IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

MICROSOFT CORPORATION, a Washington corporation, Plaintiff, v. JOHN DOES 1-2, CONTROLLING A COMPUTER NETWORK AND THEREBY INJURING PLAINTIFF AND ITS CUSTOMERS, Defendants.	Civil Action No.: 1:17-cv-1224

MICROSOFT'S REQUEST FOR ENTRY OF DEFAULT

Pursuant to Federal Rule of Civil Procedure 55(a), Plaintiff Microsoft Corp. ("Microsoft") requests that the Clerk of the Court enter default against Defendants John Does 1-2 ("Defendants"). As detailed below, Plaintiff served Defendants with the Complaint, summons and related material through Court-ordered methods pursuant to Fed. R. Civ. P. 4(f)(3) that were reasonably calculated to provide Defendants with notice of the proceedings. Dkt. 26 (authorizing alternative methods of service, including particularly e-mail and Internet publication). Defendants received notice and are very likely aware of these proceedings, and despite receiving notice have not appeared in this action. The time for Defendants to appear and response to Plaintiff's Complaint has now expired.

Upon the Court's entry of default pursuant to this request, Plaintiff intends, thereafter, to file a motion for default judgment and permanent injunction pursuant to Fed. R. Civ. P. 55(b)(2).

I. STATEMENT OF FACTS

This action arises out of violations of federal and state law caused by Defendants' distribution of malware which Microsoft has identified as "Barium". Defendants are the persons responsible for operating Internet domains used to propagate and control the Barium malware and related cybercrime operation. On October 27, 2017, the Court entered a TRO that disabled much of the Defendants' technical infrastructure used to carry out attacks to steal information and intellectual property. Dkt. 26. The Court subsequently entered a Preliminary Injunction to ensure that Defendants' infrastructure cannot cause further harm. Dkt. 36.

When the Court issued the TRO and Preliminary Injunction, the Court found good cause to permit service of Plaintiff's Complaint and related materials by alternative means pursuant to Rule 4(f)(3). Dkt. 26, 36. The Court has directed that, under the circumstances, appropriate means of service sufficient to satisfy Due Process includes e-mails to the e-mail accounts associated with Defendants and publication on a publicly available Internet website. *Id.*

Service of Process on Defendants

The Court authorized service by e-mail and publication on October 27, 2017. Dkt. 26 at p. 9. On November 2, 2017 (and subsequently thereafter), Plaintiff served e-mail addresses associated with Defendants' Internet domains. Declaration of Michael Zweiback in Support of Microsoft's Request for Entry of Default ("Zweiback Decl."), ¶¶ 16-17, 20-22. Plaintiff also served Defendants by publication at website www.noticeofpleadings.net/barium. *Id.* at ¶¶ 7-8.

The time for Defendants to answer or respond to the complaint expired 21 days after service of the summons – on November 23, 2017 (21 days after e-mail service). *See id.* at ¶ 3. To the best of Plaintiff's information and belief, no Defendant is a minor or incompetent person, or unable to respond due to the absence caused by military service. *Id.* at ¶ 3.

II. LEGAL AUTHORITY

"When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk must enter the party's default." Fed. R. Civ. P. 55(a). Plaintiff has served the Complaint, summons, and all orders and pleadings on Defendants using the methods ordered by the Court under Rule 4(f)(3), including service by e-mail and publication. These methods of service satisfy Due Process and were reasonably calculated to notify the Defendants of this action, particularly given the nature of Defendants' conduct. *See, e.g.*, *FMAC Loan Receivables v. Dagra*, 228 F.R.D. 531, 534 (E.D. Va. 2005) (acknowledging that courts have readily used Rule 4(f)(3) to authorize international service through non-traditional means, including email); *Rio Props., Inc. v. Rio Int'l Interlink*, 284 F.3d 1007, 1014-15 (9th Cir. 2002) (involving Internet-based misconduct; "[Defendant] had neither an office nor a door; it had only a computer terminal. If any method of communication is reasonably calculated to provide [Defendant] with notice, surely it is email . . . ."); [1] *BP Prods. N. Am, Inc. v. Dagra*, 236 F.R.D. 270, 271-73 (E.D. Va. 2005) (approving notice by publication in two Pakistani newspapers circulated in the defendant's last-known location); *Microsoft Corp. v. John Does 1-27*, Case No. 1:10-cv-156 (E.D. Va. 2010, Brinkema J.) at Dkt. 38, p. 4 (authorizing service by email and publication in similar action).

As explained above, Plaintiff successfully sent numerous service e-mails to the e-mail addresses associated with the Defendants and their domains used to carry out cybercrime, unauthorized intrusion, hacking and theft of sensitive information and intellectual property.

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[1] *Rio Properties* has been followed in the Fourth Circuit. *See FMAC Loan Receivables*, 228 F.R.D. at 534 (E.D. Va. 2005) (following *Rio*); *BP Prods. N. Am., Inc.*, 232 F.R.D. at 264 (E.D. Va. 2005) (same); *Williams v. Adver. Sex L.L.C.*, 231 F.R.D. 483, 486 (N.D. W. Va. 2005) ("The Fourth Circuit of Appeals has not addressed this issue. Therefore, in the absence of any controlling authority in this circuit, the Court adopts the reasoning of the Ninth Circuit in *Rio Properties, Inc.* . . . .").

Zweiback Decl. ¶¶ 14-18, 20-22. Given that Defendants' preferred mode of communication regarding the domains was via electronic means, given the direct association between the e-mail addresses and the domains, and given that the pleadings were successfully sent to such addresses, it is appropriate to find that the Complaint and summons were served on Defendants pursuant to this Court's order. *Id.* While Defendants' specific physical addresses are unknown, the evidence indicates that Defendants carry out business through the e-mail addresses. *Id.* at ¶¶ 26-27. Moreover, it is likely that Defendants are aware of the notice website, which has been publicly available since October 31, 2017 and was included in the e-mails to the Defendants. *Id.* at ¶¶ 8-10, 26-27. Defendants are undoubtedly aware that they have lost control of much of their harmful infrastructure, pursuant to the Court's injunctions, and any cursory investigation would reveal that Plaintiff has initiated this lawsuit. *Id.*

Therefore, pursuant to Fed. R. Civ. P. 55(a), entry of default against the non-responsive Defendants is appropriate here. *See 3M v. Christian Invs. LLC*, 2012 U.S. Dist. LEXIS 64104, at *4 (E.D. Va. 2012) (default entered against non-responsive international defendant served pursuant to Rule 4(f)).

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III. CONCLUSION

For all the foregoing reasons, entry of default against the Defendants is appropriate. Plaintiff respectfully requests entry of default pursuant to Rule 55(a) so that Plaintiff can proceed with a motion for default judgment and permanent injunction.

Dated: May 21, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 21, 2018, the foregoing was electronically filed with the Clerk of Court using the CM/ECF system. Copies of the forgoing were also served on the defendants listed below by electronic mail:

John Does 1-2

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