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THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Anita Redd, on behalf of her
minor son, **Russell Horning**,
also known as Backpack Kid;
and **RH Performer, LLC**, a
Georgia limited liability
company

Plaintiffs,

v.

Epic Games, Inc., a North
Carolina corporation; and
Does 1 through 50, inclusive,

Defendants.

Case No.

Complaint for:

1. **Direct Infringement of Copyright;**
2. **Contributory Infringement of Copyright;**
3. **Violation of the Right of Publicity under California Common Law;**
4. **Violation of the Right of Publicity under Cal. Civ. Code § 3344;**
5. **Unfair Competition under Cal. Bus. & Prof. Code § 17200, et seq.;**
6. **False Designation of Origin under 15 U.S.C. § 1125(a);**
7. **Trademark Infringement under California Common Law;**
8. **Trademark Infringement under 15 U.S.C. § 1125(a);**
9. **Trademark Dilution under 15 U.S.C. § 1125(c)**

Demand for Jury Trial

1 Plaintiffs Anita Redd, on behalf of her minor son, Russell Horning,
2 also known as Backpack Kid (“Backpack Kid”), and RH Performer, LLC
3 (collectively referred to as “Plaintiffs”), by and through their
4 undersigned counsel, assert the following claims against Defendant
5 Epic Games, Inc. (“Epic”) and Does 1 through 50 (collectively referred
6 to as “Defendants”), and alleges as follows:

7 I. OVERVIEW

8 1. Through its unauthorized misappropriation of Backpack
9 Kid’s highly popular signature dance, the “Floss,” in its smash-hit,
10 violent video game, Fortnite Battle Royale (“Fortnite”), Epic has
11 unfairly profited from exploiting Backpack Kid’s protected creative
12 expression, likeness, and Plaintiffs’ trademark without consent or
13 authorization.

14 2. Backpack Kid is a professional performer, who created the
15 Floss dance in 2016, which exploded in popularity following his
16 performance of the dance on Saturday Night Live on May 20, 2017,
17 alongside Katy Perry. The Floss is now inextricably linked to Backpack
18 Kid and has continued to be a part of his celebrity persona.

19 3. Defendants capitalized on Backpack Kid’s celebrity and the
20 Floss’s popularity, particularly with its younger fans, by selling the
21 Floss as an in-game purchase in Fortnite as the “Floss” emote, which
22 players can buy to customize their avatars for use in the game.
23 Defendants did not credit Backpack Kid nor seek Plaintiffs’ consent to
24 use, display, reproduce, sell, or create a derivative work based upon
25 Backpack Kid’s Floss dance or likeness in Fortnite. Defendants also did
26 not seek Plaintiffs’ consent to use the term “Floss” as the name for the
27 emotes.

1 names of those defendants have been ascertained, Plaintiffs will amend
2 this complaint accordingly. Each of the defendants aided and abetted
3 and is responsible in some manner for the occurrences herein alleged,
4 and Plaintiff's injuries were proximately caused thereby.

5 10. At all times herein mentioned, each of the defendants was
6 acting as an agent, servant, employee or representative of defendants,
7 and, in doing the things alleged in this Complaint, was acting within
8 the course and scope of that agency, service, employment, or joint
9 venture.

10 **III. SUBJECT MATTER JURISDICTION AND**
11 **VENUE**

12 11. The Court has subject matter jurisdiction over this action
13 pursuant to 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1332
14 (diversity), and 28 U.S.C. § 1367 (supplemental jurisdiction).

15 12. Venue is proper in this District under A) 28 U.S.C. §
16 1391(b)(2) (federal question jurisdiction), because a substantial part of
17 the events or omissions giving rise to the claim occurred in this District;
18 and B) 28 U.S.C. §§ 1391(b)(1) and (c) (personal jurisdiction), because
19 all defendants are subject to personal jurisdiction in this State and at
20 least one in this District.

21 **IV. FACTUAL BACKGROUND**

22 **A. Backpack Kid and the Creation of the Floss**

23 13. Raised in the city of Lawrenceville, Georgia, Backpack Kid
24 began gaining popularity in 2016 for posting videos of himself dancing
25 on Instagram. Backpack Kid exploded in popularity after the world-
26 famous singer, Rihanna, posted one of his videos; Backpack Kid gained
27 55,000 followers on Instagram in two days after the Rihanna post.

1 14. After obtaining widespread notoriety, Backpack Kid
2 continued to post videos of himself dancing on Instagram. As part of
3 his dances, Backpack Kid included his signature move that he originally
4 called “The Russell.” Indeed, most of Backpack Kid’s videos included
5 Backpack Kid performing The Russell either by himself or with others.

6 15. Backpack Kid’s popularity further increased after his May
7 20, 2017 Saturday Night Live performance with Katy Perry where he
8 performed his signature dance. Katy Perry has stated that she invited
9 Backpack Kid to perform with her after discovering Backpack Kid’s
10 popular Instagram page. Fans began referring to Backpack Kid by his
11 moniker after the Saturday Night Live performance because he
12 performed the dance while wearing a backpack.

13 16. Backpack Kid also performed his signature dance in Katy
14 Perry’s 2017 “Swish Swish” music video, which was posted to YouTube
15 on August 24, 2017.¹ At the time of this filing, the Swish Swish music
16 video has over 508 million views on YouTube.

17 17. Since its creation in 2016 and its rise to fame soon after,
18 Backpack Kid’s dance maintained its popularity. Videos of the dance,
19 now known as the “Floss” or “Flossing,” gained widespread recognition
20 and notoriety, particularly on social media. Hundreds of thousands of
21 fans, including celebrities and athletes, have posted videos of
22 themselves Flossing on social media. Since the Floss’s creation,
23 Backpack Kid has used and continues to successfully use the Floss
24 commercially.

25 18. The Floss has become synonymous with Backpack Kid, who
26 is unanimously credited with creating the dance. Backpack Kid is
27

28 ¹ The video can be found at <https://www.youtube.com/watch?v=iGk5fR-t5AU>.

1 constantly inundated with requests to perform the Floss; he has
2 performed it on numerous occasions at the behest of both the public and
3 celebrities, including at schools, companies, and other locations around
4 the world. Accordingly, the Floss is a part of Backpack Kid’s celebrity
5 identity and the dance’s unique movements readily evoke a connection
6 to Backpack Kid. Plaintiffs also have copyrights in the Floss dance and
7 trademark rights in the “Floss” and “Backpack Kid.”

8 **B. Fortnite: The Most Popular Video Game Ever**

9 19. Even prior to releasing Fortnite, which would become among
10 the most popular and successful video games ever, Epic had already
11 developed two popular video game franchises: Unreal and Gears of
12 War. Since releasing the first Gears of War game in 2006, Epic released
13 several subsequent Gears of War video games, and the franchise has
14 made has made over \$1 billion in total sales.

15 20. In or around 2011, following the release of the third Gears
16 of War installment, Fortnite began from an Epic internal video game
17 “hackathon,” a gathering of Epic developers to brainstorm ideas and
18 create games in a short period. Although the Fortnite game was not
19 developed during the hackathon, the idea to merge building games (*i.e.*,
20 Minecraft) and shooter games (*i.e.*, Gears of War or Call of Duty)
21 emerged during the hackathon.

22 21. In or around July 2017, Epic released the initial version of
23 Fortnite as a paid early-access video game. However, by September
24 2017, after PlayerUnknown’s Battlegrounds—a game which occupied
25 the same “battle royale” genre as Fortnite—became a worldwide
26 success, Epic released Fortnite Battle Royale, a free-to-play battle
27 royale third person shooting game on the Windows, macOS, PlayStation
28 4 and Xbox One platforms. Epic subsequently released Fortnite on the

1 iOS, Nintendo and Android platforms on April 2, 2018, June 12, 2018,
2 and August 9, 2018, respectively.

3 22. Similar to PlayerUnknown's Battlegrounds, Fortnite
4 utilizes the battle royale format where up to 100 players, alone, in pairs,
5 or in groups, compete to be the last player or group alive. Indeed,
6 similar to Battlegrounds and Gears of War, Fortnite features the use of
7 weapons and violence, that players use to eliminate the competition by
8 attacking and shooting them.

9 23. As a free-to-play video game, Epic allows players to
10 download and play Fortnite for free. Fortnite is supported by in-game
11 transactions where players can purchase virtual currency, called
12 "Vinderbucks" or "V-Bucks." The players in turn use V-Bucks to
13 purchase customizations for their in-game avatars, including new
14 characters, pickaxe modifications, glider skins, clothes, and emotes
15 (dances or movements). Fortnite also sells "Battle Passes" or additional
16 levels that allow you to unlock skins, gliders, and emotes unique to that
17 Pass. Fortnite offers four pricing levels for purchasing V-Bucks:

- 18 1) 1,000 V-Bucks for \$9.99;
- 19 2) 2,500 (+300 Bonus) V-Bucks for \$24.99;
- 20 3) 6,000 (+1,500 Bonus) V-Bucks for \$59.99; or
- 21 4) 10,000 (+3,500 Bonus) V-Bucks for \$99.99.

22 24. There are four types of emotes: common emotes, uncommon
23 emotes, rare emotes, and epic emotes. The rarer the emote, the more
24 expensive or harder it is to obtain. Uncommon emotes cost 200 V-
25 Bucks. Rare emotes cost 500 V-Bucks. And Epic emotes cost 800 V-
26 Bucks.

27 25. To start, Fortnite provides each player with the Dance
28 Moves emote, a common emote, for no compensation. Players can then

1 obtain other emotes by purchasing and playing additional levels in
2 Battle Passes (950 V-Bucks each) that come with emotes unique to that
3 Pass, or by purchasing certain emotes directly with V-Bucks. On some
4 occasions, Fortnite sells Battle Pass emotes directly, without requiring
5 the player to purchase the Battle Pass.

6 26. Emotes are incredibly popular and are fundamental to
7 Fortnite's success. Players purchase emotes, alongside clothing and
8 skins, to personalize their Fortnite experience. Emotes have also
9 become popular outside Fortnite. Professional athletes in soccer and
10 other sports have based their celebrations on Fortnite emotes. Young
11 adults, teenagers, and kids also post videos of themselves on YouTube
12 and social media performing emotes under various hashtags, including
13 #fortnitedance or #fortnitevideos.

14 27. Upon information and belief, Epic creates emotes by copying
15 and coding dances and movements directly from popular videos, movies,
16 and television shows without consent. Epic does so by coding still
17 frames of the source material.

18 28. Epic has copied the dances and movements of numerous
19 performers, including, for example, the dance from the 2004 Snoop Dogg
20 music video, "Drop It Like It's Hot" (named the "Tidy" emote), Alfonso
21 Ribeiro's performance of his famous dance on *The Fresh Prince of Bel-*
22 *Air* television show (named the "Fresh" emote), the dance performed by
23 Will Smith on the same television show (named the "Rambunctious"
24 emote), the dance in Marlon Webb's popular "Band of the Bold" video
25 (named the "Best Mates" emote), Donald Faison's signature dance seen
26 on the NBC television show *Scrubs* (named the "Dance Moves" emote),
27 and 2 Milly's "Milly Rock" dance (named the "Swipe It" emote).

28

1 29. Moreover, Epic also misappropriated other popular dances,
2 including Backpack Kid’s Floss dance. Upon information and belief,
3 Epic did not seek consent or authorization to use any of these
4 movements or dances.

5 30. Soon after its release, Fortnite became an international
6 phenomenon. The game eclipsed 10 million players merely two weeks
7 after its release; 125 million players by July 2018. In November 2018,
8 Bloomberg announced that Fortnite had 200 million player accounts
9 across all platforms.

10 31. Fortnite’s popularity has translated into record sales for
11 Epic. Analysts have estimated that since its release, Fortnite has
12 generated between \$1 billion to \$2 billion in revenue through in-game
13 purchases such as emotes. In May 2018, Fortnite broke its own record
14 by generating approximately \$318 million in revenue, the biggest
15 month ever for a video game. In fact, nearly 80 million people played
16 Fortnite in August 2018. Because of Fortnite’s success, Epic’s estimated
17 valuation rose from about \$825 million to about \$5 billion. Bloomberg
18 estimates that Epic’s valuation could grow to \$8.5 billion by 2018’s end.

19 32. Upon information and belief, Epic will likely continue
20 adding popular emotes to Fortnite without the artists’ or creators’
21 consent or approval to attract more players and add to its ever-growing
22 revenue.

23 **C. Fortnite’s Unauthorized Use of the Floss**

24 33. On December 14, 2017, Fortnite released its Season 2 Battle
25 Pass. Players could purchase the Battle Pass, alongside its
26 accompanying emotes and other customizations, for the regular price of
27 950 V-Bucks. As part of the Season 2 Pass, Fortnite offered a new rare
28 emote that it called “Floss.” According to Fortnite, players can obtain

1 the Floss emote as a reward from Tier 49 of the Season 2 Battle Pass.
2 Also, on certain occasions, Fortnite sold the Floss emote separately for
3 500 V-Bucks.

4 34. As the name indicates, the Floss emote is identical to
5 Backpack Kid's Floss dance. If obtained or purchased, the Fortnite
6 player's avatar can perform the dance during Fortnite gameplay. The
7 reaction from many players worldwide was immediate recognition of the
8 emote as embodying the Floss while others likely believed it was Epic's
9 original creation.

10 35. Upon information and belief, Epic intentionally developed
11 the Floss emote to exploit Backpack Kid performing the Floss. In fact,
12 players had asked for it by name in various online forums relating to
13 Fortnite. Epic did not seek to obtain Plaintiffs' authorization or consent
14 for its use of Backpack Kid's likeness and the Floss.

15 36. Moreover, Plaintiffs did not give Epic express or implied
16 consent for its use of Backpack Kid's likeness and the Floss. Epic also
17 did not compensate Plaintiffs for its use of Backpack Kid's likeness and
18 the Floss for the Floss emote.

19 37. Upon information and belief, Epic added the Floss emote to
20 intentionally exploit the popularity of Backpack Kid and the Floss
21 dance without providing Plaintiffs any form of compensation.

22 38. Epic profited from its improper misappropriation of the
23 Floss and Backpack Kid's likeness by, *inter alia*: 1) selling the
24 infringing Floss emote directly to players; 2) selling the Season 2 Battle
25 Pass that contains the Floss emote; 3) advertising the Floss emote to
26 attract additional players, including Backpack Kid's fans or those
27 persons familiar with the Floss to play Fortnite and make in-game
28 purchases; 4) staying relevant to its current players to incentivize those

1 players to continue playing Fortnite; 5) impliedly representing that
2 Backpack Kid consented to Epic’s use of his likeness; 6) erroneously
3 cause the association of the Floss with the Fortnite; 7) creating the false
4 impression that Backpack Kid endorsed Fortnite; and 8) inducing
5 and/or contributing to Fortnite players’ avatars performing the Floss
6 dance.

7 39. Upon information and belief, Epic uses the Floss, and other
8 dances, to create the false impression that Epic started these dances
9 and crazes or that the artist who created them is endorsing the game.
10 Indeed, players have posted thousands of videos of themselves
11 performing the “Floss” emote without crediting Backpack Kid as the
12 dance’s creator and owner. Accordingly, upon information and belief,
13 Epic actively and knowingly directs, causes, induces, and encourages
14 others, including, but not limited to, its players, designers, suppliers,
15 distributors, resellers, software developers, and repair providers, to
16 misappropriate Backpack Kid’s likeness and the Floss dance.

17 40. Prominent artists, including Chancelor Johnathan Bennett,
18 known as Chance the Rapper, and Terrence Ferguson, known as 2
19 Milly, have also publicly disapproved of Epic’s practices, and advocated
20 for Epic sharing profits with the artists that created these dances.

21 41. Epic made a fortune from unlawfully and unfairly
22 misappropriating Backpack Kid’s and other artists’ creative expression
23 and likeness without crediting or compensating these artists. Plaintiffs
24 thus bring this lawsuit to prevent Fortnite from further using Backpack
25 Kid’s likeness and the Floss, and to recover the profits rightfully owed
26 to them.

1 **FIRST CAUSE OF ACTION**

2 **(For Direct Infringement of Copyright Against All Defendants)**

3 42. Plaintiffs hereby repeat and reallege the allegations set
4 forth in paragraphs 1 through 41 above, as though fully set forth herein

5 43. On May 20, 2017, after previously obtaining widespread
6 notoriety for his Instagram dance videos, Backpack Kid and his Floss
7 dance exploded in popularity after he performed the Floss on Saturday
8 Night Live with Katy Perry. Backpack Kid also performed The Floss in
9 Katy Perry’s 2017 “Swish Swish” music video, which was posted to
10 YouTube.

11 44. Backpack Kid is the undisputed creator of the wildly popular
12 and immediately recognizable Floss Dance. Backpack Kid’s 2016
13 Instagram videos depicting R.H performing the Floss are the original
14 depictions of the Floss or Flossing.

15 45. Plaintiffs are in the process of registering the Floss with the
16 United States Copyright Office. On July 30, 2018 and October 22, 2018,
17 Plaintiffs submitted applications for copyright registrations, which
18 were assigned Copyright Office case numbers 1-6803798591 and 1-
19 7053827951, respectively.

20 46. Defendants have infringed and continue to infringe
21 Plaintiffs’ copyrights in the Floss by selling the Floss emote as an in-
22 game purchase, under the name “Floss” that, if purchased, a player can
23 use to make his or her avatar perform during Fortnite gameplay;
24 substantially copying the Floss in digital form to the Fortnite game;
25 advertising the Floss in its promotional materials; and creating the
26 Floss emote as a derivative work of the Floss.

1 47. Defendants did not seek to obtain Plaintiffs' permission for
2 use of the Floss for the Floss emote. Nor have Defendants compensated
3 or credited Backpack Kid for their use of the Floss.

4 48. Moreover, Defendants actively and knowingly directed,
5 caused, induced, and encouraged others, including, but not limited to,
6 its players, designers, suppliers, distributors, resellers, software
7 developers, and repair providers, to misappropriate Backpack Kid's
8 likeness and the Floss.

9 49. Defendants' acts of infringement have been willful,
10 intentional, and purposeful, in disregard of and with indifference to
11 Plaintiffs' rights.

12 50. Defendants' willful and continued unauthorized use of the
13 Floss has caused and will continue to cause confusion and mistaken
14 belief by leading the public to erroneously associate the Floss with
15 Fortnite in violation of 17 U.S.C. §§ 101 et seq.

16 51. As a result of Defendants' conduct, Plaintiffs have been
17 damaged by being precluded from receiving their rightful share of the
18 profits earned by Epic for its improper and unlicensed use of Plaintiffs'
19 exclusive copyrights in the Floss in Fortnite.

20 52. Plaintiffs are entitled to permanent injunctive relief
21 preventing Defendants, and their officers, agents, and employees, and
22 all related persons from further using the Floss and engaging in other
23 acts in violation of Copyright law.

24 53. As a direct and proximate result of Defendants'
25 infringement of Plaintiffs' copyrights and exclusive rights under
26 copyright, Plaintiffs are also entitled to recover damages, including
27 attorneys' fees, and any profits obtained by Defendants as a result of
28

1 the infringements alleged above, in an amount according to proof to be
2 determined at the time of trial.

3 54. In doing the acts herein alleged, Defendants acted
4 fraudulently, willfully, and with malice, and Plaintiffs are therefore
5 entitled to punitive damages according to proof at the time of trial.

6 **SECOND CAUSE OF ACTION**

7 **(For Contributory Infringement of Copyright Against All**
8 **Defendants)**

9 55. Plaintiffs hereby repeat and reallege the allegations set
10 forth in paragraphs 1 through 54 above, as though fully set forth herein.

11 56. Plaintiffs are in the process of registering the Floss with the
12 United States Copyright Office. On July 30, 2018 and October 22, 2018,
13 Plaintiffs submitted applications for copyright registrations, which
14 were assigned Copyright Office case numbers 1-6803798591 and 1-
15 7053827951, respectively.

16 57. Defendants have infringed and continue to infringe
17 Plaintiffs' copyrights in the Floss by selling the Floss emote as an in-
18 game purchase, under the name "Floss" that, if purchased, a player can
19 use to make his or her avatar perform during Fortnite gameplay;
20 substantially copying the Floss in digital form to the Fortnite game;
21 advertising the Floss in its promotional materials; and creating the
22 Floss emote as a derivative work of the Floss.

23 58. By providing the Floss emote necessary for its players to
24 commit direct copyright infringement, Defendants have and continue to
25 materially contribute to the unauthorized reproductions and
26 distributions by its players of the Floss.

1 59. Defendants did not seek to obtain Plaintiffs' permission for
2 its use of the Floss for the Floss emote. Nor have Defendants
3 compensated or credited Backpack Kid for their use of the Floss.

4 60. Moreover, Defendants actively and knowingly directed,
5 caused, induced, and encouraged others, including, but not limited to,
6 its players, designers, suppliers, distributors, resellers, software
7 developers, and repair providers, to misappropriate Backpack Kid's
8 likeness and the Floss.

9 61. Defendants' acts of infringement have been willful,
10 intentional, and purposeful, in disregard of and with indifference to
11 Plaintiffs' rights.

12 62. Defendants' willful and continued unauthorized use of the
13 Floss has caused and will continue to cause confusion and mistaken
14 belief by leading the public to erroneously associate the Floss with
15 Fortnite in violation of 17 U.S.C. §§ 101 et seq.

16 63. As a result of Defendants' conduct, Plaintiffs have been
17 damaged by being precluded from receiving his rightful share of the
18 profits earned by Epic for its improper and unlicensed use of Plaintiffs'
19 exclusive copyrights in the Floss in Fortnite.

20 64. Defendants' conduct is causing and, unless enjoined and
21 restrained by this Court, will continue to cause Plaintiffs great and
22 irreparable injury that cannot be compensated or measured in money.
23 Plaintiffs have no adequate remedy at law. Pursuant to 17 U.S.C. §
24 502, Plaintiffs are entitled to injunctive relief, prohibiting further
25 contributory infringements of Plaintiffs' copyrights.

26 65. As a direct and proximate result of Defendants'
27 infringement of Plaintiffs' copyrights and exclusive rights under
28 copyright, Plaintiffs are also entitled to recover damages, including

1 attorneys' fees, and any profits obtained by Defendants as a result of
2 the infringements alleged above, in an amount according to proof to be
3 determined at the time of trial.

4 66. In doing the acts herein alleged, Defendants acted
5 fraudulently, willfully, and with malice, and Plaintiffs are therefore
6 entitled to punitive damages according to proof at the time of trial.

7 **THIRD CAUSE OF ACTION**

8 **(For Violation of the Right of Publicity Under California**
9 **Common Law Against All Defendants)**

10 67. Plaintiffs hereby repeat and reallege the allegations set
11 forth in paragraphs 1 through 66, above, as though fully set forth
12 herein.

13 68. Through their use of the Floss as an in-game dance emote
14 that can be purchased as the emote of the same name, Defendants
15 misappropriated Backpack Kid's identity. The Floss emote depicts
16 Backpack Kid performing the Floss.

17 69. Upon information and belief, Defendants created the Floss
18 emote by capturing and digitally copying Backpack Kid performing the
19 Floss. Defendants then utilized the digital copy to create code that, if
20 purchased, allows player avatars to perform the Floss.

21 70. Defendants did not seek or obtain Plaintiffs' authorization
22 or consent for its use of Backpack Kid's likeness or the Floss for the
23 Floss emote. Nor have Defendants compensated or credited Backpack
24 Kid for their use of his likeness or the Floss.

25 71. Defendants used Backpack Kid's likeness and the Floss to
26 generate significant wealth by: 1) selling the infringing Floss emote
27 directly to players; 2) advertising the Floss emote to attract additional
28 players, including Backpack Kid's fans or those persons familiar with

1 the Floss to play Fortnite and make in-game purchases; 3) using
2 Backpack Kid's fame to stay relevant to its current players to
3 incentivize those players to continue playing Fortnite; 4) impliedly
4 representing that Backpack Kid consented to Epic's use of his likeness;
5 5) intentionally causing the erroneous public association between the
6 Floss and Fortnite; 6) creating the false impression that Backpack Kid
7 endorsed Fortnite; and 7) inducing and/or contributing to the
8 performance and misattribution of the Floss by others.

9 72. As a performance artist, Backpack Kid exploits his identity
10 by performing in shows, events, and with the media. Backpack Kid was
11 damaged by Defendants' conduct as he was prevented from reaping the
12 profits of licensing his likeness or the Floss to Defendants.

13 73. Defendants' conduct caused and will continue to cause
14 confusion and mistaken belief by leading the public to erroneously
15 believe that Backpack Kid consented to the use of his likeness or the
16 Floss in the Fortnite game.

17 74. Plaintiffs are entitled to permanent injunctive relief
18 preventing Defendants, and their officers, agents, and employees, and
19 all related persons from further using Backpack Kid's likeness or the
20 Floss.

21 75. Plaintiffs are also entitled to recover damages, including any
22 profits obtained by Defendants as a result of the infringements alleged
23 above, in an amount according to proof to be determined at the time of
24 trial.

1 **FOURTH CAUSE OF ACTION**

2 **(For Violation of the Right of Publicity Under Cal. Civ. Code §**
3 **3344 Against All Defendants)**

4 76. Plaintiffs hereby repeat and reallege the allegations set
5 forth in paragraphs 1 through 75, above, as though fully set forth
6 herein.

7 77. Through their use of the Floss as an in-game dance emote
8 that can be purchased as the emote of the same name, Defendants
9 misappropriated Backpack Kid's identity. The Floss emote depicts
10 Backpack Kid performing the Floss.

11 78. Upon information and belief, Defendants created the Floss
12 emote by capturing and digitally copying Backpack Kid performing the
13 Floss. Defendants then utilized the digital copy to create code that, if
14 purchased, allows player avatars to perform the Floss.

15 79. Defendants did not seek or obtain Plaintiffs' authorization
16 or consent for its use of Backpack Kid's likeness or the Floss for the
17 Floss emote. Nor have Defendants compensated or credited Backpack
18 Kid for their use of his likeness or the Floss.

19 80. Defendants used Backpack Kid's likeness and the Floss to
20 generate significant wealth by: 1) selling the infringing Floss emote
21 directly to players; 2) advertising the Floss emote to attract additional
22 players, including Backpack Kid's fans or those persons familiar with
23 the Floss to play Fortnite and make in-game purchases; 3) using
24 Backpack Kid's fame to stay relevant to its current players to
25 incentivize those players to continue playing Fortnite; 4) impliedly
26 representing that Backpack Kid consented to Epic's use of his likeness;
27 5) intentionally causing the erroneous public association between the
28 Floss and Fortnite; 6) creating the false impression that Backpack Kid

1 endorsed Fortnite; and 7) inducing and/or contributing to the
2 performance and misattribution of the Floss by others.

3 81. As a performance artist, Backpack Kid exploits his identity
4 by performing in shows, events, and with the media. Backpack Kid was
5 damaged by Defendants' conduct as he was prevented from reaping the
6 profits of licensing his likeness or the Floss to Defendants.

7 82. Defendants' conduct caused and will continue to cause
8 confusion and mistaken belief by leading the public to erroneously
9 believe that Backpack Kid consented to the use of his likeness or the
10 Floss in the Fortnite game.

11 83. Plaintiffs are entitled to permanent injunctive relief
12 preventing Defendants, and their officers, agents, and employees, and
13 all related persons from further using Backpack Kid's likeness or the
14 Floss.

15 84. Plaintiffs are also entitled to recover damages, including any
16 profits obtained by Defendants as a result of the infringements alleged
17 above, in an amount according to proof to be determined at the time of
18 trial.

19 **FIFTH CAUSE OF ACTION**

20 **(Unfair Competition Under Cal. Bus. & Prof. Code § 17200)**

21 85. Plaintiffs hereby repeat and reallege the allegations set
22 forth in paragraphs 1 through 84, above, as though fully set forth
23 herein.

24 86. By misappropriating Backpack Kid's likeness and the Floss
25 through the creation of the Floss emote, Defendants have engaged in
26 business acts or practices that constitute unfair competition in violation
27 of Cal. Bus. & Prof. Code. § 17200.

28

1 87. As a result of Defendants' violations, Defendants have
2 unjustly enriched themselves by: 1) selling the infringing Floss emote
3 directly to players; 2) advertising the Floss emote to attract additional
4 players, including Backpack Kid's fans or those persons familiar with
5 the Floss to play Fortnite and make in-game purchases; 3) using
6 Backpack Kid's fame to stay relevant to its current players to
7 incentivize those players to continue playing Fortnite; 4) impliedly
8 representing that Backpack Kid consented to Epic's use of his likeness;
9 5) intentionally causing the erroneous public association between the
10 Floss and Fortnite; 6) creating the false impression that Backpack Kid
11 endorsed Fortnite; and 7) inducing and/or contributing to the
12 performance and misattribution of the Floss by others.

13 88. Plaintiffs have been damaged by Defendants' conduct as
14 Plaintiffs were prevented from reaping the profits of licensing Backpack
15 Kid's likeness or the Floss to Defendants.

16 89. Plaintiffs are entitled to permanent injunctive relief
17 preventing Defendants, and their officers, agents, and employees, and
18 all related persons from further using Backpack Kid's likeness and
19 Plaintiffs' trademark in the Backpack Kid name and copyright in the
20 Floss dance.

21 90. Plaintiffs are also entitled to recover damages, including any
22 profits obtained by Defendants as a result of the infringements alleged
23 above, in an amount according to proof to be determined at the time of
24 trial.

25 **SIXTH CAUSE OF ACTION**

26 **(False Designation of Origin Under 15 U.S.C. § 1125(a))**

27 91. Plaintiffs hereby repeat and reallege the allegations set
28 forth in paragraphs 1 through 90 above, as though fully set forth herein.

1 92. Since creating the Floss and performing it on Saturday
2 Night Live, Backpack Kid's Floss dance has exploded in popularity. The
3 Floss has become synonymous with Backpack Kid, who is unanimously
4 credited with creating the dance. Backpack Kid has also been
5 interviewed several times about the creation of the Floss and how to
6 properly perform it. Accordingly, the Floss is a part of Backpack Kid's
7 identity and the dance's unique movements readily evoke imagery of
8 Backpack Kid's popular Instagram videos and famous Saturday Night
9 Live performance.

10 93. In Fortnite, players can have their characters perform the
11 Floss within the game. In fact, the in-game dance is also named Floss.
12 Through Defendants' unauthorized use of the "Floss" name and dance
13 in Fortnite, Defendants have misappropriated Backpack Kid's likeness,
14 copyright and trademark.

15 94. Moreover, Plaintiffs are damaged by Defendants'
16 exploitation of the Floss and Backpack Kid's likeness through 1) selling
17 the infringing Floss emote directly to players; 2) advertising the Floss
18 emote to attract additional players, including Backpack Kid's fans or
19 those persons familiar with the Floss to play Fortnite and make in-game
20 purchases; 3) using Backpack Kid's fame to stay relevant to its current
21 players to incentivize those players to continue playing Fortnite; 4)
22 impliedly representing that Backpack Kid consented to Epic's use of his
23 likeness; 5) intentionally causing the erroneous public association
24 between the Floss and Fortnite; 6) creating the false impression that
25 Backpack Kid endorsed Fortnite; and 7) inducing and/or contributing to
26 the performance and misattribution of the Floss by others.

27

28

1 95. As a result of Defendants' conduct, Plaintiffs have been
2 damaged by being precluded from receiving his rightful share of the
3 profits from selling or licensing the Floss name and dance.

4 96. Moreover, Plaintiffs were damaged by Defendants' conduct
5 as they were prevented from reaping the profits of licensing the Floss
6 name and dance to Defendants for commercial gain.

7 97. Plaintiffs are entitled to permanent injunctive relief
8 preventing Defendants, and their officers, agents, and employees, and
9 all related persons from further using the Floss name and dance.

10 98. Plaintiffs are also entitled to recover damages, including any
11 profits obtained by Defendants as a result of the infringements alleged
12 above, in an amount according to proof to be determined at the time of
13 trial.

14 **SEVENTH CAUSE OF ACTION**

15 **(Trademark Infringement Under California Common Law)**

16 99. Plaintiffs hereby repeat and reallege the allegations set
17 forth in paragraphs 1 through 98, above, as though fully set forth
18 herein.

19 100. Since Backpack Kid's creation of the Floss in 2016 and its
20 rise to fame soon after, the Floss exploded in popularity. Consequently,
21 the public has identified the dance as the Floss. Accordingly, since
22 2016, Backpack Kid has used, and thereby owns common law
23 trademark rights in the Floss.

24 101. The Floss name is distinctive and has acquired
25 distinctiveness through Backpack Kid's continuous and widespread use
26 of the Floss name and dance in performances and videos in the United
27 States and worldwide.

28

1 102. In Fortnite, players can have their characters perform the
2 dance within the game. In fact, the in-game dance is also named the
3 Floss. Through Defendants' unauthorized use of the "Floss" name and
4 dance in Fortnite, Defendants have misappropriated Plaintiffs'
5 trademark.

6 103. Moreover, Plaintiffs damaged by Defendants' exploitation of
7 the Floss name through 1) selling the infringing Floss emote directly to
8 players; 2) advertising the Floss emote to attract additional players,
9 including Backpack Kid's fans or those persons familiar with the Floss
10 to play Fortnite and make in-game purchases; 3) using Backpack Kid's
11 fame to stay relevant to its current players to incentivize those players
12 to continue playing Fortnite; 4) impliedly representing that Backpack
13 Kid consented to Epic's use of his likeness; 5) intentionally causing the
14 erroneous public association between the Floss and Fortnite; 6) creating
15 the false impression that Backpack Kid endorsed Fortnite; and 7)
16 inducing and/or contributing to the performance and misattribution of
17 the Floss by others.

18 104. As a result of Defendants' conduct, Plaintiffs have been
19 damaged by being precluded from receiving his rightful share of the
20 profits from selling or licensing the Floss name and dance.

21 105. Moreover, Plaintiffs were damaged by Defendants' conduct
22 as he was prevented from reaping the profits of licensing the Floss name
23 and dance to Defendants for commercial gain.

24 106. Plaintiffs are entitled to permanent injunctive relief
25 preventing Defendants, and their officers, agents, and employees, and
26 all related persons from further using the Floss name and dance.

27 107. Plaintiffs are also entitled to recover damages, including any
28 profits obtained by Defendants as a result of the infringements alleged

1 above, in an amount according to proof to be determined at the time of
2 trial.

3 **EIGHTH CAUSE OF ACTION**

4 **(Trademark Infringement Under 15 U.S.C. § 1125(a))**

5 108. Plaintiffs hereby repeat and reallege the allegations set
6 forth in paragraphs 1 through 107, above, as though fully set forth
7 herein.

8 109. Defendants' unauthorized use of "Floss" name and dance for
9 the Floss emote in its violent Fortnite game constitutes infringement in
10 violation of the Lanham Act, 15. U.S.C. § 1125(a), *et seq.*, and has caused
11 substantial and irreparable injury to Plaintiffs' reputation and goodwill.

12 110. As a direct and proximate result of Defendants' trademark
13 infringement, Plaintiffs are entitled to permanent injunctive relief
14 preventing Defendants, and their officers, agents, and employees, and
15 all related persons from further using the Floss name and dance.

16 111. Plaintiffs are also entitled to recover damages, including any
17 profits obtained by Defendants as a result of the infringements alleged
18 above, in an amount according to proof to be determined at the time of
19 trial.

20 112. Defendants' acts have been deliberate, willful, and
21 intentional and purposeful to exploit Backpack Kid's celebrity and
22 popularity of the Floss name and dance.

23 113. Defendants threaten to continue to advertise, promote,
24 market, sell and offer for sale the Floss emote using the same name as
25 Plaintiffs' mark, and unless and restrained and enjoined, will continue
26 to do so to Plaintiffs' irreparable damage.

27 114. Defendants' conduct is causing and, unless enjoined and
28 restrained by this Court, will continue to cause Plaintiffs great and

1 irreparable injury that cannot be compensated or measured in money.
2 Plaintiffs thus have no adequate remedy at law and are entitled to
3 injunctive relief, prohibiting further infringements of Plaintiffs'
4 trademark.

5 115. In addition, Plaintiffs have incurred costs and attorneys' fees
6 to bring this action.

7 **NINTH CAUSE OF ACTION**

8 **(Trademark Dilution Under 15 U.S.C. § 1125(c))**

9 116. Plaintiffs hereby repeat and reallege the allegations set
10 forth in paragraphs 1 through 115, above, as though fully set forth
11 herein.

12 117. By virtue of the prominent and continuous use of the Floss
13 mark, Plaintiffs' mark has become distinctive and famous within the
14 meaning of 15 U.S.C. § 1125(c).

15 118. Defendants' conduct dilutes the distinctive quality of
16 Plaintiffs' mark in violation of Section 43(c) of the Lanham Act, 15
17 U.S.C. § 1125(c).

18 119. Defendants' conduct and actions have lessened the capacity
19 of Plaintiffs' mark as Defendants did not credit Backpack Kid nor seek
20 his consent to use the Floss trademark.

21 120. Defendants' acts have been deliberate, willful, and
22 intentional and purposeful to exploit Backpack Kid's celebrity and
23 popularity of the Floss name and dance.

24 121. Defendants threaten to continue to advertise, promote,
25 market, sell and offer for sale the Floss emote using the same name as
26 Plaintiffs' mark, and unless and restrained and enjoined, will continue
27 to do so to Plaintiffs' irreparable damage.

28

1 122. Defendants' conduct is causing and, unless enjoined and
2 restrained by this Court, will continue to cause Plaintiffs great and
3 irreparable injury that cannot be compensated or measured in money.
4 Plaintiffs thus have no adequate remedy at law and are entitled to
5 injunctive relief, prohibiting further dilution of Plaintiffs' trademark.

6 123. In addition, Plaintiffs have incurred costs and attorneys' fees
7 to bring this action.

8 **PRAYER FOR RELIEF**

9 **As to the First Cause of Action:**

- 10 1. For an order restraining Defendants from using, selling, or
11 displaying Plaintiffs' copyright in its Fortnite game;
12 2. For an award of damages according to proof;
13 3. For punitive and/or exemplary damages;
14 4. For attorney's fees and costs;

15 **As to the Second Cause of Action:**

- 16 5. For an order restraining Defendants from using, selling, or
17 displaying Plaintiffs' copyright in its Fortnite game;
18 6. For an award of damages according to proof;
19 7. For punitive and/or exemplary damages;
20 8. For attorney's fees and costs;

21 **As to the Third Cause of Action:**

- 22 9. For an order restraining Defendants from using, selling, or
23 displaying Backpack Kid's likeness in its Fortnite game;
24 10. For an award of damages according to proof;

25 **As to the Fourth Cause of Action:**

- 26 11. For an order restraining Defendants from using, selling, or
27 displaying Backpack Kid's likeness in its Fortnite game;
28 12. For an award of damages according to proof;

1 13. For punitive and/or exemplary damages;

2 **As to the Fifth Cause of Action:**

3 14. For an order restraining Defendants from using, selling, or
4 displaying Plaintiffs' copyright and likeness in its Fortnite game;

5 15. For an award of damages according to proof;

6 16. For punitive and/or exemplary damages;

7 17. For attorney's fees and costs;

8 **As to the Sixth Cause of Action:**

9 18. For an order restraining Defendants from using, selling, or
10 displaying Plaintiffs' copyright and likeness in its Fortnite game;

11 19. For an award of damages according to proof;

12 20. For punitive and/or exemplary damages; and

13 21. For attorney's fees and costs;

14 **As to the Seventh Cause of Action:**

15 22. For an order restraining Defendants from using, selling, or
16 displaying Plaintiffs' trademark in Fortnite;

17 23. For an award of damages according to proof; and

18 **As to the Eighth Cause of Action:**

19 24. For an order restraining Defendants from using, selling, or
20 displaying Plaintiffs' trademark in Fortnite;

21 25. For an award of damages according to proof;

22 26. For punitive and/or exemplary damages;

23 27. For attorney's fees and costs;

24 **As to the Ninth Cause of Action:**

25 28. For an order restraining Defendants from using, selling, or
26 displaying Plaintiffs' trademark in Fortnite;

27 29. For an award of damages according to proof;

28 30. For punitive and/or exemplary damages;

1 31. For attorney's fees and costs;

2 **As to All Causes of Action:**

3 32. For costs of suit; and

4 33. For such other and further relief as the Court may deem
5 proper.

6 Dated: December 17, 2018

Respectfully Submitted,

7
8 **Pierce Bainbridge Beck Price &
9 Hecht LLP**

10
11 By: /s/Carolynn Kyungwon Beck
12 Carolynn Kyungwon Beck
13 *Attorneys for Plaintiffs*

JURY TRIAL

Plaintiffs request a trial by jury on all issues to which it is entitled a jury.

Dated: December 17, 2018

Respectfully Submitted,

Pierce Bainbridge Beck Price & Hecht LLP

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