**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 AND THEREBY
INJURING PLAINTIFF AND ITS
CUSTOMERS,

        Defendants.

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Civil Action No: 1:16-cv-00993 (GBL/TCB)

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

**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 to Supplement Preliminary Injunction Order

("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 the Preliminary Injunction

Motion, Microsoft seeks *ex parte* relief to disable the recently registered domains set forth in

Appendix A of the proposed 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 Preliminary Injunction Motion filed concurrently herewith. Therefore, Microsoft requests that the *Ex Parte* Motion to Supplement Preliminary Injunction Order and associated pleadings be sealed pending execution of the *ex parte* relief sought in Microsoft's 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 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)).

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).[1]

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. Dkt. No. 14 ¶¶ 5-6. If Defendants knew Microsoft sought the relief set forth in the Preliminary Injunction Motion, they could quickly adapt the command and control infrastructure used to secretly establish

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[1] *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.).

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

themselves on a victim's network. *Id.* ¶ 36.

In fact, Defendants have shown that this is their intention. After the execution of this Court's Temporary Restraining Order and Preliminary Injunction Order, Defendants continued to register domains to carry out new attacks on Microsoft's technology and customers. Declaration of Jason L. Norton In Support Of Microsoft's Motion to Supplement Preliminary Injunction Order ("Norton Decl.") ¶ 17.   Defendants continue to misuse Microsoft's trademarks and brand names to make their domains seem legitimate. *Id.* Given Microsoft's actions against Defendants in this case, even disclosing that Microsoft has filed a Motion to Supplement the Preliminary Injunction Order 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 Strontium 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. Dkt. No. 14 ¶ 36. For example, once Defendants become aware that domains in Strontium's 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 last five years, Microsoft has brought 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 Strontium. Declaration of Gabriel M. Ramsey In Support Of Motion For Protective Order ("Ramsey Decl.") ¶ 5. In three of those cases, the defendants immediately attempted to either destroy evidence or move their command and control infrastructure upon detecting the legal action being taken against them. *Id.* This, along with Defendant's defiance of this Court's injunctive orders, underscore 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 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 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.

CONCLUSION

Therefore, for all the foregoing reasons, Microsoft requests that 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 Preliminary Injunction Motion:

1.   The Motion in Support of Microsoft's Motion for Protective Order Sealing Documents and accompanying documents, including this Brief;

2.   The declaration of Gabriel M. Ramsey in Support of the Motion for Protective Order Sealing Documents;

3.   Microsoft's *Ex Parte* Motion to Supplement Preliminary Injunction Order and accompanying documents;

4.   Brief in Support of Microsoft's *Ex Parte* Motion to Supplement Preliminary Injunction Order and accompanying documents;

5.   The Declaration of Jason L. Norton in Support of Microsoft's *Ex Parte* Motion to Supplement Preliminary Injunction Order and attachments thereto;

6.   Declaration of Honorable Faith Hochberg and attachments thereto; and

7.   [Proposed] Supplemental Preliminary Injunction Order and accompanying documents.

Microsoft respectfully requests that these materials be sealed pending execution of the *ex parte* temporary relief sought in Microsoft's Preliminary Injunction Motion, in particular the disabling of the domains set forth in Appendix A to the proposed Supplemental Preliminary Injunction Order. Microsoft respectfully requests that immediately upon the execution of the portion of the Order disabling the domains in Appendix A to the proposed Order, the Preliminary Injunction Motion and related pleadings be filed in the public docket. Upon execution of the *ex parte* relief disabling the domains in Appendix A to the Order, Microsoft will file with the Clerk of the Court a Notice that the Supplemental Preliminary Injunction Order has been executed. Microsoft further requests that upon disabling of the domains in Appendix A to the Order, Microsoft be permitted to disclose such materials as it deems necessary to commence its efforts to provide Defendants notice of any further hearings and service of pleadings associated with the instant Preliminary Injunction Motion.

Microsoft respectfully requests that should the Court decide not to grant the *ex parte*

temporary relief requested in Microsoft's Preliminary Injunction Motion, that the materials be sealed indefinitely.

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

Dated: November 14, 2016   Respectfully submitted,

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