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 9 ZYNGA INC.

10 UNITED STATES DISTRICT COURT  
 11 NORTHERN DISTRICT OF CALIFORNIA  
 12 SAN JOSE DIVISION

14 ZYNGA GAME NETWORK INC., a Delaware  
 Corporation,

15  
 16 Plaintiff,

17 v.

18 JASON WILLIAMS, an individual, LUNA  
 MARTINI, an individual, WAN-WEN KUO, an  
 19 individual, and JOHN DOES 4-5 D/B/A MW  
 GROUP

20 Defendants.  
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 23  
 24  
 25  
 26

**CASE NO. CV-10:01022 JF (PSGx)**

**MOTION FOR DEFAULT JUDGMENT AS  
 TO DEFENDANTS JASON WILLIAMS,  
 LUNA MARTINI AND WAN-WEN KUO;  
 AND**

**MEMORANDUM OF POINTS AND  
 AUTHORITIES**

**Noted For Hearing:**

**DATE: June 24, 2011**

**TIME: 9:00 a.m.**

**PLACE: Courtroom 3, 5<sup>th</sup> Floor**

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1 **NOTICE OF MOTION AND MOTION**

2 TO ALL PARTIES: Please take notice that on June 24, 2011 at 9:00 a.m., in Courtroom 3,  
3 Fifth Floor of the United States Federal District Courthouse, San Jose Courthouse, 280 South 1<sup>st</sup>  
4 Street, San Jose, California 95113, Plaintiff Zynga Inc. (“Zynga”) will move the Court pursuant to  
5 Federal Rule of Civil Procedure 55(b)(2) for entry of default judgment against defendants Jason  
6 Williams, Luna Martini and Wan-Wen Kuo (“Defendants”). Zynga’s Motion is based on this Notice  
7 of Motion and Motion, the supporting Memorandum of Points and Authorities, the Declaration of  
8 David K. Caplan, the Proposed Default Judgment, all pleadings on file in this action, and any other  
9 matter that may be submitted in support of this Motion.

10 **ISSUE TO BE DECIDED**

11 Whether the Court should enter default judgment against Defendants, awarding Zynga their  
12 profits from their unlawful conduct; permanently enjoining Defendants from infringing Zynga’s  
13 rights; and finding that this is an exceptional case meriting an award of attorney’s fees.

14 **MEMORANDUM OF POINTS AND AUTHORITIES**

15 **I. STATEMENT OF RELEVANT FACTS**

16 **A. Procedural Background**

17 Zynga filed its original complaint in this action on March 10, 2010. (Dkt. No. 1.) Zynga filed  
18 its First Amended Complaint on September 7, 2010. (Dkt. No. 22.) On March 25, 2011, the Court  
19 authorized Zynga to serve Defendants with process by electronic mail. (Dkt. No. 35.) Zynga served  
20 Defendants with process on March 28, 2011. (See Dkt. No. 36.) Zynga filed its request for entry of  
21 default by the Clerk against Defendants on April 22, 2011. (Dkt. No. 39.). The Clerk entered  
22 Defendant’s default on May 2, 2011. (Dkt. No. 42.)

23 **B. Zynga’s Rights and the Mafia Wars Game**

24 Zynga is the largest social gaming company, providing, *inter alia*, online poker games, word  
25 games, board games, role playing games and party games including Zynga Poker, Mafia Wars,  
26 YoVille, Vampires, Street Racing, Scramble and Word Twist. (Dkt. No. 22 (“FAC”), ¶ 11.)  
27 Zynga’s games are available on Facebook, MySpace, Bebo, Hi5, Friendster, Tagged, Yahoo!, and  
28 the iPhone and iPod Touch, among others. *Id.* Zynga’s games have been a runaway success. In

1 July, 2008, Zynga had over 1.3 million daily active users and 20 million registered users. As of  
2 January 1, 2009, Zynga had over 75 million registered users. As of May 2009, Zynga had more than  
3 9.5 million daily users. By September 2010, Zynga had over 100 million unique users playing its  
4 games every month. (See id. ¶ 12.)

5 One of Zynga’s most popular properties is Mafia Wars (the “Game”), a computer game for  
6 use on wireless devices and computers that allows users to start a Mafia family with their friends and  
7 compete to become the most powerful family. (FAC, ¶ 13.) Zynga makes the Game available  
8 through social networking websites and applications (collectively “Providers”), including but not  
9 limited to those identified above. (Id. ¶ 18.)

10 Zynga has made use of the trademark MAFIA WARS in commerce since at least September  
11 2008. (FAC, ¶ 14.) Zynga’s success and the success of the MAFIA WARS mark have been widely  
12 reported in the press, on the Internet and in blogs. (Id. ¶ 15.) As of February 2009, the Game had  
13 over 1.1 million daily active users. As of July 2009, the Game had more than 4 million daily active  
14 users. As of December 2009, the Game had over 7 million daily active users. (Id.)

15 The mark MAFIA WARS has acquired distinctiveness, and by virtue of the extensive online  
16 sales and advertising under the mark MAFIA WARS, the MAFIA WARS mark has become well-  
17 known within social gaming circles as a source identifier for the Game. (FAC, ¶ 16.) Zynga owns  
18 United States Federal Trademark Application Serial No. 77772110 for the mark MAFIA WARS in  
19 International Class 009 for downloadable computer game software for use on wireless devices and  
20 computers, and International Class 041 for entertainment services, namely, providing on-line  
21 computer games. (Id. ¶ 17.)

22 Zynga owns or leases the computer servers that players must access in order to play the  
23 Game, and grants players who participate in the Game a revocable license to access its servers for  
24 the purpose of playing the Game. (FAC, ¶ 19.). Zynga’s Terms of Service govern users’ play of the  
25 Game, and players who use the Game must consent to the Terms of Service.<sup>1</sup> (Id. ¶ 20.) Players  
26

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27 <sup>1</sup> The Terms of Service also establish that Defendants have consented to personal jurisdiction and  
28 venue in this Court. See Declaration of David K. Caplan in Support of Zynga’s Motion for Default  
Judgment (“Caplan Decl.”), Exs. 1 and 2, ¶ 12(a), Ex. 3, ¶ 8.2.

1 who use the Game in a manner not expressly authorized by Zynga, including without limitation in  
2 violation of the Terms of Service, are not authorized to participate in the Game or to access Zynga’s  
3 servers. (Id. ¶ 21.) When users sign up with Zynga to play the Game, they receive a certain amount  
4 of “Virtual Currency” that they use to compete in the Mafia Wars game with other players using the  
5 Providers’ sites and/or applications. Players can increase their total amount of “Virtual Currency”  
6 through their play, and can also purchase “Virtual Currency” from Zynga. (Id. ¶ 22.) Players use  
7 “Virtual Currency” to purchase various virtual, in-Game digital items (“Virtual Goods”). (Id. ¶ 23.)

8 Zynga grants players a limited, revocable license to use the “Virtual Currency” or “Virtual  
9 Goods” while playing the Game, but retains sole and exclusive ownership of the “Virtual Currency”  
10 or “Virtual Goods” and the source code that allows the “Virtual Currency” or “Virtual Goods” to be  
11 used in the Game. (FAC, ¶ 24.) Zynga has not authorized any third party to sell the “Virtual  
12 Currency” or “Virtual Goods” required to play the Game. (Id. ¶ 25.) Among other things, the Terms  
13 of Service that govern users’ play of the Game prohibit users from selling “Virtual Currency” or  
14 “Virtual Goods” for real-world money or otherwise exchanging “Virtual Currency” or “Virtual  
15 Goods” for anything of value outside the Game. (Id. ¶ 26.)

## 16 **II. DEFENDANTS’ UNLAWFUL CONDUCT**

17 Without Zynga’s authorization or approval, Defendants have established and operated  
18 websites (the “Infringing Websites”) at the Internet domain names MWBLACKMARKET.COM,  
19 MAFIAWARSDIRECT.COM and MWFEXPRESS.COM (collectively the “Domain Names”) through which they “sell” (or previously “sold”) “Virtual Goods” that users, playing the Game  
20 through the Providers’ websites and/or applications, can use to compete with other players who  
21 obtained their “Virtual Goods” directly from Zynga. (FAC, ¶¶ 27, 28.)

22 Defendants advertise and “sell” these “Virtual Goods” using the MAFIA WARS mark and/or  
23 confusingly similar misspellings or variations of the MAFIA WARS mark. (FAC, ¶ 29.)

24 Defendants “sell” “Virtual Goods” for use in the Game for real-world money, and at prices that are  
25 substantially lower than the prices paid by users who obtain their “Virtual Goods” from Zynga. (Id.  
26 ¶ 30.)  
27  
28

1 Defendants have used the Game itself as part of their scheme, transferring the “Virtual  
2 Goods” they “sell” during game play in contravention of the Game’s terms of service and/or security  
3 measures, and in violation of the license they received from Zynga to participate in the Game. (FAC,  
4 ¶ 31.) Zynga has never authorized Defendants to use the mark MAFIA WARS or to “sell” “Virtual  
5 Goods” for use in the Game, nor has Zynga authorized Defendants to use the Game to transfer  
6 “Virtual Goods” that Defendants have “sold” to players through the Infringing Websites. (*Id.*, ¶ 32.)

### 7 **III. ARGUMENT**

#### 8 **A. Governing Law for Default Judgments**

9 Default judgments are governed by Rule 55. In this case, the controlling rule is Rule  
10 55(b)(2) because Zynga’s claims against Defendants are not for a sum certain. Fed. R. Civ. P.  
11 55(b)(1), (2). As such, default judgment against Defendants can only be entered by the Court upon  
12 application by Zynga. *Id.* As noted above, Defendants have failed to plead or otherwise defend  
13 against Zynga’s claims. To the best of Zynga’s knowledge, Defendants are not infants or  
14 incompetent persons, nor does the Servicemembers Civil Relief Act, 50 U.S.C. App. § 501 et seq.,  
15 apply to them. (Caplan Decl., ¶ 5.) Accordingly, the Court may properly enter default judgment  
16 against Defendants based solely on Zynga’s Motion.<sup>2</sup>

#### 17 **B. The Eitel Factors Favor Entering Default Judgment**

18 “The decision to grant or deny default judgment under Rule 55(b) is within the discretion of  
19 the Court.” *Dabu v. Becks Creek Indus.*, No. CV-08:5626, 2009 U.S. Dist. LEXIS 119737, at \*3  
20 (N.D. Cal., September 23, 2009) (citing *Eitel v. McCool*, 782 F.2d 1470, 1471-72 (9th Cir. 1986)).  
21 Courts in the Ninth Circuit consider the following factors (the “Eitel Factors”) in determining  
22 whether to grant default judgment: (1) the possibility of prejudice to the plaintiff; (2) the merits of  
23 the plaintiff’s substantive claim; (3) the sufficiency of the complaint; (4) the sum of money at stake  
24 in the action; (5) the possibility of a dispute concerning material facts; (6) whether the default was  
25 due to excusable neglect; and (7) the policy favoring adjudication on the merits. *Id.* “In applying

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26 <sup>2</sup> Although Defendants have not participated in this litigation, Zynga has nevertheless served this  
27 Motion and the supporting documents on Defendants by electronic mail pursuant to Federal Rule of  
28 Civil Procedure 55(b)(2) and consistent with this Court’s order authorizing Zynga to serve  
Defendants with process by electronic mail. (Dkt. No. 35.)

1 this discretionary standard, default judgments are more often granted than denied.” PepsiCo v.  
2 Triunfo-Mex, Inc., 189 F.R.D. 431, 432 (C.D. Cal. 1999). As demonstrated below, the Eitel factors  
3 strongly favor entry of default judgment against Defendants.

#### 4 **1. Zynga Will Be Prejudiced if Default Judgment Is Not Entered**

5 With respect to the first Eitel factor, Zynga will suffer prejudice if default judgment is not  
6 entered. Eitel, 782 F.2d at 1471. It is well-established that upon entry of default, the factual  
7 allegations of a complaint except those relating to the amount of damages are deemed to be true.  
8 TeleVideo Sys., Inc. v. Heidenthal, 826 F.2d 915, 917-18 (9th Cir. 1987); Geddes v. United Fin.  
9 Group, 559 F.2d 557, 560 (9th Cir. 1977). Logically, entry of default also generally establishes a  
10 defendant’s liability. See Adriana Int’l Corp. v. Lewis & Co., 913 F.2d 1406, 1414 (9th Cir. 1990).

11 The truth of Zynga’s allegations having been established, default judgment is the only  
12 recourse available to Zynga, and Zynga will suffer prejudice if that relief is denied. See Koninklijke  
13 Philips Elec. N.V. v. KXD Tech., Inc., No. 05-1532, 2008 U.S. Dist. LEXIS 50839, at \*12 (D. Nev.  
14 Jul. 2, 2008), *affirmed*, Koninklijke Philips Elec., N.V. v. KXD Tech., Inc., No. 08-16794, 2009 U.S.  
15 App. LEXIS 21156 (9th Cir. Sept. 24, 2009)) (“The Court finds that if it does not enter default  
16 judgment, Plaintiff would be without other recourse for recovery and thus will suffer prejudice.”).  
17 Furthermore, the established facts alleged in Zynga’s First Amended Complaint are more than  
18 sufficient to demonstrate that Zynga will suffer prejudice in the form of, among other things,  
19 impairment of its trademark rights and interference with its relationships with its customers, if  
20 default judgment is not entered. On the record before the Court, there can be no doubt that the first  
21 Eitel factor supports entry of default judgment.

#### 22 **2. Zynga’s Claims Are Meritorious and its First Amended Complaint is Sufficient**

23 The second and third Eitel factors require a plaintiff to state a claim on which it may recover.  
24 Eitel, 782 F.2d at 1471. As set forth above, Defendants’ liability is deemed established upon default  
25 and all findings of fact necessary to support liability are accepted as true. Adriana Int’l Corp., 913  
26 F.2d at 1414; Geddes, 559 F.2d at 560.

27 In this case, Zynga has adequately pled all of the following claims against Defendants: (1)  
28 false designation of origin pursuant to 15 U.S.C. § 1125(a); (2) violation of the Computer Fraud and

1 Abuse Act, 18 U.S.C. § 1030; (3) California unfair competition pursuant to California Business &  
2 Professions Code § 17200; (4) violation of California Penal Code § 502; (5) California common law  
3 trademark infringement; (6) California common law passing off and unfair competition; (7) breach  
4 of contract; (8) intentional interference with contractual relations; and (9) Trespass to Chattels.

5 Zynga's First Amended Complaint properly alleges the necessary elements for each of these causes  
6 of action, and Defendants' failure to respond to the allegations establishes their liability for each of  
7 the claims asserted in the First Amended Complaint.

8 **a. Defendants are Liable for Federal False Designation of Origin, as well as**  
9 **California Statutory and Common Law Unfair Competition Claims**

10 Zynga's claim for federal statutory false designation of origin under the Lanham Act, as well  
11 as its claims for California statutory unfair competition and California common law trademark  
12 infringement, passing off and unfair competition, all require Zynga to establish the same material  
13 elements: that Zynga owns a valid and legally protectable mark, and that Defendants' use of the  
14 mark is likely to cause consumer confusion. See Lifted Research Group, Inc. v. Salem, No. CV-  
15 08:4497, 2009 U.S. Dist. LEXIS 44850, at \*8-9 (N.D. Cal. May 15, 2009) (citing Applied Info. Scis.  
16 Corp. v. eBay, Inc., 511 F.3d 966, 969 (9th Cir. 2007)); see also Cleary v. News Corp., 30 F.3d  
17 1255, 1262-63 (9th Cir. 1994) ("This Circuit has consistently held that state common law claims of  
18 unfair competition and actions pursuant to California Business and Professions Code § 17200 are  
19 'substantially congruent' to claims made under the Lanham Act.").

20 In this case, the MAFIA WARS trademark at issue is valid and legally protectable, as  
21 evidenced by its application for registration on the Principal Register of the U.S. Patent and  
22 Trademark Office. See 15 U.S.C. § 1057(c). With regard to whether Defendants' use of the mark is  
23 likely to cause consumer confusion, the Ninth Circuit considers eight factors to assess the likelihood  
24 of confusion: (1) strength of the mark; (2) proximity of the goods; (3) similarity of the marks; (4)  
25 evidence of actual confusion; (5) marketing channels used; (6) type of goods and degree of care  
26 likely to be used by the purchaser; (7) defendant's intent in selecting the mark; and (8) likelihood of  
27 expansion of the product lines. AMF Inc. v. Sleekcraft Boats, 599 F.2d 341, 348-49 (9th Cir. 1979),  
28

1 abrogated in part on other grounds by Mattel, Inc. v. Walking Mountain Prods., 353 F.3d 792, 810 n.  
2 19 (9th Cir. 2003).

3 In its First Amended Complaint, Zynga has sufficiently alleged the likelihood of confusion  
4 pursuant to the Sleekcraft factors. Zynga alleges the strength of its MAFIA WARS trademark that  
5 “has acquired distinctiveness, and by virtue of the extensive online sales and advertising under the  
6 mark MAFIA WARS, the MAFIA WARS mark has become well-known within social gaming  
7 circles as a source identifier for the Game.” (FAC, ¶ 16.) Where, as here, the goods at issue are  
8 “related or complementary,” the likelihood of confusion is heightened. M2 Software, Inc. v.  
9 Madacy Entm’t, 421 F.3d 1073, 1082 (9th Cir. 2005). Zynga alleges that it sells “Virtual Currency”  
10 and “Virtual Goods” for use in the Game (Id. ¶¶ 22, 23) and that Defendants have used the MAFIA  
11 WARS mark in conjunction with the advertising and sale of Zynga’s “Virtual Goods” (Id. ¶ 29). In  
12 addition, the marks at issue in this case are not only similar, but appear to be identical. (See id. ¶  
13 29.) Zynga supports these allegations by submitting evidence that Defendants have used the Marks  
14 in the content of their Infringing Websites. (See Caplan Decl., Exs. 6-8.) The marketing channels  
15 used by Zynga and the Defendants are also similar. When users sign up with Zynga to play the  
16 Game, they receive a certain amount of “Virtual Currency” for use in purchasing various “Virtual  
17 Goods,” and players can increase their total amount of “Virtual Currency” through their play or they  
18 can purchase “Virtual Currency” from Zynga using the Providers’ websites and/or applications. (Id.  
19 ¶ 22.) Similarly, Defendants sell Zynga’s “Virtual Goods” through their Infringing Websites. (Id. ¶  
20 28.) See M2 Software, 421 F.3d at 1083 (“Convergent marketing channels increase the likelihood  
21 of confusion.”) (quoting Nutri/System, Inc. v. Con-Stan Indus., Inc., 809 F.2d 601, 606 (9th  
22 Cir.1987)). Furthermore, Zynga has alleged that because the Defendants have duplicated the  
23 MAFIA WARS mark and/or used confusingly similar misspellings or variations thereof, purchasers  
24 are likely to be confused, deceived or mistaken as to the source of and authorization for the “Virtual  
25 Goods” sold by Defendants. (Id. ¶¶ 34, 62.) With respect to Defendant’s intent, “[w]hen the alleged  
26 infringer knowingly adopts a mark similar to another’s, [a court] must presume that the public will  
27 be deceived.” M2 Software, 421 F.3d at 1085 (citing Sleekcraft, 599 F.2d at 354).

1           Moreover, Zynga’s uncontested allegations in its First Amended Complaint establish that  
2 Defendants have used the MAFIA WARS mark in a manner that is likely to cause confusion. (See  
3 e.g., FAC, ¶¶ 34, 62.) Zynga has sufficiently pled and established its statutory and common law  
4 trademark infringement and unfair competition claims. (See also FAC, ¶¶ 33-35; 42-48; 61-69.)

5           **b. Defendants are Liable for Violating the Computer Fraud and Abuse Act**

6           A defendant is civilly liable for violating the Computer Fraud and Abuse Act when that  
7 defendant: 1) intentionally accesses a computer without authorization or exceeds authorized access,  
8 and thereby obtains information from any computer involved in interstate and foreign commerce and  
9 communication, or 2) knowingly and with intent to defraud, accesses a computer involved in  
10 interstate and foreign commerce and communication, without authorization or exceeds authorized  
11 access, and by means of such conduct furthers the intended fraud and obtains anything of value; and  
12 3) causes a loss to one or more persons during any one-year period aggregating at least Five  
13 Thousand Dollars (\$5,000) in value. 18 U.S.C. §§ 1030(a), (e), (g). Zynga has sufficiently alleged  
14 each of these elements in its First Amended Complaint.<sup>3</sup> (See FAC, ¶¶ 36-41.) Furthermore, Zynga  
15 has explained that Defendants have accessed Zynga’s computer servers without authorization to  
16 carry out their unauthorized “Virtual Goods” selling activities. (See *id.* ¶ 31.) Thus, Zynga has  
17 sufficiently pled and established its claim for violation of the Computer Fraud and Abuse Act.

18           **c. Defendants are Liable for Violating California Penal Code § 502**

19           A defendant is civilly liable for violating California Penal Code § 502 when that defendant  
20 does any of the following, causing damage or loss to the plaintiff: 1) knowingly accesses and  
21 without permission makes use of data from a computer, computer system or computer network  
22 owned or leased by the plaintiff in order to wrongfully obtain money, property or data; 2) knowingly  
23 accesses and without permission takes, copies or makes use of data from a computer, computer

24 \_\_\_\_\_  
25 <sup>3</sup> Although allegations related to the amount of damages are not generally established by entry of  
26 default, it is appropriate for the Court to find that Defendants’ default establishes that Zynga has  
27 suffered the \$5,000 in damage necessary to state its claim under the Computer Fraud and Abuse Act.  
28 See *Tagged, Inc. v. Doe*, CV-09:1713, 2010 U.S. Dist. LEXIS 5428, at \*23 (N.D. Cal. Jan 25, 2010)  
(finding on motion for default judgment that plaintiff had stated a claim for violation of the  
Computer Fraud and Abuse Act based in part on plaintiff’s allegation that defendant’s conduct had  
“caused monetary damage of at least \$5,000” to the plaintiff.).

1 system or computer network owned or leased by the plaintiff; 3) knowingly and without permission  
2 uses computer services owned or leased by the plaintiff; 4) knowingly and without permission  
3 disrupts or causes the disruption of computer services or denies or causes the denial of computer  
4 services to an authorized user of a computer, computer system, or computer network owned or  
5 leased by the plaintiff; 5) knowingly and without permission provides or assists in providing a means  
6 of accessing a computer, computer system, or computer network owned or leased by the plaintiff; 6)  
7 knowingly and without permission accesses or causes to be accessed a computer, computer system,  
8 or computer network owned or leased by the plaintiff. Cal. Penal Code. §§ 502(c), (e). Zynga has  
9 sufficiently alleged each of these elements in its First Amended Complaint. (See FAC, ¶¶ 49-60.)  
10 Furthermore, Zynga has explained that Defendants have accessed Zynga’s computer servers without  
11 authorization to carry out their unauthorized “Virtual Goods” selling activities. (See id. ¶ 31.) Thus,  
12 Zynga has sufficiently pled and established its claim for violation of California Penal Code § 502.

13 **d. Defendants are Liable for Breach of Contract**

14 “A cause of action for breach of contract requires proof of the following elements:  
15 (1) existence of the contract; (2) plaintiff’s performance or excuse for nonperformance; (3)  
16 defendant’s breach; and (4) damages to plaintiff as a result of the breach.” CDF Firefighters v.  
17 Maldonado, 158 Cal. App. 4th 1226, 1239 (2008). Zynga has sufficiently pled each of these  
18 elements in its First Amended Complaint. (See FAC, ¶¶ 70-75.) Zynga has further developed this  
19 claim by explaining that Defendants have not only “sold” “Virtual Goods” in violation of the Terms  
20 of Service, but that they have also exploited the Game itself to transfer their “Virtual Goods” in  
21 violation of the Terms of Service. (See id. ¶¶ 26, 31, 32.) Zynga has sufficiently pled its claim for  
22 breach of contract.

23 **e. Defendants are Liable for Intentional Interference with Contractual Relations**

24 “The elements which a plaintiff must plead to state the cause of action for intentional  
25 interference with contractual relations are: (1) a valid contract between plaintiff and a third party;  
26 (2) defendant’s knowledge of this contract; (3) defendant’s intentional acts designed to induce a  
27 breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual  
28 relationship; and (5) resulting damage.” Pac. Gas & Elec. Co. v. Bear Stearns & Co., 50 Cal. 3d

1 1118, 1126 (1990). Zynga has sufficiently alleged each of these elements. (See FAC, ¶¶ 76-81.)  
2 Zynga has further developed this claim by explaining that Defendants have deliberately interfered  
3 with Zynga’s contractual relationships with its customers by offering their unauthorized “Virtual  
4 Goods” at prices far below the prices paid by customers who obtain their “Virtual Goods”  
5 legitimately from Zynga, and by using the Game itself to transfer “Virtual Goods” to their customers  
6 in contravention of the Game’s terms of service and/or security measures, and in violation of the  
7 license they received from Zynga to participate in the Game. (See *id.*, ¶¶ 30-31.) In so doing,  
8 Defendants have deliberately sought to induce Zynga’s customers to breach the Terms of Service by  
9 “purchasing” unauthorized “Virtual Goods” from them, and by participating in unauthorized in-  
10 game “Virtual Goods” transfers. Zynga has sufficiently pled its claim for intentional interference  
11 with contractual relations.

12 **f. Defendants’ Interference with Zynga’s Contractual Relationships With its**  
13 **Customers Is an Independent Basis for Liability Under Cal. Bus. & Prof.**  
14 **Code § 17200**

15 California Business & Professions Code § 17200 (the “UCL”) prohibits “unlawful, unfair or  
16 fraudulent business act[s] or practice[s].” “[C]ommon law torts can generally be used as a predicate  
17 for a claim under the UCL.” Cortez v. Global Ground Support, LLC, CV-09:4138, 2009 U.S. Dist.  
18 LEXIS 110268, at \*7 (N.D. Cal. Nov. 25, 2009) (citing CRST Van Expedited, Inc. v. Werner  
19 Enters., 479 F.3d 1099, 1107 (9th Cir. 2007) (finding a claim for intentional interference with the  
20 plaintiff’s employment contracts was sufficient to sustain a claim under the UCL)). In this case,  
21 Defendants’ intentional interference with Zynga’s contracts with its customers is an independent  
22 basis for the Court to find Defendants liable for violating the “unlawful” prong of the UCL.

23 **g. Defendants are Liable for Trespass to Chattels**

24 “In order to prevail on a claim for trespass based on accessing a computer system, the  
25 plaintiff must establish: (1) defendant intentionally and without authorization interfered with  
26 plaintiff’s possessory interest in the computer system; and (2) defendant’s unauthorized use  
27 proximately resulted in damage to plaintiff.” Ebay, Inc. v. Bidder’s Edge, Inc., 100 F. Supp. 2d  
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1 1058, 1069-70 (N.D. Cal. 2000). Zynga has sufficiently alleged each of these elements. (See FAC,  
2 ¶¶ 82-87.)

3 Zynga has sufficiently pled its claims, and the undisputed facts establish that Zynga's claims  
4 are meritorious. Therefore, the second and third Eitel factors weigh in favor of Zynga's Motion.

5 **3. Zynga's Requested Monetary Relief is Tailored to Defendants' Misconduct**

6 The fourth Eitel factor requires the Court to consider the amount at stake in the action "in  
7 relation to the seriousness of Defendant's conduct." PepsiCo, Inc. v. Cal. Sec. Cans, 238 F. Supp. 2d  
8 1172, 1176 (C.D. Cal. 2002); Eitel, 782 F.2d at 1472. Requested relief is reasonable, and this factor  
9 weighs in favor of default, when the "sum of money being sought by Plaintiff is . . . tailored to the  
10 specific misconduct of Defendant." Bd. Of Trustees of the Carpenter Trust Fund for Northern  
11 California v. JKJ, Inc., CV-09:636, 2010 U.S. Dist. LEXIS 7354, at \*12 (N.D. Cal. January 6, 2010).

12 In this case, Zynga is requesting that Defendants be ordered to account for and to disgorge their  
13 profits from the sale of "Virtual Goods" for use in the Game to Zynga. This is tailored directly to  
14 Defendants' unlawful conduct. Therefore, this factor weighs in favor of Zynga's Motion.

15 **4. There Is No Possibility of a Genuine Issue of Material Fact**

16 The fifth Eitel factor weighs the possibility of a dispute regarding any material facts in the  
17 case. Eitel, 782 F.2d at 1472-73. As set forth above, Zynga has established that no possibility of a  
18 genuine issue of material fact exists in this matter because Defendants' default has established as  
19 true the allegations of material fact in Zynga's First Amended Complaint. "Thus, no dispute has  
20 been raised regarding the material averments of the complaint, and the likelihood that any genuine  
21 issue may exist is, at best, remote. This factor therefore favors the entry of default." Philip Morris  
22 U.S.A. Inc. v. Castworld Prods., 219 F.R.D. 494, 500 (C.D. Cal. 2003).

23 **5. The Default Entered Against Defendants did Not Result from Excusable Neglect**

24 The sixth Eitel factor considers the possibility that default resulted from excusable neglect.  
25 Eitel, 782 F.2d at 1473. That is not the case here. In the time since they were served with the  
26 summons and the First Amended Complaint, Defendants have chosen not to participate in this  
27 litigation in any capacity.

1 Under these circumstances, courts have rightfully concluded that “the possibility of  
2 excusable neglect is remote.” Philip Morris, 219 F.R.D. at 501; see also United Bank of Kuwait  
3 PLC v. Enventure Energy Enhanced Oil Recovery Assocs., 755 F. Supp. 1195, 1205 (S.D.N.Y.  
4 1989) (“A default is deemed willful where a defendant simply ignores the complaint without  
5 action.”) (citing Marziliano v. Heckler, 728 F.2d 151, 156 (2d Cir. 1984)). This factor also favors  
6 the entry of default judgment.

7 **6. The Policy Favoring Adjudication of Disputes on the Merits Does Not Weigh**  
8 **Against Default Judgment**

9 Finally, the seventh Eitel factor does not weigh against Zynga’s Motion because Defendants’  
10 failure to participate in the litigation prevents the Court from considering this dispute on the merits.  
11 See Philip Morris, 219 F.R.D. at 501 (“‘Defendant’s failure to answer [Plaintiff’s] Complaint makes  
12 a decision on the merits impractical, if not impossible. Under FRCP 55(a), termination of a case  
13 before hearing the merits is allowed whenever a defendant fails to defend an action.’ This is  
14 precisely what occurred in the present case. Therefore, the seventh Eitel factor does not preclude the  
15 Court from entering default judgment against Defendant.”) (quoting PepsiCo Inc. v. Cal. Sec. Cans.,  
16 238 F. Supp. 2d at 1177)).

17 **IV. ZYNGA’S REQUESTED RELIEF**

18 **A. Zynga Is Entitled to an Injunction Prohibiting Defendants from Infringing the**  
19 **MAFIA WARS Mark**

20 The Lanham Act explicitly authorizes the Court to “grant injunctions, according to the  
21 principles of equity and upon such terms as the court may deem reasonable, to prevent” Defendants  
22 from infringing Zynga’s trademark rights. 15 U.S.C. § 1116(a). “Indeed, ‘[i]njunctive relief is the  
23 remedy of choice for trademark and unfair competition cases, since there is no adequate remedy at  
24 law for the injury caused by a defendant’s continuing infringement.’” Herman Miller, Inc. v.  
25 Alphaville, Design, Inc., CV:08-3437, 2009 U.S. Dist. LEXIS 103384, at \*21 (N.D. Cal. October 22,  
26 2009) (quoting Century 21 Real Estate Corp. v. Sandlin, 846 F.2d 1175, 1180 (9th Cir. 1988)).  
27 When a defendant’s “refusal to answer or appear . . . makes it difficult for plaintiff to prevent further  
28 infringement,” the “traditional equitable principles established by eBay Inc. v. MercExchange, LLC,

1 547 U.S. 388, 126 S. Ct. 1837, 1839-40, 164 L. Ed. 2d 641 (2006) are satisfied and injunctive relief  
2 is warranted.” Herman Miller, 2009 U.S. Dist. LEXIS 103384, at \*22; see also Philip Morris, 219  
3 F.R.D. at 502 (“[I]njunctive relief is appropriate because the claims otherwise warrant an injunction,  
4 and Defendant, though well aware of serious claims brought against it, has chosen to ignore this  
5 lawsuit. Failure to grant the injunction would needlessly expose the Plaintiff to the risk of continuing  
6 irreparable harm.”).

7 In fashioning an appropriate injunction, “any doubt in respect of the extent thereof must be  
8 resolved in [the plaintiff’s] favor as the innocent producer and against the [defendant], which has  
9 shown by its conduct that it is not to be trusted.” Polo Fashions, Inc. v. Dick Bruhn, Inc., 793 F.2d  
10 1132, 1135 (9th Cir. 1986). Id. at 1135 (quoting William R. Warner & Co. v. Eli Lilly & Co., 265  
11 U.S. 526, 532, 44 S.Ct. 615, 618, 68 L.Ed. 1161 (1924)). In Polo, the court emphasized that  
12 injunctive relief was appropriate even though the defendants voluntarily ceased their infringement  
13 after the suit was filed. “We should not require Polo also to introduce concrete evidence that the  
14 defendants are likely to infringe again. If the defendants sincerely intend not to infringe, the  
15 injunction harms them little; if they do, it gives Polo substantial protection of its trademark.” Polo  
16 Fashions, 793 F.3d at 1135-36; see also Vuitton Et Fils, S.A. v. Crown Handbags, 492 F. Supp.  
17 1071, 1077 (S.D.N.Y. 1979) (“mere possibility of [infringement] is sufficient to warrant an  
18 injunction”) (internal quotation marks and citation omitted). Accordingly, Zynga respectfully  
19 requests that the Court enter the proposed permanent injunction filed concurrently herewith.

20 **B. Zynga Is Entitled to an Injunction Prohibiting Defendants from: 1) “Selling”**  
21 **or Advertising Zynga’s “Virtual Goods”; and 2) Accessing Zynga’s Servers**

22 The California Unfair Competition Law (“UCL”) authorizes the Court to “make such orders  
23 or judgments . . . as may be necessary to prevent the use or employment by any person of any  
24 practice which constitutes unfair competition[.]” Cal. Bus. & Prof. Code § 17203.

25 The remedial power granted under this section is “extraordinarily broad. Probably  
26 because . . . unfair business practices can take many forms, the Legislature has given  
27 the courts the power to fashion remedies to prevent their ‘use or employment’ in  
28

1           whatever context they may occur.” . . . . Injunctive relief “may be as wide and  
2           diversified as the means employed in perpetration of the wrongdoing.”  
3 Hewlett v. Squaw Valley Ski Corp., 54 Cal. App. 4th 499, 540 (1997) (quoting Consumers Union of  
4 U.S., Inc. v. Alta-Dena Certified Dairy, 4 Cal. App. 4th 963, 972 (1992); People v. Casa Blanca  
5 Convalescent Homes, Inc., 159 Cal. App. 3d 509, 536 (1984)).<sup>4</sup>

6           In this case, Defendants rely on two distinct but related means to perpetrate their unlawful  
7 conduct: The advertisement for the “sale” of “Virtual Goods” through the Infringing Websites and  
8 possibly other means such as email and instant messages; and the use of the Game itself to transfer  
9 “Virtual Goods”. Zynga is entitled to an injunction that will ensure Defendants can neither advertise  
10 “Virtual Goods” nor gain access to the Game to transfer “Virtual Goods.”<sup>5</sup> Zynga therefore  
11 respectfully requests that the Court enter the proposed permanent injunction filed concurrently  
12 herewith.

### 13           **C. Zynga Is Entitled to its Requested Monetary Award**

14           The Ninth Circuit has held that where, as here, trademark infringement is deliberate and  
15 willful, both the trademark owner and the buying public are slighted if a court provides no greater  
16 remedy than injunctive relief. Maier Brewing Co. v. Fleischmann Distilling Corp., 390 F.2d 117,  
17 123-24 (9th Cir. 1968); see also Lindy Pen Co., Inc. v. Bic Pen Corp., 982 F.2d 1400, 1405 (9th Cir.  
18 1993). “Monetary recovery for trademark infringement and unfair competition is measured  
19 variously by defendant’s profits, plaintiff’s actual business damages and losses caused by the wrong,  
20 or plaintiff’s loss of profits caused by the wrong.” Kelley Blue Book v. Car-Smarts, Inc., 802 F.  
21 Supp. 278, 292 (C.D. Cal. 1992); see also Brookfield Communications, Inc. v. West Coast  
22 Entertainment Corp., No. CV-98: 9074, 1999 U.S. Dist. LEXIS 23244, at \*8 (C.D. Cal. November  
23 12, 1999) (noting same). Accordingly, the question before the Court is not whether Zynga is entitled  
24 to monetary relief, but rather the appropriate amount of recovery.

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26 <sup>4</sup> Hewlett was subsequently superseded by statute on other grounds as stated in UFW of Am. v.  
Dutra Farms, 83 Cal. App. 4th 1146, 1163-64 (2000).

27 <sup>5</sup> An injunction prohibiting Defendants from advertising Zynga “Virtual Goods” is also appropriate  
28 because it will confirm that third party service providers should decline to run Defendants’  
advertisements for Zynga “Virtual Goods” if Defendants violate the Court’s injunction.

1 Courts have routinely awarded the infringing parties' profits to the injured parties as means  
2 of compensation for the injury caused in trademark infringement cases. See Thomas McCarthy,  
3 Trademarks & Unfair Competition §§ 30:25-30:26 (4th ed. 2007). The Ninth Circuit has frequently  
4 provided to injured parties profits gained from the deliberate and willful infringement of their  
5 trademarks. See e.g., Maier Brewing, 390 F.2d at 123 (granting plaintiffs the infringer's profits);  
6 Nat'l Co. v. Wolfe, 223 F.2d 195, 205 (9th Cir. 1955) (ordering an accounting of defendant's  
7 profits). In this case, the undisputed facts show that Defendants have willfully and deliberately acted  
8 to benefit from the goodwill established in Zynga's trademark. Accordingly, Zynga is entitled to  
9 recover the profits reaped from their deliberate infringement of Zynga's trademark.<sup>6</sup>

10 **D. Zynga Is Entitled to Recover its Attorneys' Fees and Costs**

11 Zynga is entitled to recover its attorneys' fees pursuant to section 35(a) of the Lanham Act,  
12 15 U.S.C. § 1117, which gives the Court discretion to award reasonable attorneys' fees in  
13 "exceptional cases." 15 U.S.C. § 1117(a). A trademark case is generally exceptional for purposes of  
14 an award of attorneys' fees when the infringement is malicious, fraudulent, deliberate or willful.  
15 Gracie v. Gracie, 217 F.3d 1060, 1068 (9th Cir. 2000); Philip Morris, 219 F.R.D. at 502. In fact, the  
16 Ninth Circuit has found an abuse of discretion when a court has failed to award attorneys' fees for  
17 willful infringement. See Playboy Enters., Inc. v. Baccarat Clothing Co., Inc., 692 F.2d 1272, 1276  
18 (9th Cir. 1982). Furthermore, a defendant's failure to participate in the litigation constitutes an  
19 exceptional circumstance that justifies an award of attorneys' fees. See Philip Morris, 219 F.R.D. at  
20 502 (citing Taylor Made Golf Co. v. Carsten Sports, 175 F.R.D. 658, 663 (S.D. Cal. 1997)).

21 Here, Defendants have chosen to disregard these proceedings, and the undisputed factual  
22 allegations of Zynga's First Amended Complaint establish that Defendants' infringement is willful  
23 and deliberate. Thus, Zynga has established that this is an exceptional case warranting an award of  
24 attorneys' fees.

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26  
27 <sup>6</sup> Courts in this district have awarded Zynga the defendants' profits in other cases very similar to the  
28 case at bar. See Zynga Game Network Inc. v. Greene, et al., No. CV:09-2744 SI, Dkt. No. 80, ¶ 12;  
and Dkt. No. 88, ¶ 12; Zynga Game Network Inc. v. Erkan, et al., No. CV:09-3264 SC, Dkt. No. 47,  
¶ 13.

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**CONCLUSION**

For the foregoing reasons, Zynga respectfully requests that the Court grant its Motion and enter default judgment against Defendants permanently enjoining Defendants from continuing their unlawful conduct; awarding Zynga Defendants' profits from their sale of "Virtual Goods"; and finding that this is an exceptional case warranting an award of attorneys' fees and costs.

Dated: May 6, 2011

By: \_\_\_\_\_ /s/  
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