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FILED
A.M. APR 15 2009
UNITED STATES BANKRUPTCY COURT
SAN FRANCISCO, CA

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

In re:
HELLER ERHMAN, LLP,

Debtor

Case No. 08-32514
Honorable Dennis Montali
Chapter 11

**LIFELOCK, INC.'S REPLY TO
OPPOSITIONS TO MOTION FOR
RELIEF OF AUTOMATIC STAY**

[11 U.S.C. §362]

Hearing Date: April 16, 2008
Hearing Time: 9:30 a.m.
Courtroom: 22

1 **TO THIS HONORABLE COURT, ALL PARTIES AND THEIR**
2 **ATTORNEYS OF RECORD:**

3 Moving Party LifeLock, Inc. herein replies to the oppositions filed by Debtor
4 and Debtor in Possession Heller Ehrman, LLP (hereinafter “Heller Ehrman”) and
5 Official Committee of Unsecured Creditors (hereinafter “Committee”).

6 By way of the instant motion, LifeLock respectfully requests this Bankruptcy
7 Court to grant relief from the automatic stay so LifeLock may proceed under
8 applicable non-bankruptcy law to enforce its remedies and to proceed to final
9 judgment in a non-bankruptcy forum, provided that the stay remains in effect with
10 respect to enforcement of any judgment against Debtor that is not covered by its
11 professional negligence insurance policy.

12
13 **I. THERE IS “CAUSE” TO JUSTIFY RELIEF FROM THE**
14 **AUTOMATIC STAY.**

15 Heller Ehrman and the Committee each argue in opposition to the instant
16 motion that there is not sufficient “cause” to grant the requested relief. However,
17 there are two mutually exclusive reasons to justify the granting of the instant
18 motion.

19 ***A. The Contemplated Litigation by LifeLock, Inc. against Heller***
20 ***Ehrman is only Tangentially Related to the Bankruptcy Case.***

21 LifeLock’s contemplated litigation against Heller Ehrman seeks to prosecute
22 California state law claims for the firm’s overbilling malpractice, breach of
23 fiduciary duty, and fraud. Deferring this contemplated litigation to the District
24 Court does not pose a financial hardship to Heller Ehrman since enforcement of any
25 judgment that is not covered by the applicable professional negligence insurance
26 policy will be stayed.

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1 Regardless of the outcome of this motion, the litigation in District Court by
2 LifeLock will proceed against Heller Ehrman's former partner Mary Azcuenaga.
3 By requiring LifeLock to litigate this matter in two separate forums (this
4 Bankruptcy Court and the District Court), there is a substantial risk that inconsistent
5 judgments will be rendered. In the District Court, LifeLock will be entitled to a
6 jury trial against Mary Azcuenaga, which may lead to different findings of fact
7 and/or law as compared to the findings this Court may make against Heller Ehrman.

8 If this Court does not provide LifeLock relief from the stay, then LifeLock
9 will proceed forward to obtain a judgment with findings of fact against Mary
10 Azcuenaga. Heller Ehrman will then be collaterally estopped from arguing any
11 contrary factual positions in any later proceeding in this Bankruptcy Court. For
12 example, if LifeLock obtains a jury determination that Mary Azcuenaga breached
13 her fiduciary duty while she acted as a senior partner for Heller Ehrman, then such
14 decision will become relevant and binding evidence in LifeLock's subsequent claim
15 against Heller Ehrman in this Bankruptcy Court.

16 However, if relief from the automatic stay is granted and LifeLock is
17 permitted to proceed against Heller Ehrman and Mary Azcuenaga simultaneously in
18 the District Court, then there will not be any prejudice to Heller Ehrman since a
19 consistent verdict will be obtained.

20 The equities in favor granting relief from the automatic stay are as follows:
21 (1) there will be consistent findings of fact against Heller Ehrman and Mary
22 Azcuenaga; (2) LifeLock's claims will be adjudicated in a jury trial; (3) this
23 Bankruptcy Court will not have to use its judicial resources to litigate this claim
24 after the Central District Court of California has already used its resources to
25 adjudicate the claim against Mary Azcuenaga; and (4) enforcement of any judgment
26 that is not covered by Heller Ehrman's insurance policy will be stayed.

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1 ***B. LifeLock’s Claims Against Heller Ehrman May Be Fully Or***
2 ***Partially Satisfied By Heller Ehrman’s \$200,000,000 Insurance***
3 ***Policy.***

4 It is uncontested that LifeLock’s claims against Heller Ehrman are within the
5 available amount of insurance coverage. Instead, Heller Ehrman and the
6 Committee argue that since there is a \$2,000,000 self insured retention (“SIR”), this
7 dispute should not be litigated in the District Court.

8 This argument is meritless for two reasons: (1) it is irrelevant that Heller
9 Ehrman has a \$2,000,000 SIR since the enforcement of any judgment against Heller
10 Ehrman not covered by the applicable insurance policy will be stayed; and (2)
11 regardless if LifeLock’s claims are litigated in the Bankruptcy Court or the District
12 Court, Heller Ehrman will be required to hire counsel to defend the claims.
13 Litigation costs to defend LifeLock’s claim against Heller Ehrman are not a
14 relevant factor in deciding whether to grant relief from the automatic stay. *In re*
15 *Santa Clara Fair Ass’n, Inc.*, 180 BR 564, 566 (9th Cir. BAP 1995).

16 Moreover, LifeLock’s claims against Heller Ehrman will likely *exceed* the
17 \$2,000,000 SIR at the end of the litigation. Please see, the proposed Complaint for
18 the significant and substantial allegations of Heller Ehrman’s wrongdoings.

19 Accordingly, this Court should annul the stay and permit LifeLock to
20 proceed forward with its claim against Heller Ehrman in the Central District of
21 California.

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1 **II. LIFELOCK IS NOT REQUIRED TO ARBITRATE ITS CLAIM**
2 **AGAINST HELLER EHRMAN.**

3 In the opposition, Heller Ehrman attempts to discredit LifeLock by stating
4 that the dispute should be arbitrated instead of litigated in District Court. However,
5 this argument is meritless since arbitration is voluntary for a client and may be
6 waived by the commencement of litigation in District Court. Please see, California
7 *Business and Professions Code* §6201; *Aguilar v. Lerner* (2004) 32 Cal.4th 974,
8 987-990. LifeLock has waived its right to arbitrate these claims. Instead, LifeLock
9 intends to proceed forward in Court.

10
11 **III. THE LOCATION OF THE CONTEMPLATED LITIGATION IS NOT**
12 **A RELEVANT ISSUE BEFORE THIS COURT.**

13 Heller Ehrman also argues that the Central District Court of California is not
14 a convenient forum for it to litigate the claims by LifeLock. This issue is also
15 irrelevant to the determination of whether relief from the automatic stay should be
16 granted.

17 Nonetheless, Heller Ehrman appeared for and litigated on behalf of LifeLock
18 in the underlying Experian Matter in the Central District of California. Moreover,
19 Heller Ehrman staffed the Experian Matter with at least 19 attorneys, of which 9 of
20 the 19 attorneys are licensed and practice law in the State of California.

21 Accordingly, if Heller Ehrman contends that the Central District of
22 California is not a convenient location for it to defend itself, it may elect to
23 challenge the venue with a motion to the Central District Court after this
24 Bankruptcy Court grants relief from the automatic stay. Regardless, this issue is
25 not dispositive to the question presented to this Court in the instant motion.


1 **IV. CONCLUSION.**

2 LifeLock respectfully requests this Court to grant relief from the automatic
3 stay so LifeLock may proceed under applicable non-bankruptcy law to enforce its
4 remedies and to proceed to final judgment in a non-bankruptcy forum, provided that
5 the stay remains in effect with respect to enforcement of any judgment against
6 Debtor that is not covered by its professional negligence insurance policy.

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8 Dated: April 14, 2009

Respectfully submitted,

9 **ROSEN ♦ SABA, LLP**

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11 By 
12 Ryan D. Saba, Esq.
13 Attorneys for LifeLock, Inc.

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