

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

Case No.: 21-cv-20862-BLOOM/Otazo-Reyes

MILLENNIUM FUNDING, INC. et al,

Plaintiffs,

vs.

1701 MANAGEMENT LLC et al,

Defendants.

**PLAINTIFFS' MOTION FOR DEFAULT JUDGMENT AGAINST
DEFENDANTS 1701 MANAGEMENT LLC dba LIQUIDVPN, AUH20 LLC AND
CHARLES MUSZYNSKI aka FREDERICK DOUGLAS**

Plaintiffs MILLENNIUM FUNDING, INC., VOLTAGE HOLDINGS, LLC, AMBI DISTRIBUTION CORP., AFTER PRODUCTIONS, LLC, AFTER II MOVIE, LLC, MORGAN CREEK PRODUCTIONS, INC., MILLENNIUM FUNDING, INC., BEDEVILED LLC, MILLENNIUM MEDIA, INC., COLOSSAL MOVIE PRODUCTIONS, LLC, YAR PRODUCTIONS, INC., FSMQ FILM, LLC, FW PRODUCTIONS, LLC, MILLENNIUM IP, INC., I AM WRATH PRODUCTION, INC., KILLING LINK DISTRIBUTION, LLC, BADHOUSE STUDIOS, LLC, LF2 PRODUCTIONS, INC., LHF PRODUCTIONS, INC., VENICE PI, LLC, RAMBO V PRODUCTIONS, INC., RUPTURE CAL, INC., MON, LLC, SF FILM, LLC, SPEED KILLS PRODUCTIONS, INC., MILLENNIUM IP, INC., NIKOLA PRODUCTIONS, INC., WONDER ONE, LLC, BODYGUARD PRODUCTIONS, INC., OUTPOST PRODUCTIONS, INC., GLACIER FILMS 1, LLC, DEFINITION DELAWARE LLC, HANNIBAL CLASSICS INC., JUSTICE EVERYWHERE PRODUCTIONS LLC, STATE OF THE UNION DISTRIBUTION AND COLLECTIONS, LLC, PARADOX STUDIOS, LLC,

SRIPLAW

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DALLAS BUYERS CLUB, LLC, HITMAN TWO PRODUCTIONS, INC., and SCREEN MEDIA VENTURES, LLC (“Copyright Plaintiffs”) and 42 VENTURES, LLC (“42”) (all collectively “Plaintiffs”), move this honorable Court for Entry of Final Default Judgment against Defendants 1701 MANAGEMENT LLC d/b/a LIQUIDVPN (“1701”), AUH2O LLC (“AUH2O”), and CHARLES MUSZYNSKI a/k/a FREDERICK DOUGLAS (“Muszynski”) (all collectively “LiquidVPN Defendants”).

Plaintiff respectfully state that there is no possibility of inconsistent liability among the LiquidVPN Defendants because they are jointly and severally liable for Plaintiffs’ claims and liability for all has resolved due to their default. Plaintiffs do not allege that other Defendants in this action are jointly and severally liable with the LiquidVPN Defendants. *See* PLAINTIFFS’ NOTICE WITHDRAWAL OF NOTICE OF JOINT LIABILITY [DOC. #124].

I. FACTUAL BACKGROUND

Plaintiffs filed a Second Amended Complaint (“SAC”) seeking injunctive relief and damages against the LiquidVPN Defendants among others, for direct copyright infringement, contributory copyright infringement, vicarious infringement, Digital Millennium Copyright Act (“DMCA”) violations, trademark infringement, federal unfair competition, breach of contract, unjust enrichment and breach of publicity rights. *See* SAC [Doc. #96].

Copyright Plaintiffs are the owners of the copyrights in the Works listed in Exhibit “1” [Doc. #104-1, errata] of the SAC. The Works are currently available for sale in commerce. *See, e.g.,* Affidavit of Jonathan Yunger [Doc. #96-24] at ¶¶3-10, 20.

The LiquidVPN Defendants operate a Virtual Private Network (“VPN”) service under the names “LiquidVPN” and “Popcorn Time VPN”. *See* SAC at ¶226.

A VPN is a type of Internet Service for transmitting, routing, and/or providing connections for said transmitting and routing, through a network that provides access to the Internet. A conventional Internet Service Provider (“ISP”) will assign its subscriber an Internet Protocol (“IP”) address and log the subscriber’s activities on the Internet while using the assigned IP address. In comparison, many VPN providers provide their subscribers “anonymous” usage by, for example, not logging subscriber access, assigning the subscriber IP addresses that are simultaneously shared among many users, and/or encrypting traffic. A VPN provider often receives IP addresses and colocation services from a larger data center such as Defendant QuadraNet, Inc. *See* SAC at ¶103.

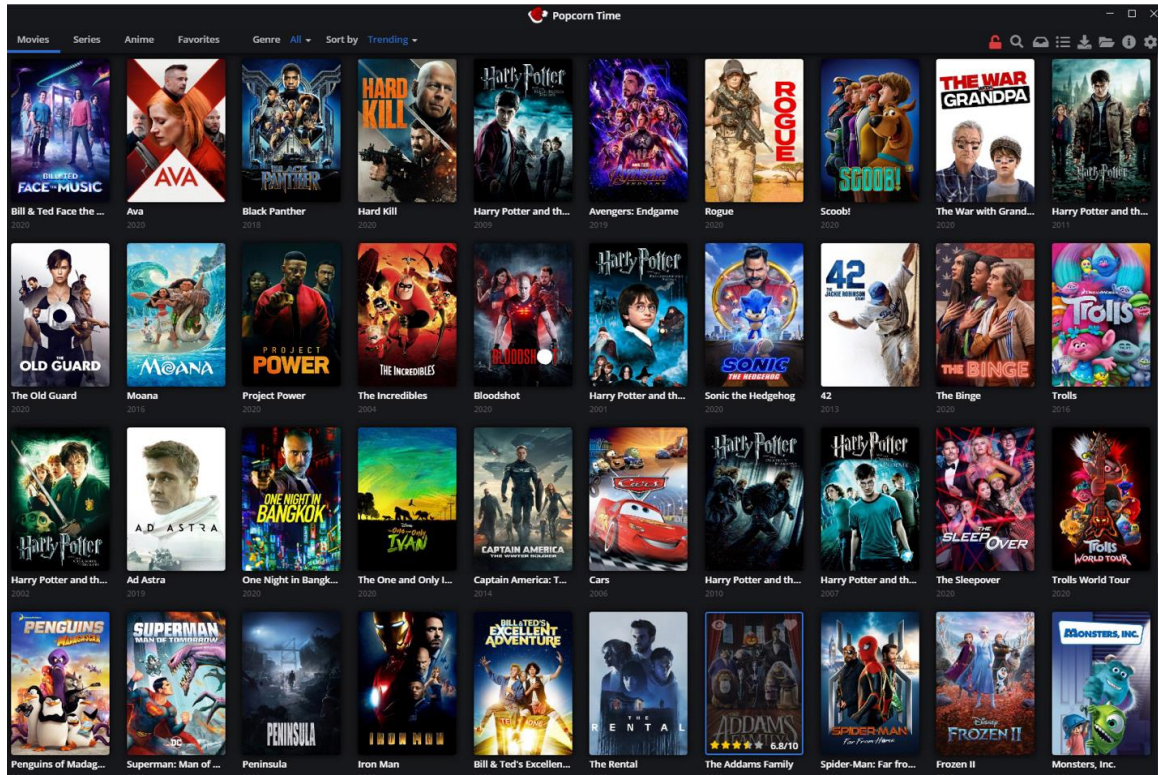
The LiquidVPN Defendants describe their VPN service as a tool to “Watch Popcorn Time without being detected by your ISP and P2P tracking software” and promote it as a tool that can be used to pirate copyright protected content “without the risk of getting caught by your ISP or anyone else.” *See* SAC at ¶¶225-226.

The Popcorn Time promoted by the LiquidVPN Defendants is a piracy software application so notorious that the United States Trade Representative (“USTR”) placed it on a list of examples of Notorious Markets engaged in and facilitating substantial piracy. *See* SAC at ¶141 (citing USTR, 2020 Review of Notorious Markets, Jan. 14, 2021, pg. 26).

The Popcorn Time promoted by the LiquidVPN Defendants has been referred to in the news media as “Netflix for Pirates”. <http://fortune.com/2016/02/26/popcorn-time-netflix-pirates/> [accessed on Sept. 20, 2021]. Even the LiquidVPN Defendants describe Popcorn Time as “...a very popular content streaming service that uses the BitTorrent protocol to provide a Netflix-like experience for free.” *See* SAC at ¶140.

Popcorn Time offers its users nearly instantaneous access to huge quantities of infringing content. *See* Affidavit of Stephen Bunting [Doc. #96-17] at ¶¶23-27. The following is a general

overview. Once installed, Popcorn Time provides a user-friendly interface for searching and watching copyright protected content. A user can search through thumbnail images of over thousands of titles including Plaintiff Eve Nevada LLC's motion picture *Ava*.



See Aff. of Bunting [Doc. #96-17] at ¶25 (Figure 4).

A user merely needs to enter “Hunter Killer” in the search bar to find the Plaintiff Hunter Killer Production, Inc.’s Work *Hunter Killer*. See Id. at ¶26. By pressing the “DOWNLOAD” button, Popcorn Time connects the user to torrent sources to download a complete high resolution (1080p) copy of Works such as *Hunter Killer*, *Shock and Awe* and *Survivor*. See Id. at ¶¶28-29. These torrent sources are illegal sources of copyrighted content that enable Popcorn Time users to view unauthorized streams or download unauthorized copies of popular motion pictures and television shows, including the Copyright Plaintiffs’ Works.

Muszynski is the sole member in AUH2O and 1701, which he has described as his “shelf companies”. *See* SAC at ¶¶75, 97; Affidavit of David Cox [Doc. #96-6] at ¶12. Muszynski used one of his alter egos, 1701, to purchase the assets, and uses another one of his alter egos, AUH2O to sell bandwidth VPN service. While 1701 owns LiquidVPN, AUH2O receives funds from Orchid Labs, Inc. for selling bandwidth on the LiquidVPN network to the Orchid Network. *See* SAC at ¶85. *See also* Aff of Cox at ¶12 and Ex. G.

Muszynski use the fake name “Jamie Castro” on the website for LiquidVPN and as the registration name for the domain with registration domains. *See* SAC at ¶30, Aff. of Cox at ¶¶30-34 (the name Jamie Castro used to register various domains including LiquidVPN.com and legalshame.co). *See also* Affidavit of Kerry S. Culpepper [Doc. #96-26] at ¶¶25, 37.

The LiquidVPN Defendants advertise use of their Popcorn Time VPN to “Enjoy Popcorn Time...without the risk of getting caught by your ISP or anyone else”. Affidavit of Joshua Lee [Doc. #25-1] at ¶12 of the FAC.

The LiquidVPN Defendants further promote their VPN service as “fully supports bittorrent and P2P...We will never censor P2P or BitTorrent...In fact, we have pulled out of locations because they did not like our policies on P2P and bit torrent...” *Id.* at ¶15.

The LiquidVPN Defendants further promote their VPN service as a “DMCA Free Zone...” *Id.* at ¶16.

Plaintiff 42 is the owner of a federal trademark registration, Reg. No. 5,963,253 for the mark Popcorn Time, which issued on Jan. 14, 2020 on the principal register of the United States Patent and Trademark Office. This registration for the standard character mark Popcorn Time covers CLASS 9: Downloadable computer software for downloading and streaming multimedia content images, videos and audio. A true copy of this registration is attached as Exhibit “2” [Doc.

#96-2] to the SAC. The registration is valid and subsisting and has never been cancelled. 42's US trademark asserts a first date of use of November 29, 2019.

Plaintiff 42 distributes and streams licensed content under the Popcorn Time trademark throughout the U.S. on one or more websites on U.S. top level domains. *See* Aff. of Culpepper [Doc. No. 96-26] at ¶4.

For example, 42 streams in depth humorous movie reviews called "Reel Reviews™" and debates concerning motion pictures and pop culture called "Nerd Wars™" from the website <http://popcorn4u.com/> under the registered trademark "Popcorn Time" through an agreement with Andy Signore, the creator of the popular YouTube® channel Popcorned Planet (since 2009) and former executive producer of the Emmy nominated series Honest Trailers (nominated in 2016 and 2017). *See* Id.

Plaintiff 42 has invested substantial time, effort and financial resources promoting its Popcorn Time trademark in connection with the marketing and sale of its website and apps in interstate commerce and engaging with content owners for licensed content. *See* Id. at ¶¶4-7.

Plaintiff 42's Popcorn Time trademark is inherently distinctive as applied to 42's goods and/or services that bear the mark. *See* SAC at ¶134.

The LiquidVPN Defendants contracted with the Florida company Reliable.Net LLC ("Reliable") to use Reliable's data center and dedicated servers in a facility in Miami, Florida. Reliable received IP addresses from Choopa and reassigned IP addresses in this facility to the LiquidVPN Defendants. *See* SAC at ¶¶121-122.

Among the IP addresses the LiquidVPN Defendants received from Reliable was IP address 108.61.128.241 hosted on a server in the Miami, Florida facility. *See* Exhibit "3" [Doc. #96-3], SAC at ¶¶169-170.

Copyright Plaintiffs engaged Maverickeye UG (haftungsbeschränkt) (“MEU”) to monitor P2P/BitTorrent networks to capture evidence of acts of distribution of their Works and to generate infringement notices to be sent to the ISPs assigned the IP addresses at which MEU confirmed instances of actual observed distribution. *See* Aff. of Arheidt [Doc. #96-20], SAC at ¶201.

In just May of 2019, Copyright Plaintiffs’ agent sent over 40 notices to Choopa concerning confirmed acts of distributions of Plaintiffs’ Works *Automata* and *I Feel Pretty* at IP address 108.61.128.241 on the Miami, Florida server reassigned from Choopa to Reliable and from Reliable to the LiquidVPN Defendants. *See Id.* at ¶216, Ex. 3.

Choopa promptly forwarded these notices to Reliable, who forwarded them to the designated abuse contact email address at LiquidVPN. *See* SAC at ¶¶219-220.

David Cox, the previous owner of LiquidVPN, identified many of the IP addresses currently assigned to and used by the LiquidVPN Defendants. *See* Aff. of Cox at ¶¶41-43, Ex. D and E. The LiquidVPN Defendants contracted with QuadraNet to use QuadraNet’s data center and dedicated servers among other facilities in the United States. QuadraNet reassigned IP addresses in this facility to the LiquidVPN Defendants. *See* Aff. of Cox ¶¶3, 42; Ex. D.

Among the IP addresses the Defendants received from QuadraNet was IP address 104.223.91.202. *See* Aff. of Arheidt at ¶10.

Plaintiffs’ agent sent over 5450 notices to Defendants concerning infringements of Plaintiffs’ Works at IP addresses QuadraNet assigned to the LiquidVPN Defendants. *See Id.* at ¶¶10-11.

The LiquidVPN Defendants took no action in response to any of these notices. Indeed, the LiquidVPN Defendants are not even monitoring the email address for receiving abuse notices. *See* Aff. of Cox at ¶40.

Plaintiffs' counsel sent a letter to 1701 and 1701's counsel concerning this matter prior to filing the original complaint that was completely ignored. *See* Aff. of Culpepper at ¶21; SAC at ¶324; Ex. 7.

A Clerk's Default [Doc. #112] was entered against the LiquidVPN Defendants on September 3, 2021, as the LiquidVPN Defendants failed to appear, answer, or otherwise plead to the Second Amended Complaint ("SAC") [Doc. #96], despite having been served.

II. LEGAL STANDARD

Default judgment may be entered against a party who "has failed to plead or otherwise defend." Fed. R. Civ. P. 55(a).

Upon entry of default by the clerk, the well-pled factual allegations of the SAC, other than those related to damages, will be taken as true. *PetMed Express, Inc. v. Medpets.com*, 336 F.Supp.2d 1213, 1217 (S.D. Fla. 2004) (citing *Buchanan v. Bowman*, 820 F.2d 359 (11th Cir. 1987)).

The Copyright Act authorizes courts to grant injunctive relief "to prevent or restrain infringement of a copyright." 17 U.S.C. § 502(a). The Court has the "power to grant injunctions, according to the principles of equity and upon such terms as the court may deem reasonable, to prevent the violation of any right of the registrant of a mark registered in the Patent and Trademark Office or to prevent a violation under subsection (a), (c), or (d) of section 1125 of this title." 15 U.S. Code § 1116.

III. ANALYSIS

A. Personal Jurisdiction over the LiquidVPN Defendants is appropriate

Florida's long-arm statute provides that a court may exercise jurisdiction over a party who commits "a tortious act within this state." Fla. Stat. § 48.193(1)(a)(1) and (2). With respect to the

“tortious activity” provision, copyright infringement will qualify. *See Cable/Home Commc'n Corp. v. Network Prods., Inc.*, 902 F.2d 829, 857 (11th Cir. 1990) (finding a violation of copyright and communications laws to satisfy the “tortious activity” provision of the Florida long-arm statute); *Louis Vuitton Malletier, S.A. v. Mosseri*, 736 F.3d 1339, 1354 (11th Cir. 2013) (holding that trademark infringement occurring in Florida satisfied the “tortious activity” provision of the Florida long-arm statute); *Roof & Rack Products, Inc. v. GYB Investors, LLC*, 2014 U.S. Dist. LEXIS 92334, 2014 WL 3116413, at p. 2 (S.D. Fla. July 8, 2014) (“Copyright infringement is a tortious act, and a person who infringes upon a copyright whose owner resides in Florida causes injury inside the state.”(internal citations omitted)). Florida’s specific jurisdiction requires the plaintiff to establish a nexus between the injuries suffered and the defendant's contacts. *See Woods v. Nova Companies Belize Ltd.*, 739 So. 2d 617, 620 (Fla. 4th DCA 1999) (citing *Helicopteros Nacionales de Colombia S.A. v. Hall*, 466 U.S. 408, 416, 104 S. Ct. 1868, 80 L. Ed. 2d 404 (1984)).

Muszynski is a lifelong Floridian who ran the Florida limited liability company Waste Professionals for decades. SAC at ¶¶72-76. Although Muszynski purchased LiquidVPN from David Cox and SMR Hosting, LLC through his Puerto Rican entity 1701, the purchase agreement was signed in Florida and called for personal jurisdiction in Florida. *Id.* at ¶¶96, Aff. of Cox; Ex. “B” [Doc. #96-11]. Together with Florida resident Michael Gamache, Muszynski operated the LiquidVPN service by obtaining servers and IP addresses in Miami from the Florida company ReliableSite.Net LLC among other data centers. *See* SAC at ¶¶78-79. LiquidVPN is effectively a Florida company ran by Florida resident (Gamache) and an ex-Floridian (Muszynski). Plaintiffs Works were pirated by the LiquidVPN Defendants and their subscribers at IP addresses in Florida. Accordingly, the LiquidVPN Defendants committed the torts of copyright and trademark

infringement in Florida and have perfectly availed themselves of the privileges of conducting business in Florida.

Moreover, it appears that Muszynski directed and engaged in many of these infringing activities in Daytona Beach, Florida from his IP address log records. *See* SAC at ¶74. Because 1701 and AUH2O are Muszynski's alter egos, the activities of Muszynski can be imputed to them. Courts in this district have held that an alter ego's activities may impute to a resident corporation for purposes of personal jurisdiction under the Florida long-arm statute. *Kertesz v. Net Transactions, Ltd.*, 635 F. Supp. 2d 1339, 1347 (S.D. Fla. 2009) (citing *Dania Jai-Alai Palace, Inc. v. Sykes*, 450 So.2d 1114 (Fla. 1984); *Aldea Communications, Inc. v. Gardner*, 725 So.2d 456 (Fla. Dist.Ct.App.1999)). Accordingly, personal jurisdiction over the LiquidVPN Defendants is appropriate.

B. The LiquidVPN Defendants were served multiple times and default was entered.

On March 15, 2021, 1701 was duly served a copy of the original complaint pursuant to Rule 4(h)(1) of the *Federal Rules of Civil Procedure*. *See* Affidavit of Service [Doc. #9]. The Clerk entered default against 1701 on April 21, 2021. *See* [Doc. #18].

On May 25, 2021, 1701 was duly served a copy of the FAC pursuant to Rule 4(h)(1). *See* Affidavit of Service [Doc. #45]. The Clerk entered default against 1701 again on June 10, 2021. *See* [Doc. # 52].

On June 3, 2021, AUH2O was duly served a copy of the FAC pursuant to Rules 4(h)(2) and 4(f)(A). *See* Affidavit of Service by C. John Arthurton II [Doc. #49]. The Clerk entered default against AUH2O on April 21, 2021. *See* [Doc. #18].

On April 26, 2021, Muszynski was duly served a copy of the original Complaint. *See* Affidavit of Service [Doc. #21]. On May 5, 2021, Muszynski was duly served a copy of the

FAC pursuant to Rules 4(e)(1), 5(b)(2)(C) and/or 5(b)(2)(B)(i). *See* Affidavit of Service [Doc. # 34]. The Clerk entered default against Muszynski on June 10, 2021. *See* [Doc. #53].

In addition to being served twice, Muszynski also has knowledge of these proceedings through Douglas K. Gartenlaub, who he previously retained as counsel for 1701 and himself. *See* Exhibit “B” [Doc. #96-11] at pg. 12 (¶22(b)(ii) requires notices be sent to Mr. Gartenlaub). Although Mr. Gartenlaub did not appear in this matter as counsel for Muszynski, he appeared as counsel for Gamache (a high school friend of Muszynski) and for Waste Professionals LLC (a company Muszynski owned for decades). *See* Aff. of Cox at ¶¶8-10. Accordingly, it is clear that the LiquidVPN Defendants have purposefully chosen to default.

C. The Copyright Claims

To prevail on their direct copyright infringement claims, the Copyright Plaintiffs need only (1) “show ownership” and (2) a violation of “at least one exclusive right” under 17 U.S.C. § 106. *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1013 (9th Cir. 2001); *see also Disney Enters. v. Hotfile Corp.*, No. 11-20427-CIV-Williams, 2013 U.S. Dist. LEXIS 172339, at 94 (S.D. Fla. 2013). Copyright Plaintiffs satisfy both requirements. First, there is no dispute about Copyright Plaintiffs’ ownership of the Copyrighted Works. The Copyright Office has issued certificates of registration for the Copyrighted Works as listed in Exhibit “1” [Doc. #96-1] to the SAC. These certificates create a presumption of copyright validity and of ownership. *See* 17 U.S.C. § 410(c). The Copyright Plaintiffs are either the original authors (from work by hire agreements) indicated in the certificate or parent or affiliate companies of the original authors. *See, e.g.* Aff. of Yunger [Doc. #96-24] at ¶¶3-5.

Second, the Copyright Plaintiffs have sufficiently alleged that the LiquidVPN Defendants directly infringe their exclusive rights of distribution and public performance of their Works in

violation of 17 U.S.C. §§ 106(3) and (4). As stated by the LiquidVPN Defendants on their website, “Popcorn Time is a very popular content *streaming* service that uses the *BitTorrent protocol* to provide a Netflix-like experience for free. The United Kingdom has passed laws that could lead to up to 10 years in prison for *streaming* media with the Popcorn Time software. LiquidVPN will keep the fun times popping.” Aff. of Lee [Doc. #25-1] at ¶13 (emphasis added). The LiquidVPN Defendants have violated the Copyright Plaintiffs’ exclusive right of distribution by distributing copies of Plaintiffs’ Works from Popcorn Time via their VPN network when subscribers choose DOWNLOAD to download a copy of Plaintiffs’ Works via Popcorn Time while using Defendants’ so called “Popcorn Time VPN”. See Aff. of Bunting [Doc. #96-17] at ¶¶28-29. The LiquidVPN Defendants have violated the Copyright Plaintiffs’ exclusive right of public performance by streaming copies of Plaintiffs’ Works from Popcorn Time over their so-called Popcorn Time VPN network when subscribers choose WATCH IT NOW to stream copies of Plaintiffs’ Works. See Id. at ¶29 (Figure 11). When a party transmits a performance of a Copyrighted Work to a public audience, that party directly infringes the public performance right. See *American Broadcasting Cos., Inc. v. Aereo, Inc.*, 134 S. Ct. 2498, 2509 (2014) (service that made Internet streams of content performed publicly: “Aereo communicates the same contemporaneously perceptible images and sounds to a large number of people who are unrelated and unknown to each other.”); see also, e.g., *WPIX, Inc. v. IVI, Inc.*, 691 F.3d 275, 278 (2d Cir. 2012) (“undisputed” that defendant’s Internet streaming of television programs infringed public performance right).

Third, the Copyright Plaintiffs have sufficient alleged that the LiquidVPN Defendants contribute to infringements of the Copyrighted Works. “One infringes contributorily by intentionally inducing or encouraging direct infringement.” See *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 125 S. Ct. 2764, 162 L. Ed. 2d 781 (2005). The Defendants

intentionally induce and encourage direct infringement of users of Popcorn Time. When the Defendants' subscribers use their so-called Popcorn Time VPN to download, stream, share and/or reproduce copies of the Copyright Plaintiffs' Works exactly as encouraged by the LiquidVPN Defendants, these subscribers directly infringe Plaintiffs exclusive rights of public performance, distribution and reproduction. The LiquidVPN Defendants contribute to these infringements by providing the Popcorn Time VPN for its end users to pirate Plaintiffs' Works using Popcorn Time "without getting caught". The LiquidVPN Defendants also have knowledge that their end users are using their Popcorn Time VPN to pirate Plaintiffs' Works from the thousands of notices that Plaintiffs' agent sent to QuadraNet and Choopa that were forwarded onto the LiquidVPN Defendants. The LiquidVPN Defendants also had knowledge that their end users are using their VPN service to pirate copyright protected Works including Plaintiffs' Works because this is exactly how they instructed their subscribers to use the VPN service. Indeed, the LiquidVPN Defendants promote the VPN service as "Popcorn Time VPN" and include Plaintiff Millennium Funding, Inc.'s title art for its motion picture *Survivor* as an example of a movie that can be pirated. See Aff. of Lee [Doc. #25-1] at ¶¶12, 16, 20.

Fourth, the Copyright Plaintiffs have sufficient alleged that the LiquidVPN Defendants are vicariously liable to their end users' infringements of the Copyrighted Works. "One...infringes vicariously by profiting from direct infringement while declining to exercise a right to stop or limit it." *MGM Studios Inc. v. Grokster, Ltd.*, 545 U.S. at 930. In order to state a claim for vicarious copyright infringement, a plaintiff must allege (1) "the right and ability to supervise," and (2) "a direct financial interest" in the profits of the infringing activity. See *Affordable Aerial Photography, Inc. v. Modern Living Real Estate, LLC*, No. 19-cv-80488-BLOOM/Reinhart, 2019 U.S. Dist. LEXIS 132023, at *7-8 (S.D. Fla. Aug. 6, 2019) (citing *Klein & Heuchan, Inc. v. Costar*

Realty Info., Inc., 707 F. Supp. 2d 1287, 1297 (M.D. Fla. 2010). The LiquidVPN Defendants have the right and ability to supervise and control the infringing activities of the end users that occur through the use of their so-called Popcorn Time VPN service and at all relevant times has derived a direct financial benefit from the infringement of Plaintiffs' copyrights. SAC at ¶410. Indeed, the LiquidVPN Defendants promote not just Popcorn Time, but particularly the Work *Survivor* of Plaintiff Millennium Funding, Inc. as a Work their service can be used to pirate. *Id.* at ¶228. The LiquidVPN Defendants could take simple measures such as null-routing and/or logging IP addresses to stop unauthorized distribution of Plaintiffs' Works over servers controlled by them that they lease from QuadraNet but purposefully refuse to do so. *Id.* at ¶¶408-409. Accordingly, the LiquidVPN Defendants are vicariously liable for their end users' infringements.

The LiquidVPN Defendants have no safe harbor from liability because they fail to implement a policy for terminating repeat infringers and have not even registered a DMCA agent with the Copyright office. *See BMG Rights Mgmt. (US) LLC v. Cox Communs., Inc.*, 881 F.3d 293 (4th Cir. 2018). Moreover, the LiquidVPN Defendants cannot use their policy of not logging their subscribers' access to provide anonymous IP addresses (*see* Aff. of Lee [Doc. #25-1] at ¶¶11-12) as an excuse for not terminating repeat infringers. A defendant who disables itself from doing anything to prevent infringement does not reasonably implement a repeat infringer policy. *See In re Aimster Copyright Litig.*, 334 F.3d 643, 655 (7th Cir. 2003).

17 U.S.C. § 504(c) provides that a copyright owner may elect an award of statutory damages at any time before final judgment is rendered in the sum of not less than \$750 or more than \$30,000.00 as the court considers just. 17 U.S.C. § 504(c)(1). In addition, if the Court finds that Defendant's copyright infringement was willful, it may impose damages above the maximum limit up to a sum of not more than \$150,000.00. Pursuant to 17 U.S.C. § 504(c), the Copyright

Plaintiffs requests the maximum statutory damages of \$150,000 for infringement of each of the sixty-six (66) Works because not only do the LiquidVPN Defendants directly infringe their distribution rights, the LiquidVPN Defendants willfully contributed to and induced infringement of the Works by promoting their service as Popcorn Time VPN for blatant piracy. Indeed, the LiquidVPN Defendants even included title art of the movie *Survivor* (of Millennium). *See* SAC at ¶¶228. Accordingly, Copyright Plaintiffs request damages of \$9,900,000 against the LiquidVPN Defendants for direct and contributory copyright infringement.

D. The DMCA Claims

Copyright Plaintiffs sufficiently alleged secondary liability for DMCA violations against the LiquidVPN Defendants under the theories of contributory and vicarious liability. *See* SAC at ¶¶429-449. “One infringes contributorily by inducing or encouraging direct infringement, and infringes vicariously by profiting from direct infringement while declining to exercise a right to stop or limit it.” *Grokster*, 545 U.S. at 930, 125 S.Ct. 2764.

Copyright Plaintiffs have alleged DMCA violations against the LiquidVPN Defendants’ end users pursuant to 17 U.S.C. §1202 for including the unauthorized wordings “RARBG,” “YTS” or “FGT,” in the Copyright Management Information (“CMI”) of the file copies of Copyright Plaintiffs’ Works. *See* SAC at ¶¶434, 187-200. Through its conduct, the LiquidVPN Defendants knowingly and intentionally induced, enticed, persuaded, and caused these end users to commit DMCA violations through encouraging them to use the notorious Popcorn Time piracy application to access torrent files for copying copyright-protected Works from notorious movie piracy websites such as YTS. *See Id.* at ¶¶187-200, 229. Moreover, despite the LiquidVPN Defendants having actual and constructive knowledge of their end users’ DMCA violations and the right and ability to supervise and control the DMCA violations that occur through the use of their service,

they have refused, and continue to refuse, to take any meaningful action to prevent the widespread DMCA violations by their subscribers. *See Id.* at ¶222.

Pursuant to 17 U.S.C. § 1203(c)(3)(B), Copyright Plaintiffs are entitled to an award of “...the sum of not less than \$2,500 or more than \$25,000” for each DMCA violation. Due to the ubiquity and continuing ability of the LiquidVPN Defendants’ end users to use the service to conceal their identity while using the piracy application Popcorn Time exactly as promoted and encouraged by Defendants, the LiquidVPN Defendants are secondarily liable for thousands of DMCA violations. Indeed, just from a single IP address 108.61.128.241 assigned to the LiquidVPN Defendants, there are thousands of instances of DMCA violations. *See Exhibit “3”* to the SAC [Doc. #96-3] (CMI in file names altered to include “FGT” and “YTS”). Despite this, Copyright Plaintiffs elect to receive the maximum statutory damages of \$25,000 for just one DMCA violation for each of Copyright Plaintiffs’ twenty-one (66) Works. Accordingly, Copyright Plaintiffs request damages of \$1,650,000 against the LiquidVPN Defendants for secondary liability as to DMCA violations.

E. Plaintiff 42’s Trademark Claims

Plaintiff 42’s mark has been registered in the U.S. Patent and Trademark office, Russia and Iceland. *See Exhibit “2”* [Doc. #96-2] to the SAC, Aff. of Culpepper [Doc. #96-26] at ¶2. A Defendant is liable for trademark infringement for, “without the consent of the registrant...the use in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive...” 15 U.S.C. § 1114(1) (2021). A counterfeit mark is defined as “a spurious mark which is identical with, or substantially indistinguishable from, [the plaintiff’s] mark.” 15 U.S.C. § 1127

(2021). A counterfeit mark does not have to be an exact replica, for that “would allow counterfeiters to escape liability by modifying the registered trademarks of their honest competitors in trivial ways.” *United States v. Chong Lam*, 677 F.3d 190, 199 (4th Cir. 2012) (internal quotations and citation omitted).

The LiquidVPN Defendants have intentionally used Plaintiff 42’s Mark Popcorn Time in US commerce without authorization or license by using the name “Popcorn Time VPN” to promote their VPN service to use the piracy application Popcorn Time. Defendants’ Popcorn Time mark uses exactly the same standard characters as 42’s registered trademark Popcorn Time. *See* Aff. of Lee [Doc. #25-1] at ¶20. The LiquidVPN Defendants have no senior user rights in the US because any prior use was for criminal copyright infringement. *See In re JJ206, LLC*, 120 USPQ2d 1568, 1570 (TTAB 2016) (finding applicant’s use and intended use of the applied for marks on marijuana vaporizers unlawful because the goods constitute illegal drug paraphernalia under the Controlled Substances Act).

Finally, the LiquidVPN Defendants’ use of Plaintiff 42’s Mark in connection with promotion of their service for movie piracy is likely to confuse consumers since the two marks are identical. 42 distributes software with licensed content under the name Popcorn Time, while the LiquidVPN Defendants use it for promoting software for pirating content under the name Popcorn Time. Where a party produces counterfeit goods, there is a presumption of likelihood of confusion. *See Polo Fashions, Inc. v. Craftex, Inc.*, 816 F.2d 145, 148 (4th Cir. 1987). As discussed above, the LiquidVPN Defendants used, and continue to use, the mark Popcorn Time to promote and distribute their VPN service for using the piracy application Popcorn Time. These actions are sufficient to create a presumption of consumer confusion and a likelihood that Plaintiff 42 will succeed on its claim for trademark infringement.

Plaintiff 42 has sufficiently pleaded its claim for unfair competition. As with trademark infringement, the test for liability for false designation of origin under Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), is also whether the public is likely to be deceived or confused by the similarity of the marks at issue. *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 780, (1992). Because 42's registered mark Popcorn Time is identical to the LiquidVPN Defendants' mark Popcorn Time, there is a high likelihood of confusion. Therefore, because Plaintiff 42 has established the merits of its trademark infringement claim against the LiquidVPN Defendants, including that consumers are likely to be confused, a likelihood of success is also shown as to 42's claims for federal unfair competition.

In a case involving the use of counterfeit marks in connection with a sale, offering for sale, or distribution of services, 15 U.S.C. § 1117(c) provides that a plaintiff may elect an award of statutory damages at any time before final judgment is rendered in the sum of not less than \$1,000.00 nor more than \$200,000.00 per counterfeit mark per type of good or service. 15 U.S.C. § 1117(c)(1). In addition, if the Court finds that Defendants' counterfeiting actions were willful, it may impose damages above the maximum limit up to \$2,000,000.00 per mark per type of good or service. 15 U.S.C. § 1117(c)(2). Pursuant to 15 U.S.C. § 1117(c), Plaintiffs request an award of statutory damages of \$100,000 for the LiquidVPN Defendants' use of 42's mark Popcorn Time in connection with their piracy business and for the unfair competition. The allowed scope of monetary damages for unfair competition is also encompassed in 15 U.S.C. § 1117(c). Accordingly, judgment for unfair competition is limited to the amount awarded pursuant to damages for the LiquidVPN Defendants' counterfeiting.

F. Claim for Breach of Contract and Unjust Enrichment

David Cox and SMR Hosting, LLC assigned claims for breach of contract against the LiquidVPN Defendants to Plaintiffs MILLENNIUM FUNDING, INC. (“Millennium”) and VOLTAGE HOLDINGS, LLC (“Voltage”) per a stipulated consent judgment in the action 4:21-cv-10490-SDD-RSW in the Eastern District of Michigan. *See* Exhibit “1” to Plaintiffs’ Motion.

Plaintiffs have attached a copy of the ASSET PURCHASE & EARN-OUT AGREEMENT (“Agreement”) [Doc. #96-11] between 1701 and David Cox (“Cox”) and SMR Hosting, LLC (“SMR”) to the SAC. The Agreement provides that it “shall be governed, construed, litigated, and enforced in accordance with laws of the State of Florida...”. Agreement at ¶15. Under Florida law, “[t]he elements of a breach of contract action are: (1) a valid contract; (2) a material breach; and (3) damages.” *Ferguson Enters., Inc. v. Astro Air Conditioning & Heating, Inc.*, 137 So. 3d 613, 615 (Fla. 2d DCA 2014) (citing *Havens v. Coast Fla., P.A.*, 117 So. 3d 1179, 1181 (Fla. 2d DCA 2013)); *J.J. Gumberg Co. v. Janis Servs., Inc.*, 847 So. 2d 1048, 1049 (Fla. 4th DCA 2003); *Rollins, Inc. v. Butland*, 951 So. 2d 860, 876 (Fla. 2d DCA 2006).

The Agreement called for 1701 to pay David Cox and SMR Hosting, LLC to perform post earn-out Work for LiquidVPN in exchange for a payment at Cox’s hourly rate. SAC at ¶502. 1701 breached the Agreement by failing to pay SMR the total of \$46,540.00 excluding interest. *Id.* at ¶506. 1701’s obligation to make the agreed upon payment was not excused or relieved. 1701’s breaches of the agreement were substantial failures to perform that are material.

Millennium and Voltage request \$46,540.00 as damages for the LiquidVPN Defendants’ breach of the Agreement. Millennium and Voltage voluntarily withdraw their claim for unjust enrichment.

G. Claim for Breach of Statutory and Common Law Right of Publicity

Florida Statute § 540.08 prohibits the unauthorized publication of a person's name or likeness. To maintain a cause of action for a violation of section 540.08, a plaintiff must allege that his or her name or likeness is used to directly promote a commercial product or service. *Lane v. MRA Holdings, LLC*, 242 F. Supp. 2d 1205 (M.D. Fla. 2002); *Tyne v. Time Warner Entm't Co.*, 204 F. Supp. 2d 1338 (M.D. Fla. 2002); *Loft v. Fuller*, 408 So. 2d 619 (Fla. 4th DCA 1981).

The LiquidVPN Defendants “publish, print, display or otherwise publicly use for purposes of trade or for any commercial or advertising purpose the name and/or other likeness of David Cox on the website liquidvpn.com”, Cox did not consent to use of his name on the website and Cox has suffered damages as a result of said use of his name and/or other likeness without his permission by the LiquidVPN Defendants. *See* SAC at ¶¶520-522. Particularly, the LiquidVPN Defendants “promote Cox as one of the persons who “run the day to day operations of LiquidVPN” on the website knowing that Cox ceased all involvement with LiquidVPN in 2019.” SAC at ¶360. Cox has stated that he has lost approximately \$25,863 in business from lost customers in the past year who canceled service based upon the mistaken assumption that he is affiliated with the LiquidVPN website. *See* Decl. of Cox at ¶9. Because of the LiquidVPN Defendants’ default, Plaintiffs Voltage and Millennium cannot ascertain the extent to which the LiquidVPN Defendants have profited from this unauthorized use of Cox’s name and likeness.

Cox assigned his claims for breach of publicity to Voltage and Millennium in the stipulated consent judgment in the action 4:21-cv-10490-SDD-RSW in the Eastern District of Michigan. *See* Exhibit “1”. Voltage and Millennium request damages of \$25,863 for the LiquidVPN Defendants’ breach of Cox’ statutory and common law publicity rights.

H. Permanent Injunction

Plaintiffs seek a permanent injunction against the LiquidVPN Defendants which (A) enjoins them from infringing to and/or contributing to infringements of the Copyright Plaintiffs' copyrighted Work and 42's trademark; (B) orders them to remove the title art of Plaintiff Millennium Funding, Inc.'s Work *Survivor* and any reference to Cox or LiquidVPN, Inc. that falsely portrays him and his dissolved corporation as playing a role in the operations of LiquidVPN from their website; and (C) orders them to block subscribers from accessing notorious piracy websites of foreign origin that are listed in the annual trade report of Notorious Foreign Markets published by the United States Government such as (a) YTS; (b) Piratebay; (c) Rarbg; (d) 1337x; and (e) Popcornime on networks under their control.

Plaintiffs further seek an order pursuant to 28 U.S.C §1651(a) that QuadraNet Inc., QuadraNet Enterprises LLC, Namecheap, Enom, Spectrum and any other service provider cease providing service for the LiquidVPN Defendants that, upon Plaintiffs' request, those in privity with the LiquidVPN Defendants and those with notice of the injunction, including any Internet search engines, Web hosts, domain-name registrars, and domain name registries and/or their administrators that are provided with notice of the injunction, cease facilitating access to any or all servers, domain names and websites through which the LiquidVPN Defendants engage in the aforementioned infringements

Permanent injunctive relief is appropriate where a Plaintiff demonstrates that (1) it has suffered irreparable injury; (2) there is no adequate remedy at law; (3) the balance of hardship favors an equitable remedy; and (4) an issuance of an injunction is in the public's interest. *eBay, Inc. v. MercExchange, LLC*, 547 U.S. 388, 392-93 (2006). Plaintiffs have carried their burden on each of the four factors. Accordingly, permanent injunctive relief is appropriate.

LiquidVPN Defendants’ encouragement of its subscribers to use Popcorn Time is undoubtedly causing the Copyright Plaintiffs irreparable harm. *See* Affidavit of Yunger at ¶¶14-17 and 21-23. First, by inducing unauthorized distributing and streaming of the Copyright Plaintiffs’ Works, Popcorn Time deprives the Copyright Plaintiffs of their exclusive rights to control how, when, and to whom they will disseminate their Copyrighted Works. *See Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 546 (1985) (“The rights conferred by copyright are designed to assure contributors to the store of knowledge a fair return for their labors.”).

Second, the LiquidVPN Defendants’ advertisements that give their subscribers the impression that by using Defendants’ so-called “Popcorn Time VPN” they can freely obtain infringing copies of the Copyrighted Works via Popcorn Time inevitably and irreparably undermines the legitimate market in which consumers can purchase access to the same works. *See* Aff. of Yunger [Doc. #96-24] at ¶¶16, 20-23. The LiquidVPN Defendants promotes their VPN services as a means to intentionally compete with authorized and legitimate offerings, including licensed VOD services and as a means for consumers to avoid the need to pay for those offerings. *See* Id. at ¶¶22-23.

Third, the LiquidVPN Defendants threaten harm to the Copyright Plaintiffs’ relationships and goodwill with authorized licensees, which demonstrates irreparable harm. *See* Id. at ¶17, *see Disney Enters., Inc. v. VidAngel, Inc.*, 869 F.3d 848, 866 (9th Cir. 2017) (“substantial evidence ... that VidAngel’s service undermines the value of the Studios’ copyrighted works, their ‘windowing’ business model, and their goodwill and negotiating leverage with licensees”).

The Plaintiffs have provided affidavits of Culpepper and Arheidt verifying the LiquidVPN Defendants’ trademark infringement by using Plaintiff 42’s trademark “Popcorn Time” and

contributory copyright infringements for blatantly promoting their “Popcorn Time VPN” for the purpose of piracy. *See* Docs. ##96-20 and 96-26.

Copyright Plaintiffs have no adequate remedy at law so long as the LiquidVPN Defendants continue to operate their LiquidVPN service to distribute their Works without authorization. Absent the requested injunction, Plaintiff 42 cannot stop the LiquidVPN Defendants from using 42’s registered trademark in connection with piracy. An award of monetary damages alone will not cure the injury to 42’s reputation and goodwill that will result if Defendants’ infringing and counterfeiting and infringing actions are allowed to continue. By contrast, Defendants face no hardship if they are prohibited from the infringement of Plaintiffs’ trademarks and copyrights, which are illegal acts.

The public has a compelling interest in protecting copyright owners’ marketable rights to their works. *See Eldred v. Ashcroft*, 537 U.S. 186, 212 n.18 (2005) (“[t]he economic philosophy behind the [Copyright] [C]lause...is the conviction that encouragement of individual effort by personal gain is the best way *to advance public welfare* through the talents of authors and inventors” (emphasis added)).

Further, the public has an interest in being protected from being misled by the LiquidVPN Defendants’ advertising into installing Popcorn Time and using it to illegally stream and downloads copyright protected Works. Enjoining the Defendants’ illegal conduct plainly furthers the public interest.

V. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court enter final default judgment and permanent injunction against Defendants 1701 MANAGEMENT LLC d/b/a

LIQUIDVPN, AUH2O LLC, and CHARLES MUSZYNSKI a/k/a FREDERICK DOUGLAS in the form of the proposed Final Default Judgment and permanent injunction filed herewith.

DATED: Sept. 20, 2021

Respectfully submitted,

/s/ Joel B. Rothman

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that on September 20, 2021, the foregoing document was electronically filed with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served on this day on all those identified on the Service List, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those parties who are not authorized to receive Notices of Electronic Filing.

s/ Joel B. Rothman
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