

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

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: 1:19-cv-00716-ABJ:

**FILED UNDER SEAL PURSUANT TO
LOCAL RULE 5.1**

**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 an Ex Parte Motion for Fourth Supplemental Preliminary Injunction (“Fourth Supplemental Preliminary Injunction Motion”) 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. In its Fourth Supplemental Preliminary Injunction Motion, Microsoft seeks *ex parte* relief to disable the recently registered domains set forth in **Appendix A** of the proposed Fourth Supplemental Preliminary Injunction Order (“Order”). That will cease the irreparable harm resulting from Defendants’ conduct. Microsoft seeks *ex parte* relief under seal, with respect to the portion of the Order disabling the domains in **Appendix A**, because advance public

disclosure or notice of that 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 Fourth Supplemental Preliminary Injunction Motion filed concurrently herewith. Therefore, Microsoft requests that the *Ex Parte* Motion for Fourth Supplemental Preliminary Injunction Order and associated pleadings be sealed pending execution of the *ex parte* relief sought in Microsoft's Fourth Supplemental Preliminary Injunction Order, in particular disabling of the domains set forth in **Appendix A** to the Order. 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 portion of the Order disabling the domains set forth in **Appendix A**. As soon as that relief is executed, all papers will be made available on the public docket.

ARGUMENT

The right of access to court records is not absolute. *Nixon v. Warner Commc 'ns, Inc.*, 435 U.S. 589, 598 (1978). Although both common law and the First Amendment afford the public a qualified right of access to judicial proceedings, *In re Fort Totten Metrorail Cases*, 960 F.Supp.2d 2, 5 (D.C. Cir. 2013), the D.C. Circuit has expressed doubts about whether the First Amendment right of access applies outside of the criminal context. *SEC v. Am. Int'l Grp.*, 712 F.3d 1, 5 (D.C. Cir. 2013); *Ctr. for Nat'l Sec. Studies v. DOJ*, 331 F.3d 918, 935 (D.C. Cir. 2003); *In re Reporters Committee for Freedom of the Press*, 773 F.2d 1325, 1337 (D.C. Cir. 1985) (Scalia, J.) (doubting that the benefits of open criminal trials inure to civil suits between private parties).

Competing interests may outweigh the public’s common law right of access to judicial records. *United States v. Hubbard*, 650 F.2d 293, 317–22 (D.C. Cir. 1980). Indeed, “[a] district court has authority to seal and unseal documents as part of its ‘supervisory power over its own records and files.’” *United States v. Ring*, 47 F.Supp.3d 38, 40 (D.D.C. 2014) (quoting *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 598 (1978)); *In re Nat’l Broadcasting Co.*, 653 F.2d 609, 613 (D.C. Cir. 1981) (“Because of the difficulties inherent in formulating a broad yet clear rule to govern the variety of situations in which the right of access must be reconciled with legitimate countervailing public or private interests, the decision as to access is one which rests in the sound discretion of the trial court.”).

Under D.C. Circuit law, the district court should weigh the following when presented with a motion to seal or unseal: “(1) the need for public access to the documents at issue; (2) the extent of previous public access to the documents; (3) the fact that someone has objected to disclosure, and the identity of that person; (4) the strength of any property and privacy interests asserted; (5) the possibility of prejudice to those opposing disclosure; and (6) the purposes for which the documents were introduced during the judicial proceedings.” *Hubbard*, 650 F.2d at 317-22; *Metlife, Inc. v. Financial Stability Oversight Council*, 865 F.3d 661, 666 (D.C. Cir. 2017) (Garland, C.J.) (“[T]he Hubbard test has consistently served as our lodestar because it ensures that we fully account for the various public and private interests at stake.”).

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, U.S. Supreme Court and D.C. 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...”); *Carroll v. President and Com’rs of Princess Anne*, 393 U.S. 175, 181 (1968) (“There is a place in our jurisprudence for ex parte issuance, without notice, of temporary restraining orders.”); *Omar v. Harvey*, 2006 WL 286861, at *1 (D.D.C. 2006) (holding that an *ex parte* restraining order is appropriate where plaintiff demonstrates notice would render fruitless further prosecution of the action); *Council on American-Islamic Relations v. Gaubatz*, 667 F.Supp.2d 67, 75 (D.D.C. 2009) (noting that ex parte restraining orders may be appropriate in circumstances where notice is impossible).

In this case, Microsoft’s rights and interests in protecting its ability to obtain *ex parte* temporary relief, and the necessity of sealing its pleadings in order to effectively disable the domains in **Appendix A** to the proposed Order, 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 access Microsoft’s services without authorization; hack into high-value computer networks; install malware on the networks to gain and maintain long-term, surreptitious access to that network; and locate and exfiltrate sensitive information off of the networks. *See* Declaration of David Anselmi In Support Of Microsoft’s Motion for Fourth Supplemental Preliminary Injunction Order (“Anselmi Decl.”) ¶ 24. If Defendants knew Microsoft sought the relief set forth in the Fourth Supplemental Preliminary Injunction Motion, they could quickly adapt the command and control infrastructure used to secretly establish themselves on a victim’s network. *See id.* ¶ 27.

In fact, Defendants have shown that this is their intention. Defendants make and have continued to make unauthorized access to Microsoft's services and software, hack into a target's computer network, and in particular Microsoft's software, install malware on those networks giving them long-term and surreptitious access to those networks, and then locate and exfiltrate sensitive information from them. *Id.* ¶ 2. Given Microsoft's actions against Defendants in this case, even disclosing that Microsoft has filed a Motion for Fourth Supplemental Preliminary Injunction Motion gives Defendants the opportunity to change their command and control infrastructure, set forth at **Appendix A** to the Order.

Additionally, evidence shows that when the Phosphorus defendants become aware of efforts to mitigate or investigate their activities, they take steps to conceal their activities and to conceal the injury 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.* at ¶ 27. For example, once Defendants become aware that domains in Phosphorus' 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.* In the past five years, Microsoft has brought over 15 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 Phosphorus. Declaration of Gabriel M. Ramsey In Support Of Motion For Protective Order ("Ramsey Decl.") ¶ 5. In several of those cases, defendants also immediately took action to attempt to defy and evade the court's order as soon as they detected legal action being taken against them. *Id.* This underscores the risk that the Defendants in this case will take similar steps to destroy evidence and move their command and control infrastructure in **Appendix A** if they are given notice of the Preliminary

Injunction Motion. *Id.* ¶ 6.

The harm that would be caused by the public filing of Microsoft's Motion for Fourth Supplemental Preliminary Injunction Motion would far outweigh the public's right to access that information. There is no need for the public to have immediate access to the Fourth Supplemental Preliminary Injunction Motion and supporting documents while Microsoft is seeking *ex parte* relief with respect to the domains in **Appendix A**, 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, disabling the domains in **Appendix A** to the Order. After such point, sealing will no longer be necessary, and Microsoft will immediately commence efforts to provide Defendants notice of future hearings and service of related pleadings—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 disabling the domains in **Appendix A** to the Order, will file with the Clerk of the Court a Notice that the temporary restraining order has been executed. The Clerk of the Court may then file all documents related to this request on the public docket.

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.

Dated: July 17, 2020

Respectfully submitted,

/s/ Gabriel M. Ramsey

Gabriel M. Ramsey (*pro hac vice* pending)

CROWELL & MORING LLP

3 Embarcadero Center, 26th Floor

San Francisco, CA 94111

Telephone: (415) 986-2800

Fax: (415) 986-2827

gramsey@crowell.com

Julia R. Milewski (D.C. Bar No. 1008678)

Justin D. Kingsolver (D.C. Bar. No. 1033806)

CROWELL & MORING LLP

1001 Pennsylvania Avenue NW

Washington DC 20004-2595

Telephone: (202) 624-2500

Fax: (202) 628-5116

jmilewski@crowell.com

jkingsolver@crowell.com

Richard Domingues Boscovich (*pro hac vice* pending)

MICROSOFT CORPORATION

One Microsoft Way

Redmond, WA 98052-6399

Telephone: (425) 704-0867

Fax: (425) 936-7329

rbosco@microsoft.com

crmoses@microsoft.com

Attorneys for Plaintiff Microsoft Corp.