

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

-----X	:	
MICROSOFT CORPORATION,	:	
	:	
Plaintiff,	:	<b>Case No. 23 Civ. 10685 (PAE)</b>
-against-	:	
	:	
DUONG DINH TU,	:	
LINH VAN NGUYEN, and	:	
TAI VAN NGUYEN,	:	
	:	
Defendants.	:	
-----X		

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**PLAINTIFF MICROSOFT’S MEMORANDUM OF LAW IN SUPPORT OF  
MOTION FOR DEFAULT JUDGMENT AND PERMANENT INJUNCTION**

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## **I. INTRODUCTION**

Plaintiff Microsoft Corporation (“Microsoft”) respectfully moves the Court to enter default judgment and issue a permanent injunction to prevent Defendants Duong Dinh Tu, Linh Van Nguyen (a/k/a Nguyen Van Linh), and Tai Van Nguyen (collectively, “Defendants”) from continuing to run and operate a criminal enterprise that sells tools and services for committing cybercrime (the “Fraudulent Enterprise” or “Enterprise”), and to prevent further harm to Microsoft and the general public that would be caused absent such permanent injunctive relief.

As set forth in Microsoft’s pleadings and this Court’s previous orders, the Fraudulent Enterprise uses internet “bots” to defraud Microsoft’s security systems, allowing for the creation of millions of free Microsoft email accounts in the names of fake people. Defendants then sell these fraudulent accounts in bulk in their own illicit online marketplace to other criminals, who use the accounts to spray computer viruses across the Internet, engage in phishing scams, and commit crippling cyberattacks, terrorizing Microsoft customers around the world. Microsoft now seeks—pursuant to Local Civil Rule 55.2 and Federal Rules of Civil Procedure 55(b)(2) and 65—a (1) default judgment against the Defendants, and (2) permanent injunction prohibiting Defendants from operating the Fraudulent Enterprise and permanently transferring ownership to Microsoft of the malicious domains used by Defendants to perpetrate their Enterprise.<sup>1</sup>

## **II. STATEMENT OF FACTS**

### **A. Procedural History**

Microsoft filed this suit under seal on December 7, 2023, alleging that Defendants—by perpetrating the Fraudulent Enterprise—(1) violated the Racketeer Influenced and Corrupt

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<sup>1</sup> Because Microsoft is not seeking monetary damages in this action (only a default judgment and permanent injunctive relief), there is no need for a damages inquest in connection with this motion.

Organizations Act (18 U.S.C. § 1962) (“RICO”); (2) infringed Microsoft’s trademarks in violation of the Lanham Act (15 U.S.C. § 1114 *et seq.*); (3) engaged in false designation of origin, federal false advertising, and federal unfair competition in violation of the Lanham Act (15 U.S.C. § 1125(a)); (4) diluted Microsoft’s trademarks in violation of the Lanham Act (15 U.S.C. § 1125(c)); (5) tortiously interfered with Microsoft’s business relationships with its customers; (6) converted Microsoft’s property; (7) trespassed on Microsoft’s chattels; and (8) were unjustly enriched at Microsoft’s expense. Along with the filing of its Complaint (Dkt. No. 10), Microsoft moved for an Emergency *Ex Parte* Temporary Restraining Order and Order to Show Cause (“TRO Motion”) (Dkt Nos. 12–19) to enjoin Defendants from their unlawful conduct. Declaration of Brian T. Markley in Support of Microsoft’s Motion for Default Judgment and Permanent Injunction (“Markley Decl.”) ¶ 4.

This Court entered an Emergency *Ex Parte* Temporary Restraining Order and Order to Show Cause (“TRO”) on December 7, 2023 (Dkt. No. 35-1). Following execution of the TRO, on December 13, 2023, this action was unsealed (*see* Dkt. No. 5), and Microsoft duly served Defendants with its Complaint (Dkt. No. 10), the TRO (Dkt. No. 35-1), the TRO Motion (Dkt. No. 12), and all attendant papers (Dkt. Nos. 13–19). Markley Decl. ¶ 5. After Defendants failed to serve answering papers on Microsoft by December 18, 2023, as instructed by the Court, Microsoft asked the Court to convert the TRO into a Preliminary Injunction Order (“Preliminary Injunction Order”) (*see* Dkt. No. 20), which the Court did on December 20, 2023 (*see* Dkt. No. 23). Markley Decl. ¶ 6. Microsoft then duly served the Preliminary Injunction Order on Defendants (*see* Dkt. No. 26). Markley Decl. ¶ 6.

Defendants have, as of January 4, 2024, been in default under Federal Rule of Civil Procedure 12(a)(1)(A)(i) for failure to respond to the Complaint. That day, Microsoft represented

to the Court that, although Defendants were in default, Microsoft would delay a motion for default judgment so that it could first collect certain non-party discovery (*see* Dkt. No. 25). Markley Decl. ¶ 8. As set forth in subsequent status letter updates to the Court, that discovery entailed the collection of documents from PayPal PTE Ltd. (Dkt. Nos. 30, 32). *See* Markley Decl. ¶ 10.

On July 23, 2024, Microsoft filed, under seal, a Motion for an *Ex Parte* Supplemental Preliminary Injunction Order (“Supplemental Preliminary Injunction Motion”) (Dkt. No. 33) in connection with the Defendants’ continued perpetration of the Enterprise through a new Internet domain that was not included explicitly in the December 20, 2023 Preliminary Injunction Order, and the Court entered an *Ex Parte* Order for Supplemental Preliminary Injunction (“Supplemental Preliminary Injunction”) following a hearing that same day (Dkt. No. 41 at 3–4). Markley Decl. ¶ 11.

### **B. Injunctive Relief**

The Court has made several factual findings in the course of issuing preliminary injunctive relief to Microsoft, including that:

- The Court has jurisdiction;
- Defendants have used certain IP addresses and Internet domains identified by Microsoft to improperly access Microsoft’s security systems, deceive those systems into believing that they are legitimate human consumers of Microsoft services, open Microsoft Outlook email accounts in names of fictitious users, and sell those fraudulent accounts to cybercriminals for use as tools in perpetrating a wide variety of online crimes; and
- Unless enjoined, Defendants are likely to continue to engage in conduct that violates RICO and the Lanham Act, and that constitutes tortious interference, conversion, trespass to chattels, and unjust enrichment.

Dkt. No. 23 ¶¶ 1, 3–4, 9; *see also* Dkt. No. 41 at 3–4. Based on these findings, through its Preliminary Injunction Order and Supplemental Preliminary Injunction Order, the Court enjoined Defendants from perpetrating further violations of law, and ordered third-party registry operators,



hosting service providers, and proxy service providers to cause the Internet domains used by Defendants to effectuate their Enterprise to be disabled and otherwise redirected to Microsoft's control.

### **C. Microsoft Properly Served Defendants**

#### **1. Initial Preliminary Injunction**

In its letter to the Court dated December 18, 2023, Microsoft set forth four methods by which it would effectuate service of the Preliminary Injunction Order—by (1) email, (2) publication, (3) registered mail, and (4) personal service. *See* Dkt. No. 20 at 2–3. As represented in the Declaration of Jason Rozbruch Regarding Service on Defendants of the Preliminary Injunction Order, Microsoft effectuated or attempted service by each alternative method ordered by the Court (*see* Dkt. No. 26), as follows:

***Email.*** On December 20, 2023, Cahill emailed the Preliminary Injunction Order to Defendants at the following email addresses: duongdinhtu93@gmail.com, duongdinhtu93@outlook.com, 17021195@vnu.edu.vn, nguyenlinh.uet@gmail.com, nvt.kscntt@gmail.com, and daukho1112@gmail.com. Dkt. No. 26 at 1–2.

- On December 20, 2023, Cahill received an automated return email stating that the emails sent to nguyenlinh.uet@gmail.com, nvt.kscntt@gmail.com, and daukho1112@gmail.com were “rejected” because those email addresses “couldn’t be found.” *Id.* at 2.
- Upon information and belief, at a time between December 13, 2023—when Cahill served the TRO, Complaint, TRO Motion, and Memorandum of Law and Declarations in Support Thereof by email to the same email addresses, but did not receive any such automated return email—and December 20, 2023, Defendants disabled the nguyenlinh.uet@gmail.com, nvt.kscntt@gmail.com, and daukho1112@gmail.com email addresses. This would explain why Cahill received the automated return email on December 20, 2023, but not on December 13, 2023. *Id.*

***Publication.*** On December 21, 2023, Microsoft published the Preliminary Injunction Order as part of “splash pages” that replaced Defendants’ illicit websites, 1stcaptcha.com,

Anycaptcha.com, Nonecaptcha.com, and Hotmailbox.me, which Microsoft now controls as a result of the Court's order. *Id.* Thus, as soon as the Defendants navigated to their own web pages following execution of this Court's Order, they would have necessarily seen the splash pages, including prominent links to the pleadings and orders in this action, as depicted here:



### This Domain has been seized by Microsoft

1. Microsoft Corporation has filed a lawsuit in federal court in the Southern District of New York alleging that the operators of this website have been using the website to sell fraudulently-obtained Microsoft accounts and technology to fraudulently obtain Microsoft and other company accounts.
2. Pursuant to a temporary restraining order issued by the federal court overseeing this lawsuit, control of this website domain has been seized by Microsoft Corporation pending the outcome of the litigation.
3. Information about the lawsuit can be found here [Notice of pleadings](#)
4. For genuine Microsoft services and products, please visit the official Microsoft website at [www.microsoft.com](http://www.microsoft.com).
5. Microsoft has made it a top priority to stop the sale of fraudulent or abusive products, or products that falsely claim a connection to Microsoft. Microsoft continuously monitors the Internet and takes action where appropriate, including but not limited to filing civil lawsuits. To those of you who may be considering purchasing these products, we urge you to not do so. By purchasing them, you are supporting unlawful activity. To those creating, selling, or distributing these products, bear in mind that we are watching and taking notice.

**Registered Mail.** On December 20, 2023, Microsoft transmitted the Preliminary Injunction Order via Federal Express to Defendant Duong Dinh Tu at Can ho C18.08 Sai Gon Avenue, so 11, Tam Binh, Thu Duc, Ho Chi Minh, Vietnam, 700000. Microsoft subsequently learned from Federal Express that the registered mail package was refused by the front desk of the apartment building located at that address. Counsel for Microsoft spoke with a Federal Express representative, who said that Federal Express was not provided with a reason for why the package was refused, and that, in the representative's experience, this refusal likely means the physical address is not a correct address for the recipient (here, Defendant Tu). *Id.* at 2–3.

**Personal Service.** Microsoft had planned to deliver the Preliminary Injunction Order, TRO, Complaint, TRO Motion, and Memorandum of Law and Declarations in Support Thereof to

Defendant Tu at the above-referenced physical address but could not do so because the address was deemed invalid as noted above. *See id.* at 3.

## **2. Supplemental Preliminary Injunction**

Microsoft likewise effectuated service of this Court's Supplemental Preliminary Injunction by the same email and publication alternative service methods previously authorized by this Court. Dkt. No. 40; Dkt. No. 41 at 4; Markley Decl. ¶ 12.

**Email.** On July 26, 2024, Cahill emailed the Supplemental Preliminary Injunction, Supplemental Preliminary Injunction Motion, and the Memorandum of Law and Declarations of Jason Lyons and Jason Rozbruch in Support Thereof to Defendants at the following email addresses: duongdinhtu93@gmail.com, duongdinhtu93@outlook.com, 17021195@vnu.edu.vn, nguyenlinh.uet@gmail.com, nvt.kscntt@gmail.com, and daukho1112@gmail.com. *See* Dkt. No. 40 at 2; Markley Decl. ¶ 12. Cahill received the same automated return emails for nguyenlinh.uet@gmail.com, nvt.kscntt@gmail.com, and daukho1112@gmail.com that it did when serving the initial Preliminary Injunction Order.

**Publication.** On July 26, 2024, Microsoft published the Supplemental Preliminary Injunction, Supplemental Preliminary Injunction Motion, and the Memorandum of Law and Declarations of Jason Lyons and Jason Rozbruch in Support Thereof as part of a splash page prominently visible to anyone who visits Defendants' new illicit website, Rockcaptcha.com. *See* Dkt. No. 40 at 2; Markley Decl. ¶ 12.

## **III. ARGUMENT**

### **A. Microsoft Has Satisfied Due Process**

Microsoft has served the Complaint, summons, and all orders and pleadings on Defendants using the methods ordered by the Court, including service by email and publication. Legal notice and service by email and publication satisfies due process, as these means are reasonably

calculated, in light of the circumstances, to apprise the interested parties of this lawsuit. *See Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950). Such methods are also authorized under Federal Rule of Civil Procedure 4(f)(3), which allows a party to serve defendants by means not prohibited by international agreement.

Moreover, the alternative methods of service that this Court has authorized in this case have been approved in other cases involving international defendants attempting to evade authorities. *See, e.g.*, Default Judgment and Order for Permanent Injunction at 2–4, *Microsoft Corp. v. Malikov*, No. 22-cv-1328 (N.D. Ga. Jan 11, 2023), Dkt. No. 50 (Markley Decl. Ex. 15) (transmission by email and publication sufficient to satisfy due process); *Rio Props., Inc. v. Rio Int’l Interlink*, 284 F.3d 1007, 1013–19 (9th Cir. 2002) (affirming authorization of service by email on international defendant); *Payne v. McGettigan’s Mgmt. Servs. LLC*, 2019 WL 6647804, at \*1–2 (S.D.N.Y. Nov. 19, 2019) (noting that courts have found various alternative methods of service appropriate and authorizing service via email on foreign defendant); *Elsevier, Inc. v. Siew Yee Chew*, 287 F. Supp. 3d 374, 379–80 (S.D.N.Y. 2018) (finding, in trademark infringement action, that service on foreign defendants via email satisfied constitutional standards of due process). Such service is particularly warranted in cases such as this involving Internet-based misconduct, carried out by international defendants, causing immediate, irreparable harm. *See Rio Props., Inc.*, 284 F.3d at 1012–18. Courts in the Second Circuit have consistently followed *Rio Properties*. *See, e.g., Payne*, 2019 WL 6647804, at \*1; *Elsevier, Inc.*, 287 F. Supp. 3d at 379–80.

Courts have likewise found that such alternative means of service satisfy due process as necessary for the entry of a default judgment. *See* Default Judgment Memorandum & Order at 8–10, *Microsoft Corp. v. John Does 1-5*, No. 15-cv-6565 (E.D.N.Y. Mar. 31, 2017), Dkt. No. 32

(Markley Decl. Ex. 16); Default Judgment and Order for Permanent Injunction at 2, *Malikov*, No. 22-cv-1328 (Markley Decl. Ex. 15).

### **B. The Court Should Enter a Default Judgment**

Federal Rule of Civil Procedure 55(b) and Local Civil Rule 55.2 authorize the entry of a default judgment when the defendant fails to plead or otherwise defend or respond within the proscribed period of time. “In determining whether to grant a motion for default judgment, a court within this district considers three factors: (1) whether the defendant’s default was willful; (2) whether defendant has a meritorious defense to plaintiff’s claims; and (3) the level of prejudice the non-defaulting party would suffer as a result of the denial of the motion for default judgment.” *Kelly Toys Holdings, LLC v. alialialiLL Store*, 606 F. Supp. 3d 32, 48 (S.D.N.Y. 2022) (quoting *Nespresso USA, Inc. v. Afr. Am. Coffee Trading Co. LLC*, 2016 WL 3162118, at \*2 (S.D.N.Y. June 2, 2016)).

**Willfulness.** As to willfulness, an unexcused failure to appear, after valid and effective service of process, as has occurred here, is evidence of a party’s willfulness. *See Indymac Bank, F.S.B. v. Nat’l Settlement Agency, Inc.*, 2007 WL 4468652, at \*1 (S.D.N.Y. Dec. 20, 2007); *see also Kelly Toys Holdings, LLC*, 606 F. Supp. 3d at 49 (concluding default judgment was warranted, upon reasoning that the defaulting defendants had “willfully failed to appear, answer, or otherwise respond to the Complaint or comply with the . . . TRO and PI Order”). Accordingly, the willfulness factor weighs in favor of entering default judgment against the Defendants.

**Meritorious Defenses.** Courts have concluded that where, as here, a defaulting party fails to present even untimely arguments in its defense, the court may presume the absence of a meritorious defense. *See, e.g., Kelly Toys Holdings, LLC*, 606 F. Supp. 3d at 49 (“By virtue of their failure to appear, Defaulting Defendants have likewise failed to present any meritorious defenses.”); *Indymac Bank, F.S.B.*, 2007 WL 4468652, at \*1 (“[T]he Court is unable to determine

whether these defendants have a meritorious defense to Plaintiff's allegations because they have presented no such defense to the Court. Thus, Plaintiff's allegations are deemed admitted."); *Mason Tenders Dist. Council v. Duce Constr. Corp.*, 2003 WL 1960584, at \*2 (S.D.N.Y. Apr. 25, 2003) (finding that the second factor regarding meritorious defenses "need not be addressed" when the defendants "have failed to proffer any defense and are therefore deemed to have admitted the well-pleaded allegations of the Complaint"). Accordingly, this factor weighs in favor of entering default judgment against the Defendants.

**Prejudice.** Denial of a motion for default judgment would be unfairly prejudicial to Microsoft given that Defendants have failed to respond to any of this Court's orders, and there is no indication that "requiring [Microsoft] to take further steps prior to a determination on the merits would be effective in eliciting a response from Defendants." *Mason Tenders Dist. Council*, 2003 WL 1960584, at \*3; *see also Indymac Bank, F.S.B.*, 2007 WL 4468652, at \*1 (finding that denial of motion for default judgment would be unfairly prejudicial due to defendants' failure "to appear, defend, or plead in response to any of the substantive allegations"); *Kelly Toys Holdings, LLC*, 606 F. Supp. 3d at 49 (concluding that denial of motion for default judgment "would be highly prejudicial to Plaintiff since Plaintiff would be left without any recourse to address Defaulting Defendants' unlawful conduct"). Accordingly, the prejudice factor also weighs in favor of entering default judgment against the Defendants.

Default judgment is thus appropriate and warranted here.

### **C. The Court Should Enter a Permanent Injunction Against Defendants**

A permanent injunction is appropriate where, as here, the plaintiff can demonstrate that (1) it has suffered an irreparable injury; (2) remedies available at law, such as monetary damages, cannot provide adequate compensation for that injury; (3) when considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) the public

interest would not be disserved by a permanent injunction. *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006); *see also, e.g., Allstar Mktg. Grp. LLC v. andnov73*, 2023 WL 5208008, at \*5 (S.D.N.Y. Aug. 14, 2023) (applying *eBay* in trademark case). Courts have entered—simultaneous with entering default judgments—permanent injunctions depriving cybercrime defendants of their malicious infrastructure on a going-forward basis. *See, e.g., Default Judgment and Order for Permanent Injunction, Malikov*, No. 22-cv-1328 (Markley Decl. Ex. 15); Default Judgment Memorandum & Order, *John Does 1-5*, No. 15-cv-6565 (Markley Decl. Ex. 16); Permanent Injunction & Order, *Microsoft Corp. v. John Does 1-5*, No. 15-cv-6565 (E.D.N.Y. Mar. 31, 2017), Dkt. No. 33 (Markley Decl. Ex. 17).

### **1. Microsoft Has Sufficiently Pled Its Claims**

Where, as here, a defendant has defaulted, well-pleaded facts are deemed admitted. *See, e.g., Laboratorios Rivas, SRL v. Ugly & Beauty, Inc.*, 2013 WL 5977440, at \*4 (S.D.N.Y. Nov. 12, 2013) (“[A] party’s default is deemed to constitute a concession of all well pleaded allegations of liability.”), *report and recommendation adopted*, 2014 WL 112397 (S.D.N.Y. Jan. 8, 2014). Moreover, “as long as the complaint has stated a valid cause of action,” a defendant’s default establishes the defendant’s liability. *See Laboratorios Rivas, SRL*, 2013 WL 5977440, at \*4. Here, Defendants have clearly defaulted, and the allegations set forth in Microsoft’s Complaint state valid causes of action for violations of RICO and the Lanham Act, and for common law tortious interference, conversion, trespass to chattels, and unjust enrichment.

#### **a. RICO**

RICO prohibits “any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce to conduct or participate, directly or indirectly, in the conduct of such enterprise’s affairs through a pattern of racketeering activity.”

18 U.S.C. § 1962(c). It is unlawful under RICO “for any person to conspire to violate” § 1962(c), regardless of whether that conspiracy ultimately comes to fruition. *Id.* § 1962(d).

For the reasons set forth in Plaintiff’s Memorandum of Law in Support of Its Motion for an Emergency *Ex Parte* Temporary Restraining Order and Order to Show Cause (Dkt. No. 13) (“TRO Memorandum of Law”) at 28–33, the evidence before this Court demonstrates that Defendants have formed and associated with an unlawful enterprise, which they have used to engage in a pattern of racketeering activity involving millions of predicate acts of wire fraud, *see* 18 U.S.C. § 1343, which is a RICO predicate act under 18 U.S.C. § 1961(1)(B). Specifically, Defendants’ RICO enterprise is evidenced by, among other things, their collective collaboration in programming the software—on the 1stCAPTCHA GitHub Page—used to perpetrate the Fraudulent Enterprise. *See* TRO Memorandum of Law at 31. It is also evidenced by the Facebook “friendship” between Defendants Linh Van Nguyen and Tu. *See id.* Defendants have engaged in wire fraud insofar as Defendants have received millions of dollars in payments in interstate and international commerce in exchange for their illicit services. *See id.* at 32. Finally, as to harm, Defendants’ conduct has forced Microsoft to spend millions of dollars in connection with investigating, identifying, and remediating the threats caused by the enterprise’s racketeering activity. *See id.* at 33.

#### **b. Lanham Act**

Defendants’ misappropriation of Microsoft’s registered trademarks constitutes trademark dilution, trademark infringement, false designation of origin, federal false advertising, and federal unfair competition under Sections 43(c), 32(1), and 43(a) of the Lanham Act. First, Section 43(c) of the Lanham Act prohibits the use of a mark or trade name in commerce that is “likely to cause dilution by blurring or dilution by tarnishment of the famous mark, regardless of the presence or absence of actual or likely confusion, of competition, or of actual economic injury.” 15 U.S.C.



§ 1125(c); *see also Glob. Brand Holdings, LLC v. Church & Dwight Co., Inc.*, 2017 WL 6515419, at \*1–2 (S.D.N.Y. Dec. 19, 2017) (“[A] ‘trademark dilution’ claim does not require a plaintiff to demonstrate likelihood of confusion between the two marks . . . [the mark’s] ‘fame is the key ingredient’”) (quoting *Savin Corp. v. Savin Grp.*, 391 F.3d 439, 449 (2d Cir. 2004)). Second, Section 32(1) of the Lanham Act prohibits the use of a reproduction, counterfeit, copy, or “colorable imitation” of a registered mark in connection with the distribution of goods and services where such use is likely to cause confusion or mistake, or to deceive. 15 U.S.C. § 1114(1)(a). And third, Section 43(a) of the Lanham Act prohibits the use of a trademark, any false designation of origin, false designation of fact, or misleading representation of fact which:

is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or . . . in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person’s goods, services, or commercial activities.

15 U.S.C. § 1125(a)(1).

Defendants have violated each of these three provisions. *See* TRO Memorandum of Law at 33–38. Specifically, Defendants have used Microsoft’s famous and distinctive registered trademarks on their Hotmailbox and 1stCAPTCHA Websites, *see* Dkt. No. 15 (Declaration of Jason Lyons in Support of Motion for Emergency *Ex Parte* TRO and Order to Show Cause) ¶¶ 30–32, and in promoting their RockCAPTCHA Website, *see* Dkt. No. 34 (Declaration of Jason Lyons in Support of Microsoft’s Motion for an *Ex Parte* Supplemental Preliminary Injunction Order) ¶ 9—*i.e.*, in commerce—without Microsoft’s authorization, in violation of Section 43(c) of the Lanham Act. Defendants’ conduct has also caused “initial-interest confusion” and “post-sale confusion,” thereby violating Lanham Act Sections 32(1) and 43(a). *See Coty Inc. v. Excell Brands, LLC*, 277 F. Supp. 3d 425, 441, 458 (S.D.N.Y. 2017) (finding that plaintiff established

likelihood of success on the merits as to its claims under the Lanham Act Sections 32(1) and 43(a) and noting that, “in addition to confusion arising at the point of sale, courts recognize, and [plaintiff] alleges, two other types of confusion: initial-interest and post-sale confusion”); TRO Memorandum of Law at 35.

### **c. Tortious Interference**

Under New York law, a claim for tortious interference requires that (1) the plaintiff had business relations with a third party; (2) the defendant interfered with those business relations; (3) the defendant acted for a wrongful purpose or used dishonest, unfair, or improper means; and (4) the defendant’s acts injured the relationship. *Catskill Dev., LLC v. Park Place Ent. Corp.*, 547 F.3d 115, 132 (2d Cir. 2008) (explaining that, with respect to the third element, a defendant’s “commission of a ‘crime or an independent tort’ clearly constitutes wrongful means”) (internal citation omitted). Here, Defendants acted for a wrongful purpose and through dishonest, unfair, and improper means, to interfere with and cause damage to Microsoft’s business relationships, not only with its end-user customers, but also with key corporate partners. *See* TRO Memorandum of Law at 38–39.

### **d. Conversion**

Under New York law, a claim for conversion requires that (1) plaintiff’s property subject to conversion is a specific identifiable thing; (2) plaintiff had ownership, possession, or control over the property before its conversion; and (3) defendant exercised an unauthorized dominion over the thing in question, to the alteration of its condition or to the exclusion of the plaintiff’s rights. *Moses v. Martin*, 360 F. Supp. 2d 533, 541 (S.D.N.Y. 2004); *see also Thyroff v. Nationwide Mut. Ins. Co.*, 8 N.Y.3d 283, 288–89, 292–93 (2007) (finding that conversion applies to electronic computer records and data). Here, Defendants interfered with and converted Microsoft’s account-creation systems. They deceived Microsoft’s CAPTCHA defense systems, infiltrated those

systems, and then stole valuable information therefrom, which Defendants used to create and sell fraudulent accounts and tokens for subsequent use by criminals for cybercrime activity and other unlawful ends. *See* TRO Memorandum of Law at 39.

**e. Trespass to Chattels**

Under New York law, a claim for trespass to chattels requires that (1) defendants acted with intent; (2) to physically interfere with (3) plaintiff's lawful possession; and (4) harm resulted. *Rekor Sys., Inc. v. Loughlin*, 2022 WL 789157, at \*13 (S.D.N.Y. Mar. 14, 2022); *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 404 (2d Cir. 2004) ("A trespass to a chattel may be committed by intentionally . . . using or intermeddling with a chattel in the possession of another, where the chattel is impaired as to its condition, quality, or value.") (internal quotations and citations omitted). Defendants have interfered with and taken as their own Plaintiff's resources, particularly the "tokens" procured from the CAPTCHA challenges employed by Microsoft. *See* TRO Memorandum of Law at 39–40. These activities injure the value of Plaintiff's property and constitute a trespass. *See id.*

**f. Unjust Enrichment**

Under New York law, a claim for unjust enrichment requires that (1) defendant benefitted, (2) at plaintiff's expense, and (3) equity and good conscience require restitution. *Beth Israel Med. Ctr. v. Horizon Blue Cross & Blue Shield of N.J., Inc.*, 448 F.3d 573, 586 (2d Cir. 2006). Here, Defendants clearly benefitted at Microsoft's expense by infiltrating Microsoft's systems, stealing the data necessary to create fraudulent Microsoft accounts, and then selling those fraudulent

accounts (along with CAPTCHA tokens) to cybercriminals for them to wreak havoc on Microsoft and its customers. *See* TRO Memorandum of Law at 40–41.

## **2. Microsoft Has Been Irreparably Harmed**

Microsoft has suffered a “reduc[tion]” in “reputational value and goodwill,” which constitutes the “irreparable harm” requisite to the issuance of injunctive relief. *See Church of Scientology Int’l v. Elmira Mission of the Church of Scientology*, 794 F.2d 38, 44 (2d Cir. 1986). Through their ongoing fraudulent scheme, Defendants have caused tens of millions of dollars in damage to Microsoft and have irreparably harmed its reputation, goodwill, and critical customer relationships. *See* TRO Memorandum of Law at 42; *see also Diageo N. Am., Inc. v. W.J. Deutsch & Sons Ltd.*, 626 F. Supp. 3d 635, 653–54 (S.D.N.Y. 2022) (quoting 15 U.S.C. § 1116(a)) (“Upon a finding of trademark dilution, a plaintiff seeking a permanent injunction ‘shall be entitled to a rebuttable presumption of irreparable harm.’ Irreparable harm exists in a trademark case when the party seeking the injunction shows that it will potentially lose goodwill and control over the reputation of its trademark.”), *appeal withdrawn*, 2022 WL 21295717 (2d Cir. Nov. 14, 2022), *aff’d*, 2024 WL 2712636 (2d Cir. May 28, 2024); *Kelly Toys Holdings, LLC*, 606 F. Supp. 3d at 52 (concluding the “Defaulting Defendants ha[d] caused unquantifiable irreparable harm to the goodwill and reputation associated with Plaintiff” where defendants “traffick[ed] in counterfeit goods”).

## **3. The Balance of Equities Tips Decidedly in Microsoft’s Favor**

The balance of equities decidedly tips in Microsoft’s favor because Defendants will suffer no harm to any legitimate interest if this Court issues a permanent injunction. *See Kelly Toys Holdings, LLC*, 606 F. Supp. 3d at 53 (“[T]he balance of hardships overwhelmingly favors Plaintiff since it has suffered and will continue to suffer irreparable harm to its business, profits, goodwill and reputation as a result of Defendants’ willful infringement of the [Plaintiff’s trademarks].”);

*see also Allstar Mktg. Grp. LLC*, 2023 WL 5208008, at \*6 (“The balance of hardships favors [Plaintiff], which has suffered and will continue to suffer irreparable harm to its goodwill and reputation as a result of the Defaulting Defendants’ sale of Counterfeit Products.”). Moreover, there is simply no reason (in equity or otherwise) why Defendants should be permitted to engage in an illegal scheme to injure Microsoft, its customers, and the public.

#### **4. The Public Interest Favors an Injunction**

This Court’s issuance of a permanent injunction would serve the public interest and is explicitly authorized by RICO and the Lanham Act. The public interest is plainly served by enforcing statutes designed to protect the public, such as RICO and the Lanham Act. In fact, courts in this District have explained that “the public interest is served by a permanent injunction, as ‘the public has an interest in not being deceived – in being assured that the mark it associates with a product is not attached to goods of unknown origin and quality.’” *Kelly Toys Holdings, LLC*, 606 F. Supp. 3d at 53 (quoting *N.Y.C. Triathlon, LLC v. NYC Triathlon Club, Inc.*, 704 F. Supp. 2d 305, 344 (S.D.N.Y. 2010)); *Allstar Mktg. Grp. LLC*, 2023 WL 5208008, at \*6. Further, several courts have granted permanent injunctive relief targeted at disabling malicious cybercrime infrastructures. *See, e.g.*, Default Judgment and Order for Permanent Injunction, *Malikov*, No. 22-cv-1328 (Markley Decl. Ex. 14); Permanent Injunction & Order, *John Does 1-5*, No. 15-cv-6565 (Markley Decl. Ex. 16).

#### **IV. CONCLUSION**

For the reasons set forth herein, and based on the Complaint, the evidence submitted in this case, and the Court’s prior orders, Microsoft respectfully requests that the Court grant its Motion for Default Judgment and Permanent Injunction.

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