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NOV 14 2017

**IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

JAMES N. HARTEN, Clerk
By:  Deputy Clerk

MICROSOFT CORPORATION

Plaintiff,

v.

**JOHN DOES 1-51,
CONTROLLING MULTIPLE
COMPUTER BOTNETS
THEREBY INJURING
MICROSOFT AND ITS
CUSTOMERS**

Defendants.

CASE NO.

1:17-CV-4566

FILED UNDER SEAL

**MEMORANDUM IN SUPPORT OF MOTION FOR PROTECTIVE ORDER
TEMPORARILY SEALING DOCUMENTS**

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INTRODUCTION

Microsoft has filed a Complaint and *Ex Parte* Application for an Emergency Temporary Restraining Order and Order to Show Cause Regarding Preliminary Injunction (“TRO Application”) to stop the harmful and malicious Internet activities of John Doe Defendants 1 through 51, which are aimed 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 its TRO Application and supporting declarations. 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 request is narrowly tailored to impose the least restriction on the public's right of access to information. Microsoft requests that all sealed documents be immediately unsealed upon execution of the temporary restraining order.

BACKGROUND

Microsoft has filed a Complaint and TRO Application to stop the Defendants' activities that violate The Computer Fraud and Abuse Act, 18 U.S.C. § 1030; The Georgia Computer Systems Protection Act, O.C.G.A. § 16-9-93; The Lanham Act, 15 U.S.C. § 1114 et seq.; The Uniform Deceptive Trade Practices Act, O.C.G.A. § 10-1-372; 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 TRO Application 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 of the public. The reasons for this are set forth in detail in the Memorandum in Support of Microsoft's TRO Application.

ARGUMENT

The public has a right to access judicial records and documents, but this right is not absolute. *Romero v. Drummond Co., Inc.*, 480 F.3d 1234, 1245 (11th Cir. 2013). "The right of access does not apply to discovery and, where it does apply, may be overcome by a showing of good cause." *Id.* Pleadings and motions that are "presented to the court to invoke its powers or affect its decisions," whether or not characterized as dispositive," are subject to the public's right of access, and a showing of good cause must be made to seal them. *Id.* (citation omitted); *see also* *F.T.C. v. AbbVie Prods. LLC*, 713 F.3d 54, (11th Cir. 2013).

"When deciding whether to grant a party's motion to seal, the court is required to balance the historical presumption of access against any significant interests raised by the party seeking to file under seal." *Sheffield v. State Farm Fire & Casualty Co.*, No. 5:14-CV-38, 2016 WL 3546373, at *1 (S.D. Ga. June 23, 2016); *see also* *Romero*, 480 F.3d at 1246. In balancing these interests, courts look to "whether allowing access would impair court functions or harm legitimate privacy interests, the degree of and likelihood of injury if made public, the reliability of the

information, whether there will be an opportunity to respond to the information, whether the information concerns public officials or public concerns, and the availability of a less onerous alternative to sealing the documents.” *Romero*, 480 F.3d at 1246.

Good cause can exist under a variety of circumstances where the moving party’s right to protect a legitimate interest outweighs the public’s right of access. One such circumstance is “when disclosure will cause the party to suffer a clearly defined and serious injury.” *Reid v. Viacom International Inc.*, No. 1:14-CV-1252-MHC, 2016 WL 4157208, at *2 (N.D. Ga., Jan. 25, 2016). Another is when a party’s privacy or proprietary interests are at stake, such as trade secrets. *Romero*, 480 F.3d at 1246; *see also Danimer Scientific, LLC v. Metabolix, Inc.*, No. 1:10-CV-102 (WLS), 2010 WL 11470643, at *2 (M.D. Ga. Nov. 9, 2010) (finding good cause to protect trade secrets and other confidential, proprietary information when disclosure would harm the parties’ legitimate privacy interest in the information).

Moreover, courts in other judicial districts have sealed records when doing so was necessary to protect against cybercrime. *E.g., Oneamerica Financial Partners, Inc. v. T-Systems North America, Inc.*, No. 115CV01534TWPKL, 2016 WL 891349, at *4 (S.D. Ind., Mar. 9, 2016) (granting motion to seal information regarding plaintiff’s IT security and infrastructure that if disclosed, could make

plaintiff vulnerable to a hacker attack); *In re Google Inc. Gmail Litig.*, 2013 WL 5366963, at *3 (N.D. Cal. Sept. 25, 2013) (holding that compelling reasons existed to seal complaint because it contained information that could be used “to circumvent Google’s anti-virus and anti-spam mechanisms”). Thus, an effort to thwart future cyberattacks is sufficient good cause to seal sensitive information. *See Music Group Macao Commercial Offshore Ltd v. Foote*, No. 14-cv-03078-JSC, 2015 WL 3993147, at *2 (N.D. Cal. Jun. 30, 2015) (“Weighing the public interest in understanding the judicial process against Plaintiff’s allegation that disclosing server data may harm it by encouraging another cyber attack, or at least making it feasible, the Court finds a compelling reason to seal . . .”).

In this case, Microsoft’s right and interest in protecting its ability to obtain emergency *ex parte* temporary relief, and the necessity of sealing to Microsoft’s ability to obtain such relief, is paramount over any competing public interest to immediate access to the information Microsoft requests to be sealed. If Microsoft’s papers are not sealed, the relief sought would very likely be rendered fruitless, and there is substantial risk Defendants would destroy evidence. The harm that would be caused by public filing of Microsoft’s Complaint and moving papers would far outweigh the public’s right to access that information. Moreover, there is no need for public access to these documents while Microsoft is seeking *ex parte* temporary

relief, which will only be effective if the materials remain under seal until after Microsoft is able to obtain that relief. Applying the balancing test demonstrates that Microsoft's interest in protecting the confidentiality of the pleadings far outweighs any public right to disclosure of that information.

There is a real and substantial risk that if this case and documents filed are made public before Microsoft can execute the temporary restraining order, Defendants will destroy all evidence of their prior activities, change their online identities, and move their infrastructure to different servers to continue carrying out their illicit activities. As set forth in Microsoft's TRO Motion and supporting declarations, there is specific evidence that Defendants will take these steps if provided advance notice of this action. *See* Decl. of Michael Zweiback Filed in Support Of Microsoft's Application For An Emergency *Ex Parte* Temporary Restraining Order And Order To Show Cause Re: Preliminary Injunction, at ¶¶ 3-4.

Further, Microsoft only seeks to seal such information for a limited period of time. After Microsoft obtains effective *ex parte* temporary relief, Microsoft intends to immediately commence its efforts to provide Defendants notice of the preliminary injunction hearing and service of the Complaint. All documents will then 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* temporary relief that Microsoft requests in the TRO Application, Microsoft respectfully requests 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.

CONCLUSION

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

1. Microsoft's Complaint and Appendices A through C in support thereof;
2. Civil Cover Sheet;
3. Report On The Filing Or Determination Of An Action Regarding A Patent Or Trademark;
4. Microsoft's Certificate Of Interested Persons And Corporate Disclosure Statement Pursuant To Fed. R. Civ. P. 7.1;
5. Notice Of Hearing Re: Motion For Protective Order Temporarily Sealing Documents;

6. Motion For Protective Order Temporarily Sealing Documents;
7. Memorandum In Support Of Motion For Protective Order Temporarily Sealing Documents;
8. Declaration of Michael Zweiback In Support Of Motion For Protective Order Temporarily Sealing Documents;
9. [Proposed] Order Granting Microsoft's Motion For Protective Order Temporarily Sealing Documents;
10. Notice Of Hearing Re: Microsoft's Motion For Leave To Exceed Page Limits Re: Brief In Support Of Microsoft's Application For An Emergency *Ex Parte* Temporary Restraining Order And Order To Show Cause Re: Preliminary Injunction;
11. Microsoft's Motion For Leave To Exceed Page Limits Re: Microsoft's Brief In Support Of Microsoft's Application For An Emergency *Ex Parte* Temporary Restraining Order And Order To Show Cause Re: Preliminary Injunction;
12. Brief In Support Of Microsoft's Motion For Leave To Exceed Page Limits Re: Microsoft's Brief In Support Of Microsoft's Application For An Emergency *Ex Parte* Temporary Restraining Order And Order To Show Cause Re: Preliminary Injunction;

13. [Proposed] Order Granting Motion For Leave To Exceed Page Limits
Re: Microsoft's Brief In Support Of Microsoft's Application For An
Emergency *Ex Parte* Temporary Restraining Order And Order To
Show Cause Re: Preliminary Injunction;
14. Notice Of Hearing Re: Application Of Microsoft For An Emergency
Ex Parte Temporary Restraining Order And Order To Show Cause Re:
Preliminary Injunction;
15. Application Of Microsoft For An Emergency *Ex Parte* Temporary
Restraining Order And Order To Show Cause Re: Preliminary
Injunction;
16. Brief In Support Of Microsoft's Application For An Emergency *Ex*
Parte Temporary Restraining Order And Order To Show Cause Re:
Preliminary Injunction;
17. Declaration of Jean-Ian Boutin In Support Of Microsoft's Application
For An Emergency *Ex Parte* Temporary Restraining Order And Order
To Show Cause Re: Preliminary Injunction, and exhibits in support
thereof;
18. Declaration of Vishant Patel In Support Of Microsoft's Application For
An Emergency *Ex Parte* Temporary Restraining Order And Order To

Show Cause Re: Preliminary Injunction, and exhibits in support thereof;

19. Declaration of Rodelio G. Fiñones In Support Of Microsoft's Application For An Emergency *Ex Parte* Temporary Restraining Order And Order To Show Cause Re: Preliminary Injunction, and exhibits in support thereof;
20. Declaration of Michael Zweiback In Support Of Microsoft's Application For An Emergency *Ex Parte* Temporary Restraining Order And Order To Show Cause Re: Preliminary Injunction, and exhibits in support thereof;
21. [Proposed] Emergency *Ex Parte* Temporary Restraining Order And Order To Show Cause Re: Preliminary Injunction;
22. *Pro Hac Vice* Applications of Richard Boscovich, Michael Zweiback, and Erin Coleman.

Microsoft respectfully requests that the case and these materials be sealed pending execution of the *ex parte* temporary relief sought in the TRO Application. Microsoft respectfully requests that immediately upon execution of the temporary restraining order, the instant case be unsealed and the foregoing documents be filed in the public docket. Upon execution of the *ex parte* relief, Microsoft will file with the Clerk of

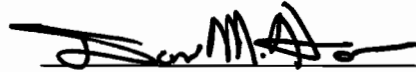
the Court a Notice that the temporary restraining order has been executed. Microsoft further requests that upon execution of the temporary restraining order, Microsoft be permitted to disclose such materials as it deems necessary, including to commence its efforts to provide Defendants notice of the preliminary injunction hearing and service of the Complaint.

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

[Signature on next page]

Dated: November 14, 2017

Respectfully submitted,



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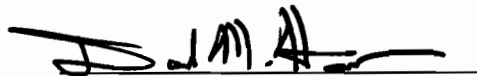
Attorneys for Plaintiff Microsoft Corp.

CERTIFICATION OF COMPLIANCE

Pursuant to L.R. 7.1(D), N.D. Ga., counsel for Plaintiff hereby certifies that this Brief has been prepared with one of the font and point selections approved by the Court in L.R. 5.1, N.D. Ga.

Dated: November 14, 2017

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