

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

MICROSOFT CORPORATION, a Washington corporation, <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">v.</p> MARAT MAZYNSKIJ, an individual, and DMITRY CHUPAKHIN (AKA "SERGEY SKOROVOD"), an individual, <p style="text-align: center;">Defendants.</p> <hr style="width: 40%; margin-left: 0;"/>)))))))))))))))	Civil Action No: 1:13cv139 (LMB/TCB)
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BRIEF IN SUPPORT OF MICROSOFT’S REQUEST FOR ENTRY OF DEFAULT

Plaintiff Microsoft Corp. (“Microsoft”), respectfully requests, pursuant to Fed. R. Civ. P. 55(a), that the Court enter default against Defendant Dmitry Chupakhin who operated and controlled the Bamital botnet from and through the Internet domains at issue in this case. Entry of default is warranted here. Defendant Dmitry Chupakhin was duly served with a copy of the Amended Complaint and summons in the above-entitled action: (1) on July 8, 2013 by registered delivery requiring Mr. Chupakhin’s signature, via international courier, (2) on August 26, 2013 by registered delivery requiring signature, via the Russian Post and (3) on August 19 and 23 by email and publication.

The Hague Convention governing service of documents in U.S. civil matters is currently suspended by the Russian Federation. Thus, service by that means is not possible, and service is governed by Fed. R. Civ. P. 4(f), and underlying principles of Due Process. Service by personal delivery to Mr. Chupakhin is authorized by Fed. R. Civ. P. 4(f)(2)(C)(i). Service by personal delivery by registered mail requiring signature of the addressee or another adult at the defendant’s address is a form of service authorized under Articles 113 and 115 of the Code of Civil Procedure of the Russian Federation, and is thus authorized under Fed. R. Civ. P. 4(f)(2)(A). Service by email and Internet publication are means of service authorized by the Court in its Orders at Docket

Nos. 23 and 38, and are authorized pursuant to Fed. R. Civ. P. 4(f)(3). All of these means were reasonably calculated to provide Mr. Chupakhin with notice and have, in fact, provided him notice of these proceedings. Despite receiving notice Mr. Chupakhin has not appeared in this action. Accordingly, Microsoft is entitled to an entry of default.

Upon the entry of default pursuant to this request, Microsoft intends, thereafter, to file a motion for default judgment and permanent injunction pursuant to Fed. R. Civ. P. 55(b)(2), transferring the malicious domains in suit to Microsoft and enjoining the conduct complained of in this action.

I. STATEMENT OF FACTS

A. Procedural History

Microsoft filed this suit on January 31, 2013, directed at the command and control infrastructure of the Bamital botnet, alleging that the pernicious effects of the Bamital botnet caused and continued to cause irreparable injury to Microsoft, its customers and members and the public, and stated claims for violation of the Computer Fraud and Abuse Act (18 U.S.C. § 1030), Electronic Communications Privacy Act (18 U.S.C. § 2701), the Lanham Act (15 U.S.C. § 1114 et seq, 15 U.S.C. §§1125(a) and (c), and the common law of trespass to chattels, unjust enrichment and conversion. (Dkt. No. 1)

Simultaneously, Microsoft applied for an Emergency Temporary Restraining Order and preliminary injunction to disable the Bamital botnet's command and control server software, operating from and through the domains at issue in this case. (Dkt. No. 3-9) The Court issued a Temporary Restraining Order, Seizure Order and Order to Show Cause Re Preliminary Injunction ("the TRO") on January 31, 2013. (Dkt. No. 23) The order was executed on February 7, 2013 – all of the domains were disabled, and the Bamital botnet software operating at and through these domains was, thus, disabled. (Dkt. No. 27) On February 13, 2013, the Court issued a Preliminary Injunction disabling, during the pendency of this action, the domains through which the Bamital botnet was operated and controlled. (Dkt. No. 38)

When it issued the TRO and Preliminary Injunction, the Court found good cause to permit

service of Microsoft's complaint and related materials by alternative means of e-mail and publication at the publicly accessible website www.noticeofpleadings.com, pursuant to Rule 4(f)(3). The Court further granted Microsoft the ability to serve discovery, in order to obtain further contact and identifying information regarding defendants. (Dkt. No. 23, 38)

B. Investigation Regarding Defendants' Contact And Identifying Information

Through the discovery process and informal discovery efforts and investigation, Microsoft identified defendant Dmitry Chupakhin, determined his physical address in the city of Chelyabinsk, Russian Federation, and determined his email addresses beyond the email addresses used to register botnet domains. On June 19, 2013, Microsoft filed the Amended Complaint naming Mr. Chupakhin as a defendant. (Dkt. No. 50) The clerk of the court issued the summons to Mr. Chupakhin on June 21, 2013. (Dkt. No. 52)

C. Service Of The Amended Complaint on Defendant Dmitry Chupakhin

The Amended Complaint and summons have been served by upon Mr. Chupakhin by the means described below. Despite this robust notice and service, Mr. Chupakhin has not come forward in this action to defend or seek reinstatement of the Bamital botnet domains.

1. Service By International Courier

On June 25, 2013, Microsoft initiated service of process to defendant Dmitry Chupakhin at his address (Barbyusa St., Bldg. 134, Apt. 24, Chelyabinsk, Russian Federation 454078), by registered delivery via international courier (UPS), requiring signature of the addressee upon receipt. (Declaration of Gabriel Ramsey ("Ramsey Decl."), ¶ 10) English and Russian translated copies of the Amended Complaint and summons were delivered to Mr. Chupakhin, who signed for and received the documents at 1:03 PM Chelyabinsk time on July 8, 2013. (*Id.* at ¶¶ 10-11).

2. Service By Registered Delivery By Russian Post

On August 26, 2013, Microsoft initiated service of process to defendant Dmitry Chupakhin at his address in Chelyabinsk, Russian Federation, by registered delivery by the Russian Post, in the same manner as if the instant lawsuit had been filed in court in the Russian Federation. On August 26, 2013, a legal assistant at Orrick (CIS) LLC in Moscow, Russian Federation, deposited

English and Russian translated copies of the Amended Complaint and summons to Mr. Dmitry Chupakhin with the post office in Moscow, to be sent to Mr. Chupakhin's address at Barbyusa St., Bldg. 134, Apt. 24, Chelyabinsk, Russian Federation 454078 by a formal registered delivery process, requiring signature upon receipt by defendant or any other adult person at the address. (Declaration of Konstantin Kasyan ("Kasyan Decl."), ¶ 2, Ex. 1). On September 12, 2013 at 7:23 pm Chelyabinsk time, the documents were received and signed for at the Barbyusa St. address. (*Id.*, ¶ 3, Ex. 2). The delivery record states that, at that time, there was "delivery to the addressee." This is the means of service authorized by Articles 113 and 115 of the Code of Civil Procedure of the Russian Federation for service of a complaint and summons in Russian courts of general jurisdiction. (*Id.*, ¶ 5). Articles 113 and 115 provide that service of process is appropriate by personal delivery to a defendant or by registered delivery requiring signature acknowledging receipt by the defendant or by any other adult person living at the same address. (*Id.*) This means of service used in the present action complies with Russian law.

3. Service By Electronic Mail

On August 19, 2013, Microsoft served Dmitry Chupakhin by sending copies of the Amended Complaint, Summons, translations into Russian and a link to all pleadings in this action, as well as the notice language approved by the Court in the temporary restraining order and preliminary injunction, to Mr. Chupakhin's email addresses pizdato77@gmail.com and serg.skorovod@gmail.com. (Ramsey Decl., ¶ 14, Ex. 4) On August 23, 2013, Microsoft served Dmitry Chupakhin by sending copies of the Amended Complaint, Summons, translations into Russian and a link to all pleadings in this action, as well as the notice language approved by the Court in the temporary restraining order and preliminary injunction, to Mr. Chupakhin's email address dmitry@chupahin.com. (*Id.*) In these email communications, Microsoft also requested that Mr. Chupakhin respond and engage in discussion with Microsoft. (*Id.*) On February 7, 2013, Microsoft served Defendant Dmitry Chupakhin by sending copies of the original Complaint, translations into Russian and a link to all pleadings in this action, as well as the notice language approved by the Court in the temporary restraining order to all email addresses known to be associated with the Bamital botnet command and control domains. (*Id.*, ¶ 16).

4. Service By Internet Publication

Beginning on February 7, 2013 and continuously thereafter, Microsoft published the Complaint, Amended Complaint, summons and all orders and pleadings in this action on the publicly available website www.noticeofpleadings.com. The Amended Complaint and all subsequent pleadings and orders have been made available on that website throughout the case. The Court-approved notice language was provided in Russian and English on this website. A link to the website and the approved notice language was sent in each service of process email sent to Mr. Chupakhin. Members of the public who have become aware of the case have communicated with Microsoft regarding the www.noticeofpleadings.com website. Further, prior defendant Marat Mazynskij, with whom Microsoft has resolved its dispute, repeatedly referenced documents located on www.noticeofpleadings.com in his responsive motion to dismiss the Amended Complaint (Docket No. 53). (Ramsey Decl., ¶ 17).

II. THE COURT SHOULD ENTER DEFAULT UNDER FED. R. CIV. P. 55(A) BECAUSE DEFENDANT DMITRY CHUPAKHIN – DESPITE HAVING BEEN SERVED – HAS FAILED TO ANSWER OR OTHERWISE APPEAR

Under Fed. R. Civ. P. 55(a) “when a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk must enter the party’s default.” Between February 7, 2013 and present, Microsoft has served the Complaint, Amended Complaint, summons and all orders and pleadings on Mr. Chupakhin by multiple means, including personal delivery, registered delivery via the Russian post, email and publication. Service by personal delivery to Mr. Chupakhin is authorized by Fed. R. Civ. P. 4(f)(2)(C)(i). Service by personal delivery, requiring signature of the defendant or any other adult at the defendant’s address is a form of service authorized under Articles 113 and 115 of the Code of Civil Procedure of the Russian Federation, and is thus authorized under Fed. R. Civ. P. 4(f)(2)(A). Service by email and Internet publication is a means of service authorized by the Court in its Orders at Docket Nos. 23 and 38, and is authorized pursuant to Fed. R. Civ. P. 4(f)(3).

These methods of service comply with the Federal Rules and satisfy Due Process, as they were reasonably calculated to notify Mr. Chupakhin of this action, have repeatedly resulted in

physical and personal transfer of the Amended Complaint and summons to Mr. Chupakhin, in his own language and, given that Mr. Chupakhin is very familiar with digital modes of communication (as evidenced by the activities alleged in this case), digital transmission of these documents to Mr. Chupakhin is consistent with his preferred modes of activity. For all of these reasons, the means of service satisfy principles of Due Process. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).¹ Despite being served, Mr. Chupakhin has not responded or appeared within the 21 day period. Thus, entry of default is appropriate.

A. The Hague Convention Does Not Apply Because It Has Been Suspended By The Russian Federation

The U.S. Department of State indicates that execution of formal requests for judicial assistance pursuant to the Hague Convention are currently suspended between the Russian Federation and United States and, accordingly, the State Department has advised that service of process is to be carried out by alternative methods that are consistent with the laws of the Russian Federation, the Federal Rules of Civil Procedure and principles of Due Process. (*See* http://travel.state.gov/law/judicial/judicial_3831.html). *See e.g. RSM Prod. Corp. v. Fridman*, 2007 U.S. Dist. LEXIS 58194, *5-6 (S.D.N.Y. 2007) (approving service of process by non-treaty based means upon an individual defendant in Russia, in view of suspension of Hague Convention processes); *Xcentric Ventures, LLC v. Karsen, Ltd.*, 2011 U.S. Dist. LEXIS 81698 (D. Ariz. 2011) (same; permitting service of process upon defendant in Russia by email under Rule 4(f)(3), in light of suspension of Hague Convention processes); *Henry F. Teichmann, Inc. v. Caspian Flat Glass OJSC*, 2013 U.S. Dist. LEXIS 54299, *3 (W.D. Pa. 2013) (Regarding defendant in Russia: “[b]ecause it would be futile, Plaintiff need not first attempt service through the Hague Service Convention.”); *Arista Records LLC v. Media Servs. LLC*, 2008 U.S. Dist. LEXIS 16485 (S.D.N.Y. 2008) (plaintiff need not first attempt service on Russian Defendant in accordance with the Hague Convention for service pursuant to Rule 4(f)(3) to be proper).

¹ Whether methods of service are sufficient turns on their “ability to inform people of the pendency of proceedings that affect their interests” in light of “the practical application to the affairs of men as they are ordinarily conducted.” *Greene v. Lindsey*, 456 U.S. 444, 451 (1982); *see also Mullane*, 339 U.S. at 315 (“The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish.”).

B. Service By Personal Delivery To Dmitry Chupakhin Is Authorized By Fed. R. Civ. P. 4(f)(2)(C)(i)

Mr. Chupakhin has twice been served the Amended Complaint and Summons, in the Russian language, by personal delivery requiring his personal receipt of the documents and signature, once through UPS and once through a registered delivery service offered by the Russian Post. These means of service are authorized by Fed. R. Civ. P. 4(f)(2)(C)(i), which provides that a defendant “may be served at a place not within any judicial district of the United States... by a method that is reasonably calculated to give notice: ... unless prohibited by the foreign country’s law, by... delivering a copy of the summons and of the complaint to the individual personally.” Fed. R. Civ. P. 4(f)(2)(C)(i). As discussed below, registered delivery with proof of personal receipt is authorized under the law of the Russian Federation. This means is also reasonably calculated to give notice, as Mr. Chupakhin has personally received the documents and indicated his receipt by providing his signature. Accordingly, it is an authorized means of service under Rule 4(f)(2)(C)(i). *See Elrod v. Busch Entm’t Corp.*, 2011 U.S. Dist. LEXIS 69459, *6 (E.D. Va. 2011) (personal service of complaint and summons on defendant in India, where defendant provided signature acknowledging receipt, complied with Fed. R. Civ. P. 4(f)(2)(C)(i)); *Gannon Int’l, Ltd. v. Blocker*, 2011 U.S. Dist. LEXIS 3348, *17-22 (E.D. Mo. 2011) (personal service upon defendant in Vietnam, which does not adhere to the Hague Convention, was effective under Fed. R. Civ. P. 4(f)(2)(C)(i) where consistent with Vietnamese law). Despite receiving notice by these means, Mr. Chupakhin has not appeared in or otherwise responded to this action. Accordingly, entry of default is appropriate.

C. Service By Registered Delivery By Russian Post To Dmitry Chupakhin Is Authorized By Fed. R. Civ. P. 4(f)(2)(A)

Mr. Chupakhin has been served the Amended Complaint and Summons, in the Russian language, by a registered delivery service offered by the Russian Post. This means of service is authorized by Fed. R. Civ. P. 4(f)(2)(A), which provides that a defendant “may be served at a place not within any judicial district of the United States... by a method that is reasonably calculated to give notice: ... as prescribed by the foreign country’s law for service in that country in an action in its courts of general jurisdiction.” Fed. R. Civ. P. 4(f)(2)(A). Delivery through registered delivery,

with proof of receipt and signature by defendant or another adult at defendant's address is an authorized means of service under Articles 113 and 115 of the Code of Civil Procedure of the Russian Federation. (*See* Kasyan Decl., ¶ 5). In other words, this is precisely the way that a complaint and summons would be served to initiate a suit in a Russian court of general jurisdiction. (*Id.*) Accordingly, it is an authorized means of service under Rule 4(f)(2)(A). *See e.g. SEC v. Dowdell*, 2002 U.S. Dist. LEXIS 4522, *42-43 (W.D. Va. 2002) (referring to rules for service of Bahamian law allowing notice to be served by leaving it at registered office; service of U.S. complaint was effective under Fed. R. Civ. P. 4(f)(2)(A)); *Retractable Techs., Inc. v. Occupational & Med. Innovations, Ltd.*, 253 F.R.D. 404, 405-406 (E.D. Tex. 2008) (“a foreign court’s general service law, as applicable to its residents and citizens, will control for the purposes of Rule 4(f)(2)(A) as long as there is not some other, more specific, provision that mandates service by another method). Despite receiving notice by this means, Mr. Chupakhin has not appeared in or otherwise responded to this action. Accordingly, entry of default is appropriate.

D. Service By Electronic Mail And Internet Publication To Dmitry Chupakhin Is Authorized By Fed. R. Civ. P. 4(f)(3)

Courts have come to appreciate the need to resort to alternative means of serving evasive international defendants. The Ninth Circuit in *Rio Props., Inc. v. Rio Int’l Interlink*, for example, recognized that service by email is particularly warranted in cases – such as this one – involving Internet-based misconduct perpetrated by international defendants, as perhaps the only method “aimed directly and instantly” at serving international e-business defendants:

[Defendant] had neither an office nor a door; it had only a computer terminal. If any method of communication is reasonably calculated to provide [Defendant] with notice, surely it is email—the method of communication which [Defendant] utilizes and prefers. In addition, email was the only court-ordered method of service aimed directly and instantly at [Defendant] ... Indeed, when faced with an international e-business scofflaw, playing hide-and-seek with the federal court, email may be the only means of effecting service of process.

Rio Props., Inc. v. Rio Int’l Interlink, 284 F.3d 1007, 1014-15 (9th Cir. 2002). Since *Rio Props.*, several courts have found email an appropriate alternative means of service under Rule 4(f)(3) in cases involving online malfeasance by international defendants. *See e.g., FMAC Loan Receivables v. Dagra*, 228 F.R.D. 531, 534 (E.D. Va. 2005) (acknowledging that courts have readily used Rule 4(f)(3) to authorize international service through non-traditional means, including email); *Gurung v.*

Malhotra, 279 F.R.D. 215, 220 (S.D.N.Y. 2011) (finding service by email effective under Rule 4(f)(3)); *Prediction Co. LLC v. Rajgarhia*, 2010 U.S. Dist. LEXIS 26536 (S.D.N.Y. 2010) (same); *Williams-Sonoma, Inc. v. Friendfinder, Inc.*, 2007 U.S. Dist. LEXIS 31299, *5-6 (N.D. Cal. 2007) (finding service by email consistent with the Hague Convention and warranted in cases involving misuse of Internet technology by international defendants); *Liberty Media Holdings, LLC v. Vinigay.com*, 2011 U.S. Dist. LEXIS 26657, *11 (D. Ariz. 2011) (finding service by email appropriate on Brazilian defendants who had downloaded copyrighted material off the Internet); *Liberty Media Holdings, LLC v. March*, 2011 U.S. Dist. LEXIS 5290, *4-5 (S.D. Cal. 2011) (finding service by email appropriate on foreign defendants who had registered Internet domain names that allegedly infringed plaintiff's trademarks).

As discussed, Microsoft successfully sent emails containing and linking to the Complaint, Amended Complaint, summons and the orders and pleadings in this proceeding to the email addresses of Mr. Chupakhin. (Ramsey Decl., ¶¶ 14-16, Ex. 4). Given that Mr. Chupakhin's mode of communication with domain registrars to obtain the botnet domains was electronic means, specifically email, given the direct association between the email addresses and the botnet infrastructure, and given that the pleadings were successfully sent to such addresses, it is appropriate to find that the Amended Complaint and summons were served on Mr. Chupakhin by email pursuant to authority approving email as a valid means of service.

Federal Courts have also routinely authorized service on international defendants by publication when it is reasonable to conclude that the defendants are likely to read the media in which the notice is published. *See BP Prods. N. Am., Inc. v. Dagra*, 236 F.R.D. 270, 271-273 (E.D. Va. 2005) (approving notice by publication in two Pakistani newspapers circulated in the defendant's last-known location); *Smith v. Islamic Emirate of Afghanistan*, 2001 U.S. Dist. LEXIS 21712 (S.D.N.Y. Dec. 26, 2001) (approving service by publication upon Osama bin Laden and the al-Qaeda organization); *SEC v. HGI, Inc.*, 1999 U.S. Dist. LEXIS 17441, *4-5 (S.D.N.Y. Nov. 5, 1999) (approving service by publication in a national newspaper); *Morris v. Khadr*, 415 F. Supp. 3d 1323, 1327 (D. Utah 2006) (allowing the plaintiffs to serve defendant in Toronto by publishing notice in a newspaper and posting the complaint on a website "www.september11classaction.com").

Here, Mr. Chupakhin has been provided links to www.noticeofpleadings.com where the Amended Complaint and summons are published. Given that Mr. Chupakhin specifically carries out his business through email addresses to which service was effected and to which the pleadings and links to www.noticeofpleadings.com were sent and given that both a now-dismissed defendant and third parties have indicated awareness of the case by reference to documents obtained from this website (Ramsey Decl., ¶ 17), notice of the instant proceedings by publication through the www.noticeofpleadings.com website is appropriate.

All of the above-mentioned methods of service advised Mr. Chupakhin of the nature of this action and the relief sought, directed Mr. Chupakhin how to respond to the Amended Complaint, provided contact information to do so and provided a link to the website www.noticeofpleadings.com, where all documents in the case have been published. That these means of service are effective is best illustrated by the fact that dismissed defendant Marat Mazynskij obtained notice by these same means and, in response, retained counsel and filed a motion to dismiss, prior to resolving the matter with Microsoft. (*See* Dkt. No. 53).

E. Default Should Be Entered Against Mr. Chupakhin Pursuant To Rule 55(a)

For all of the foregoing reasons, the Amended Complaint and summons should be deemed served upon Defendant Dmitry Chupakhin for a period of greater than 21 days. Despite Microsoft's extraordinary efforts to serve Mr. Chupakhin and provide him with notice of the action, Mr. Chupakhin has failed to plead or otherwise defend against the action. Mr. Chupakhin is 28 years old and, from his sophisticated activities and all other information known about him, there is no evidence that he is an infant, in the U.S. military or an incompetent person. Ramsey Decl., ¶ 9. Therefore, pursuant to Fed. R. Civ. P. 55(a), entry of default against the non-responsive Defendant Dmitry Chupakhin is appropriate. *See 3M Co. v. Christian Invs. LLC*, 2012 U.S. Dist. LEXIS 64104, *4 (E.D. Va. 2012) (default entered against non-responsive international defendant served pursuant to Rule 4(f)); *Gurung v. Malhotra*, 279 F.R.D. 215, 220 (S.D.N.Y. 2011) (same; defendant served by email); *Prediction Co. LLC v. Rajgarhia*, 2010 U.S. Dist. LEXIS 26536 (S.D.N.Y. Mar. 22, 2010) (same); *Gucci Am. v. Huoqing*, 2011 U.S. Dist. LEXIS 776 (N.D. Cal. 2011) (default entered against defendant based on identity contained in domain WHOIS information associated

with domain through which counterfeit Gucci bags were sold); *Transamerica Corp. v. Moniker Online Servs., LLC.*, 2010 U.S. Dist. LEXIS 48016 (S.D. Fl. 2010) (default entered against fictitious individual who had used a false name and fake address in registering and using internet domain names infringing trademark).

III. CONCLUSION

For all of the foregoing reasons, entry of default against Defendant Dmitry Chupakhin is appropriate. Microsoft respectfully requests entry of default against Mr. Chupakhin.

Dated: October 15, 2013

Respectfully submitted,

ORRICK, HERRINGTON & SUTCLIFFE LLP

/s/ Lauren Parker

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CERTIFICATE OF SERVICE

I hereby certify that the 15th day of October, 2013, I will electronically file the foregoing with the Clerk of the Court using the CM/ECF system. Copies of the foregoing were also served on the defendant listed below by registered international delivery and by electronic mail.

Dmitry Chupakhin aka “Sergey Skorovod”

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