

THE HONORABLE THOMAS S. ZILLY

UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON

BUNGIE, INC., a Delaware corporation,

Plaintiff

v.

AIMJUNKIES.COM, a business of unknown  
classification; PHOENIX DIGITAL GROUP  
LLC, an Arizona limited liability company;  
JEFFREY CONWAY, an individual; DAVID  
SCHAEFER, an individual; JORDAN GREEN,  
an individual; and JAMES MAY, an individual,

Defendants.

Cause No. 2:21-cv-0811 TSZ

**DEFENDANTS’ ANSWER  
AND AMENDED  
COUNTERCLAIMS**

Defendants, by and through their undersigned counsel, hereby hereby answer  
Plaintiff’s First Amended Complaint as follows:

**INTRODUCTION**

1. Defendants are without knowledge or information sufficient to form a belief as  
to the truth of the allegations of Paragraph 1 and therefore deny those allegations.

2. Admitted that Defendants David Schaefer, Jeffrey Conway, and Jordan Green  
were at one time members of Defendant Phoenix Digital Group LLC (“Phoenix Digital”) and  
that at one time Phoenix Digital operated the website AimJunkies.com. Otherwise Denied.  
Specifically denied that Defendants ever “copied Bungie’s data structures for Destiny 2 and  
reverse-engineered other components of Destiny 2’s software code to develop cheat  
software.”



**JURISDICTION AND VENUE**

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2 19. Admitted that this Court has subject matter jurisdiction over the claims  
3 asserted in the First Amended Complaint but Denied that any of those claims has merit.

4 20. Denied.

5 21. Denied.

6 22. Denied.

7 23. Denied.

8 **FACTS AND BACKGROUND**

9 24. Defendants are without knowledge or information sufficient to form a belief as  
10 to the truth of the allegations of Paragraph 24 and therefore deny those allegations.

11 25. Defendants are without knowledge or information sufficient to form a belief as  
12 to the truth of the allegations of Paragraph 25 and therefore deny those allegations.

13 26. Defendants are without knowledge or information sufficient to form a belief as  
14 to the truth of the allegations of Paragraph 26 and therefore deny those allegations.

15 27. Defendants are without knowledge or information sufficient to form a belief as  
16 to the truth of the allegations of Paragraph 27 and therefore deny those allegations.

17 28. Defendants are without knowledge or information sufficient to form a belief as  
18 to the truth of the allegations of Paragraph 28 and therefore deny those allegations.

19 29. Defendants are without knowledge or information sufficient to form a belief as  
20 to the truth of the allegations of Paragraph 29 and therefore deny those allegations.

21 30. Defendants are without knowledge or information sufficient to form a belief as  
22 to the truth of the allegations of Paragraph 30 and therefore deny those allegations.

23 31. Defendants are without knowledge or information sufficient to form a belief as  
24 to the truth of the allegations of Paragraph 21 and therefore deny those allegations.

25 32. Denied.

26 33. Denied.

27 34. Denied.

1           35. Admitted that software, such as that distributed by Plaintiff Bungie, Inc. may  
2 be used to surreptitiously install malware and other harmful software on the computers of  
3 those who play Destiny 2. Otherwise Defendants are without knowledge or information  
4 sufficient to form a belief as to the truth of the allegations of Paragraph 35 and therefore deny  
5 those allegations. Specifically denied that any software or other product distributed by  
6 Defendants performs any such function.

7           36. Defendants are without knowledge or information sufficient to form a belief as  
8 to the truth of the allegations of Paragraph 36 and therefore deny those allegations.

9           37. Defendants are without knowledge or information sufficient to form a belief as  
10 to the truth of the allegations of Paragraph 37 and therefore deny those allegations.

11           38. Defendants are without knowledge or information sufficient to form a belief as  
12 to the truth of the allegations of Paragraph 38 and therefore deny those allegations.

13           39. Defendants are without knowledge or information sufficient to form a belief as  
14 to the truth of the allegations of Paragraph 39 and therefore deny those allegations.

15           40. Defendants are without knowledge or information sufficient to form a belief as  
16 to the truth of the allegations of Paragraph 40 and therefore deny those allegations.

17           41. Defendants are without knowledge or information sufficient to form a belief as  
18 to the truth of the allegations of Paragraph 41 and therefore deny those allegations.

19           42. Defendants are without knowledge or information sufficient to form a belief as  
20 to the truth of the allegations of Paragraph 42 and therefore deny those allegations.

21           43. Defendants are without knowledge or information sufficient to form a belief as  
22 to the truth of the allegations of Paragraph 43 and therefore deny those allegations.

23           44. Defendants are without knowledge or information sufficient to form a belief as  
24 to the truth of the allegations of Paragraph 44 and therefore deny those allegations.

25           45. Defendants are without knowledge or information sufficient to form a belief as  
26 to the truth of the allegations of Paragraph 45 and therefore deny those allegations.

1           46. Defendants are without knowledge or information sufficient to form a belief as  
2 to the truth of the allegations of Paragraph 46 and therefore deny those allegations.

3           47. Defendants are without knowledge or information sufficient to form a belief as  
4 to the truth of the allegations of Paragraph 47 and therefore deny those allegations.

5           48. Denied.

6           49. Denied.

7           50. Denied.

8           51. Denied.

9           52. Denied.

10          53. Defendants are without knowledge or information sufficient to form a belief as  
11 to the truth of the allegations of Paragraph 53 and therefore deny those allegations.

12          54. Defendants are without knowledge or information sufficient to form a belief as  
13 to the truth of the allegations of Paragraph 54 and therefore deny those allegations.

14          55. Denied.

15          56. Defendants are without knowledge or information sufficient to form a belief as  
16 to the truth of the allegations of Paragraph 56 and therefore deny those allegations.

17          57. Defendants are without knowledge or information sufficient to form a belief as  
18 to the truth of the allegations of Paragraph 57 and therefore deny those allegations.

19          58. Defendants are without knowledge or information sufficient to form a belief as  
20 to the truth of the allegations of Paragraph 54 and therefore deny those allegations.

21          59. Denied.

22          60. Denied.

23          61. Denied.

24          62. Admitted that the Aimjunkies website was acquired by Phoenix Digital in or  
25 around June 2016. Denied that Defendant Phoenix Digital, and its three managing members,  
26 Mr. Schaefer, Mr. Conway and Mr. Green presently own and control AimJunkies.

27          63. Denied.

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64. Denied.

65. Denied.

66. Denied.

67. Denied.

68. Denied.

69. Denied.

70. Denied.

71. Denied.

72. Denied.

73. Denied.

74. Denied that Mr. May, “has also used and been involved in the development of Defendants’ Destiny 2 cheat software.” As to the remaining allegations of this paragraph, Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 74 and therefore deny those allegations.

75. Denied.

76. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 76 and therefore deny those allegations.

77. Denied.

78. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 78 and therefore deny those allegations.

79. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 79 and therefore deny those allegations.

80. Denied.

81. Admitted. Denied that the ESP feature infringes any legitimate right of Bungie.

82. Denied.

83. Denied.

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84. Admitted.

85. Denied.

86. Admitted, but denied that the “AIMBOT” feature infringes any legitimate right of Bungie.

87. Denied.

88. Denied.

89. Admitted but denied that the “OPK” feature infringes any legitimate right of Bungie.

90. Denied.

91. Denied.

92. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 92 and therefore deny those allegations.

93. Denied.

94. Admitted but denied that this infringes any legitimate right of Bungie.

95. Denied.

96. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 96 and therefore deny those allegations.

97. Denied.

98. Denied. Specifically Denied that Defendants have at any time after December 10, 202 offered or otherwise distributed the products at issue here.

99. Denied.

100. Admitted that Aimjunkies is no longer owned or controlled by any of the Defendants. Otherwise Denied.

**FIRST CAUSE OF ACTION**  
**(Copyright Infringement, 17 U.S.C. § 501, et seq. -- Against All Defendants)**





1 119. Denied.

2 120. Denied.

3 121. Denied.

4 122. Denied.

5 123. Denied.

6 124. Denied.

7 **THIRD CAUSE OF ACTION**

8 **(False Designation of Origin, 15 U.S.C. § 1125(a) -- Against The Phoenix**  
9 **Digital Defendants)**

10 125. Admitted that Bungie repeats, realleges, and incorporates herein by reference  
11 the allegations in the foregoing paragraphs as if fully set forth herein. Unless as specifically  
12 admitted above, Denied that those allegations have merit.

13 126. Denied.

14 127. Denied.

15 128. Denied.

16 129. Denied.

17 130. Denied.

18 131. Denied.

19 **AFFIRMATIVE DEFENSES**

20 1. Plaintiff's Amended Complaint fails to state claims for which relief may be  
21 granted.

22 2. Plaintiff's claims for copyright infringement as set out herein are barred under  
23 the clear holding of the Ninth Circuit Court of Appeals in *MDY Industries, LLC v. Blizzard*  
24 *Entertainment, Inc.*, 629 F.3d 928 (9th Cir. 2010), that, *as a matter of law*, alleged breaches of  
25 covenants in a copyright license are *not* acts of copyright infringement.

26 3. Plaintiff's claims for copyright infringement as set out herein are barred under  
27 the clear holding of the Ninth Circuit Court of Appeals in *Lewis Galoob Toys, Inc. v.*  
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1 *Nintendo of America*, 964 F.2d 965 (9th Cir. 1992) that, *as a matter of law*, the use of  
2 software resident on the computer of a game player to enhance the player’s performance of  
3 the game does *not* unlawfully create a “derivative work” or otherwise infringe a copyright.

4 4. All claims for “statutory damages,” “enhanced damages,” “attorneys’ fees” or  
5 other relief under 17 U.S.C. §§ 505, 505 are barred under 17 U.S.C. §§ 412 and the clear  
6 holding of the Ninth Circuit Court of Appeals in *Derek Andrew, Inc. v. Poof Apparel Corp.*,  
7 528 F.3d 696 (9th Cir. 2008) that, “to recover statutory damages, the copyrighted work must  
8 have been registered prior to commencement of the infringement,” and that, “the first act of  
9 infringement in a series of ongoing infringements of the same kind marks the commencement  
10 of one continuing infringement under § 412.”

11 5. All use by Defendants of the “DESTINY Marks” as alleged herein was a  
12 nominative or descriptive “fair use” of the marks given that such use was only to refer,  
13 accurately, to the actual products of Plaintiff Bungie, Inc., and/or to describe, accurately and  
14 truthfully, what the products at issue here do.

15 6. Plaintiff’s claims are barred by the doctrine of unclean hands in that they are  
16 based on information illegally and unlawfully obtained by Bungie, Inc., through the  
17 unauthorized, clandestine accessing and downloading of information contained in private files  
18 on the personal computer of Defendant James May.

19 7. Plaintiff’s claims are barred by the doctrine of unclean hands in that they are  
20 based on information illegally and unlawfully obtained by Bungie, Inc., through breach of the  
21 Terms of Service of Defendant Phoenix Digital Group LLC.

22 8. Plaintiff is precluded from recovering any damages that could have been  
23 avoided through the exercise of reasonable care and due diligence.

**AMENDED COUNTERCLAIMS**

**First Amended Counterclaim of James May For Unauthorized  
Access With Intent To Defraud  
18 U.S.C. § 1030(a)(4)**

For his counterclaims, Defendant James May (“Mr. May”) alleges as follows:

1. Mr. May incorporates by reference the responses contained in paragraphs 1-131 of Defendants’ Answer, and paragraphs 1-8 of Defendants’ Affirmative Defenses, as if fully set forth herein.

2. At all relevant times, Mr. May has maintained, used and operated at his home a personal computer on which personal, private and confidential information is stored and maintained in one or more files contained on his personal computer’s hard drive.

3. By virtue of being the author of the data and files generated and stored on his personal computer, Mr. May owns and holds copyrights in such data and files pursuant to 17 U.S.C. § 201. (“Copyright in a work protected under this title vests initially in the author or authors of the work.”)

4. In addition, copyrighted works of others are, with the authorization of the owners of such copyrighted works, stored and maintained on Mr. May’s personal computer. Such works include, but are not limited to, “loader” software and “driver” software made available to Mr. May with permission by co-defendant Phoenix Digital Group LLC.

5. Mr. May protects access to the files on his personal computer by requiring the use of one or more passwords, known only to him, to gain access to the files on his personal computer’s hard drive. In addition, Mr. May includes a firewall on his computer to deter and prevent unauthorized access to his computer and the files and data contained thereon.

6. In approximately October or November, 2019, Mr. May accepted the terms of the “Limited Software License Agreement” (“LSLA”) then utilized by Counterclaim Defendant Bungie, Inc., to receive access to the Destiny 2 game offered by Bungie, Inc.

1           7.     A copy of the LSLA that governed at all relevant times herein is attached as  
2 Exhibit A. A copy of that LSLA that governed at all relevant times herein is also attached as  
3 Exhibit 6 (Dkt. #34-1, pp 18-27) to the Amended Complaint filed May 19, 2022 (Dkt. #34-1).

4           8.     The LSLA that governed at all relevant times herein references Bungie’s  
5 “Privacy Policy” that purports to form a part of the LSLA. A copy of the Bungie Privacy  
6 Policy that governed at all relevant times herein is attached as Exhibit B.

7           9.     The LSLA in effect at all relevant times does not provide Bungie, Inc. with  
8 authorization to surreptitiously access files on Mr. May’s personal computer and/or download  
9 information from those files without the direct knowledge and express authorization of Mr.  
10 May. In particular, the LSLA itself makes no mention whatsoever about granting Bungie  
11 access to Mr. May’s (or anyone else’s) personal computer.

12          10.    The Privacy Policy (Exhibit B) incorporated into the LSLA also does not grant  
13 Bungie the authority to surreptitiously access files on Mr. May’s personal computer and/or  
14 download information from those files without the direct knowledge and express  
15 authorization of Mr. May. In particular Section 2(a) of the Privacy Policy entitled,  
16 “Information We Collect,” authorized Bungie to collect only, “Contact Data,” “Credentials,”  
17 “Demographic Data,” “Billing Data,” “Profile Data,” “Content,” and “Resume Data” from  
18 Mr. May. None of these expressly stated categories includes the personal, private and  
19 confidential information stored and maintained in the private and confidential files contained  
20 on Mr. May’s personal computer’s hard drive.

21          11.    On several occasions between October 2, 2019 and May 25, 2021 Bungie, Inc.,  
22 without the knowledge and authorization of Mr. May accessed and obtained information from  
23 personal files contained on Mr. Mays’ personal computer. Bungie did so by exceeding the  
24 authorization provided to it by the Bungie Privacy Policy.

25          12.    Attached as Exhibit C is Bungie Production Document  
26 BUNGIE\_WDWA\_0000409, which Bungie, Inc., produced on or about July 25, 2022 in the  
27 course of this litigation.  
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1           13. At the deposition of Bungie's Engineering Lead, Dr. Edward Kaiser conducted  
2 October 4, 2022, Dr. Kaiser testified and confirmed that Exhibit C is, in fact, "an export of  
3 data from our [Bungie's] database corresponding to the bans of all accounts that we [Bungie]  
4 know of being associated with James May."

5           14. Exhibit C is, thus, an internal document created by Bungie reflecting  
6 information collected by Bungie about Mr. May.

7           15. Exhibit C evidences some one-hundred and four (104) instances in which  
8 Bungie, Inc., without the knowledge of, and authorization by, Mr. May accessed Mr. May's  
9 personal computer and downloaded information from it.

10           16. "Column 3" of Exhibit C entitled "Evidence" contains multiple listings that  
11 identify computer files contained only on Mr. May's computer. Such listings are expressly  
12 identified, for example, with the location, "c:\users\james\desktop\reclass\blah64.exe  
13 (4D09FFB3B8CFE53A8250D1A112C4CDE3)" which is a private file on the "c" drive of  
14 Mr. May's computer, and which file is protected by the passwords and firewall operating on  
15 Mr. May's computer to prevent unauthorized access by others to his computer. Mr. May  
16 owns and holds copyrights in this file pursuant to 17 U.S.C. § 201.

17           17. The data in "Column 3" of Exhibit C lists several computer file paths that Mr.  
18 May recognizes as being files on his own computer and that contain his personal and  
19 confidential records and and data.

20           18. Column 3 of Exhibit 3 further shows that on December 17, 2019, file "g:\work  
21 files\reclass\x64\plugins\reclasskernel64.sys" was identified by Bungie as an AimJunkies  
22 related binary. This file, described in Exhibit 3 created by Bungie, is a file that exists on an  
23 external hard drive attached to Mr. May's personal computer. Mr. May holds copyrights in  
24 this file pursuant to 17 U.S.C. § 201.

25           19. Column 3 of Exhibit C further references the file path "c:\users\james\desktop\  
26 reclass\blah64.exe." This filepath is the location of a file on Mr. May's personal computer  
27 representing the default desktop in the Windows operating system for his file, "james," which  
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1 contains Mr. May's personal and proprietary files. The randomly named .sys files, such as "c:\  
2 anobx14.sys" in document Exhibit C, are in the root directory of drive C:\ on Mr. May's  
3 personal computer and share the same file hash  
4 (6E73A01E5DFC8D8DEA4D8A99E9273A04). These files do not attach to or manipulate  
5 the Destiny 2 process and have nothing to do with Destiny 2. Mr. May holds copyrights in  
6 these files pursuant to 17 U.S.C. § 201.

7 20. Attached as Exhibit D is Bungie Production Document  
8 BUNGIE\_WDWA\_0000367 dated 2018, which is another document Bungie, Inc., has  
9 produced in the course of this litigation and which was generated by or on behalf of Bungie,  
10 Inc. This document was first produced by Bungie on July 25, 2022 and first came to the  
11 attention of Mr. May on or after July 25, 2022.

12 21. Exhibit D demonstrates that Bungie also collected data without Mr. May's  
13 authorization. In particular, the file "reclasskernel64.sys" referenced in Exhibit D shows a  
14 file path "(C:\Users\james\Desktop\ReClass.NET-KerneIPlugin-master\bin\  
15 ReClassKernel64.pdb)." File path "(C:\Users\james\Desktop\ReClass.NET-KerneIPlugin-  
16 master\bin\ReClassKernel64.pdb)." is another file on Mr. May's personal computer. This file  
17 is associated with the creation of, but is not necessary in the regular use of  
18 (reclasskernel64.sys). A .pdb file describes the specifics of a program's structure which are  
19 useful for analysis and debugging but unnecessary for the program to be run by the computer.  
20 Mr. May holds copyrights in this file pursuant to 17 U.S.C. § 201.

21 22. Exhibit D further demonstrates that the file (reclasskernel64.sys) was signed by  
22 Phoenix Digital Group LLC. The digital signature for a signed file is stored within the file  
23 that is signed. This demonstrates that Bungie was accessing files related to Phoenix Digital  
24 Group LLC resident on Mr. May's personal computer.

25 23. The files ending in the suffix ".sys." accessed and downloaded by Bungie are  
26 proprietary files of Phoenix Digital in which Phoenix Digital has copyright pursuant to 17  
27 U.S.C. § 201.

1           24.     During the course of the deposition of Dr. Kaiser on October 4, 2022, and the  
2 Rule 30(6) Deposition of Bungie conducted October 5, 2022, Dr. Kaiser testified that Bungie  
3 obtained additional information from Mr. May's personal computer and described the nature  
4 of files known to VirusTotal by using VirusTotal's search feature to crosscheck files using  
5 hashes obtained from metadata available within the Destiny 2 process.

6           25.     In particular, Bungie, at deposition, testified that the file "reclasskernel64.sys"  
7 was crosschecked with "VirusTotal" and was first uploaded to VirusTotal on March 8, 2022.  
8 As March 8, 2022 is significantly after the 2018 date of Exhibit D, no "crosscheck" with  
9 VirusTotal was not, and could not have been made at that time.

10          26.     Bungie could have only obtained this string for the ".pdb" file path by  
11 obtaining access to, opening and copying the contents of the file ("reclasskernel64.sys")  
12 without the authorization of Mr. May. In particular, when a ".pdb" file is generated, the  
13 original path to it is stored within the resulting binary ".sys" file. Because a ".pdb" file is not  
14 executable, the file on Mr. May's computer at the location "C:\Users\james\Desktop\  
15 ReClass.NET-KernelPlugin-master\bin\ReClassKernel64.pdb", which appears in Exhibit C  
16 attached, never attaches to the Destiny 2 process at any time, nor can it be started as a  
17 Windows process. Accordingly, Bungie could not have obtained this information without  
18 first directly opening and accessing the contents of the file "reclasskernel64.sys" which is a  
19 private file resident on Mr. May's personal computer. Mr. May holds copyrights in this file  
20 pursuant to 17 U.S.C. § 201.

21          27.     The specifics of the digital signature for file "reclasskernel64.sys" could only  
22 have been available to Bungie if (1) Bungie had accessed the contents of the file directly on  
23 Mr. May's computer, or (2) if Bungie had employed methods to query information about  
24 other programs running on the system not directly available from within the Destiny 2  
25 process.

26          28.     Exhibit D further demonstrates that Bungie further accessed information from  
27 Mr. May's private work folder on his external drive without the authorization of Mr. May. In  
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1 particular, the reference in Exhibit D to the file path “g:\work files\”, directs to Mr. May’s  
2 external drive which contains proprietary technology and trade secrets known only to Mr.  
3 May. Mr. May holds copyrights in these materials pursuant to 17 U.S.C. § 201.

4 29. On information and belief, Bungie, Inc. has conducted further unauthorized  
5 and clandestine surveillance of private records on the personal computer of Mr. May. Such  
6 surveillance was conducted without the knowledge of, and permission of, Mr. May. In all  
7 cases, such surveillance by Bungie of private records on the personal computer of Mr. May  
8 exceeded any authorization provided to Bungie under Bungie’s Privacy Policy.

9 30. Bungie’s actions in surreptitiously accessing Mr. May’s private computer files  
10 were based on fraud. In particular, Bungie, through its LSLA and its Privacy Policy  
11 represented that Bungie would collect only the information expressly stated in the Privacy  
12 Policy.

13 31. Mr. May agreed to the LSLA and Privacy Policy in reliance on Bungie’s  
14 representation that Bungie would collect only the information expressly stated in the Privacy  
15 Policy. Based on that reliance, Mr. May provided limited authorization for Bungie to collect  
16 only the data specified in the Privacy Policy.

17 32. By exceeding the scope of the express authorization provided by Mr. May to  
18 Bungie, Bungie defrauded Mr. May, who would not have provided Bungie with any access to  
19 his personal computer but for reliance on Bungie’s representation that it would collect only  
20 the information specified in the Privacy Policy.

21 33. Bungie fraudulently misrepresented that it would collect only the information  
22 specified in the Privacy Policy. Mr. May relied on Bungie’s fraudulent misrepresentation in  
23 electing to agree to the Bungie LSLA and Privacy Policy.

24 34. Upon information and belief, Bungie, Inc., after fraudulently accessing Mr.  
25 May’s personal computer, used the information obtained in order to conduct further  
26 surveillance on parties that include, but are not limited to, Phoenix Digital and its principals.  
27 This information was, in part, used to bring fraudulent and meritless claims against Mr. May,  
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1 Phoenix Digital and the other individual defendants named in this action, causing needless  
2 fees, costs, disruptions and emotional distress in an amount to be determined at trial.

3 35. Bungie, Inc.'s unauthorized access of Mr. May's confidential and private  
4 computer files has caused and will continue to cause Mr. May irreparable injury and damage  
5 in excess of \$5000 in less than one year.

6 36. Mr. May's damages suffered as a result of Bungie's unauthorized access to and  
7 retrieval of Mr. May's confidential and private computer files include, but are not limited to,  
8 his spending in excess of \$2702 to purchase new computers and drives, and spending in  
9 excess of 40 hours reviewing files for indication of compromise, cleaning such files when  
10 detected, and getting the new computer set up and ready for work, all incurred at the fair  
11 value of his time of at least \$75 per hour. Mr. May has incurred further damages in an  
12 amount to be determined at trial.

13 37. Bungie, Inc.'s activities constitute unauthorized access with intent to defraud  
14 in violation of the Computer Fraud and Abuse Act, 18 U.S.C. § 1030(a)(4).

15 38. Bungie, Inc.'s conduct is intentional, malicious and willful.

16 39. Mr. May is entitled to appropriate relief as prayed for hereinafter, including  
17 injunctive relief and damages.

18 **Second Amended Counterclaim of James May For Theft Of Computer Data**  
19 **18 U.S.C. § 1030(a)(2)(C)**

20 40. Mr. May reasserts and incorporates the allegations set forth in counterclaim  
21 paragraphs 1-39 above as though set forth fully herein.

22 41. Mr. May protects the files and data on his personal computer through such  
23 technological measures and means as the use of passwords and firewalls to preclude  
24 unauthorized access to the data, files and records thereon.

25 42. Bungie without authorization circumvented and bypassed the various  
26 technological measures Mr. May uses to protect the files and data on his personal computer  
27 by means including, but not limited to, deceit and subterfuge. In particular, by falsely  
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1 representing that Bungie would collect only the information specified by the Bungie Privacy  
2 Policy, Bungie obtained limited access to Mr. May's computer, thereby bypassing the  
3 password and firewall technology utilized by Mr. May to protect his files. By intentionally  
4 exceeding the terms of the express authority provided to Bungie by Mr. May, Bungie engaged  
5 in theft of Mr. May's private computer data.

6 43. Bungie, Inc.'s unauthorized infiltration of Mr. May's personal computer and its  
7 unauthorized surveillance and acquisition of the personal records contained therein has caused  
8 and will continue to cause Mr. May irreparable injury and damage, as stated in detail in  
9 Paragraphs 34, 35 and 36 above.

10 44. Bungie, Inc.'s activities constitute theft of computer data in violation of the  
11 Computer Fraud and Abuse Act, 18 U.S.C. § 1030(2)(C).

12 45. Bungie, Inc.'s conduct is intentional, malicious and willful.

13 46. Mr. May is entitled to appropriate relief as prayed for hereinafter, including  
14 injunctive relief and damages.

15 **Third Amended Counterclaim of James May For Unauthorized Access**  
16 **18 U.S.C. § 1030(a)(5)(C)**

17 47. Mr. May reasserts and incorporates the allegations set forth in counterclaim  
18 paragraphs 1-46 above as though set forth fully herein.

19 48. Mr. May protects the files and data on his personal computer through such  
20 technological measures and means as the use of passwords and firewalls to preclude  
21 unauthorized access to the data, files and records thereon.

22 49. Bungie without authorization circumvented and bypassed the various  
23 technological measures Mr. May uses to protect the files and data on his personal computer  
24 by means including, but not limited to, deceit and subterfuge. In particular, by falsely  
25 representing that Bungie would collect only the information specified by the Bungie Privacy  
26 Policy, Bungie obtained limited access to Mr. May's computer, thereby bypassing the  
27 password and firewall technology utilized by Mr. May to protect his files. By intentionally  
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1 exceeding the terms of the express authority provided to Bungie by Mr. May, Bungie engaged  
2 in theft of Mr. May's private computer data.

3 50. Bungie, Inc.'s unauthorized infiltration of Mr. May's personal computer and its  
4 unauthorized surveillance and acquisition of the personal records contained therein has caused  
5 and will continue to cause Mr. May irreparable injury and damage, as stated in detail in  
6 Paragraphs 34, 35 and 36 above.

7 51. Bungie, Inc.'s activities constitute unauthorized access in violation of the  
8 Computer Fraud and Abuse Act, 18 U.S.C. § 1030(5)(C).

9 52. Bungie, Inc.'s conduct is intentional, malicious and willful.

10 53. Mr. May is entitled to appropriate relief as prayed for hereinafter, including  
11 injunctive relief and damages.

12 **Fourth Amended Counterclaim of James May For Circumvention**  
13 **of Technological Measures, (17 U.S.C. § 1201(a))**

14 54. Mr. May reasserts and incorporates the allegations set forth in counterclaim  
15 paragraphs 1-53 above as though set forth fully herein.

16 55. Mr. May protects the files and data on his personal computer through such  
17 technological measures and means as the use of passwords and firewalls to preclude  
18 unauthorized access to the data, files and records thereon.

19 56. Bungie without authorization circumvented and bypassed the various  
20 technological measures Mr. May uses to protect the files and data on his personal computer  
21 by means including, but not limited to, deceit and subterfuge. In particular, by falsely  
22 representing that Bungie would collect only the information specified by the Bungie Privacy  
23 Policy, Bungie obtained limited access to Mr. May's computer, thereby bypassing the  
24 password and firewall technology utilized by Mr. May to protect his files. By intentionally  
25 exceeding the terms of the express authority provided to Bungie by Mr. May, Bungie engaged  
26 in theft of Mr. May's private computer data.

1           57. Bungie, Inc.’s unauthorized infiltration of Mr. May’s personal computer and its  
2 unauthorized surveillance and acquisition of the personal records contained therein has caused  
3 and will continue to cause Mr. May irreparable injury and damage, as stated in detail in  
4 Paragraphs 34, 35 and 36 above.

5           58. Bungie’s actions were and are willful.

6           59. Bungie’s conduct has caused irreparable harm to Mr. May, and, unless  
7 enjoined, will cause further irreparable harm for which Mr. May has no adequate remedy at  
8 law.

9           60. Mr. May is entitled to the relief provided by 17 U.S.C. § 1203, including, but  
10 not limited to, injunctive relief, an order for the impounding, modification, or destruction of  
11 any device or product in Bungie’s custody or control involved in the circumvention of Mr.  
12 May’s technological measures, actual damages and Defendants’ profits or statutory damages,  
13 and Mr. May’s costs and attorneys’ fees.

14                           **First Amended Counterclaim of Phoenix Digital Group LLC**  
15                           **For Breach Of Contract**

16           61. For its counterclaims, Defendant Phoenix Digital Group LLC (“Phoenix  
17 Digital”) alleges as follows:

18           62. Phoenix Digital reasserts and incorporates the allegations set forth in  
19 counterclaim paragraphs 1-60 above as though set forth fully herein.

20           63. In order to gain access to the “cheat software” products at issue here,  
21 subscribers to any of the products offered by Phoenix Digital through the “Aimjunkies”  
22 website must agree to the Terms of Service required by Phoenix Digital. A true and correct  
23 copy of these Terms of Service is attached hereto as Exhibit E.

24           64. The Terms of Service contained in Exhibit E were first put in place as early as  
25 July 22, 2015, were in place on January 3, 2021, and have continually been in place without  
26 change between July 22, 2015, and May, 2022.

1           65. Under the terms of the Phoenix Digital Terms of Service, any person obtaining  
2 the “cheat software” products at issue here agrees, among other things, not to decompile,  
3 reverse engineer or otherwise inspect the internal workings of the software.

4           66. Among other things, the Phoenix Digital Terms of Service provide that, “By  
5 accessing our website, you are agreeing to our Terms of Service and Privacy Policy.”

6           67. The Phoenix Digital Terms of Service further provide that, “By making a  
7 purchase through this website, you agree to the following: [specified terms].”

8           68. Among the specified terms to which such purchasers agree are agreements  
9 that, “You shall not modify, hack, decompile, disassemble, reverse engineer, derive source  
10 code, or create derivative works of our software, in part or in whole. You shall not transmit  
11 our software or display the software’s object code on any computer screen or to make any  
12 hard copy memory dumps of the software’s object code.”

13           69. On or about January 3, 2020, Bungie, Inc., obtained access to the “cheat  
14 software” at issue here. In particular, on or about January 3, 2020 a purchaser using the name,  
15 “Martin Zeniu” obtained a license through the aimjunkies website to use the “cheat software”  
16 at issue here.

17           70. During the deposition of Bungie’s Rule 30(b)(6) designee, Dr. Edward Kaiser,  
18 Dr. Kaiser testified and confirmed the “Martin Zeniu” is in fact an alias used by an employee  
19 or agent of Bungie, Inc., who acted on behalf of Bungie to obtain access to the “cheat  
20 software” at issue here.

21           71. By purchasing a license to the subject “cheat software” from the aimjunkies  
22 website, Bungie, through its agent, “Martin Zeniu” agreed to and was bound by the terms of  
23 Phoenix Digital’s Terms of Service (Exhibit E) existing on that date as well as before and  
24 after.

25           72. During the deposition of Bungie’s Rule 30(b)(6) designee, Dr. Edward Kaiser,  
26 Dr. Kaiser further testified and confirmed that Bungie tested the “cheat software” that it  
27 obtained via “Martin Zeniu” acting on behalf of and agent for Bungie.  
28

1           73. Based on the deposition testimony of Bungie’s Rule 30(b)(6) designee, Dr.  
2 Edward Kaiser, Bungie tested, decompiled, reverse engineered and otherwise inspected the  
3 internal workings of the “cheat software” product obtained from the aimjunkies website by its  
4 agent, “Martin Zeniu,” on or about January 3, 2020, in breach of the Phoenix Digital Terms of  
5 Service which were in place on January 3, 2021 and to which Bungie had agreed.

6           74. Bungie, Inc.’s decompilation, reverse engineering and inspection of the  
7 internal workings of the “cheat software” products at issue here constitutes a breach of the  
8 Phoenix Digital Terms of Service.

9           75. Bungie’s breach of the express terms of the Phoenix Digital Terms of Service  
10 has caused and is continuing to cause harm and damage to Phoenix Digital. Such damages  
11 include but are not limited to investigating and responding to inaccurate and factually baseless  
12 claims by Bungie, both in and outside of court, that Phoenix Digital has engaged in unlawful  
13 conduct when it has not, which accusations have diminished the fair market value of Phoenix  
14 Digital’s “aimjunkies” website, resulting in Phoenix Digital’s sale of the website at a price  
15 lower than that that would have been realized had Bungie not breached the applicable Terms  
16 of Service and not made false and harmful accusations against Phoenix Digital and its  
17 Officers and Directors.

18                           **Second Amended Counterclaim of Phoenix Digital For Circumvention of**  
19                           **Technological Measures, (17 U.S.C. § 1201(a))**

20           76. Phoenix Digital reasserts and incorporates the allegations set forth in  
21 counterclaim paragraphs 1-75 above as though set forth fully herein.

22           77. Bungie bypassed, removed, deactivated, and/or impaired one or more of the  
23 technological measures Phoenix Digital employed to control access to its proprietary  
24 programs it uses to distribute the “cheat software” at issue here.

25           78. In particular, Bungie, without the authorization of Phoenix Digital, improperly  
26 gained access to “loader” software used by Phoenix Digital to distribute the “cheat software”  
27 at issue here to its customers. This was done, in part, through the actions and activities of  
28

1 Bungie described in Paragraphs 22, 23, 26, 27 & 30-34 above. In doing so, Bungie defeated  
2 and compromised technological measures implemented to preclude such access to Phoenix  
3 Digital’s loader software.

4 79. As a direct result of Bungie’s circumvention, Bungie has caused and is  
5 continuing to cause harm and damage to Phoenix Digital. Such damage includes but is not  
6 limited to investigating and responding to inaccurate and factually baseless claims by Bungie,  
7 both in and outside of court, that Phoenix Digital has engaged in unlawful conduct when it has  
8 not, which accusations have diminished the fair market value of Phoenix Digital’s  
9 “aimjunkies” website, resulting in Phoenix Digital’s sale of the website at a price lower than  
10 that that would have been realized had Bungie not breached the applicable Terms of Service  
11 and not made false and harmful accusations against Phoenix Digital and its Officers and  
12 Directors.

13 80. Bungie’s actions were and are willful.

14 81. Bungie’s conduct has caused irreparable harm to Phoenix Digital, and, unless  
15 enjoined, will cause further irreparable harm for which Phoenix Digital has no adequate  
16 remedy at law.

17 82. Phoenix Digital is entitled to the relief provided by 17 U.S.C. § 1203,  
18 including, but not limited to, injunctive relief, an order for the impounding, modification, or  
19 destruction of any device or product in Bungie’s custody or control involved in the  
20 circumvention of Phoenix Digital’s technological measures, actual damages and Defendants’  
21 profits or statutory damages, and Phoenix Digital’s costs and attorneys’ fees.

22 **JURY DEMAND**

23 Pursuant to Federal Rule of Civil Procedure 38(b), Counterclaim-Plaintiffs James May  
24 and Phoenix Digital Group LLC each demand a trial by jury as to all issues so triable in this  
25 action.

**PRAYER FOR RELIEF**

WHEREFORE, Counter-Claim Plaintiffs Phoenix Digital and James May pray for the following relief:

A. That judgment be entered in Phoenix Digital and Mr. May’s favor against Bungie on all their counterclaims.

B. That Bungie and its officers, agents, representatives, servants, employees, heirs, successors, and assigns, and all others in active concert or participation with Bungie be preliminarily and permanently enjoined from:

(1) Acquiring access to the private computers, computer files of Phoenix Digital and Mr. May and data contained thereon or therein;

(2) Inducing, or enabling others to access the private computers, computer files of Phoenix Digital and Mr. May and data contained thereon or therein;

(3) Circumventing the technological measures used by Phoenix Digital and Mr. May to prevent access to the private computers, computer files of Phoenix Digital and Mr. May and data contained thereon or therein;

(4) Inducing, or enabling others to circumvent the technological measures used by Phoenix Digital and Mr. May to prevent access to the private computers, computer files of Phoenix Digital and Mr. May and data contained thereon or therein; and

(5) Aiding or assisting another person or entity in any of the activities described in (1) - (4).

C. An order requiring that Bungie immediately transfer copies of any and all files, records, data or other information obtained from the private computers, computer files of Phoenix Digital and Mr. May and data contained thereon or therein;

D. An order requiring that Bungie then destroy all copies of any and all files, records, data or other information obtained from the private computers, computer files of Phoenix Digital and Mr. May and data contained thereon or therein in their possession or control;



1 E. An award to Phoenix Digital and Mr. May of restitution and damages,  
2 including but not limited to compensatory, statutory (including enhanced statutory damages  
3 for willful infringement), punitive damages, and all other damages permitted by law;

4 F. That Phoenix Digital and Mr. May be awarded pre-judgment and post-  
5 judgment interest on all damages awarded against Bungie;

6 G. An award to Phoenix Digital and Mr. May of their costs incurred in this suit as  
7 well as reasonable attorneys' fees; and

8 H. For such other relief as the Court deems just and proper.

9 Dated November 21, 2022.

10 /s/ Philip P. Mann  
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