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

MICROSOFT CORPORATION, a  
Washington corporation,

Plaintiff,

v.

JOHN DOES 1-5, CONTROLLING  
COMPUTER BOTNETS AND THEREBY  
INJURING PLAINTIFF AND ITS  
CUSTOMERS,

Defendants.

Index No.

**CV 15 - 6565**

**FILED UNDER SEAL**

**GLEESON, J.**

**BLOOM, M.J.**

**MICROSOFT'S EMERGENCY MOTION  
TO TEMPORARILY FILE CASE UNDER SEAL**

FILED  
CLERK

2015 NOV 23 AM 9:01

U.S. DISTRICT COURT  
EASTERN DISTRICT  
OF NEW YORK

Pursuant to Fed. R. Civ. P. 26(c)(1), Plaintiff Microsoft Corporation (“Microsoft”) hereby moves this Court to grant the Emergency Motion To File Case Under Seal (the “Motion”) for a protective order temporarily sealing the instant case in general, and the following documents in particular, filed by Microsoft in this action:

1. The instant Emergency Motion To Temporarily File Case Under Seal and attachments hereto;
2. Order to Show Cause to Temporarily Seal Case;
3. Complaint and attachments thereto, including appendices and summonses;
4. Trademark Report;
5. Pro Hac Vice Applications of Gabriel Ramsey, Jeffrey Cox, and Elena Garcia;
6. Ex Parte Application for an Emergency Temporary Restraining Order, Seizure Order and Order to Show Cause re Preliminary Injunction and accompanying documents;
7. Appendix of Evidence to Ex Parte Application for an Emergency Temporary Restraining Order, Seizure Order and Order to Show Cause re Preliminary Injunction;
8. Brief in Support of Ex Parte Application for an Emergency Temporary Restraining Order, Seizure Order and Order to Show Cause re Preliminary Injunction;
9. The Declaration of Rodelio G. Fiñones in Support of Ex Parte Application for an Emergency Temporary Restraining Order, Seizure Order and Order to Show Cause re Preliminary Injunction and Exhibits thereto;
10. The Declaration of Jason B. Lyons in Support of Ex Parte Application for an Emergency Temporary Restraining Order, Seizure Order and Order to Show Cause re Preliminary Injunction and Exhibits thereto;
11. The Declaration Jeffrey L. Cox in Support of Ex Parte Application for an Emergency

Temporary Restraining Order, Seizure Order and Order to Show Cause re Preliminary Injunction and Exhibits thereto; and

12. [Proposed] Ex Parte Temporary Restraining Order and Order To Show Cause Re Preliminary Injunction and Appendices thereto.

### **BACKGROUND**

Microsoft has filed a Complaint and an Application for Emergency Temporary Restraining Order, Seizure Order and Order to Show Cause Re Preliminary Injunction (“Application for TRO”) and Brief in Support to stop the activities of defendants John Does 1 through 5 for violations of the Computer Fraud and Abuse Act (18 U.S.C. § 1030); the Electronic Communications Privacy Act (18 U.S.C. § 2701); trademark infringement, false designation of origin, and trademark dilution in violation of the Lanham Act (15 U.S.C. §§ 1114, 1125(a), and 1125(c), respectively); violations of the Racketeer Influenced and Corrupt Organizations Act (18 U.S.C. § 1961, *et seq.*); and related common law claims. Microsoft seeks *ex parte* relief in its Application for TRO that will cease the irreparable harm resulting from Defendants’ conduct. Microsoft seeks *ex parte* relief 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 to Microsoft, its customers and members, and the public. The reasons for this are set forth in detail in the Brief in Support of Microsoft’s Application for TRO. Therefore, Microsoft requests that the case and all documents filed in the case be sealed until execution of the temporary restraining order and seizure order.

### **GOOD CAUSE EXISTS FOR TEMPORARILY SEALING THIS CASE**

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 and seizure orders are 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.*

Temporary sealing of this case is not only necessary under the Lanham Act but is also essential to Microsoft’s pursuit of its claims and this Court’s ability to efficiently perform its

judicial functions. If the case and its filings are made public before Microsoft obtains the temporary relief sought, it will likely “impair in a material way the performance” of this Court’s ability to administer justice. There is a real and substantial risk that if these documents are made public, Defendants will both destroy all evidence of their prior activities and move their infrastructure to different servers to carry out their illicit activities anew. It is for these reasons that Microsoft seeks *ex parte* temporary relief here under seal, and public filing of these materials would frustrate the very purpose of the *ex parte* relief sought.

Dated: November 22, 2015

Respectfully submitted,

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