

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

MICROSOFT CORPORATION, a
Washington corporation,

Plaintiff,

v.

JOHN DOES 1-2,
Controlling a Computer Network
Thereby Injuring Plaintiff and Its
Customers,

Defendants.

Civil Action No: 1:21-cv-01346 (LMB/WEF)

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

**BRIEF IN SUPPORT OF PLAINTIFF’S MOTION FOR PROTECTIVE ORDER
TEMPORARILY SEALING DOCUMENTS**

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

BACKGROUND

Plaintiff obtained a Preliminary Injunction Order (Dkt. 24) 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. Plaintiff seeks *ex parte* relief in the present Second Motion to Supplement Preliminary Injunction Order that will cease the irreparable harm resulting from Defendants’ continued conduct. Plaintiff 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 Plaintiff’s request are set forth in detail in the Second Motion to Supplement Preliminary Injunction Order filed concurrently

herewith. Therefore, Plaintiff's request that this case and all documents filed in this case be sealed pending execution of the of domains identified in Plaintiff's Second Motion to Supplement Preliminary Injunction Order. Plaintiff's requested sealing order is narrowly tailored to impose the least restriction on the public's right of access to information as possible. Plaintiff requests that all sealed documents be immediately unsealed upon execution of the temporary restraining order and upon Plaintiff's filing of a notice of execution of the Second Supplemental Preliminary Injunction 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 Publ'g 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.[sic] Co.*, 743 F.2d 231, 235-36 (4th Cir. 1984)); *In re U.S. for an Order Pursuant to 18 U.S.C. Section 2703(D)*, 707 F.3d 283, 294 (4th Cir. 2013) (finding no error to seal

documents and noting “[t]he mere fact that a case is high profile in nature does not necessarily justify public access”).

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 recognizes the necessity of non-public *ex parte* proceedings. *See Granny Goose Foods, Inc. v. Brotherhood of Teamsters & Auto Truck Drivers, Local No. 70*, 415 U.S. 423, 439(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) (“[T]emporary restraining orders may be issued without full notice, even, under certain circumstances, *ex parte*[.]”); *Bell v. True*, 356 F. Supp. 2d 613, 617 n.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).¹

In this case, Plaintiff’s rights and interests in protecting its ability to obtain emergency *ex parte* 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 Plaintiff’s papers are not sealed, the relief sought would very likely be rendered fruitless and there is a substantial

¹ 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 Commc’ns., LLC v. Limelight Networks, Inc.*, 611 F. Supp. 2d 572, 583 (E.D. Va. 2009) (Davis, J.).

risk Defendants would destroy evidence. Defendants are highly-sophisticated cybercriminals. They specialize in targeting, penetration, and stealing sensitive information from high-value computer networks; gain unauthorized access to Microsoft's services; install malware to harvest user credentials and manipulate operating systems; infiltrate user accounts; and locate and exfiltrate sensitive information. Dkt. 8, Declaration of Christopher Coy in Support of Microsoft's TRO Application ("Coy Decl.") ¶¶ 6, 9, 31-34; *see also* Declaration of Christopher Coy in Support of Microsoft's Second Motion to Supplement Preliminary Injunction Order ("Coy Suppl. Decl.") ¶¶ 5-13; Declaration of Gabriel M. Ramsey in Support of Motion for Protective Order Temporarily Sealing Documents, ¶¶ 2-6. As Defendants' conduct confirms, once the security community is aware of the Defendants' active infrastructure, the Defendants abandon that infrastructure and move to new infrastructure that is used to continue the efforts to compromise accounts of new victims. *Id.* Moreover, when Defendants become aware of efforts to mitigate or investigate their activities, they take steps to conceal their activities and to conceal the injury that has been caused to victims, making it more difficult for victims to adequately assess the damage or take steps to mitigate that injury going forward. *Id.*

Given Plaintiff's actions against similar unlawful Internet activity, coupled with Defendants' course of conduct here, disclosing that Plaintiff is requesting further relief of new infrastructure used by Defendants risks giving Defendants the opportunity to change their command and control infrastructure. Based on similar actions, it is likely that 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. *Id.*

The harm that would be caused by the public filing of Plaintiff's Second Motion to Supplement Preliminary Injunction and associated materials 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 Second Motion for Supplemental Preliminary Injunction Order and supporting documents while Plaintiff seeks *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 Plaintiff's interest in obtaining effective relief outweighs any immediate public right to disclosure.

Plaintiff only seeks to seal such information for a limited period of time – on the order of several days – until after effective *ex parte* relief has been obtained. After such point, sealing will no longer be necessary, and Plaintiff will immediately commence efforts to provide Defendants notice and service of the Second Supplemental Preliminary Injunction Order—at which point, all documents will be unsealed and the public will be given full access to these proceedings. Plaintiff, upon execution of the *ex parte* relief, will file with the Clerk of the Court a Notice that the Supplemental Preliminary Injunction Order has been executed and requests that upon Plaintiff's filing of the notice, the case and all documents filed in the case shall be deemed unsealed and the Clerk of the Court may make the docket and filings public.

Should, however, the Court decide not to grant the *ex parte* relief Plaintiff's requests, Plaintiff asks that such materials remain sealed for an indefinite period, as public disclosure or notice absent the *ex parte* relief requested and the particular domains at issue 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 Plaintiff'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, Plaintiff 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. The Motion for Protective Order Sealing Documents and accompanying documents, including the Brief in support of the Motion;
2. The declaration of Gabriel M. Ramsey in Support of Motion for Protective Order Sealing Documents;
3. Plaintiff's *Ex Parte* Motion to Supplement Preliminary Injunction and accompanying documents;
4. The declaration of Christopher Coy in Support of Plaintiff's *Ex Parte* Motion to Supplement Preliminary Injunction and attachments thereto;
5. [Proposed] Second Supplemental Preliminary Injunction Order and accompanying documents.
6. The Supplemental Preliminary Injunction Order and accompanying documents and the instant Order.

Plaintiff respectfully requests that these materials be sealed pending execution of the *ex parte* relief sought in Plaintiff's Second Motion for Supplemental Preliminary Injunction Order.

Plaintiff requests that immediately upon the execution of the temporary restraining order, the instant case and all documents filed in the case shall be deemed unsealed and the Clerk of the Court shall at that point make public on the public docket this case and the foregoing documents.

Upon execution of the *ex parte* relief, Plaintiff will file with the Clerk of the Court a Notice that the Supplemental Preliminary Injunction Order has been executed. Plaintiff further requests that upon execution of the Supplemental Preliminary Injunction Order, Plaintiff 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 Supplemental Preliminary Injunction Order.

Plaintiff respectfully requests that should the Court decide not to grant the *ex parte* relief requested in Plaintiff's Supplemental Preliminary Injunction Order, that the materials be sealed indefinitely.

Dated: August 8, 2022

Respectfully submitted,

/s/ David J. Ervin

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