

**FILED**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
Alexandria Division**

2017 OCT 26 A 8:49

CLERK US DISTRICT COURT  
ALEXANDRIA, VIRGINIA

MICROSOFT CORPORATION, a  
Washington corporation,

Plaintiff,

v.

JOHN DOES 1-2, CONTROLLING A  
COMPUTER NETWORK AND THEREBY  
INJURING PLAINTIFF AND ITS  
CUSTOMERS,

Defendants.

Civil Action No: 17-cv-1224

**FILED UNDER SEAL PURSUANT TO  
LOCAL RULE 5**

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

Microsoft submits the following memorandum in support of its Motion for a Protective Order Sealing Documents.

**BACKGROUND**

Microsoft has 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 and 2 (collectively, “Defendants”) who are engaged in harmful and malicious Internet activities directed at Microsoft, its customers, and the general public. Microsoft seeks *ex parte* relief in the TRO Application that will cease the irreparable harm resulting from Defendants’ conduct. Microsoft seeks *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 Microsoft’s request are set forth in

detail in the TRO Application filed concurrently herewith. Therefore, Microsoft requests that this case and all documents filed in this case be sealed pending execution of the temporary restraining order sought in Microsoft's TRO Application. Microsoft's requested sealing order is narrowly tailored to impose the least restriction on the public's right of access to information as possible. Microsoft requests that all sealed documents be immediately unsealed upon execution of the temporary restraining order.

### ARGUMENT

The First Amendment provides for public access to the courts, but that right of access is not without limits. *Va. Dep't of State Police v. Wash. Post*, 386 F.3d 567, 575 (4th Cir. 2004). Indeed, "the trial court has supervisory power over its own records and may, in its discretion, seal documents if the public's right of access is outweighed by competing interests." *In Re The Knight Publishing Co.*, 743 F.2d 231, 235 (4th Cir. 1984); *see also Rushford v. New Yorker Magazine*, 846 F.2d 249, 253 (4th Cir. 1988) (stating that to place documents under seal, the court must determine "that the denial [of access] serves an important governmental interest and that there is no less restrictive way to serve that governmental interest").

Under Fourth Circuit law, the district court must do the following prior to sealing court records: (1) give public notice of the request to seal and allow interested parties a reasonable opportunity to object, (2) consider less drastic alternatives to sealing the documents, and (3) provide specific reasons and factual findings supporting its decision to seal the documents and for rejecting the alternatives. *Ashcraft v. Conoco*, 218 F.3d 282, 288 (4th Cir. 2000) (citing *In re Knight Pub. Co.*, 743 F.2d 231, 235-36 (4th Cir. 1984)).

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. Teamsters*, 415 U.S. 423, 438-39 (1974) ("Ex

parte temporary restraining orders are no doubt necessary in certain circumstances....”); *Hoechst Diafoil Co. v. Nan Ya Plastics Corp.*, 174 F.3d 411, 422 (4th Cir. 1999) (“temporary restraining orders may be issued without full notice, even, under certain circumstances, *ex parte*”); *Bell v. True*, 356 F. Supp. 2d 613, 617, fn.3 (W.D. Va. 2005) (“Material allowed to be filed *ex parte* will of course be kept sealed, to prevent its disclosure outside of the court.”); *see also Media Gen. Operations, Inc. v. Buchanan*, 417 F.3d 424, 429 (4th Cir. 2005) (upholding sealing of *ex parte* search warrants based on risk that evidence will be destroyed).<sup>1</sup>

In this case, Microsoft’s 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 Microsoft’s 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 propagate malicious software designed to compromise Microsoft’s software and services without authorization of Microsoft’s customers; hack into high-value computer networks; install malware on the networks to gain and maintain long-term, surreptitious access to such networks; and locate and exfiltrate sensitive information off of such networks. Declaration of Jason L. Norton In Support Of Microsoft’s Application For An Emergency Ex Parte TRO (“Norton Decl.”) ¶¶ 4-6. If Defendants knew Microsoft 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. Norton Decl. ¶ 57-58. Indeed, evidence shows that in the past, when the Defendants became aware of efforts to mitigate or investigate their activities, they took steps to conceal their activities and to conceal

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<sup>1</sup> *See also Publicker Industries, Inc. v. Cohen*, 733 F.2d 1059, 1070-71 (3d Cir. 1984) (discussing “exceptions to the presumptive openness of judicial proceedings,” including an exception for “the protection of a party’s interest in confidential commercial information”). This Court has recognized that “private interests, based not on the content of the material to be sealed, but instead on the relationship of the parties, might also have the potential to override even the stronger First Amendment presumptive right of public access.” *Level 3 Communs., LLC v. Limelight Networks, Inc.*, 2009 U.S. Dist. LEXIS 37775, \*28-29 (E.D. Va. 2009) (Davis, J.).

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. *Id.* For example, once Defendants become aware that domains in Defendants' active infrastructure become known to the security community, they abandon that infrastructure and move to new infrastructure that is used to continue their efforts to intrude upon the computers of existing victims and new victims. *Id.*

Given Microsoft's actions against similar unlawful Internet activity, even disclosing that Microsoft has initiated this case risks giving Defendants the opportunity to change their command and control infrastructure. In the last seven years, Microsoft has brought similar cases against John Doe defendants who have been conducting illegal activities through identifiable but movable infrastructures on the Internet very similar to that used by Defendants. Declaration of Michael Zweiback In Support Of Motion For Protective Order ("Zweiback Decl.") ¶ 4. In three of those cases, the defendants immediately attempted to either destroy evidence or move their command and control infrastructure upon detecting the legal action being taken against them. Zweiback Decl. ¶¶ 4-6. Those experiences underscore the risk that the 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 Microsoft's 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 Microsoft is seeking *ex parte* relief which will only be effective if these materials remain under seal. Applying the balancing test set forth in governing law demonstrates that Microsoft's interest in obtaining effective relief outweigh any immediate public right to disclosure.

Microsoft only seeks 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 Microsoft 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. Microsoft, 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.

Should, however, the Court decide not to grant the *ex parte* relief Microsoft requests, Microsoft asks 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 Microsoft's 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, Microsoft 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. Microsoft's Motion for Protective Order Sealing Documents and attachments thereto, including this Brief in support of the Motion and the Declaration of Michael Zweiback In Support Of Motion For Protective Order;
2. Microsoft's Complaint and accompanying documents;
3. *Pro Hac Vice* Applications of Richard Boscovich, Michael Zweiback, Kimberly K. Peretti, and Erin Coleman;
4. Motion to Exceed Page Limits and accompanying documents;
5. *Ex Parte* Application for an Emergency Temporary Restraining Order and Order to Show Cause re Preliminary Injunction and accompany documents;

6. Brief in Support of *Ex Parte* Application for an Emergency Temporary Restraining Order and Order to Show cause re Preliminary Injunction and accompanying documents;
7. The Declaration of Jason L. Norton in Support of *Ex Parte* Application for an Emergency Temporary Restraining Order and Order to Show Cause re Preliminary Injunction and Exhibits thereto;
8. The Declaration of Michael Zweiback in Support of *Ex Parte* Application for an Emergency Temporary Restraining Order and Order to Show Cause re Preliminary Injunction and Exhibits thereto;
9. [Proposed] *Ex Parte* Temporary Restraining Order and Order To Show Cause Re Preliminary Injunction.

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

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

Dated: October 26, 2017

Respectfully submitted,

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