

FILED

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

2011 SEP 22 A 9:27

CLERK US DISTRICT COURT
ALEXANDRIA, VIRGINIA

MICROSOFT CORPORATION, a)
Washington corporation,)
)
Plaintiff,)
)
v.)
)
DOMINIQUE ALEXANDER PIATTI, an)
individual, DOTFREE GROUP S.R.O., a)
Czech limited liability company and JOHN)
DOES 1-22, CONTROLLING A)
COMPUTER BOTNET THEREBY)
INJURING MICROSOFT AND ITS)
CUSTOMERS)
)
Defendants.)
)
)
)
)

Civil Action No: 1:11cv1017

FILED UNDER SEAL

NON-CONFIDENTIAL MEMORANDUM IN SUPPORT OF MICROSOFT CORPORATION'S MOTION FOR A PROTECTIVE ORDER SEALING DOCUMENTS

In support of its Motion for a Protective Order Sealing Documents, Microsoft, by counsel, submits the following memorandum.

BACKGROUND

Microsoft has filed a Complaint and a Motion for Emergency Temporary Restraining Order and Order to Show Cause re Preliminary Injunction ("TRO Motion") to prevent the activities of Defendants Dominique Alexander Patti, dotFree Group S.R.O., and John Doe Defendants 1 through 22 (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, be sealed for a limited period of five (5) days.

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).¹

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* temporary 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 for a period of five (5) business days after the entry of the temporary relief sought in the TRO Motion, after which the materials may be filed in the public docket. Microsoft further requests that after effecting the *ex parte* temporary relief

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.).

that it be permitted to disclose such materials as it deems necessary, including to commence its notice and service efforts and disclose such material as may be necessary until the Court unseals the case.

Should, however, the Court decide not to grant the *ex parte* temporary 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

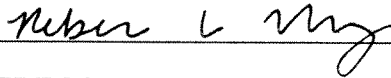
Therefore, for all the foregoing reasons, Microsoft requests that this case and the following documents in particular be kept under seal in accordance with Fed. R. Civ. P. 26(c)(1) and Local Civil Rule 5, for a period of five (5) business days after the entry of the temporary relief sought in the TRO Motion:

1. Complaint;
2. Application of Microsoft Corporation for an Emergency Temporary Restraining Order and Order to Show Cause re Preliminary Injunction;
3. Brief in Support of Application of Microsoft Corporation for an Emergency Temporary Restraining Order and Order to Show Cause re Preliminary Injunction;
4. Declaration of Mark Debenham in Support of Application of Microsoft Corporation for an Emergency Temporary Restraining Order and Order to Show Cause re Preliminary Injunction and Exhibits thereto;
5. Declaration of Jesse D. Kornblum in Support of Application of Microsoft Corporation for an Emergency Temporary Restraining Order and Order to Show Cause re Preliminary Injunction and Exhibits thereto;
6. Declaration of Gabriel M. Ramsey in Support of Application of Microsoft Corporation

for an Emergency Temporary Restraining Order and Order to Show Cause re Preliminary Injunction and Exhibits thereto.

Dated: September 22, 2011 Respectfully submitted,

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