

FILED

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

2015 FEB 20 A 9:20

CLERK US DISTRICT COURT  
ALEXANDRIA, VIRGINIA

MICROSOFT CORPORATION, a  
Washington corporation, and FS-ISAC, INC.,  
a Delaware corporation,

Plaintiffs,

v.

JOHN DOES 1-3, CONTROLLING A  
COMPUTER BOTNET THEREBY  
INJURING PLAINTIFFS AND THEIR  
CUSTOMERS AND MEMBERS,

Defendants.

Civil Action No: 15 CV 240 LMB/IDD

FILED UNDER SEAL PURSUANT TO  
LOCAL CIVIL RULE 5

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

In support of their Motion for a Protective Order Sealing Documents, Plaintiffs submit the following memorandum.

**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 through 3 (collectively “Defendants”) who are engaged in harmful and malicious Internet activities directed at Plaintiffs, their 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

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)). These three factors are satisfied here.

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, 94 S.Ct. 1113

(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, 517 (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, Plaintiffs’ rights and interests in protecting their ability to obtain emergency *ex parte* temporary relief, and the necessity of sealing to Plaintiffs’ ability to obtain such relief, is paramount over any competing public interest to *immediate* access to the information Plaintiffs request to 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. The harm that would be caused by public filing of the 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 are 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 Plaintiffs’ interest in obtaining effective relief outweigh any immediate public right to disclosure.

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

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<sup>1</sup> *See also Publicker Industries, Inc. v. Cohen*, 73 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.).

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 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 request 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. Plaintiffs' Motion for Protective Order Sealing Documents and attachments thereto, including this Non-Confidential Brief in support of the Motion;
2. Plaintiffs' Complaint and attachments thereto;
3. *Pro Hac Vice* Applications of Richard Domingues Boscovich, Gabriel M. Ramsey, Jeffrey L. Cox, Jacob M. Heath, and Robert L. Uriarte;
4. Motion to Exceed Page Limits and Attachments thereto;
5. Confidential Memorandum re: Protective Order to Seal Documents and attachments thereto;
6. *Ex Parte* Application for an Emergency Temporary Restraining Order and Order to Show Cause re Preliminary Injunction and accompanying documents;
7. Brief in Support of *Ex Parte* Application for an Emergency Temporary Restraining Order and Order to Show Cause re Preliminary Injunction;
8. The Declaration of Vikram Thakur in Support of *Ex Parte* Application for an

- Emergency Temporary Restraining Order and Order to Show Cause re Preliminary Injunction and Exhibits thereto;
9. The Declaration of Jason Lyons in Support of *Ex Parte* Application for an Emergency Temporary Restraining Order and Order to Show Cause re Preliminary Injunction and Exhibits thereto;
  10. The Declaration Jacob Heath in Support of *Ex Parte* Application for an Emergency Temporary Restraining Order and Order to Show Cause re Preliminary Injunction and Exhibits thereto;
  11. The Declaration of Eric Guerrino in Support of *Ex Parte* Application for an Emergency Temporary Restraining Order and Order to Show Cause re Preliminary Injunction and Exhibits thereto;
  12. The Declaration of Tim Liu in Support of *Ex Parte* Application for an Emergency Temporary Restraining Order and Order to Show Cause re Preliminary Injunction and Exhibits thereto;
  13. The Declaration of Karthik Selvaraj in Support of *Ex Parte* Application for an Emergency Temporary Restraining Order and Order to Show Cause re Preliminary Injunction and Exhibits thereto; and
  14. [Proposed] *Ex Parte* Temporary Restraining Order and Order To Show Cause Re Preliminary Injunction.

Plaintiffs respectfully request that the case and these materials be sealed pending execution of the *ex parte* temporary relief sought in Plaintiffs' Application for Temporary Restraining Order. Plaintiffs respectfully request 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 request 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

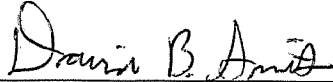
of the preliminary injunction hearing and service of the Complaint.

Plaintiffs respectfully request that should the Court decide not to grant the *ex parte* temporary relief requested in Plaintiffs' Temporary Restraining Order, that the materials be sealed indefinitely. Confidential and non-confidential memorandums in support of this motion are filed concurrently herewith.

Dated: February 19, 2015

Respectfully submitted,

ORRICK, HERRINGTON & SUTCLIFFE  
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