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16 MICROSOFT CORPORATION

17 UNITED STATES DISTRICT COURT
18 DISTRICT OF NEVADA

20 MICROSOFT CORPORATION,)
21 Plaintiff,)
22 vs.)
23 NASER AL MUTAIRI, an individual;)
24 MOHAMED BENABDELLAH, an individual;)
25 VITALWERKS INTERNET SOLUTIONS,)
26 LLC, d/b/a NO-IP.com; and DOES 1-500,)
27 Defendants.)

) Case No.
)
) **FILED UNDER SEAL**
)
) **MEMORANDUM IN SUPPORT OF**
) **MICROSOFT CORPORATION'S MOTION**
) **TO SEAL DOCUMENTS**

1 **INTRODUCTION**

2 Microsoft has filed a Complaint and Motion for Emergency Temporary Restraining Order
3 and Order to Show Cause Regarding Preliminary Injunction (“TRO Motion”) to stop the harmful
4 and malicious Internet activities of Defendants Naser Al Mutairi, Mohamed Benabdellah, and Does
5 1-500, which are aimed at Microsoft, its customers, and the general public. In its Complaint,
6 Microsoft alleges that Defendants Mutairi, Benabdellah, and Does (“Malware Defendants”) are
7 distributing various versions of the “Bladabindi” and “Jenxcus” malware through approximately
8 18,472 sub-domains owned and controlled by Defendant Vitalwerks Internet Solutions, LLC d/b/a
9 No-IP.com. Microsoft has detected 7,486,833 instances of Windows computers that have
10 encountered one or more versions of the malware in the past year. This malware permits Defendants
11 to control users’ computers, enlist them into a botnet, steal private information, and spy on the users.

12 Microsoft seeks *ex parte* relief in the TRO Motion to enable it to stop the irreparable harm
13 resulting from Defendants’ conduct. This type of remedy is necessary because advance public
14 disclosure or notice of the requested relief would allow Defendants to evade such relief and render
15 further prosecution of this action futile, thereby perpetuating the irreparable harm to Microsoft, its
16 customers, and the public. The reasons for this are set forth in detail in the TRO Motion and
17 supporting declarations. Therefore, Microsoft requests that the case and all documents filed in the
18 case be sealed until the TRO is executed, after which time the materials may be filed in the public
19 docket.

20 **ARGUMENT**

21 Federal courts have long “recognized a ‘general right to inspect and copy public records and
22 documents, including judicial records and documents.’” *Kamakana v. City & County of Honolulu*,
23 447 F.3d 1172, 1178 (9th Cir. 2006) (citing *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 597 n.7
24 (1978)). However, this right is not absolute. *Id.* A party may overcome the presumption of public
25 access to court records, but the burden to overcome that presumption depends on the type of
26 document to be sealed. *Id.* at 1180. The “compelling reasons” standard applies to the documents
27 Microsoft is seeking to seal in this case – the Complaint, the TRO Motion, and supporting
28 documents. *Krause v. Nevada Mut. Ins. Co.*, 2013 WL 3776416, at *5 (D. Nev. Jul. 16, 2013)

1 (denying defendants’ request to seal the complaint because they had not shown a compelling
2 reason); *U.S. v. Pella*, 2012 WL 5287898, at *1 (D. Nev. Oct. 24, 2012) (applying the compelling
3 reasons standard to plaintiff’s motion to file all documents in her case under seal, including the
4 complaint); *Dunbar v. Google, Inc.*, 2014 WL 4428853, at *2 (N.D. Cal. Aug. 14, 2013) (finding
5 that the higher burden applies to complaints because it forms the foundation of plaintiff’s case);
6 *Nucal Foods, Inc. v. Quality Egg LLC*, 2012 WL 260078, at *2 (E.D. Cal. Jan. 27, 2012) (using the
7 compelling reasons standard for a complaint); *McCrary v. Elations Co., LLC*, 2014 WL 1779243, at
8 *6 (C.D. Cal. Jan. 13, 2014) (same); *F.T.C. v. AMG Services, Inc.*, 2012 WL 3562027, at * 2 (D.
9 Nev. Aug. 15, 2012) (adopting the compelling reasons standard for a preliminary injunction motion);
10 *Selling Source*, 2011 WL 1630338, at *5 (applying the rationale from *Dish Network* and finding that
11 “requests for preliminary injunctive relief should be treated as dispositive motions for purposes of
12 sealing court records”); *Dish Network L.L.C. v. Soniview USA, Inc.*, 2009 WL 2224596, at *6 (S.D.
13 Cal. Jul. 23, 2009) (applying the compelling reasons standard to a temporary restraining order).

14 Under this standard, Microsoft “must articulate compelling reasons supported by specific
15 factual findings that outweigh the general history of access and the public policies favoring
16 disclosure, such as the public interest in understanding the judicial process.” *Kamakana*, 447 F.3d at
17 1178-79. The court must weigh this interest against the possibility that disclosure “could result in
18 improper use of the material for scandalous or libelous purposes or infringement upon trade secrets.”
19 *Pintos v. Pacific Creditors Ass’n*, 605 F.3d 665, 679 n.6 (9th Cir. 2010). When judicial records
20 could “become a vehicle for improper purposes,” compelling reasons exist to seal the documents.
21 *Kamakana*, 447 F.3d at 1179. One example of an improper purpose is the potential abuse of
22 information by computer hackers or other criminal actors. *See In re Google Inc. Gmail Litig.*, 2013
23 WL 5366963, at *3 (N.D. Cal. Sept. 25, 2013) (holding that compelling reasons existed to seal
24 complaint because it contained information that could be used “to circumvent Google’s anti-virus
25 and anti-spam mechanisms”).

26 Indeed, as the Ninth Circuit has recognized, public access in some cases – such as those
27 involving investigations into criminal activity – “would undermine important values that are served
28 by keeping some proceedings closed to the public.” *Time Mirror Co. v. U.S.*, 873 F.2d 1210, 1213

1 (9th Cir. 1989). This rationale applies to *ex parte* proceedings where there is a risk that disclosure
2 would undermine the purpose behind the *ex parte* relief sought. *Reno Air Racinig Ass'n, Inc. v.*
3 *McCord*, 452 F.3d 1126, 1131 (9th Cir. 2006).

4 As provided in this motion and the TRO Motion and supporting declarations, compelling
5 reasons exist to temporarily seal this case, including the pleadings and motions, until the requested
6 temporary restraining order is executed. In this case, Microsoft's right and interest in protecting its
7 ability to obtain emergency *ex parte* temporary relief, and the necessity of obtaining such relief is
8 paramount over any competing public interest. If Microsoft's papers are not sealed, the relief sought
9 would be rendered fruitless. There is a real and substantial risk that if these documents are made
10 public, Defendants will destroy all evidence of their prior activities, change their online identities,
11 and move their infrastructure to different servers to continue carrying out their illicit activities. As
12 set forth in Microsoft's TRO Motion and supporting declarations, there is specific evidence that
13 Defendants will take these steps if provided advance notice of this action.

14 The Court must balance the interests of protecting Microsoft's ability to effectively obtain
15 preliminary relief against the public's interest in the protected information. The harm that would be
16 caused by public filing of the Complaint, TRO Motion, and supporting documents would far
17 outweigh the public's right to access that information. Moreover, there is no need for public access
18 to these documents while Microsoft is seeking *ex parte* temporary relief, which will only be effective
19 if the materials remain under seal until after Microsoft is able to obtain that relief. Applying the
20 balancing test demonstrates that Microsoft's interest in protecting the confidentiality of the pleadings
21 far outweighs any public right to disclosure of that information.

22 Further, Microsoft only seeks to seal such information for a limited period of time until after
23 Microsoft is able to obtain effective *ex parte* temporary relief. After such point, sealing will no
24 longer be necessary, and Microsoft intends to immediately commence its efforts to provide
25 Defendants notice of the preliminary injunction hearing and service of the Complaint. Therefore,
26 Microsoft seeks to seal such materials until it is able to execute the TRO, after which the materials
27 may be filed in the public docket. Microsoft further requests that after effecting the *ex parte*
28 temporary relief that it be permitted to disclose such materials as it deems necessary, including to

1 commence its notice and service efforts and disclose such materials as it deems necessary, until the
2 Court unseals the case.

3 Should, however, the Court decide not to grant the *ex parte* temporary relief Microsoft
4 requests in the TRO Motion, Microsoft respectfully requests that such materials remain sealed for an
5 indefinite period, as public disclosure or notice absent the *ex parte* relief requested would facilitate
6 Defendants' harmful and malicious Internet activities.

7 Given the limited period of sealing as an alternative that balances the public interest in access
8 with Microsoft's important interest in maintaining these materials under seal, granting this motion to
9 seal is warranted.

10 **CONCLUSION**

11 For the foregoing reasons, Microsoft requests that this case and the following documents be
12 kept under seal in accordance with Fed. R. Civ. P. 26(c)(1) and Local Rule 10-5 until Microsoft is
13 able to execute the TRO, after which time the materials may be filed in the public docket:

- 14 1. Complaint;
- 15 2. Application of Microsoft Corporation for an Emergency Temporary Restraining
16 Order and Order to Show Cause Regarding Preliminary Injunction;
- 17 3. Memorandum in Support of Application of Microsoft Corporation for an Emergency
18 Temporary Restraining Order and Order to Show Cause Regarding Preliminary
19 Injunction;
- 20 4. Declaration of Jason Lyons in Support of Application of Microsoft Corporation for an
21 Emergency Temporary Restraining Order and Order to Show Cause Regarding
22 Preliminary Injunction, including all attached Exhibits;;
- 23 5. Declaration of David Anselmi in Support of Application of Microsoft Corporation for
24 an Emergency Temporary Restraining Order and Order to Show Cause Regarding
25 Preliminary Injunction, including all attached Exhibits;
- 26 6. Declaration of Francis Tan Seng in Support of Application of Microsoft Corporation
27 for an Emergency Temporary Restraining Order and Order to Show Cause Regarding
28 Preliminary Injunction, including all attached Exhibits;

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- 7. Declaration of Randall D. Haimovici in Support of Application of Microsoft Corporation for an Emergency Temporary Restraining Order and Order to Show Cause Regarding Preliminary Injunction, including all attached Exhibits; and
- 8. [Proposed] Ex Parte Temporary Restraining Order and Order To Show Cause Regarding Preliminary Injunction.

Dated: June 19, 2014

Respectfully submitted,
SHOOK, HARDY & BACON, L.L.P.

/s/ Tony M. Diab

TONY M. DIAB
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