

FILED  
LODGED  
ENTERED  
RECEIVED  
MAR - 9 2011  
AT SEATTLE COURT CLERK U.S. DISTRICT OF WASHINGTON  
BY DEPUTY

The Honorable James L. Robart  
CERTIFIED TRUE COPY  
ATTEST: WILLIAM M. McCOOL  
Clerk, U.S. District Court  
Western District of Washington  
By Mary Dett  
Deputy Clerk

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

MICROSOFT CORPORATION,  
Plaintiff,

v.

JOHN DOES 1-11 CONTROLLING A  
COMPUTER BOTNET THEREBY  
INJURING MICROSOFT AND ITS  
CUSTOMERS,  
Defendants.

Case No. 2:11-cv-00222

**SECOND AMENDED [PROPOSED]  
EX PARTE TEMPORARY  
RESTRAINING ORDER, SEIZURE  
ORDER AND ORDER TO SHOW  
CAUSE RE PRELIMINARY  
INJUNCTION**

**\*\*FILED UNDER SEAL\*\***

Plaintiff Microsoft Corporation ("Microsoft") has filed a complaint for injunctive and other relief pursuant to: (1) the Computer Fraud and Abuse Act (18 U.S.C. § 1030); (2) the CAN-SPAM Act (15 U.S.C. § 7704); (3) the Lanham Act (15 U.S.C. §§ 1114(a)(1), 1125(a), (c)); and (4) the common law of trespass, conversion and unjust enrichment. Microsoft has moved *ex parte* for an emergency temporary restraining order and seizure order pursuant to Rule 65(b) of the Federal Rules of Civil Procedure, 15 U.S.C § 1116(d) (the Lanham Act) and 28 U.S.C. § 1651(a) (the All Writs Act), and an order to show cause why a preliminary injunction should not be granted.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the papers, declarations, exhibits, and memorandum filed in support of Microsoft's Application for *Ex Parte* Temporary Restraining Order, *Ex Parte* Seizure and Order

CCT & other cases, ussimo find 2011

1 to Show Cause Re Preliminary Injunction (“TRO Application”), the Court hereby makes the  
2 following findings of fact and conclusions of law:

3 1. This Court has jurisdiction over the subject matter of this case and there is good  
4 cause to believe that it will have jurisdiction over all parties hereto; the Complaint states a claim  
5 upon which relief may be granted against the Defendants under the Computer Fraud and Abuse  
6 Act (18 U.S.C. § 1030); CAN-SPAM Act (15 U.S.C. § 7704); the Lanham Act (15 U.S.C. §§  
7 1114, 1125); and the common law of trespass to chattels, conversion and unjust enrichment.

8 2. Microsoft owns the registered trademarks “Microsoft,” “Windows,” and “Hotmail”  
9 used in connection with its services, software, and products.

10 3. There is good cause to believe that Defendants have engaged in and are likely to  
11 engage in acts or practices that violate the Computer Fraud and Abuse Act (18 U.S.C. § 1030);  
12 CAN-SPAM Act (15 U.S.C. § 7704); the Lanham Act (15 U.S.C. §§ 1114, 1125); and the  
13 common law of trespass to chattels, conversion and unjust enrichment, and that Microsoft is,  
14 therefore, likely to prevail on the merits of this action.

15 4. There is good cause to believe that, unless the Defendants are restrained and  
16 enjoined by Order of this Court, immediate and irreparable harm will result from the Defendants’  
17 ongoing violations of the Computer Fraud and Abuse Act (18 U.S.C. § 1030); CAN-SPAM Act  
18 (15 U.S.C. § 7704); the Lanham Act (15 U.S.C. §§ 1114, 1125); and the common law of trespass  
19 to chattels, conversion and unjust enrichment. The evidence set forth in Microsoft’s Application  
20 for an Emergency Temporary Restraining Order, Seizure Order and Order to Show Cause Re  
21 Preliminary Injunction (“TRO Motion”), and the accompanying declarations and exhibits,  
22 demonstrates that Microsoft is likely to prevail on its claim that Defendants have engaged in  
23 violations of the foregoing laws by: (1) intentionally accessing and sending malicious software to  
24 Microsoft’s and its customers’ protected computers and operating systems, without authorization,  
25 in order to infect those computers and make them part of the botnet; (2) sending malicious  
26 software to configure, deploy and operate a botnet; (3) sending unsolicited spam e-mail to  
27 Microsoft’s Hotmail accounts; and (4) sending unsolicited spam e-mails that falsely indicate that  
28 they are from or approved by Microsoft and that promote counterfeit pharmaceuticals and other

1 fraudulent schemes. There is good cause to believe that if such conduct continues, irreparable  
2 harm will occur to Microsoft and the public, including Microsoft's customers. There is good  
3 cause to believe that the Defendants will continue to engage in such unlawful actions if not  
4 immediately restrained from doing so by Order of this Court.

5           5.       There is good cause to believe that immediate and irreparable damage to this  
6 Court's ability to grant effective final relief will result from the sale, transfer, or other disposition  
7 or concealment by Defendants of the botnet command and control software that is hosted at and  
8 otherwise operates through the Internet Protocol (IP) addresses listed in Appendix A and the  
9 Internet domains at issue in Microsoft's TRO Application and from the destruction or  
10 concealment of other discoverable evidence of Defendants' misconduct available at those  
11 locations if the Defendants receive advance notice of this action. Based on the evidence cited in  
12 Microsoft's TRO Application and accompanying declarations and exhibits, Microsoft is likely to  
13 be able to prove that: (1) the Defendants are engaged in activities that directly violate U.S. law  
14 and harm Microsoft and the public, including Microsoft's customers; (2) the Defendants have  
15 continued their unlawful conduct despite the clear injury to the foregoing interests; (3) the  
16 Defendants are likely to delete or relocate the botnet command and control software at issue in  
17 Microsoft's TRO Application and the harmful, malicious, and trademark infringing software  
18 disseminated through these IP addresses and domains and to warn their associates engaged in such  
19 activities if informed of Microsoft's action. Microsoft's request for this emergency *ex parte* relief  
20 is not the result of any lack of diligence on Microsoft's part, but instead is based upon the nature  
21 of Defendants' unlawful conduct. Therefore, in accordance with Fed. R. Civ. P. 65(b) and 15  
22 U.S.C. § 1116(d), good cause and the interests of justice require that this Order be Granted  
23 without prior notice to the Defendants, and accordingly Microsoft is relieved of the duty to  
24 provide the Defendants with prior notice of Microsoft's motion.

25           6.       There is good cause to believe that the Defendants have engaged in illegal activity  
26 using the data centers and/or Internet hosting providers identified in Appendix A to host the  
27 command and control software and the malicious botnet code and content used to maintain and  
28 operate the botnet at computers, servers, electronic data storage devices or media at the IP

1 addresses identified in Appendix A.

2 7. There is good cause to believe that to immediately halt the injury caused by  
3 Defendants, Defendants' IP addresses identified in Appendix A must be immediately disabled;  
4 Defendants' computing resources related to such IP addresses must be disconnected from the  
5 Internet; Defendants must be prohibited from accessing Defendants' computer resources related  
6 to such IP addresses; and to prevent the destruction of data and evidence located on those  
7 computer resources.

8 8. There is good cause to believe that to immediately halt the injury caused by  
9 Defendants, and to ensure that future prosecution of this case is not rendered fruitless by attempts  
10 to delete, hide, conceal, or otherwise render inaccessible the software components that distribute  
11 unlicensed copies of Microsoft's registered trademarks and carry out other harmful conduct, with  
12 respect to Defendants' most current, active command and control IP addresses hosted at data  
13 centers operated by ECommerce, Inc.; FDCservers.net, LLC; Wholesale Internet, Inc.; Burstnet  
14 Technologies, Inc. d/b/a Network Operations Center, Inc.; and Softlayer Technologies, Inc., the  
15 United States Marshals Service in the judicial districts where the data centers are located should  
16 be directed to seize, impound and deliver into the custody of third-party escrow service Stroz  
17 Friedberg, 1925 Century Park East, Suite 1350, Los Angeles, CA 90067, all of Defendants'  
18 computers, servers, electronic data storage devices, software, data or media associated with the IP  
19 addresses listed in Appendix A.

20 9. There is good cause to believe that the Defendants have engaged in illegal activity  
21 using the Internet domains identified at Appendix B to this order to host the command and control  
22 software and content used to maintain and operate the botnet. There is good cause to believe that  
23 to immediately halt the injury caused by Defendants, each of Defendants' current and prospective  
24 domains set forth in Appendix B must be immediately made inaccessible, and/or removed from  
25 the Internet zone file.

26 10. There is good cause to direct that third party data centers, hosting providers and  
27 Internet registries/registrars reasonably assist in the implementation of the Order and refrain from  
28 frustrating the implementation and purposes of this Order, pursuant to 28 U.S.C. § 1651(a) (the

1 All Writs Act).

2 11. There is good cause to believe that if Defendants are provided advance notice of  
3 Microsoft's TRO Application or this Order, they would move the botnet infrastructure, allowing  
4 them to continue their misconduct and would destroy, move, hide, conceal, or otherwise make  
5 inaccessible to the Court evidence of their misconduct, the botnet's activity, the infringing  
6 materials, the instrumentalities used to make the infringing materials, and the records evidencing  
7 the manufacture and distributing of the infringing materials.

8 12. There is good cause to permit notice of the instant order, notice of the Preliminary  
9 Injunction hearing and service of the Complaint by formal and alternative means, given the  
10 exigency of the circumstances and the need for prompt relief. The following means of service are  
11 authorized by law, satisfy Due Process, satisfy Fed. R. Civ. Pro. 4(f)(3), and are reasonably  
12 calculated to notify defendants of the instant order, the Preliminary Injunction hearing and of this  
13 action: (1) personal delivery upon defendants who provided to the data centers and Internet  
14 hosting providers contact information in the U.S.; (2) personal delivery through the Hague  
15 Convention on Service Abroad or other treaties upon defendants who provided contact  
16 information outside the United States; (3) transmission by e-mail, facsimile, and mail to the  
17 contact information provided by defendants to the data centers, Internet hosting providers, and  
18 domain registrars who host the software code associated with the IP addresses in Appendix A, or  
19 through which domains in Appendix B are registered; and (4) publishing notice to the Defendants  
20 on a publicly available Internet website.

21 13. There is good cause to believe that the harm to Microsoft of denying the relief  
22 requested in its TRO Application outweighs any harm to any legitimate interests of Defendants  
23 and that there is no undue burden to any third party.

24 **TEMPORARY RESTRAINING ORDER AND SEIZURE ORDER**

25 **IT IS THEREFORE ORDERED** as follows:

26 A. Defendants, their representatives and persons who are in active concert or  
27 participation with them are temporarily restrained and enjoined from intentionally accessing and  
28 sending malicious software to Microsoft's and its customers' protected computers and operating

1 systems, without authorization, in order to infect those computers and make them part of the  
2 botnet; sending malicious software to configure, deploy and operate a botnet; sending unsolicited  
3 spam e-mail to Microsoft's Hotmail accounts; and sending unsolicited spam e-mail that falsely  
4 indicate that they are from or approved by Microsoft; or undertaking any similar activity that  
5 inflicts harm on Microsoft or the public, including Microsoft's customers.

6 B. Defendants, their representatives and persons who are in active concert or  
7 participation with them are temporarily restrained and enjoined from configuring, deploying,  
8 operating or otherwise participating in or facilitating the botnet described in the TRO Application,  
9 including but not limited to the command and control software hosted at and operating through the  
10 IP addresses and domains set forth herein and through any other component or element of the  
11 botnet in any location.

12 C. Defendants, their representatives and persons who are in active concert or  
13 participation with them are temporarily restrained and enjoined from using the trademarks  
14 "Microsoft," "Windows," "Hotmail," and/or other trademarks; trade names; service marks; or  
15 Internet Domain addresses or names; or acting in any other manner which suggests in any way  
16 that Defendants' products or services come from or are somehow sponsored or affiliated with  
17 Microsoft, and from otherwise unfairly competing with Microsoft, misappropriating that which  
18 rightfully belongs to Microsoft, or passing off their goods as Microsoft's.

19 D. Defendants, their representatives and persons who are in active concert or  
20 participation with them are temporarily restrained and enjoined from infringing Microsoft's  
21 registered trademarks, Registration Nos. 1200236, 2165601, 2463510 and others.

22 E. Defendants, their representatives and persons who are in active concert or  
23 participation with them are temporarily restrained and enjoined from using in connection with  
24 Defendants' activities any false or deceptive designation, representation or description of  
25 Defendants' or of their representatives' activities, whether by symbols, words, designs or  
26 statements, which would damage or injure Microsoft or give Defendants an unfair competitive  
27 advantage or result in deception of consumers.

28 F. Defendants' materials bearing infringing marks, the means of making the

1 counterfeit marks, and records documenting the manufacture, sale, or receipt of things involved in  
2 such violation, in the possession of data centers operated by ECommerce, Inc., FDCServers.net  
3 LLC, Wholesale Internet, Inc., Burstnet Technologies, Inc., and Softlayer Technologies, Inc., all  
4 pursuant to 15 U.S.C. §1116(d), shall be seized:

5           1.       The seizure at the foregoing data centers and hosting providers shall take  
6 place no later than seven (7) days after the date of issue of this order. The seizure may continue  
7 from day to day, for a period not to exceed three (3) days, until all items have been seized. The  
8 seizure shall be made by the United States Marshals Service. The United States Marshals Service  
9 in the judicial districts where the foregoing data centers and hosting providers are located are  
10 directed to coordinate with each other and with Microsoft and its attorneys in order to carry out  
11 this Order such that disablement and seizure of the servers is effected simultaneously, to ensure  
12 that Defendants are unable to operate the botnet during the pendency of this case. In order to  
13 facilitate such coordination, the United States Marshals in the relevant jurisdictions are set forth,  
14 as follows:

- 15
- 16           a. Northern District of Illinois  
            U.S. Marshal: Darryl K. McPherson  
            219 S. Dearborn Street, Room 2444  
            Chicago, IL 60604  
            (312) 353-5290
  - 18           b. District of Colorado  
            U.S. Marshal: John Kammerzell  
            U.S. Courthouse  
            901 19th St., 3rd Floor  
            Denver, Co 80294  
            (303) 335-3400
  - 22           c. Middle District of Pennsylvania  
            U.S. Marshal: Martin J. Pane (Acting)  
            Federal Building  
            Washington Avenue & Linden Street, Room 231  
            Scranton, PA 18501  
            (570) 346-7277
  - 26           d. Western District of Missouri  
            U.S. Marshal: C. Mauri Sheer  
            U.S. Courthouse  
            400 E. 9th St., Room 3740  
            Kansas City, MO 64106  
            (816) 512-2000

1  
2 e. Eastern District of Virginia  
3 U.S. Marshal: John R. Hackman  
4 401 Courthouse Square  
5 Alexandria, VA 22314  
6 (703) 837-5500

7  
8 f. Northern District of Texas  
9 U.S. Marshal: Randy Paul Ely  
10 Federal Building  
11 1100 Commerce Street, Room 16F47  
12 Dallas, TX 75242  
13 (214) 767-0836

14  
15 g. Western District of Washington  
16 U.S. Marshal: Mark L. Ericks  
17 700 Stewart Street, Suite 9000  
18 Seattle, WA 98101-1271  
19 (206) 370-8600

20  
21 h. Southern District of Ohio  
22 U.S. Marshal: Cathy Jones  
23 U.S. Courthouse  
24 85 Marconi Boulevard, Room 460  
25 Columbus, OH 43215  
26 (614) 469-5540

27 2. The United States Marshals and their deputies shall be accompanied by  
28 Microsoft's attorneys and forensic experts at the foregoing described seizure, to assist with  
identifying, inventorying, taking possession of and isolating Defendants' computer resources,  
command and control software and other software components that are seized. The United States  
Marshals shall seize Defendants' computers, servers, electronic data storage devices or media  
associated with Defendants' IP addresses at the hosting companies set forth in Paragraph F above,  
or a live image of Defendants' data and information on said computers, servers, electronic data  
storage devices or media, as reasonably determined by the U.S. Marshals Service, Microsoft's  
forensic experts and/or attorneys.

3. Stroz Friedberg, 1925 Century Park East, Suite 1350, Los Angeles, CA  
90067, tel. (310) 623-3301, will act as substitute custodian of any and all properties seized  
pursuant to this Order and shall hold harmless the United States Marshals Service, arising from  
any acts, incidents, or occurrences in connection with the seizure and possession of the  
defendants' property, including any third-party claims, and the United States Marshal shall be

1 discharged of his or her duties and responsibilities for safekeeping of the seized materials.

2 4. The United States Marshals accomplishing such seizure are permitted to  
3 enter the premises of the data centers operated by ECommerce, Inc., FDCServers.net LLC,  
4 Wholesale Internet, Inc., Burstnet Technologies, Inc., and Soflayer Technologies, Inc., in order to  
5 serve copies of this Order, carry out the terms of this Order and to verify compliance with this  
6 Order. The United States Marshals shall employ whatever reasonable means are necessary to  
7 carry out the terms of this Order and to inspect the contents of any computers, servers, electronic  
8 data storage devices, media, room, closets, cabinets, vehicles, containers or desks or documents  
9 and to dismantle any equipment utilized by Defendants to carry out the activities prohibited by  
10 this Order.

11 G. Pursuant to the All Writs Act and to effect discovery of the true identities of the  
12 John Doe defendants, the data centers and hosting providers identified in Appendix A and the  
13 domain registries identified in Appendix B to this Order, shall:

14 1. disable Defendants' IP addresses set forth in Appendix A (including  
15 through any backup systems) so that they can no longer be accessed over the Internet, connected  
16 to, or communicated with in any way except as explicitly provided for in this order;

17 2. disable Defendants' domains set forth in Appendix B so that they can no  
18 longer be accessed over the Internet, connected to, or communicated with in any way except as  
19 explicitly provided for in this order by (1) locking the domains and removing such domains from  
20 the zone file and (2) taking all steps required to propagate the foregoing domain registry changes  
21 to domain name registrars;

22 3. transfer any content and software hosted on Defendants' IP addresses listed  
23 in Appendix A to new IP addresses not listed in Appendix A; notify Defendants and any other  
24 owners of such content or software of the new IP addresses, and direct them to contact  
25 Microsoft's Counsel, Gabriel M. Ramsey, Orrick Herrington & Sutcliffe, 1000 Marsh Road,  
26 Menlo Park, CA 90425-1015, (Tel: 650-614-7400), to facilitate any follow-on action;

27 4. preserve and produce to Microsoft documents and information sufficient to  
28 identify and contact Defendants and Defendants' representatives operating or controlling the IP

1 addresses set forth in Appendix A, including any and all individual or entity names, mailing  
2 addresses, e-mail addresses, facsimile numbers and telephone numbers or similar contact  
3 information, including but not limited to such contact information reflected in billing, usage and  
4 contact records;

5 5. provide reasonable assistance in implementing the terms of this Order and  
6 shall take no action to frustrate the implementation of this Order, including the provision of  
7 sufficient and reasonable access to offices, facilities, computer networks, computers and services,  
8 so that the United States Marshals Service, Microsoft, its attorneys and/or representatives may  
9 directly supervise and confirm the implementation of this Order against Defendants;

10 6. refrain from publishing or providing notice or warning of this Order to  
11 Defendants, their representatives or persons who are in active concert or participation with them,  
12 until this Order is fully executed, except as explicitly provided for in this Order.

13 H. Anyone interfering with the execution of this Order is subject to arrest by federal or  
14 state law enforcement officials.

15 **IT IS FURTHER ORDERED** that copies of this Order, notice of the Preliminary  
16 Injunction hearing and service of the Complaint may be served by any means authorized by law,  
17 including (1) by personal delivery upon defendants who provided contact information in the U.S.;  
18 (2) personal delivery through the Hague Convention on Service Abroad upon defendants who  
19 provided contact information outside the U.S.; (3) by transmission by e-mail, facsimile and mail  
20 to the contact information provided by defendants to the data centers, Internet hosting providers  
21 and domain registrars who hosted the software code associated with the IP addresses set forth at  
22 Appendix A or through which domains in Appendix B are registered; and (4) by publishing notice  
23 to Defendants on a publicly available Internet website.

24 **IT IS FURTHER ORDERED**, pursuant to Federal Rule of Civil Procedure 65(b), 15  
25 U.S.C. §1116(d)(10) and 28 U.S.C. § 1651(a) (the All Writs Act) that the Defendants shall appear  
26 before this Court within 28 days from the date of this order, to show cause, if there is any, why  
27 this Court should not enter a Preliminary Injunction, pending final ruling on the Complaint against  
28 the Defendants, enjoining them from the conduct temporarily restrained by the preceding

1 provisions of this Order.

2 **IT IS FURTHER ORDERED** that Microsoft shall post bond in the amount of \$173,000  
3 as cash to be paid into the Court registry.

4 **IT IS FURTHER ORDERED** that Microsoft shall compensate the data centers, Internet  
5 hosting providers and/or domain registries identified in Appendices A and B at prevailing rates for  
6 technical assistance rendered in implementing the Order.

7 **IT IS FURTHER ORDERED** that this Order shall be implemented with the least degree  
8 of interference with the normal operation of the data centers and internet hosting providers and/or  
9 domain registries identified in Appendices A and B consistent with thorough and prompt  
10 implementation of this Order.

*JWR*  
*All actions undertaken under the authority of this Order shall be in strict compliance with 15 U.S.C. § 1116.*

11 **IT IS FURTHER ORDERED** that the Defendants shall file with the Court and serve on  
12 Microsoft's counsel any answering affidavits, pleadings, motions, expert reports or declarations  
13 and/or legal memoranda no later than four (4) days prior to the hearing on Microsoft's request for  
14 a preliminary injunction. Microsoft may file responsive or supplemental pleadings, materials,  
15 affidavits, or memoranda with the Court and serve the same on counsel for the Defendants no later  
16 than one (1) day prior to the preliminary injunction hearing in this matter. Provided that service  
17 shall be performed by personal or overnight delivery, facsimile or electronic mail, and documents  
18 shall be delivered so that they shall be received by the other parties no later than 4:00 p.m. (Pacific  
19 Standard Time) on the appropriate dates listed in this paragraph.

20 **IT IS SO ORDERED**

21 Entered this 9<sup>th</sup> day of March, 2011.  
22 *at 9:00am.*



The Honorable James L. Robart  
United States District Judge