



identified two months ago that still need to be disabled. On July 18, 2019, Microsoft filed under seal its Motion for Second Supplemental Preliminary Injunction because Defendants are again rebuilding Phosphorus' command and control infrastructure in defiance of this Court's authority by bringing on line new domains, which Defendants are using in the same illegal manner and for the same illegal purposes described in its Application for Temporary Restraining Order and Preliminary Injunction and Motion for Supplemental Preliminary Injunction. *See* Dkt. Nos. 3, 19, 24. Microsoft identified the additional new domains being used by Defendants and asked this Court to transfer control to Microsoft. *See* Dkt. 24-11 (listing new domains that abuse Microsoft's trademarks and brands and are in defiance of this Court's prior orders). This Motion is fully briefed but is still pending before this Court. Microsoft therefore respectfully asks that this Court to resolve the Motion on the papers and grant the requested relief.

**b. Appointment of Court Monitor**

Given the speed and persistence with which Defendants are able to put in place new harmful infrastructure and recently added domains that will need to be addressed, Microsoft requests that this Court appoint a Court Monitor to oversee the enforcement of any permanent injunction and to ensure continuing remediation of injury flowing from Defendants' numerous violations of the Court's injunctions to date. *See* Dkt. 24, 24-9, 24-10. This approach is based off one adopted by another federal court in a nearly identical case where the Court appointed a monitor – former federal Judge Faith S. Hochberg from U.S. District Court for the District of New Jersey – to oversee enforcement of a permanent injunction through a less formal and expedited process, to submit reports to the Court identifying additional illegal activities by Defendants and noting additional domains that needed to be removed from Defendants' control, and to itemize fees and expenses relating to work to enforce the injunction. *See, e.g., Microsoft*

*Corp. v. Does 1-2*, No. 1:16CV993, 2017 WL 5163363, at \*3 (E.D. Va. Aug. 1, 2017), *report and recommendation adopted*, No. 116CV00993GBLTCB, 2017 WL 3605317 (E.D. Va. Aug. 22, 2017) (Lee, J.) (appointing Court Monitor to oversee Defendants' compliance with permanent injunction); *see also id.* at Dkt. Nos. 52, 65, 68-69, 72-73 (notice of filing of court monitor reports). Microsoft believes this expedited process is necessary to meet the pace of Defendants' actions and would ease any burden on this Court from serial, conventional proceedings, while ensuring this Court's continued involvement through regular reports on efforts to take down additional domains and curtail continued harmful actions carried out by Defendants in violation of court orders.

Defendants have not stopped their harmful activities. Even while Microsoft's last request to supplement the injunction was pending, Defendants have continued to add additional domains which are an ongoing threat to Microsoft and its customers. Microsoft will therefore need this Court's assistance to disable either through filing an additional request to supplement the injunction or through appointment of a Court Monitor to address these ongoing issues.

## **II. Request for Entry of Default (Dkt. 28)**

On September 13, 2019, Microsoft filed its Motion for Entry of Default. Dkt. 28. Microsoft served Defendants with the Complaint and related materials through Court-ordered methods pursuant to Fed. R. Civ. P. 4(f)(3) that were reasonably calculated to provide Defendants with notice of the proceedings. *See* Dkt. No. 11, ¶ 15 and pp. 9-10, and Dkt. No. 18, ¶ 15 and p. 8 (authorizing alternative methods of service, including email and internet publication). Defendants received notice and are aware of these proceedings, and despite receiving notice, have not appeared in this action. The time for Defendants to appear and respond to Plaintiff's Complaint has expired. This Request is ripe for review. Microsoft respectfully

requests that this Court enter default.

### **III. Motion for Default Judgment and Permanent Injunctive Relief**

Upon the Court's entry of default, Microsoft is prepared and ready to file a Motion for Default Judgment and Permanent Injunction pursuant to Fed. R. Civ. P. 55(b)(2). Other courts have repeatedly granted similar requests where, as here, "[d]espite extensive investigation, Plaintiffs have been unable to discover the Doe Defendants' true identities." *Microsoft Corp. v. John Does 1-8*, No. 1:14-CV-811, 2015 WL 4937441, at \*1 (E.D. Va. Aug. 17, 2015) (O'Grady, J.) (adopting Report & Recommendation entering default judgment, issuing permanent injunction); *Microsoft Corp. v. John Does 1-82*, No. 3:13-CV-00319-GCM, 2013 WL 6119242, at \*4 (W.D.N.C. Nov. 21, 2013) (Mullen, J.) (same); *Consumer Source Holding, Inc. v. Does 1-24*, No. 1:13-CV-1512 AJT/JFA, 2014 WL 2967942, at \*1 (E.D. Va. July 1, 2014) (same); Order, *Microsoft v. John Does, 1-11*, No. 11CV00222 (W.D. Wash. Sept. 13, 2011), Dkt. No. 68 (Robart, J.) (same); *Microsoft Corp. v. Does*, No. 12-CV-1335 SJ RLM, 2012 WL 5497946, at \*3 (E.D.N.Y. Nov. 13, 2012) (Johnson, J.) (same). Microsoft respectfully requests that upon review of its forthcoming Motion for Default Judgment and Permanent Injunction, this Court grant the requested relief.

### **IV. Relief Requested**

Microsoft respectfully requests that this Court (1) address the ongoing threat from Defendants continually adding new domains by (i) granting its Motion for a Second Supplemental Preliminary Injunction on the papers, Dkt. 24, and (ii) appointing a Court Monitor, *see, e.g.*, Dkt. 24, 24-9, 24-10, or otherwise implementing an efficient, expedited process to address the ongoing threat from Defendants, (2) grant Microsoft's Request for Entry of Default, Dkt. 28, and (3) review and grant Microsoft's Motion for Default Judgment and Permanent Injunction to be filed shortly after entry of default.

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Respectfully submitted,

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