

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

MICROSOFT CORPORATION, a Washington Corporation, FORTRA, LLC, a Delaware Limited Liability Company, and HEALTH-ISAC, INC., a Florida Corporation,

Plaintiffs,

v.

JOHN DOES 1-2, JOHN DOES 3-4 (AKA CONTI RANSOMWARE GROUP), JOHN DOES 5-6 (AKA LOCKBIT RANSOMWARE GROUP), JOHN DOES 7-8 (AKA DEV-0193), JOHN DOES 9-10 (AKA DEV-0206), JOHN DOES 11-12 (AKA DEV-0237), JOHN DOES 13-14 (AKA DEV-0243), JOHN DOES 15-16 (AKA DEV-0504), Controlling Computer Networks and Thereby Injuring Plaintiffs and Their Customers,

Defendants.

Case No.

FILED UNDER SEAL

**BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR PROTECTIVE ORDER
TEMPORARILY SEALING DOCUMENTS**

Plaintiffs submit the following memorandum in support of its Motion for a Protective Order Sealing Documents.

BACKGROUND

Plaintiffs have filed a Complaint and an *Ex Parte* Application for an Emergency Temporary Restraining Order and Order to Show Cause re Preliminary Injunction ("TRO Application") to prevent the activities of John Doe Defendants 1-16 (collectively "Defendants") who are engaged in harmful and malicious Internet activities directed at Microsoft, its customers, and the general public. Plaintiffs seek *ex parte* relief in the TRO Application that will cease the irreparable harm resulting from Defendants' conduct. Plaintiffs seek *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 Plaintiffs' request are set forth in detail in the TRO Application filed concurrently herewith. Therefore, Plaintiffs request that this case and all documents filed in this case be sealed pending execution of the temporary restraining order sought in Plaintiffs' TRO Application. Plaintiffs' requested sealing order is narrowly tailored to impose the least restriction on the public's right of access to information as possible. Plaintiffs request that all sealed documents be immediately unsealed upon execution of the temporary restraining order.

ARGUMENT

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 order is 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.*

The Federal Rules of Civil Procedure also recognize the important public and judicial interest in protecting confidential business information. See Fed. R. Civ. P. 26(c)(1)(G) (empowering courts to order "that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way"). Likewise, Supreme Court and Fourth Circuit authority recognize the necessity of non-public *ex parte* proceedings. See *Granny Goose Foods, Inc. v. Brotherhood of Teamsters & Auto Truck Drivers*, *Leal No. 70*, 415 U.S. 423, 439(1974) ("Ex parte temporary restraining orders are no doubt necessary in certain circumstances. . . ."); *Microsoft Corp. v. John Does 1-5*, Case No. 1:15-cv-0656-JBW-LB (E.D.N.Y. 2015) (Bloom, J.) (sealing docket); *Microsoft Corp. v. John Does 1-39, et al.*, Case No. 12-cv-1335 (E.D.N.Y. 2012) (Johnson, J.) (same).

In this case, Plaintiffs' rights and interests in protecting its ability to obtain emergency *ex parte* temporary relief, and the necessity of sealing its pleadings is paramount over any competing public interest to *immediate* access to the information Microsoft requests be sealed. If Plaintiffs' papers are not sealed, the relief sought would very likely be rendered fruitless and there is a substantial risk Defendants would destroy evidence. Defendants are highly-sophisticated cybercriminals. They access Microsoft's services without authorization; hack into high-value computer networks; install banking trojans and malware on the networks to gain and maintain long-term, surreptitious access to that network; and locate and exfiltrate sensitive information off of the networks. If Defendants knew Plaintiffs sought the relief set forth in the TRO Application, they could quickly adapt the command and control infrastructure used to secretly establish themselves on a victim's network. Indeed, evidence shows that in the past, when Defendants became aware of efforts to mitigate or investigate their activities, they took steps to conceal their activities and to conceal the injury that had been caused to their victims, making it more difficult for their victims to adequately assess the damage or take steps to mitigate that injury going forward.

Given Plaintiffs' actions against similar unlawful Internet activity, even disclosing that Plaintiffs have initiated this case risks giving Defendants the opportunity to change their command and control infrastructure. Based on similar actions, it is likely that Defendants in this case will take similar steps to destroy evidence and move their command and control infrastructure if they are given notice of the pending legal action against them.

The harm that would be caused by the public filing of Plaintiffs' Complaint and moving papers would far outweigh the public's right to access to that information. There is no need for the public to have immediate access to the Complaint, TRO Application, and supporting

documents while Plaintiffs is seeking *ex parte* relief which will only be effective if these materials remain under seal.

Plaintiffs only seek to seal such information for a limited period of time, until after effective *ex parte* temporary relief has been obtained. After such point, sealing will no longer be necessary, and Plaintiffs will immediately commence efforts to provide Defendants notice of the preliminary injunction hearing and service of the Complaint-at which point, all documents will be unsealed and the public will be given full access to these proceedings. Plaintiffs, 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.

However, should the Court decide not to grant the *ex parte* relief Plaintiffs request, Plaintiffs ask 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.

Given the limited period of sealing as an alternative that balances the public interest in access with Plaintiffs' important interests in maintaining these materials under seal for a brief period of time, granting the instant request to seal is warranted and consistent with the legal framework for addressing this issue.

CONCLUSION

Therefore, for all the foregoing reasons, Plaintiffs requests that this case and the following documents in particular be kept under seal in accordance with Fed. R. Civ. P. 26(c)(1) and Local Civil Rule 5, pending execution of the *ex parte* relief sought in the TRO Application:

1. The instant Emergency Motion To Temporarily File Case Under Seal and attachments hereto;
2. The Declaration of Garylene Javier in Support of the instant Emergency Motion To Temporarily File Case Under Seal;
3. Plaintiffs' Complaint;
4. Application for Emergency *Ex Parte* Temporary Restraining Order and Order to Show Cause re Preliminary Injunction and accompanying documents;
5. Brief in Support of Emergency Ex Parte Temporary Restraining Order and Order to Show Cause re Preliminary Injunction;
6. The declaration of Anna Saber in Support of Plaintiffs' *Ex Parte* Application for an Emergency Temporary Restraining Order and Order to Show Cause re Preliminary Injunction and attachments thereto;
7. [Proposed] Order Granting Temporary Restraining Order, Seizure Order And Order To Show Cause Re Preliminary Injunction
8. The declaration of Jason Lyons in Support of Plaintiffs' *Ex Parte* Application for an Emergency Temporary Restraining Order and Order to Show Cause re Preliminary Injunction and attachments thereto;
9. The declaration of Christopher Coy in Support of Plaintiffs' *Ex Parte* Application for an Emergency Temporary Restraining Order and Order to Show Cause re Preliminary Injunction and attachments thereto;
10. The declaration of Rodel Finones in in Support of Plaintiffs' *Ex Parte* Application for an Emergency Temporary Restraining Order and Order to Show

Cause re Preliminary Injunction and attachments thereto;

11. The declaration of Jonathan Gross in Support of Plaintiffs' *Ex Parte* Application for an Emergency Temporary Restraining Order and Order to Show Cause re Preliminary Injunction and attachments thereto;
12. The declaration of Errol Weiss in Support of Plaintiffs' *Ex Parte* Application for an Emergency Temporary Restraining Order and Order to Show Cause re Preliminary Injunction and attachments thereto;
13. The declaration of Robert G. Erdman II in Support of Plaintiffs' *Ex Parte* Application for an Emergency Temporary Restraining Order and Order to Show Cause re Preliminary Injunction and attachments thereto;
14. Motion for Leave to Exceed Page Limits re Plaintiffs' Brief in Support of Plaintiffs' Application for an Emergency Temporary Restraining Order and Order to Show Cause re Preliminary Injunction;
15. Brief in Support of Motion for Leave to Exceed Page Limits re Plaintiffs' Brief in Support of Plaintiffs' Application for an Emergency Temporary Restraining Order and Order to Show Cause re Preliminary Injunction;
16. [Proposed] Order Granting Motion for Leave to Exceed Page Limits re Plaintiffs' Brief in Support of Plaintiffs' Application for an Emergency Temporary Restraining Order and Order to Show Cause re Preliminary Injunction;
17. Plaintiffs' Motion for Protective Order Temporarily Sealing Documents;
18. Brief in Support of Plaintiffs' Motion for Protective Order Temporarily Sealing

Documents;

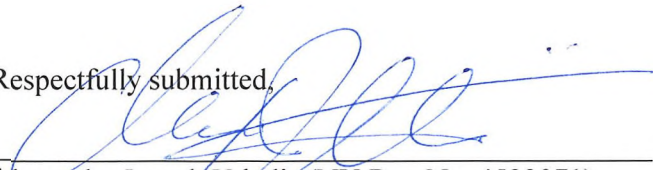
19. Declaration of Garylene Javier In Support of Plaintiffs' Motion for Protective Order Temporarily Sealing Documents and attachments thereto;
20. [Proposed] Order Granting Plaintiffs' Motion for Protective Order Temporarily Sealing Documents;
21. Notice of Hearing Re Application of Microsoft For An Emergency Ex Parte TRO and Order to Show Cause Re Preliminary Injunction; and
22. Pro Hac Vice Applications.

Plaintiffs respectfully request that the case and these materials be sealed pending execution of the *ex parte* temporary relief sought in Plaintiffs' Application for TRO. Plaintiffs respectfully requests that immediately upon the 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, Plaintiffs will file with the Clerk of the Court a Notice that the temporary restraining order has been executed. Plaintiffs further requests that upon execution of the temporary restraining order, Plaintiffs 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.

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

Dated: March 30, 2023

Respectfully submitted,



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