
- C. **Joint Pretrial Report:** 120 days before the Trial Date, parties shall prepare and file, with a copy to the assigned judge, a joint pretrial report setting forth the nature of the case, whether a jury demand has been filed, the expected duration of the trial, the status of discovery, the need to amend pleadings or add parties, whether a settlement conference has been scheduled, special problems, etc. Plaintiff's/Petitioner's counsel is responsible for proposing and contacting the other parties regarding said report.
- D. **Pretrial Conference:** A pretrial conference will be scheduled by the assigned judge. Approximately thirty (30) days before the conference, you will receive an Order Setting Pretrial Conference that will set the specific date and time for the conference. The conference will be held in the courtroom of the assigned judge, and the following nonexclusive list of matters will be addressed at that time:
 - 1) Status of settlement discussions;
 - 2) Jury trial — selection and number of jurors;
 - 3) Potential evidentiary problems;
 - 4) Potential motions *in limine*;

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- 5) Use of depositions;
- 6) Deadlines for non-dispositive motions;
- 7) Procedures to be followed with respect to exhibits;
- 8) Witnesses - identity, number, testimony;
- 9) Special needs (e.g. interpreters, equipment);
- 10) Trial submissions, such as briefs, Joint Statement of Evidence, jury instructions, voir dire questions, etc.
- 11) Receipt of Public Assistance Payments (Domestic Cases) -- If any party is on public Assistance, notify the Prosecutor's Office of this proceeding now at 296-9020.

E. Settlement/Mediation/ADR:

- 1) 45 days before the Trial Date, counsel for plaintiff shall submit a written settlement demand. Ten (10) days after receiving plaintiff's written demand, counsel for defendant shall respond (with a counteroffer, if appropriate).
- 2) 30 days before the Trial Date, a settlement/mediation/ADR conference shall have been held. FAILURE TO COMPLY WITH THIS SETTLEMENT CONFERENCE REQUIREMENT MAY RESULT IN SANCTIONS.
- 3) 20 days before the Trial Date, counsel for plaintiff shall advise the assigned judge of the progress of the settlement process.

MOTIONS PROCEDURES:

A. Noting of Motions

- 1) Dispositive Motions: All Summary Judgment or other motions that dispose of the case in whole or in part will be heard with oral argument before the assigned judge. The moving party must arrange with the bailiff a date and time for the hearing, consistent with the court rules.
- 2) Non-dispositive Motions: These motions, which include discovery motions, will be ruled on by the assigned judge without oral argument, unless otherwise ordered. All such motions must be noted for a date by which the ruling is requested; this date must likewise conform to the applicable notice requirements. Rather than noting a time of day, the Note for Motion should state "Without Oral Argument."

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- 3) **Motions in Family Law Cases:** Discovery motions to compel, motions in limine, motions relating to trial dates and motions to vacate judgments/dismissals shall be brought before the assigned judge. All other motions should be noted and heard on the Family Law Motions Calendar.
 - 4) **Emergency Motions:** Emergency motions will be allowed only upon entry of an Order Shortening Time. However, emergency discovery disputes may be addressed by telephone call, and without written motion, if the judge approves.
- B. Filing of Papers** All original papers must be filed with the Clerk's Office on the 6th floor. The working copies of all papers in support or opposition must be marked on the upper right corner of the first page with the date of consideration or hearing and the name of the assigned judge. The assigned judge's working copy must be delivered to his/her courtroom or to the judges' mailroom. Do not file working copies with the Motions Coordinator, except those motions to be heard on the Family Law Motions Calendar, in which case the working copies should be filed with the Family Law Motions Coordinator.
- 1) **Original Proposed Order:** Each of the parties must include in the working copy materials submitted on any motion an original proposed order sustaining his/her side of the argument. Should any party desire a copy of the order as signed and filed by the judge, a preaddressed, stamped envelope shall accompany the proposed order.
 - 2) **Presentation of Orders:** All orders, agreed or otherwise, must be presented to the assigned judge. If that judge is absent, contact the assigned court for further instructions. If another judge enters an order on the case, counsel is responsible for providing the assigned judge with a copy. Proposed orders finalizing settlement and/or dismissal by agreement of all parties shall be presented to the assigned judge or in the Ex Parte Department. Formal Proof in Family Law cases must be scheduled before the assigned judge by contacting the bailiff, or Formal Proof may be entered in the Ex Parte Department. If final orders and/or Formal Proof are entered in the Ex Parte Department, counsel is responsible for providing the assigned judge with a copy.
- C. Form:** Memoranda/briefs for matters heard by the assigned judge may not exceed 24 pages for dispositive motions and 12 pages for non-dispositive motions, unless the assigned judge permits over-length memoranda/briefs in advance of filing. Over-length memoranda/briefs and motions supported by such memoranda/briefs may be stricken.

IT IS SO ORDERED. FAILURE TO COMPLY WITH THE PROVISIONS OF THIS ORDER MAY RESULT IN DISMISSAL OR OTHER SANCTIONS. PLAINTIFF/PETITIONER SHALL FORWARD A COPY OF THIS ORDER AS SOON AS PRACTICABLE TO ANY PARTY WHO HAS NOT RECEIVED THIS ORDER.

Richard D. Eadie
Richard D. Eadie

JUDGE

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