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BROOKLYN OFFICE

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK**

MICROSOFT CORP.,

Plaintiff,

v.

JOHN DOES 1-2, CONTROLLING COMPUTER
BOTNETS AND THEREBY INJURING
PLAINTIFF AND ITS CUSTOMERS,

Defendants.

Case No.

FILED UNDER SEAL

CV 20 - 1217

DeARCY HALL, J.

**BRIEF IN SUPPORT OF MICROSOFT'S MOTION FOR PROTECTIVE ORDER
TEMPORARILY SEALING DOCUMENTS**

Microsoft submits the following memorandum in support of its Motion for a
Protective Order Sealing Documents.

BACKGROUND

Microsoft has filed a Complaint and an *Ex Parte* Application for an Emergency Temporary Restraining Order and Order to Show Cause re Preliminary Injunction ("TRO Application") to prevent the activities of John Doe Defendants 1 and 2 (collectively "Defendants") who are engaged in harmful and malicious Internet activities directed at Microsoft, its customers, and the general public. Microsoft seeks *ex parte* relief in the TRO Application that will cease the irreparable harm resulting from Defendants' conduct. Microsoft seeks *ex parte* relief under seal because advance public disclosure or notice of the requested relief would allow Defendants to evade such relief and further prosecution of this action, thereby perpetuating the irreparable harm at issue. The reasons for Microsoft's request are set forth in detail in the TRO Application filed concurrently herewith. Therefore, Microsoft requests that this case and all documents filed in this case be sealed pending execution of the temporary

restraining order sought in Microsoft's TRO Application. Microsoft's requested sealing order is narrowly tailored to impose the least restriction on the public's right of access to information as possible. Microsoft requests that all sealed documents be immediately unsealed upon execution of the temporary restraining order.

ARGUMENT

As detailed below and as discussed in Microsoft's Application for TRO, Brief in Support and the evidence submitted in support thereof, incorporated in this Motion by reference, there are compelling reasons for temporarily sealing the case until the requested temporary restraining order is executed. Critically, advance public disclosure or notice of the requested relief would allow Defendants to evade such relief, destroy or conceal evidence, and render fruitless further prosecution of this action, thereby perpetuating the very harm Microsoft asks this Court to remedy. To forestall these consequences, Microsoft requests that the Complaint, Application for TRO, and all supporting materials be filed under seal.

The temporary sealing requested by Microsoft is in accord with both the applicable statutory law governing the claims in this action and well-recognized exceptions to the general right of access to judicial records and documents. The Lanham Act, under which Microsoft pursues various causes of action here, specifically requires that:

[a]n order under this subsection, together with the supporting documents, *shall be sealed* until the person against whom the order is directed has an opportunity to contest such order, except that any person against whom such order is issued shall have access to such order and supporting documents after the seizure has been carried out.

15 U.S.C. § 1116(d)(8) (emphasis added).

In addition, notwithstanding the general right to access to judicial records and documents, filing documents under seal is appropriate "if 'countervailing factors' in the common law framework...so demand." *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 124 (2d Cir.

2006). In balancing whether sealing is appropriate, courts consider the danger that, absent sealing, judicial efficiency and enforcement of the law will be impaired. *See United States v. Amodeo*, 71 F.3d 1044, 1050 (2d Cir. 1995). The question of “whether public access to the materials at issue is likely to impair in a material way the performance of Article III functions” is a key measure of the appropriateness of sealing. *Id.*

The Federal Rules of Civil Procedure also recognize the important public and judicial interest in protecting confidential business information. *See Fed. R. Civ. P. 26(c)(1)(G)* (empowering courts to order “that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way”). Likewise, Supreme Court and Fourth Circuit authority recognize the necessity of non-public *ex parte* proceedings. *See Granny Goose Foods, Inc. v. Brotherhood of Teamsters & Auto Truck Drivers*, *Lcal No. 70*, 415 U.S. 423, 439(1974) (“Ex parte temporary restraining orders are no doubt necessary in certain circumstances. . . .”); *Microsoft Corp. v. John Does 1-5*, Case No. 1:15-cv-0656-JBW-LB (E.D.N.Y. 2015) (Bloom, J.) (sealing docket); *Microsoft Corp. v. John Does 1-39, et al.*, Case No. 12-cv-1335 (E.D.N.Y. 2012) (Johnson, J.) (same).

In this case, Microsoft’s rights and interests in protecting its ability to obtain emergency *ex parte* temporary relief, and the necessity of sealing its pleadings is paramount over any competing public interest to immediate access to the information Microsoft requests be sealed. If Microsoft’s papers are not sealed, the relief sought would very likely be rendered fruitless and there is a substantial risk Defendants would destroy evidence. Defendants are highly-sophisticated cybercriminals. They access Microsoft’s services without authorization; hack into high-value computer networks; install malware on the networks to gain and maintain long-term, surreptitious access to that network; and locate and exfiltrate sensitive information off of the

networks. Declaration of Gabriel M. Ramsey In Support Of Microsoft's TRO Application ("Ramsey Decl.") ¶¶2-3. If Defendants knew Microsoft sought the relief set forth in the TRO Application, they could quickly adapt the command and control infrastructure used to secretly establish themselves on a victim's network. *Id.* ¶4. Indeed, evidence shows that in the past, when Defendants became aware of efforts to mitigate or investigate their activities, they took steps to conceal their activities and to conceal the injury that had been caused to their victims, making it more difficult for their victims to adequately assess the damage or take steps to mitigate that injury going forward. *Id.* ¶5. For example, once Defendants become aware that domains in its active infrastructure become known to the security community, they abandoned that infrastructure and moved to new infrastructure that is used to continue their efforts to intrude upon the computers of existing victims and new victims. *Id.*

Given Microsoft's actions against similar unlawful Internet activity, even disclosing that Microsoft has initiated this case risks giving Defendants the opportunity to change their command and control infrastructure. Based on similar actions, it is likely that Defendants in this case will take similar steps to destroy evidence and move their command and control infrastructure if they are given notice of the pending legal action against them.

The harm that would be caused by the public filing of Microsoft's Complaint and moving papers would far outweigh the public's right to access to that information. There is no need for the public to have immediate access to the Complaint, TRO Application, and supporting documents while Microsoft is seeking ex parte relief which will only be effective if these materials remain under seal.

Microsoft only seeks to seal such information for a limited period of time, until after effective ex parte temporary relief has been obtained. After such point, sealing will no longer be

necessary, and Microsoft will immediately commence efforts to provide Defendants notice of the preliminary injunction hearing and service of the Complaint—at which point, all documents will be unsealed and the public will be given full access to these proceedings. Microsoft, upon execution of the *ex parte* relief, will file with the Clerk of the Court a Notice that the temporary restraining order has been executed.

Should, however, the Court decide not to grant the *ex parte* relief Microsoft requests, Microsoft asks that such materials remain sealed for an indefinite period, as public disclosure or notice absent the *ex parte* relief requested would facilitate Defendants' harmful and malicious Internet activities.

Given the limited period of sealing as an alternative that balances the public interest in access with Microsoft's important interests in maintaining these materials under seal for a brief period of time, granting the instant request to seal is warranted and consistent with the legal framework for addressing this issue.

CONCLUSION

Therefore, for all the foregoing reasons, Microsoft requests that this case and the following documents in particular be kept under seal in accordance with Fed. R. Civ. P. 26(c)(1) and Local Civil Rule 5, pending execution of the *ex parte* relief sought in the TRO Application:

1. The instant Emergency Motion To Temporarily File Case Under Seal and attachments hereto;
2. The Declaration of Gabriel M. Ramsey in Support of the instant Emergency Motion To Temporarily File Case Under Seal;
3. The Application by Order to Show Cause to Temporarily Seal Case;
4. Complaint and attachments thereto, including appendices and summonses;

5. Trademark Report;
6. Pro Hac Vice Applications of Gabriel Ramsey and Richard Boscovich and accompanying documents;
7. Application for Emergency *Ex Parte* Temporary Restraining Order and Order to Show Cause re Preliminary Injunction and accompanying documents;
8. Brief in Support of Emergency *Ex Parte* Temporary Restraining Order and Order to Show Cause re Preliminary Injunction;
9. The Declaration of Jason B. Lyons in Support of Emergency *Ex Parte* Temporary Restraining Order and Order to Show Cause re Preliminary Injunction and Exhibits thereto;
10. The Declaration of Kayvan Ghaffari in Support of Emergency *Ex Parte* Temporary Restraining Order and Order to Show Cause re Preliminary Injunction and Exhibits thereto; and
11. [Proposed] *Ex Parte* Temporary Restraining Order and Order to Show Cause Re Preliminary Injunction and Appendices thereto.

Microsoft respectfully requests that these materials be sealed pending execution of the *ex parte* relief sought in Microsoft's TRO Application, in particular the disabling of the domains set forth in **Appendices A and B** to the Complaint. Upon execution of that *ex parte* relief, Microsoft will file with the Clerk of the Court a Notice that the Preliminary Injunction Order has been executed and thereupon requests that all sealed documents be immediately unsealed.

Microsoft respectfully requests that should the Court decide not to grant the *ex parte* temporary relief requested in Microsoft's TRO Application, that the materials be sealed indefinitely.

Dated: March 5, 2020

Respectfully submitted,

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