

irreparable injury to Microsoft, its customers and the public. *See* D.I. 5.

Pursuant to the execution of the TRO and preliminary injunction, Microsoft has also obtained some preliminary information regarding the John Doe defendants from the records of the webhosts and other service providers whose services were used by the John Doe defendants. While much of such information provided in such records was fictitious, the records include email addresses, additional domain names and IP addresses associated with the John Doe defendants. Additionally, Microsoft has received such information from its own investigation and from third parties, which provide leads to be pursued through discovery, in order to identify the John Doe defendants.

In order to identify the John Doe defendants from information such as email addresses, domain names and IP addresses, it will be necessary to send subpoenas to third party Internet service providers to obtain account and user information provided by the John Doe defendants in association with such email addresses, domain names and IP addresses. For example, such service providers often maintain billing and account information identifying the purchasers and account holders of such services, and maintain IP address logs reflecting the computers from which the John Doe defendants logged into their accounts. Given that the account and user information kept by these third party internet service providers regarding the John Doe defendants is generally non-public, the service providers are not likely to provide it to Microsoft in the absence of a subpoena.

Accordingly, Microsoft requests an order granting authority to serve limited subpoenas to third party email service providers, domain name registrars and hosting companies, to pursue the identities of the John Doe defendants. By the instant motion, Microsoft requests authority to conduct discovery into these sources to identify the Doe Defendants. Given the state of

information currently in Microsoft's possession, Microsoft believes that it will be able to identify, name and serve John Doe Defendants if granted authority to conduct limited formal discovery for a period of 120 days.

II. ARGUMENT

Under Federal Rule of Civil Procedure 26(d), discovery may not normally begin "before the parties have conferred as required by Rule 26(f)." Because John Doe Defendants in this case are unknown to Microsoft, the conference contemplated by Rule 26(f) cannot occur. This limitation on the initiation of discovery, however, can be waived under Rule 26(d) by Court order.

Courts recognize that, in certain situations, the identity of the defendant may not be known prior to the filing of a complaint. In such circumstances, courts authorize a plaintiff to undertake discovery to identify the unknown defendants. In *Gordon v. Leeke*, 574 F.2d 1147, 1152 (4th Cir. 1978), the Fourth Circuit explained that, if a plaintiff states a meritorious claim against an unknown defendant, the Court should allow plaintiff to ascertain the identity of the unknown defendant through discovery. Courts in this Circuit have also recently authorized parties to conduct discovery based on computer IP addresses, in order to assist in the identification of John Doe defendants. See *Arista Records LLC v. Does 1-14*, 2008 U.S. Dist. LEXIS 102974 (W.D. Va. 2008) (granting discovery to identify John Does based on IP addresses); *Virgin Records America, Inc. v. John Doe*, 2009 U.S. Dist. LEXIS 21701 (E.D.N.C. 2009) (same).

This Court has granted John Doe discovery used to identify registrants of Internet domains supporting a botnet in a prior case. In *Microsoft v. John Does 1-27*, Case No. 1:10-cv-00156 (E.D. Va. 2010, Brinkema, J.), this court recognized the benefit of such discovery and ordered similar discovery so that Microsoft could investigate the identities of registrants of a

number of Internet domains used to perpetuate the harmful “Waledac” Botnet. *See* D.I. 40 in *Microsoft v. John Does 1-27*, Case No. 1:10-cv-00156 (Anderson, J.). *See also* D.I. 30 in *Microsoft v. Piatti et al.*, Case No. 1:11-cv-1017 (E.D. Va. 2011, Cacheris, J.). Likewise, in the instant matter, it is appropriate to grant Microsoft authority to conduct limited discovery to identify the Doe Defendants. Microsoft seeks only a limited discovery period of 120 days, during which it will move forward diligently with subpoenas to third-party internet service providers to identify the John Doe defendants.

III. CONCLUSION

For the reasons set forth herein, Microsoft respectfully requests permission under Rule 26(d) to conduct such discovery for a period of 120 days, as may be necessary to identify and serve the Doe Defendants. An appropriate order is attached for the Court’s signature.

Dated: February 13, 2013

Respectfully submitted,

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Certificate of Service

I hereby certify that on the 13th day of February, 2013, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system. Copies of the foregoing were also served on the defendants listed below by electronic mail:

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