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13 **UNITED STATES DISTRICT COURT**
 14 **NORTHERN DISTRICT OF CALIFORNIA**
 15 **SAN FRANCISCO DIVISION**

16 **DOE 1**, an individual,
 17 Plaintiff,
 18 v.

19 **MICROSOFT CORPORATION**, a
 20 Washington corporation; and
 21 **JEH CHARLES JOHNSON**, Secretary of
 22 the Department of Homeland Security, in
 23 his official capacity, inclusive,
 24 Defendants.

Case No. 3:16-cv-00545

**COMPLAINT FOR
 DECLARATORY RELIEF**

[28 U.S.C. § 2201; 19 U.S.C. § 1509]

KRONENBERGER ROSENFELD



150 Post Street, Suite 520, San Francisco, CA 94108

1 Plaintiff Doe 1, by and through their attorneys of record, states and alleges as
2 follows:

3 **INTRODUCTION**

4 1. This action arises from an administrative summons issued by an overseas
5 Special Agent of Immigration and Customs Enforcement (ICE), an arm of the
6 Department of Homeland Security (DHS), directed toward Defendant Microsoft
7 Corporation (the "Administrative Summons").

8 2. The Administrative Summons, dated December 14, 2015, sought
9 information about an email address operated by Defendant Microsoft for which Plaintiff
10 Doe 1 is the subscriber.

11 3. Based on the contents of the Administrative Summons, as well as another
12 similar summons issued by the same ICE Special Agent to a different email provider, as
13 well as on contemporaneous news reports, Doe 1 is informed and believes that Doe 1 is
14 the target of a campaign by politicians and law enforcement officials in the Republic of
15 Korea to suppress speech on a website associated with the email address indicated in
16 the Administrative Summons.

17 4. Doe 1 brings this action for declaratory relief because, despite Doe 1's
18 lawful actions to stay compliance with the Administrative Summons, DHS has refused to
19 withdraw the Administrative Summons, and Microsoft has threatened to comply with the
20 Administrative Summons and produce records unless Doe 1 obtains an order from a
21 court by February 4, 2016 directing it not to comply.

22 **JURISDICTION AND VENUE**

23 5. This Court has subject matter jurisdiction over Plaintiff's claims because
24 they involve the interpretation and application of the federal Customs Act and federal
25 regulations issued under it. The jurisdiction of this court is therefore founded on 28
26 U.S.C. § 1331.

27 6. Venue is proper under 28 U.S.C. § 1391 because many of the incidents,
28 events, or omissions complained of and giving rise to the instant claims and controversy



1 occurred within the State of California and this District.

2 7. This Court has personal jurisdiction over Defendant Microsoft because it
3 does substantial business in California and purposefully directs substantial activities at
4 the residents of California by means of the Internet services at issue in this case, as well
5 as other products and services. Microsoft has done substantial and continuous business
6 with California residents, and has purposefully directed substantial and pervasive
7 activities at the residents of California such that it can and should reasonably expect to
8 be haled into the courts of California.

9 **INTRADISTRICT ASSIGNMENT**

10 8. Pursuant to Local Civil Rules 3-2 and 3-5, this action should be assigned
11 to the San Francisco Division because a substantial part of the events or omissions that
12 gave rise to the claims occurred in San Francisco, where Microsoft maintains offices.

13 **PARTIES**

14 9. Plaintiff Doe 1 is an individual not of United States citizenship residing
15 outside the United States. Doe 1 is the subscriber for the email account at issue in the
16 Administrative Summons (the "Hotmail Account"). Because this litigation involves a
17 highly sensitive personal matter and poses a risk of retaliation by foreign persons,
18 Doe 1 seeks to proceed anonymously.

19 10. Defendant Jeh Charles Johnson is Secretary of the Department of
20 Homeland Security. Mr. Johnson is sued in his official capacity.

21 11. Defendant Microsoft Corporation is a Washington corporation
22 headquartered in Redmond, Washington, and having offices, employees, and significant
23 operations in this judicial district, including offices in San Francisco.

24 **FACTUAL ALLEGATIONS**

25 12. On December 14, 2015, Special Agent Barry Harsa signed a Summons to
26 Appear and/or Produce Records (the Administrative Summons) directed to Microsoft
27 Online Services, which is a division of Defendant Microsoft Corporation.

28 13. The Administrative Summons was prepared on DHS Form 3115, and it



1 states that it is issued under 19 U.S.C. § 1509 (“Section 1509”).

2 14. Special Agent Harsa is an employee of the Department of Homeland
3 Security in its Immigrations and Customs Enforcement division, and is based in the U.S.
4 Embassy in Seoul, Korea as a Deputy Attaché.

5 15. The Administrative Summons directs Microsoft to produce the following
6 information, which Special Agent Harsa wrote into Block 3 of the Administrative
7 Summons:

8 Please provide any and all information regarding Microsoft account,
9 coolgang99@hotmail.com, to include user profile, billing information,
10 addresses and phone numbers, and the dates, times and Internet protocol
11 addresses for logins from January 1, 2015 to present.

12 16. The Administrative Summons indicates that this information (the
13 “Records”) shall be produced “before the CBP Officer of ICE Special Agent named in
14 Block 2 at the place, date, and time indicated.”

15 17. Special Agent Harsa indicated his title of “Special Agent” and affiliation
16 with the U.S. Embassy in Seoul in Block 2(A) of the Administrative Summons, giving the
17 address of the Embassy and his telephone number in Korea. This information, as well
18 as Special Agent Harsa’s additional role as a Deputy Attaché, is again stated in Blocks
19 4 and 6.

20 18. Special Agent Harsa left the “Date” section of the Administrative
21 Summons, Block 2(B), blank, and in the “Time” section, Block 2(C), he wrote “ASAP.”

22 19. Special Agent Harsa also issued at least one other administrative
23 summons to Yahoo!. This second summons sought similar information for two email
24 accounts operated by Yahoo!.

25 20. Counsel for Plaintiff corresponded with Yahoo!, and on January 25, 2016,
26 sent Yahoo a notice to stay compliance with the Administrative Summons under 19
27 U.S.C. § 1509(d)(5) and 19 C.F.R. § 163.8(c). Based on this notice, on January 26,
28 2016, Yahoo agreed not to comply with the summons unless otherwise ordered by a



1 court, writing:

2 Yahoo confirms receipt of the correspondence and that no data has been
3 produced in response to the summons. Additionally, to provide the time
4 necessary for this matter to be resolved, Yahoo will stay compliance with
5 the summons until we receive clear direction that compliance is required
6 by law, e.g., a court order.

7 21. Counsel for Plaintiff gave Microsoft substantially the same notice on the
8 same day, January 25, 2016. Counsel reiterated the notice on January 26. On January
9 27, Microsoft responded, writing that it would grant an extension until February 4, 2016.
10 Counsel replied, seeking clarification, but as of the filing of this Complaint, Microsoft had
11 not responded.

12 **FIRST CAUSE OF ACTION**

13 **Declaratory Relief**

14 **Against All Defendants**

15 **28 U.S.C. § 2201**

16 22. Plaintiff repeats and incorporates by reference the allegations in
17 Paragraphs 1–21 above.

18 23. An actual case or controversy exists between Plaintiff Doe 1 and
19 Defendant DHS because DHS has refused to withdraw the Administrative Summons
20 seeking Doe 1’s information.

21 24. An actual case or controversy exists between Plaintiff Doe 1 and
22 Defendant Microsoft because Microsoft has refused to stay compliance with the
23 Administrative Summons, and has threatened to produce the Records to DHS unless
24 Doe 1 obtains judicial relief.

25 25. Section 1509 establishes a legal framework under which DHS may issue
26 certain administrative summonses for inspection of records—including records kept by
27 third parties such as Microsoft—in connection with “insuring compliance with the
28 [customs] laws of the United States...”. 19 U.S.C § 1509(a).



1 26. Only the Secretary of DHS or certain enumerated high-ranking deputies
2 may issue a Section 1509 summons. Specifically, “no delegate of the Secretary below
3 the rank of district director or special agent in charge” may issue a Section 1509
4 summons. 19 U.S.C § 1509(a).

5 27. Because the Administrative Summons was, on its face, signed by a
6 Special Agent not qualified to do so under Section 1509, the Administrative Summons is
7 invalid and unenforceable.

8 28. A Section 1509 summons may only compel production of records or a
9 personal appearance “within the customs territory of the United States.” 19 U.S.C.
10 § 1509(a)(2); 19 C.F.R. § 163.7(b). The “customs territory of the United States” is
11 defined as “only the States, the District of Columbia, and Puerto Rico.” 19 C.F.R.
12 § 101.1.

13 29. Because the Administrative Summons, on its face, requests production of
14 documents in Korea, which is beyond the “customs territory of the United States,” the
15 Administrative Summons is further invalid and unenforceable.

16 30. The Administrative Summons is further invalid and unenforceable because
17 it fails to indicate a specific date or time for production of records. Rather, the
18 Administrative Summons purportedly required Microsoft to produce the Records
19 “ASAP.”

20 31. Section 1509 and the DHS regulations promulgated under it include a
21 notice-and-stay procedure. Under this procedure, notice must be given to the person
22 whose records are sought from the third-party recordkeeper. 19 U.S.C. § 1509(d)(2); 19
23 C.F.R. § 163.8(a). Here, that person is Doe 1, and the third-party recordkeeper is
24 Defendant Microsoft.

25 32. Once notice of a Section 1509 summons is given, the person affected by
26 the summons may give notice to the third-party recordkeeper to stay compliance. 19
27 U.S.C. § 1509(d)(5); 19 C.F.R. § 163.8(c).

28 33. Once notice to stay is given, the third-party recordkeeper **must not**





1 **comply** with the summons “except in accordance with an order issued by a court of
2 competent jurisdiction authorizing examination of such records or with the consent of
3 the person staying compliance.” 19 U.S.C. § 1509(d)(6); 19 C.F.R. § 163.8(e).

4 34. Plaintiff Doe 1 has satisfied all the requirements of Section 1509 and
5 related regulations, and has given an effective notice to stay compliance with the
6 Administrative Summons.

7 35. Despite Doe 1’s effective notice to stay, and in contravention of Section
8 1509, Defendant Microsoft has still threatened to comply with the Administrative
9 Summons and to produce Records to DHS—unless Doe 1 obtains a court order to the
10 contrary by February 4, 2016, turning Section 1509’s above-described notice-and-stay
11 procedure on its head.

12 36. Also despite Doe 1’s effective notice to stay, and also in contravention of
13 Section 1509, Defendant DHS has not withdrawn the Administrative Summons.

14 37. To avoid irreparable harm stemming from the improper production of the
15 Records sought by DHS, Plaintiff Doe 1 requests that this Court issue a declaratory
16 judgment determining all parties’ respective rights and duties under Section 1509 with
17 respect to the Administrative Summons, as well as to any further Section 1509
18 summons DHS may issue to Microsoft in connection with Doe 1.

19 38. Under Rule 57 of the Federal Rules of Civil Procedure, Plaintiff Doe 1
20 requests a speedy hearing of this action for a declaratory judgment.

21 **PRAYER FOR RELIEF**

22 Plaintiff prays for a judgment against Defendants as follows:

- 23 1. For a declaratory judgment that the Administrative Summons is invalid and
- 24 unenforceable;
- 25 2. For temporary, preliminary, and permanent injunctive relief enjoining
- 26 Defendant Microsoft from producing any information to DHS in connection with the
- 27 Administrative Summons;
- 28 3. For temporary, preliminary, and permanent injunctive relief enjoining DHS

1 from enforcing the Administrative Summons;

2 4. For a declaratory judgment that, under 19 U.S.C. § 1509(d)(5) and 19
3 C.F.R. § 163.8(c), that compliance with any later-issued DHS summons under 19
4 U.S.C. § 1509 shall be stayed upon notice from Plaintiff Doe 1, and that Microsoft shall
5 not appear or produce records to DHS absent a court order; and

6 5. Such other and additional relief as the Court deems just and proper.

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8 Dated: February 2, 2016

KRONENBERGER ROSENFELD, LLP

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By: /s/ Karl S. Kronenberger
Karl S. Kronenberger

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Attorneys for Plaintiff

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