

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF INDIANA  
INDIANAPOLIS DIVISION

IN RE:	)	
	)	
ITT EDUCATIONAL SERVICES, INC., <i>et al.</i> <sup>1</sup>	)	Case No. 16-07207-JMC-7A
	)	
<u>Debtors.</u>	)	Jointly Administered
	)	
DEBORAH J. CARUSO, chapter 7 trustee	)	
for the bankruptcy estates of ITT Educational	)	
Services, Inc., ESI Service Corp. and	)	
Daniel Webster College, Inc.,	)	
	)	
Plaintiff,	)	
v.	)	Adversary No. _____
	)	
MICROSOFT CORPORATION, and	)	
MICROSOFT ONLINE, INC.	)	
	)	
Defendant.	)	

**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND  
TURNOVER OF PROPERTY OF THE ESTATE PURSUANT TO 11 U.S.C. § 542(a)**

Deborah J. Caruso, the chapter 7 trustee (the “Trustee”) in the chapter 7 cases of ITT Educational Services, Inc. (“ITT”), ESI Service Corp. (“ESI”), and Daniel Webster College, Inc. (“Webster College,” and together with ITT and ESI, the “Affiliated Debtors”), and as plaintiff in the above-captioned adversary proceeding, by counsel, hereby alleges for her *Complaint for Declaratory and Injunctive Relief and Turnover of Property of the Estate Pursuant to 11 U.S.C. § 542(a)* (the “Complaint”) against Microsoft Corporation (“Microsoft Corp.”) and Microsoft Online, Inc. (“Microsoft Online” and together with Microsoft Corp., the “Defendants”), as follows:

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<sup>1</sup> The debtors in these cases, along with the last four digits of their respective federal tax identification numbers are ITT Educational Services, Inc. [1311]; ESI Service Corp. [2117]; and Daniel Webster College, Inc. [5980].

## SUMMARY OF ACTION

1. The Trustee brings this adversary proceeding to protect the Affiliated Debtors' bankruptcy estates' interest in electronic data (the "Electronic Data") stored, hosted or otherwise maintained by the Defendants pursuant to certain licenses and agreements (the "Agreements") entered into by one or more of the Affiliated Debtors, which became property of the bankruptcy estates upon the filing of the bankruptcy cases on September 16, 2016 (the "Petition Date").

2. By this Complaint, the Trustee seeks four forms of relief. First, the Trustee seeks turnover of the Electronic Data pursuant to 11 U.S.C. § 542. Second, the Trustee seeks declaratory judgment that the Defendants are stayed, pursuant to 11 U.S.C. § 362(a)(3), from destroying, deleting, overwriting, or erasing any of the Electronic Data or taking any other action or inaction that could affect the preservation of the Electronic Data, until such time the Electronic Data is properly turned over to the Trustee. Third, the Trustee seeks immediate declaratory and injunctive relief enjoining the Defendants from destroying, deleting, overwriting, or erasing any of the Electronic Data until such time the Trustee is able to determine the most cost effective method of preserving and storing the Electronic Data for use in furtherance of her duties as Trustee (as set forth in 11 U.S.C. § 704). Fourth, the Trustee seeks declaratory judgment that the Defendants are required to continue to abide by the limitations and requirements imposed by 34 C.F.R. 99.33(a) as they may relate to the Electronic Data.

3. Application of the automatic stay, or in the alternative injunctive relief, is necessary to allow the Trustee to focus her efforts of preserving and storing the assets of the Affiliated Debtors' bankruptcy estates. These are not typical chapter 7 cases. The Affiliated Debtors' bankruptcy cases represent the largest chapter 7 cases of any for-profit educational institution. The Affiliated Debtors' prepetition operations were located in nearly 140 locations in almost 40 states. In addition to the Affiliated Debtors' real estate holdings and other tangible

property, other assets of the bankruptcy estates also include what the Trustee believes to be substantial claims for breaches of fiduciary duties and other certain claims (including, without limitation, avoidance actions and claims for equitable subordination) against former officers and directors of the Affiliated Debtors and their affiliates relating to their actions and omissions to act in such capacities (collectively, the “D&O Claims”).

4. In addition, upon information and belief, the Electronic Data contains, in part, the emails of students, faculty and administrators that pertains to litigation with regulatory agencies, including the Consumer Financial Protection Bureau.

5. Any action at this time that could potentially affect the preservation of the Electronic Data threatens the success of these chapter 7 cases and the Trustee’s ability to pursue the D&O Claims, settle claims with regulatory agencies, and other potential claims that are property of the bankruptcy estates.

### **JURISDICTION AND VENUE**

6. The Court has subject matter jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §§ 151, 157 and 1334.

7. Each count of this adversary proceeding is a core proceeding under 28 U.S.C. § 157(b)(2).<sup>2</sup>

8. Venue is proper in this district pursuant to 28 U.S.C. § 1409 on account of the Affiliated Debtors’ bankruptcy cases under chapter 7 of title 11 of the United States Code (the “Bankruptcy Code”).

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<sup>2</sup> In the event this adversary proceeding is found to be “non-core,” the Trustee consents to the entry of final orders and judgments by the Court pursuant to Rule 7008 of the Federal Rules of Bankruptcy Procedure.

9. This adversary proceeding is commenced pursuant to sections 105(a), 362, 363, 541 and 542 of the Bankruptcy Code, Rule 7001 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), and Local Rule B-7065-2.

10. The Defendants filed their proof of claim (the “Proof of Claim”) against ITT on January 27, 2017 (Claim No. 2046), have thereby submitted to the jurisdiction of the Court.

### **THE PARTIES**

11. The Plaintiff, Deborah J. Caruso, is the chapter 7 trustee appointed in each of the Affiliated Debtors’ chapter 7 bankruptcy cases, with her principal executive office located at 135 N. Pennsylvania Street, Suite 1400, Indianapolis, IN 46204. The Trustee was appointed interim trustee in each of the Affiliated Debtors’ bankruptcy cases on the Petition Date pursuant to section 701(a)(1) of the Bankruptcy Code. The Trustee became the case trustee in each of the Affiliated Debtors’ bankruptcy cases following the conclusion of the first meeting of creditors on November 1, 2016, pursuant to section 702(d) of the Bankruptcy Code.

12. Upon information and belief, the Defendant, Microsoft Corp. is a company incorporated under the laws of the State of Washington, with its principal place of business in Redmond, Washington.

13. Upon information and belief, the Defendant, Microsoft Online is a subsidiary of Microsoft Corp., incorporated under the laws of the State of Nevada, with its principal place of business in Reno, Nevada.

### **FACTUAL BACKGROUND**

#### **The Affiliated Debtors’ Business.**

14. Prior to the Petition Date, the Affiliated Debtors were the leading for-profit providers of postsecondary degree programs in the United States, offering an arrangement of master, bachelor and associate degree programs. As of June 30, 2016, the Affiliated Debtors had

approximately 40,000 enrolled students at their 137 campus locations in 39 states or in their online programs offered to students located in all 50 states and the District of Columbia.

15. All of the Affiliated Debtors' campus locations were authorized by the applicable education authorities of the states in which they operated, and were accredited by an accrediting commission recognized by the U.S. Department of Education.

**Affiliated Debtors Cease Operations and File for Bankruptcy.**

16. On September 6, 2016, the Affiliated Debtors announced that they would permanently discontinue academic operations.

17. Prior to the Petition Date, the Affiliated Debtors closed all of their campus locations and ceased operations.

18. On the Petition Date, the Affiliated Debtors each filed a voluntary petition for relief under chapter 7 of the Bankruptcy Code.

19. On January 30, 2017, the Court entered its *Order Granting Trustee's Application to Employ Electronic Strategies, Inc. to Provide Data Consolidation Services Effective Nunc Pro Tunc as of December 16, 2016* (the "ESI Employment Order") [Bankruptcy Doc 1114], authorizing the employment of Electronic Strategies, Inc. ("ESI") to provide data consolidation services to the Trustee.

**Licenses and Agreements with Defendants.**

20. Upon information and belief, prior to the Petition Date, one or more of the Affiliated Debtors entered into the Agreements with the Defendants for the utilization of Microsoft Office O365, which is an enterprise wide, Cloud-based email system that contains all emails of students, faculty and administrative personnel, as well as officers and directors. In addition to the use of Microsoft Office O365, it is believed the Defendants are also storing,

hosting or otherwise maintaining other electronic data on a non-Cloud based system pursuant to the Agreements.

21. The Defendants' Proof of Claim asserts an unsecured claim in the sum of \$177,466.46, based in whole or in part upon the Agreements. The Defendants did not attach a copy of the Agreements to the Proof of Claim.

22. Despite repeated requests by the Trustee and her agents, the Defendants have failed to provide the Trustee a copy of the Agreements.

23. The Trustee has been told by representatives of one or more of the Defendants that the Agreements are due to expire on May 31, 2017.

24. On or about April 5, 2017, Tim Konopinski, an employee of ESI, initiated contact with Microsoft Corp.'s sales representative, Joey Avraham (Account Executive), in an attempt to negotiate, on behalf of the Trustee, the preservation of the Electronic Data.

25. On or about May 17, 2017, it was communicated to Mr. Konopinski that without renewal of the current Agreements by May 31, 2017, the Electronic Data would be expunged and access would no longer be available to the Trustee or her agents.

26. In order to maintain access to the Microsoft Office O365 system and other Electronic Data, and avoid potential expungement and renew the Agreements, the Defendants' agent, Mr. Avraham, requested payment to Microsoft Corp. of \$2,544,080.26.

27. On or about May 19, 2017, the Defendants counsel, Joseph Shickich, informed counsel for the Trustee that the Defendants have a 90-day retention policy after cancellation or termination of the Agreements, pursuant to Microsoft's Online Services Terms dated May 1, 2017 (the "Online Services Terms"), which Mr. Shickich provided to the Trustee's counsel. The Online Services Terms is attached and incorporated as Exhibit 1.

28. The Online Services Terms are ambiguous and vague, and do not clearly state the Trustee will have unfettered access to the Electronic Data after the Agreements expire. Further, it has been represented by the Defendants' counsel, Mr. Shickich, that certain portions of the Electronic Data residing on leased servers will be inaccessible as of June 1, 2017.

29. Accordingly, it is unclear if the Online Services Terms apply to all of the Electronic Data maintained pursuant to the Agreements or only to the Electronic Data that is maintained pursuant to the Cloud-based system. Therefore, it is questionable if the "90-day" retention policy applies to all of the Electronic Data stored, hosted or otherwise maintained by the Defendants pursuant to the Agreements.

30. Further, the Online Services Terms provides that "Microsoft will retain Customer Data stored in the Online Service in a limited function account for 90 days after expiration or termination of Customer's subscription so that Customer may extract the data. After the 90-day retention period ends, Microsoft will disable Customer's account and delete the Customer Data." [Ex. 1, p. 4.] However, the Online Services Terms also provides that "[n]o more than 180 days after expiration or termination of Customer's use of an Online Service, Microsoft will disable the account and delete Customer Data from the account." [Ex. 1, p. 10.]

31. The Online Services Terms also provides that the Defendants have no liability for the deletion of customer data, which is assumed to comprise some or most of the Electronic Data. [Ex. 1, p. 4.]

32. Without the ability to review and analyze the Agreements, and based on the ambiguity in the Online Services Terms, the Trustee is unable to ascertain the Defendants' obligations to maintain and preserve the Electronic Data after the alleged May 31, 2017 expiration date.

33. Further, prior to the Petition Date, the Affiliated Debtors were accredited by an accrediting commission recognized by the U.S. Department of Education. As such, the regulations under the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232(g) (“FERPA”) are applicable. Upon information and belief, the Electronic Data contains information protected under FERPA.

34. Pursuant to the Online Services Terms, the Defendants have acknowledged that they are a “school official” with “legitimate educational interests” in the Electronic Data, as those terms have been defined under FERPA and its implementing regulations, and the Defendants have agreed to abide by the limitations and requirements imposed by 34 C.F.R. 99.33(a) on school officials. [Ex. 1, p. 7.] However, how the Defendants will “abide” by the limitations and requirements of FERPA is unclear.

**COUNT I**  
**(Turnover of Property of the Estate)**

35. The Trustee restates and realleges the allegations contained in paragraphs 1 through 34 above, as if fully set forth herein.

36. Pursuant to section 541(a) of the Bankruptcy Code, the Affiliated Debtors’ bankruptcy estates include all legal and equitable interests of the Affiliated Debtors in property, wherever located and by whomever held, as of the commencement of the bankruptcy cases. *See* 11 U.S.C. § 541(a).

37. The Bankruptcy Code requires that “an entity, other than a custodian, in possession, custody, or control, during the case, of property that the trustee may use, sell, or lease ... shall deliver to the trustee, and account for, such property or the value of such property, unless such property is of inconsequential value to the estate.” 11 U.S.C. § 542(a).



38. The Defendants are in possession of property of the Affiliated Debtors' bankruptcy estates. The Electronic Data is property of the Affiliated Debtors, and as such, should be turned over to the Trustee once the most cost effective method of accomplishing the turnover is determined.

**COUNT II**  
**(Declaratory Judgment Applying Automatic Stay to Defendants)**

39. The Trustee restates and realleges the allegations contained in paragraphs 1 through 38 above, as if fully set forth herein.

40. The automatic stay applies to the Defendants because the Electronic Data stored, hosted or otherwise maintained by the Defendants pursuant to the Agreements is property of the bankruptcy estates.

41. Because the automatic stay covers all actions that "obtain possession of property of the estate ... or ... exercise control over property of the estate," *see* 11 U.S.C. § 362(a)(3), all actions by the Defendants that could affect the preservation of the Electronic Data are within the bounds of the automatic stay.

42. Pursuant to 362(a)(3) of the Bankruptcy Code, the Trustee is entitled to a declaration that the Defendants' are stayed from all actions resulting in the destruction, deletion, overwriting, or erasing of any of the Electronic Data or taking any other action or inaction that could affect the preservation of the Electronic Data, until such time the Trustee can determine the most cost effective method of accomplishing turnover of the Electronic Data.

**COUNT III**  
**(Injunctive Relief Enjoining Defendants from Destroying Electronic Data)**

43. The Trustee restates and realleges the allegations contained in paragraphs 1 through 42 above, as if fully set forth herein.

44. The Trustee seeks a preliminary and permanent injunction prohibiting the Defendants from taking any actions that could result in the destruction, deletion, overwriting, or erasing of any of the Electronic Data or taking any other action or inaction that could affect the preservation of the Electronic Data, until such time the Trustee can determine the most cost effective method of accomplishing turnover of the Electronic Data.

45. Any threat of destruction, deletion, overwriting, or erasing of any of the Electronic Data or any other action or inaction that could affect the preservation of the Electronic Data jeopardizes the Trustee's efforts to marshal, assess, and preserve estate assets, and to otherwise fulfill her duties under section 704 of the Bankruptcy Code.

46. Section 704 of the Bankruptcy Code directs the Trustee to "collect and reduce to money *the property of the estate* for which the trustee serves, and *close such estate as expeditiously as is compatible with the best interests of parties in interest.*" 11 U.S.C. § 704(a)(1) (emphasis added).

47. Section 704 of the Bankruptcy Code direct the Trustee to:

- (a) "be accountable for all property received;"
- (b) "investigate the financial affairs of the debtor;" and
- (c) "unless the court orders otherwise, furnish such information concerning the estate and the estate's administration as is requested by a party in interest."

11 U.S.C. § 704(a)(2), (4), and (7).

48. Section 105(a) of the Bankruptcy Code authorizes the Court to issue "any order, process or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a).

49. Relief under section 105 of the Bankruptcy Code is particularly appropriate in a chapter 7 case when necessary to protect a Trustee's ability to effectively liquidate through marshalling, assessing, and preserving the property of the Affiliated Debtors' estates.

50. An injunction may be granted if the following factors are present: (a) a threat of irreparable harm, (b) balance of the hardships weights in favor of the Trustee, (c) a likelihood of success on the merits, and (iv) furtherance of public interest.

51. Injunctive relief is necessary to prevent immediate and irreparable harm to the bankruptcy estates which will occur if the Electronic Data is not preserved until such time the Trustee can determine the most cost effective method of accomplishing turnover of the Electronic Data.

52. The irreparable harm to the bankruptcy estates in the absence of injunctive relief far outweighs any harm to the Defendants. If the Defendants are not enjoined, the Affiliated Debtors' bankruptcy estates will likely suffer irreparable harm and the Trustee's liquidation efforts will be threatened, in particular, in the context of the pursuit of the D&O Claims and other potential claims that are property of the bankruptcy estates.

53. The Defendants will suffer little if any harm if enjoined, as the Defendants will retain their rights to (a) seek relief from the automatic stay in accordance with applicable provisions of the Bankruptcy Code, and (b) seek reasonable administrative expense claims for the cost incurred in preserving the Electronic Data until the Trustee is able to determine the most cost effective method of accomplishing turnover of the Electronic Data. In contrast, the loss of the Electronic Data will irreparably harm the Trustee's ability to pursue the D&O Claims and other potential claims of the bankruptcy estates.

54. There is a substantial likelihood that the Trustee will be able to successfully succeed in demonstrating that the bankruptcy estates have a legal or equitable interest in the Electronic Data, and as such, constitutes property of the bankruptcy estates.

55. The injunctive relief requested herein will serve the public interest by promoting compliance with the Congressional purpose of the automatic stay by protecting the property of

the Affiliated Debtors' bankruptcy estates (*i.e.*, preserving the Electronic Data that is crucial for the pursuit of assets and settlement of claims of the bankruptcy estates), and allowing the Trustee to carry out her statutory duties to protect the interests of the Affiliated Debtors' bankruptcy estates and the public (and potentially private) interests of hundreds of thousands of former students and creditors in these chapter 7 cases.

56. Based on the foregoing, the Trustee seeks a preliminary and permanent injunction prohibiting the Defendants from taking any actions that could result in the destruction, deletion, overwriting, or erasing of any of the Electronic Data or taking any other action or inaction that could affect the preservation of the Electronic Data, until such time the Trustee can determine the most cost effective method of accomplishing turnover of the Electronic Data.

**COUNT IV**  
**(Declaratory Judgment Applying 34 C.F.R. 99.33(a) to the Defendants)**

57. The Trustee restates and realleges the allegations contained in paragraphs 1 through 56 above, as if fully set forth herein.

58. To the extent the Electronic Data comprises of information protected under FERPA, the Trustee seeks a declaratory judgment that the Defendants are required to continue to abide by the limitations and requirements imposed by 34 C.F.R. 99.33(a), as previously agreed to pursuant to the Online Services Terms.

**REQUEST FOR RELIEF**

**WHEREFORE**, the Trustee demands judgment against the Defendants and requests the following relief:

- (a) The entry of a judgment requiring the Defendants to turnover the Electronic Data once the Trustee is able to determine the most cost effective method of accomplishing turnover of the Electronic Data;
- (b) The entry of a declaratory judgment that the Defendants are stayed, pursuant to section 362(a)(3) of the Bankruptcy Code from destroying, deleting, overwriting,

or erasing any of the Electronic Data or taking any other action or inaction that could affect the preservation of the Electronic Data, until such time the Electronic Data is properly turned over to the Trustee;

- (c) The entry of a declaratory judgment granting an injunction enjoining the Defendants from destroying, deleting overwriting, or erasing any of the Electronic Data until such time the Trustee is able to determine the most cost effective method of preserving and storing the Electronic Data for use in furtherance of her duties as Trustee;
- (d) The entry of a declaratory judgment that the Defendants are required to continue to abide by the limitations and requirements imposed by 34 C.F.R. 99.33(a) as it relates to the Electronic Data; and
- (e) All other relief the Court deems just and proper under the circumstances.

Respectfully submitted,

RUBIN & LEVIN, P.C.

By: /s/ John C. Hoard

John C. Hoard

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