



to Defendants in a manner consistent with Due Process and the laws of the United States.

Microsoft respectfully requests that if the Court decides not to grant the *ex parte* temporary relief requested in Microsoft's Application for Temporary Restraining Order, that the materials subject to the instant motion remain sealed, and that Microsoft be given an opportunity to publically file redacted versions of the materials.

Dated: November 25, 2013

Respectfully submitted

FISH & RICHARDSON P.C.

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**BRIEF IN SUPPORT OF *EX PARTE* MOTION FOR ORDER TEMPORARILY  
SEALING DOCUMENTS**

**I. INTRODUCTION**

This case arises out of the harmful and malicious Internet activities of Defendants John Doe Defendants 1 through 8 (collectively “Defendants”). Defendants are sophisticated cybercriminals that currently propagate and control one of the most pervasive, persistent, and injurious botnets in the world.<sup>1</sup> Defendants’ activities violate the laws of the United States and the State of Texas and are causing ongoing harm to Microsoft, its customers, and citizens of this Judicial District.

By its Complaint and an *Ex Parte* Application for an Emergency Temporary Restraining Order and Order to Show Cause Re Preliminary Injunction (“TRO Application”), Microsoft seeks to abate ongoing harms caused by Defendants’ illegal activities. Microsoft seeks *ex parte* relief because, for reasons explained fully in Microsoft’s TRO Application, providing Defendants with advanced notice of these proceedings would allow Defendants to evade such relief and hinder further prosecution of this action, thereby perpetuating the irreparable harm to Microsoft and its customers. Similarly, disclosure of these proceedings through public filing of the documents subject to the instant Motion to Seal would give Defendants the opportunity to discover and evade the relief Microsoft seeks, rendering judicial action fruitless.

Microsoft therefore respectfully requests a narrowly tailored order temporarily sealing the documents filed in this case pending execution of the temporary restraining order sought in Microsoft’s TRO Application. Microsoft requests that these documents be sealed only for the brief period of time between the date of this filing and execution of the requested relief. In order

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<sup>1</sup> Botnets are computer networks consisting of thousands (in this case, hundreds of thousands) of compromised personal computers infected with malicious software (“malware”) that transforms the computers into tools for criminal activity ranging from stealing personal information to defrauding businesses. Defendants control and propagate the infamous “ZeroAccess” botnet.

to ensure swift public access to the documents that Microsoft requests be temporarily sealed, Microsoft will immediately file a formal Notice with the Clerk of Court once the Court's order has been executed so that this case may be unsealed and the documents at issue may be placed on the public docket.

## II. DISCUSSION

The public's right to inspect and copy judicial records is not absolute. *See e.g.*, *SEC v. Van Waeyenberghe*, 990 F.2d 845, 848 (5th Cir. 1993) (citing, *inter alia*, *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978)); *accord United States v. Holy Land Found. for Relief & Dev.*, 624 F.3d 685, 689 (5th Cir. 2010). "Every court has supervisory power over its own records and files," and a district court has discretion to seal its records to prevent its docket from becoming a "vehicle for improper purposes." *Van Waeyenberghe*, 990 F.2d at 848.

In exercising its discretion to seal judicial records, a district court must balance the interests in sealing judicial records against three primarily public interests: (1) discouraging misconduct among litigants; (2) checking potential abuse of judicial power; and (3) promoting public confidence in the judicial system. *In re Sealing & Non-Disclosure*, 562 F. Supp. 2d 876, 894 (S.D. Tex. 2008) (citations omitted). Where sealing of court records does not impinge these interests, and where other private and/or public interests would be served by sealing of court records, a sealing order is appropriate, *Motorola, Inc. v. Analog Devices, Inc.*, 2003 U.S. Dist. LEXIS 28024, at \* 6 (E.D. Tex. June 6, 2003), particularly where the sealing of such records is only temporary, *see In re Sealing & Non-Disclosure*, 562 F. Supp. 2d at 894 (issuing temporary sealing order that expired after fixed time triggered by termination of criminal investigation); *accord Granny Goose Foods, Inc. v. Teamsters*, 415 U.S. 423, 438-39 (1974) (recognizing the necessity of non-public *ex parte* proceedings in some circumstances); *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 In re Search Warrants in Connection with Investigation of Columbia/HCA Healthcare Corp.*, 971 F. Supp. 251, 253 (W.D. Tex. 1997) (citing *ranks v. Delaware*, 438 U.S. 154, 169 (1978) for the proposition that search warrant proceedings are necessarily *ex parte*, “since the subject of the search cannot be tipped off to the application for the warrant.”).

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, warrant the requested temporary sealing order. The limited sealing order Microsoft requests will not disserve any of the public interests undergirding the right of public access to the courts. First, the sealing order requested herein will not encourage litigation misconduct, because the sealing order will expire in the near term, placing all litigation conduct in the public view and thereby discouraging unsavory conduct during the brief pendency of the sealing order. *See, e.g., In re: High Sulfur Content Gasoline Prods. Liab. Litig.*, 517 F.3d 220, 230 (5th Cir. 2008) (publicizing proceedings discourages unsavory conduct by attorneys).

Second, the fact that these proceedings will eventually become public serves as an adequately check against the unlikely prospect of abuse of judicial power. The requested temporary sealing order will not create a situation in which “important judicial decisions are made behind closed doors and then announced in conclusive terms to the public.” *See In re Sealing & Non-Disclosure*, 562 F. Supp. 2d at 894 (citation omitted). Microsoft expressly seeks a full public hearing on the merits of its case and request for prospective relief, and the record underlying the Court’s ultimate disposition of this case will be available to the public in a matter of weeks.

Finally, the temporary sealing order requested will not have any negative impact on the public’s confidence in the judicial system. On the contrary, a temporary sealing order will

actually *promote* the public's confidence in the judicial system by empowering the Court to afford meaningful relief. *See, e.g., James v. Stockham Valves & Fittings Co.*, 559 F.2d 310, 354 (5th Cir. 1977) (discussing responsibility of courts to fashion effective relief). For the reasons set forth in Microsoft's TRO Application, absent the requested temporary sealing order, it is very likely that any injunctive relief directed to Defendants will be fruitless. Such a scenario would undermine the public's confidence in the ability of the Court to afford civil remedies against cybercriminals. To provide just one example, part of the relief sought by Microsoft's TRO Application is an order blocking traffic to specifically identified IP addresses used by Defendants as command and control servers to direct fraudulent conduct. If Microsoft's remediation strategies with respect to these IP addresses are made public at this time, it is likely that Defendants will relocate the targeted command and control infrastructure before the Court can rule on the merits of Microsoft's TRO Application.

Microsoft only seeks a narrowly tailored sealing order that will expire after Microsoft is able to obtain effective *ex parte* temporary relief. *Compare In re Sealing & Non-Disclosure*, 562 F. Supp. 2d at 894. After such point, the materials subject to the requested sealing order would be made public, and Microsoft would immediately commence its efforts to provide Defendants notice of the preliminary injunction hearing and service of the Complaint. Because Defendants are likely to use the Court's records for the improper purpose of evading equitable relief, *see Van Waeyenberghe*, 990 F.2d at 848, and because the public and private interests at stake militate in favor of a limited sealing order, *see Motorola*, 2003 U.S. Dist. LEXIS 28024, at \* 6, Microsoft respectfully submits that a temporary sealing order is warranted under Fifth Circuit law.

### **III. CONCLUSION**

For the reasons stated, Microsoft requests that the documents filed concurrently with this Motion be sealed in accordance with Local Court Rule CV-5.2 pending execution of the *ex parte* relief sought in the TRO Application.

Dated: November 25, 2013

Respectfully submitted

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