

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

MICROSOFT CORPORATION,

Plaintiff,

v.

JOHN DOES 1-82, CONTROLLING A
COMPUTER BOTNET THEREBY
INJURING MICROSOFT AND ITS
CUSTOMERS,

Defendants.

FILED UNDER SEAL

Civil Action No. _____

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

In support of its Motion for a Protective Order Temporarily Sealing Documents, Plaintiff Microsoft Corp. ("Microsoft"), by counsel, submits the following memorandum.

BACKGROUND

Microsoft has filed a Complaint and an *Ex Parte* Application for an Emergency Temporary Restraining Order, Seizure Order, and Order to Show Cause re Preliminary Injunction ("TRO Motion") to prevent the activities of Defendants John Doe Defendants 1 through 82 (collectively "Defendants") engaged in harmful and malicious Internet activities directed at Microsoft, its customers, and the general public. Microsoft seeks *ex parte* relief in the TRO Motion that will cease the irreparable harm resulting from Defendants' conduct. Microsoft seeks *ex parte* relief 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 to Microsoft and its customers. The reasons for this are set forth in detail in

the TRO Motion. Therefore, Microsoft requests that the case be sealed and all documents filed in the case pending execution of both the temporary restraining order and seizure order sought in Microsoft's TRO Motion and that immediately, upon execution of the temporary restraining order and seizure order, the instant case shall be unsealed and the foregoing documents shall be filed in the public docket.

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).

In this case, Microsoft’s right and interest in protecting its ability to obtain emergency *ex parte* temporary relief, and the necessity of sealing to Microsoft’s ability to obtain such relief is paramount over any competing public interest. Indeed, if Microsoft’s papers are not sealed, the relief sought by Microsoft would be rendered fruitless and there is a substantial risk Defendants would destroy evidence. The harm that would be caused by public filing of the Complaint, TRO Motion and supporting documents would far outweigh the public’s right to access to that information. Here, the Court must balance the interests of protecting Microsoft’s ability to effectively obtain preliminary relief against the public’s interest in the protected information. There is no need for the public to have access to the Complaint, TRO Motion and supporting documents while Microsoft is seeking *ex parte* relief which will only be effective if these materials remain under seal until after Microsoft requests and is able to obtain that relief. Applying the balancing test demonstrates that Microsoft’s interest in protecting the confidentiality of the pleadings far outweighs any public right to disclosure of that information.

Further, Microsoft only seeks to seal such information for a limited period of time, until after Microsoft is able to obtain effective *ex parte* temporary relief. After such point, sealing will no longer be necessary, and Microsoft intends to immediately commence its efforts to provide Defendants notice of the preliminary injunction hearing and service of the Complaint. Therefore, Microsoft seeks to seal such materials pending execution of both the temporary restraining order and seizure order, after which the instant case will be immediately unsealed and the materials may be filed in the public docket. Microsoft, upon execution of the *ex parte* relief, will file with the Clerk of the Court a Notice that the temporary restraining order and seizure order have been executed. Microsoft further requests that upon such Notice, it be permitted to disclose such materials as it deems necessary, including in order to commence its efforts to provide Defendants notice of the preliminary injunction hearing and service of the Complaint, until the case becomes unsealed.

Should, however, the Court decide not to grant the *ex parte* relief Microsoft requests in the TRO Motion, Microsoft requests 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 interest in maintaining these materials under seal, 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 6.1, pending execution of the *ex parte* relief sought in the TRO Motion:

1. Complaint and the Appendices attached thereto;
2. Motion for a Protective Order Temporarily Sealing Documents;
3. Brief In Support Of Motion for a Protective Order Temporarily Sealing Documents and the Exhibits thereto;
4. [Proposed] Protective Order Temporarily Sealing Documents;
5. Notice of Hearing for Motions for a Protective Order Temporarily Sealing Documents;
6. Motion for Leave to Exceed Page Limits for Brief In Support Of *Ex Parte* Application of Microsoft for an Emergency Temporary Restraining Order, Seizure Order, and Order to Show Cause Re Preliminary Injunction;
7. Brief In Support Of Motion for Leave to Exceed Page Limits for Brief In Support Of *Ex Parte* Application of Microsoft for an Emergency Temporary Restraining Order, Seizure Order, and Order to Show Cause Re Preliminary Injunction;
8. *Ex Parte* Application of Microsoft for an Emergency Temporary Restraining Order, Seizure Order, and Order to Show Cause Re Preliminary Injunction;
9. Brief In Support Of *Ex Parte* Application of Microsoft for an Emergency Temporary Restraining Order, Seizure Order, and Order To Show Cause Re Preliminary Injunction and the Exhibits thereto;
10. Declaration of Vishant Patel In Support Of *Ex Parte* Application For An

- Emergency Temporary Restraining Order, Seizure Order, And Order To Show Cause Re Preliminary Injunction and Exhibits thereto;
11. Declaration of David Anselmi In Support Of *Ex Parte* Application For An Emergency Temporary Restraining Order, Seizure Order, And Order To Show Cause Re Preliminary Injunction and Exhibits thereto;
 12. Declaration of John Wilson In Support Of *Ex Parte* Application For An Emergency Temporary Restraining Order, Seizure Order, And Order To Show Cause Re Preliminary Injunction and Exhibits thereto;
 13. Declaration of Eric Guerrino In Support Of *Ex Parte* Application For An Emergency Temporary Restraining Order, Seizure Order, And Order To Show Cause Re Preliminary Injunction and Exhibits thereto;
 14. Declaration of Pamela Moore In Support Of *Ex Parte* Application For An Emergency Temporary Restraining Order, Seizure Order, And Order To Show Cause Re Preliminary Injunction and the Exhibits thereto;
 15. Declaration of Jeffrey L. Cox In Support Of *Ex Parte* Application For An Emergency Temporary Restraining Order, Seizure Order, And Order To Show Cause Re Preliminary Injunction and Exhibits thereto;
 16. [Proposed] *Ex Parte* Temporary Restraining Order, Seizure Order, And Order To Show Cause Re Preliminary Injunction; and
 17. Notice of Hearing for *Ex Parte* Temporary Restraining Order, Seizure Order, And Order To Show Cause Re Preliminary Injunction.

Dated: May 29, 2013

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