

Richard A. Jacobsen (RJ5136)
ORRICK, HERRINGTON & SUTCLIFFE LLP
51 West 52nd Street
New York, New York 10019
Telephone: (212) 506-5000
Facsimile: (212) 506-5151

Gabriel M. Ramsey
(*pro hac vice application pending*)
ORRICK, HERRINGTON & SUTCLIFFE LLP
1000 Marsh Road
Menlo Park, California 94025
Telephone: (650) 614-7400
Facsimile: (650) 614-7401

Attorneys for Plaintiffs
MICROSOFT CORPORATION,
FS-ISAC, INC. and NATIONAL AUTOMATED
CLEARING HOUSE ASSOCIATION

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CV 12-1335

MICROSOFT CORP., FS-ISAC, INC., and
NATIONAL AUTOMATED CLEARING HOUSE
ASSOCIATION,

Case No. 12: CIV _____

Plaintiffs

FILED UNDER SEAL

v.

JOHN DOES 1-39 D/B/A Slavik, Monstr, IOO,
Null, nvidiag, zebra7753, lexa_Mef, gss, iceIX,
Harderman, Gribodemon, Aqua, aquaSecond, it,
percent, cp01, hct, xman, Pepsi, miami, miamibc,
petr0vich, Mr. ICQ, Tank, tankist, Kusunagi,
Noname, Lucky, Bashorg, Indep, Mask, Enx,
Benny, Bentley, Denis Lubimov, MaDaGaSka,
Vkontake, rfcid, parik, reronic, Daniel, bx1, Daniel
Hamza, Danielbx1, jah, Jonni, jtk, Veggi Roma, D
frank, duo, Admin2010, h4x0rdz, Donsft,
mary.J555, susanneon, kainehave, virus_e_2003,
spaishp, sere.bro, muddem, mechan1zm,
vlad.dimitrov, jheto2002, sector.exploits AND
JabberZeus Crew CONTROLLING COMPUTER
BOTNETS THEREBY INJURING PLAINTIFFS,
AND THEIR CUSTOMERS AND MEMBERS,

KORMAN, J.

MANN, M.J.

Defendants.

**PLAINTIFFS' EMERGENCY MOTION
TO TEMPORARILY FILE CASE UNDER SEAL**

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U.S. DISTRICT COURT
EASTERN DISTRICT
OF NEW YORK

Pursuant to Federal Rule of Civil Procedure 26(c)(1), Plaintiffs Microsoft Corporation (“Microsoft”), the National Automated Clearing House Association (“NACHA”) and FS-ISAC, Inc. (collectively, “Plaintiffs”) hereby move this Court to grant the Emergency Motion To Temporarily File Case Under Seal (the “Motion”) for a protective order temporarily sealing the instant case in general such that it is not accessible on the Public Access to Court Electronic Records (“PACER”) website and does not otherwise appear on the public docket and, specifically, temporarily sealing the following documents filed by Plaintiffs in this action:

1. Complaint;
2. Application For An Emergency Temporary Restraining Order, Seizure Order And Order To Show Cause Re Preliminary Injunction;
3. Brief In Support Of Application For An Emergency Temporary Restraining Order, Seizure Order And Order To Show Cause Re Preliminary Injunction;
4. Declaration of Mark Debenham In Support Of Application For An Emergency Temporary Restraining Order, Seizure Order And Order To Show Cause Re Preliminary Injunction and Exhibits hereto;
5. Declaration of Pamela Moore In Support Of Application For An Emergency Temporary Restraining Order, Seizure Order And Order To Show Cause Re Preliminary Injunction and the Exhibits hereto;
6. Declaration of William B. Nelson In Support Of Application For An Emergency Temporary Restraining Order, Seizure Order And Order To Show Cause Re Preliminary Injunction and Exhibits hereto;
7. Declaration of Jesse D. Kornblum In Support Of Application For An Emergency Temporary Restraining Order, Seizure Order And Order To Show Cause Re Preliminary Injunction and Exhibits hereto;
8. Declaration of William Johnson In Support Of Application For An Emergency Temporary Restraining Order, Seizure Order And Order To Show Cause Re Preliminary Injunction and Exhibits hereto; and

9. Declaration of Jacob M. Heath In Support Of Application For An Emergency Temporary Restraining Order, Seizure Order And Order To Show Cause Re Preliminary Injunction and Exhibits hereto.

BACKGROUND

Plaintiffs have 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 39 and JabberZeus Crew¹ (collectively, “Defendants”) for violations of the Computer Fraud and Abuse Act (18 U.S.C. § 1030); the CAN-SPAM Act (15 U.S.C. § 7704); the Electronic Communications Privacy Act (18 U.S.C. § 2701); trademark infringement, false designation of origin, and trademark dilution under 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. Plaintiffs seek *ex parte* relief in their Application for TRO that will cease the irreparable harm resulting from Defendants’ conduct. Plaintiffs seek *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 Plaintiffs, their customers and members, and the public. The reasons for this are set forth in detail in the Brief in Support of Plaintiffs’ Application for TRO. Therefore, Plaintiffs request 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 Plaintiffs’ 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

¹ Because Defendants John Does and JabberZeus Crew are actively engaged in using computer networks to intercept, capture, and steal Internet users’ online information, the above-captioned d/b/a Internet monikers are used by Defendants in lieu of their true identities, which remain unknown.

would allow Defendants to evade such relief, destroy or conceal evidence, and render fruitless further prosecution of this action, thereby perpetuating the very harm Plaintiffs ask this Court to remedy. To forestall these consequences, Plaintiffs request that the Complaint, Application for TRO, and all supporting materials be filed under seal.

The temporary sealing requested by Plaintiffs 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 Plaintiffs pursue 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, 113 (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 Plaintiffs pursuit of their claims and this Court’s ability to efficiently perform its judicial functions. If the case and its filings are made public before Plaintiffs obtain 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. As set forth in the

Application for *Ex Parte* TRO supporting declarations, there is specific evidence that Defendants will take these steps if provided advance notice of this action. *See* Declaration of Mark Debenham in Support of Plaintiffs' Application for Emergency Temporary Restraining Order, Seizure Order and Order to Show Cause Re Preliminary Injunction and Exhibits thereto ¶¶ 102-109 and Declaration of Jacob M. Heath In Support of Plaintiffs' Application for Emergency Temporary Restraining Order, Seizure Order and Order to Show Cause Re Preliminary Injunction and Exhibits thereto ¶ 3, filed concurrently with this Motion. It is for these reasons that Plaintiffs seek *ex parte* temporary relief here, as public filing of these materials would frustrate the very purpose of the *ex parte* relief sought.

Plaintiffs request, moreover, that the case be maintained under seal only during the short length of time until they obtain effective *ex parte* temporary relief. The case will not be permanently sealed, or even sealed for any significant period of time. After the relief is obtained and the temporary restraining order and seizure order are executed, the continued sealing will be unnecessary. At such time the case may immediately be unsealed and Plaintiffs will file with the Clerk of the Court notice that execution of the requested relief has occurred so that the case materials may be filed on the public docket.

PRAYER FOR RELIEF

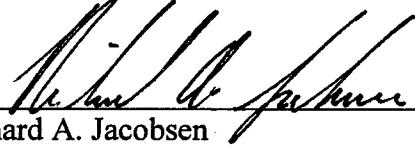
For the reasons set forth above, Plaintiffs respectfully request that the case and these materials be sealed such that they are not accessible on the PACER website or otherwise appear on the public docket until the execution of any temporary restraining order and seizure order sought in Plaintiffs' Application for TRO. Immediately upon execution, the materials will be unsealed and may be filed in the public docket. Plaintiffs respectfully request that upon executing the temporary restraining order and seizure order, that Plaintiffs be permitted to disclose such materials as they deem necessary, including to commence efforts to provide Defendants notice of the preliminary injunction hearing by publication and service of the Complaint. Plaintiffs respectfully request that should the Court decide not to grant the *ex parte*

temporary relief requested in Plaintiffs' Application for TRO, that the materials be sealed indefinitely.

Dated: March 19, 2012
New York, New York

Respectfully Submitted,

ORRICK, HERRINGTON & SUTCLIFFE LLP

By: 
Richard A. Jacobsen
51 West 52nd Street
New York, NY 10019
Telephone: (212) 506-5000
Facsimile: (212) 506-5151

Gabriel M. Ramsey
(pro hac vice application pending)
ORRICK, HERRINGTON & SUTCLIFFE LLP
1000 Marsh Road
Menlo Park, California 94025
Telephone: (650) 614-7400
Facsimile: (650) 614-7401

Attorneys for Plaintiffs
Microsoft Corporation
FS-ISAC, Inc. - Financial Services – Information
Sharing Analysis Center
National Automated Clearing House Association