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10 Gameloft S.A. and Gameloft, Inc.

2009 MAY 27 PM 3:27
GREENBERG GLUSKER FIELDS CLAMAN & MACHTINGER LLP
CENTRAL DISTRICT OF CALIFORNIA
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11 UNITED STATES DISTRICT COURT
12 CENTRAL DISTRICT OF CALIFORNIA

13 GAMELOFT S.A. and GAMELOFT,
14 INC.,

15 Plaintiffs,

16 v.

17 ROBERT BURCK d/b/a THE NAKED
18 COWBOY; NAKED COWBOY
19 ENTERPRISES; and DOES 1 through
20 10, inclusive,

21 Defendants.

Case No. **CV09-3769**
**COMPLAINT FOR
DECLARATORY RELIEF
DEMAND FOR JURY TRIAL**

AHM
(E)

22 Plaintiffs Gameloft, S.A. and Gameloft, Inc. (collectively, "Gameloft")
23 hereby allege as follows:

24 **INTRODUCTION**

25 1. In this case, Gameloft, a publisher of video games for mobile phones
26 and other portable devices, seeks to vindicate its First Amendment right to evoke
27 cultural icons and landmarks in a work of artistic expression. The game at issue is
28 "New York Nights," an interactive simulation in which players navigate through
the neighborhoods and streets of New York City. Defendants claim to own rights

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1 in the “Naked Cowboy,” a street performer who regularly appears in New York’s
2 Times Square. They have threatened Gameloft with legal action and monetary
3 damages, contending that one of the characters in Gameloft’s video game is
4 reminiscent of the “Naked Cowboy,” and therefore violates their trademark
5 interests. Having been so threatened, Gameloft seeks to remove the cloud that
6 defendants have placed on its rights by requesting a declaration that its use of
7 defendants’ trademark, if any, is protected by the First Amendment and has not
8 infringed any of defendants’ rights.

9 10 JURISDICTION AND VENUE

11 2. This action arises under the Declaratory Judgment Act, 28 U.S.C. §
12 2201, and the Lanham Act, 15 U.S.C. § 1121 *et seq.* This Court has subject matter
13 jurisdiction under 28 U.S.C. §§ 1331 and 1338(a).

14 3. Venue in this Judicial District is proper under 28 U.S.C. § 1391 in that
15 a substantial part of the events giving rise to Gameloft’s claims occurred in this
16 Judicial District, and that defendants are subject to personal jurisdiction in this
17 District by virtue of their transacting and soliciting business in this District.

18 19 THE PARTIES

20 4. Gameloft S.A. is a French corporation that develops and distributes
21 mobile phone video games and games for other portable hand-held devices.
22 Gameloft, Inc. is its United States affiliate, and it maintains employees and an
23 office in California. Gameloft S.A. and Gameloft, Inc. are referred to collectively
24 herein as “Gameloft.”

25 5. Gameloft is informed and believes, and based thereon alleges, that
26 defendant Robert Burck, d/b/a The Naked Cowboy (“Burck”) is a street performer
27 who makes appearances in New York’s Times Square wearing a white cowboy hat,
28 white cowboy boots, white underwear briefs, and an acoustic guitar. Gameloft is

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1 further informed and believes, and based thereon alleges, that Burck has parlayed
2 his success as a street performer into other business ventures, such as personal
3 appearances, motivational speaking, television, and licensing activities, which
4 ventures he conducts through defendant Naked Cowboy Enterprises, form of
5 business unknown.

6 6. Gameloft is informed and believes, and based thereon alleges that
7 defendants Burck and Naked Cowboy Enterprises transact business throughout the
8 United States, including in this Judicial District, by soliciting and entering into
9 license agreements and other business ventures.

10 7. Gameloft is unaware of the true names and capacities of the defendants
11 sued herein as Does 1 through 10, inclusive, and therefore sues these defendants by
12 fictitious names. Gameloft will seek leave of the Court to amend this Complaint to
13 allege their true names and capacities when ascertained. Gameloft is informed and
14 believes, and based thereon alleges, that each fictitiously named defendant holds or
15 purports to hold interests in the trademark rights at issue in this Complaint. Burck,
16 Naked Cowboy Enterprises and Does 1 through 10 are sometimes referred to
17 collectively herein as "Defendants."

18 8. Gameloft is informed and believes, and based thereon alleges, that at
19 all times relevant herein, each of the Defendants was the agent, servant, or
20 employee of each other Defendant, and at all times relevant herein was acting in
21 whole or at least in part within the scope of such agency.

22
23 **GENERAL ALLEGATIONS**

24 9. In April 2008, Gameloft released its mobile game entitled "New York
25 Nights 2: Friends for Life" for mobile telephones. In May 2009, Gameloft
26 submitted a version of the game to Apple so it could be released on the iPhone and
27 iPod Touch devices under the name "New York Nights: Success in the City." The
28 game, in each of its versions, is referred to herein as the "Game."

1 10. The Game is an interactive social simulation in which players choose a
2 character (with a personalized hairstyle and wardrobe) to live, work and play in
3 New York City. The player is given a wide range of choices to decide how to
4 conduct his or her social, professional and love lives, all while attending to basic
5 needs like eating, sleeping and showering. Each choice the player makes affects the
6 outcome of the Game.

7 11. The New York backdrop pervades all aspects of the Game. Arriving at
8 John F. Kennedy airport, the player's first task is to hail a yellow taxi to a
9 Greenwich Village apartment. The player must then find a roommate, get a job,
10 and form relationships with some of the characters that appear in the Game. The
11 key to making players feel that they are immersed in the New York "experience" is
12 the Game's realism. Subject to the technological limitations of the mobile game
13 medium, the Game depicts several real life New York neighborhoods for the player
14 to explore, such as 5th Avenue, Wall Street, Central Park, Times Square and
15 Chinatown. Within each neighborhood, landmarks such as the Statue of Liberty,
16 yellow cabs, Broadway theaters, the Rockefeller Square ice rink and Christmas tree,
17 hot dog vendors, street artists and performers, homeless people and tourists
18 heighten the realism for the player.

19 12. In one portion in the Game, a street performer wearing a cowboy hat
20 and playing a guitar is depicted in Times Square. In the mobile version of the
21 Game, the character appears in underwear. In the iPhone/iPod version, he appears
22 in a brown hat, pants and a beard. In both versions, he holds a guitar. This
23 character, named "Nick," is just one of the numerous characters depicted, and he
24 does not play a major role in the Game. Indeed, the segment in which Nick is
25 featured lasts for only a matter of seconds, compared to the several hours of game
26 play required to complete the Game.

27 13. On or about May 15, 2009, Mathieu Rolland (a Gameloft employee
28 based in California) received a letter from one of Defendants' representatives, Todd

1 Rubenstein, who identified himself as a Vice President of Naked Cowboy
2 Enterprises. Mr. Rubenstein claimed that Gameloft was using its trademark in
3 NAKED COWBOY (U.S.P.T.O. Reg. No. 2560456) without authorization in the
4 Game. In fact, the Game does not mention or refer to the words “Naked Cowboy”
5 at all.

6 14. Mr. Rubenstein further contended that Gameloft and any other parties
7 associated with the development of the Game were liable for licensing fees and
8 “any liabilities that may need to be addressed with regard to the unauthorized uses.”
9 He further threatened to seek damages unless Gameloft paid Defendants a license
10 fee.

11 15. On or about May 26, 2009, Gameloft’s counsel responded to Mr.
12 Rubenstein’s letter, pointing out that video games are expressive works entitled to
13 First Amendment protection, and that an artistic work’s use of a trademark is not
14 actionable unless the use of the mark has no artistic relevance to the underlying
15 work whatsoever, or, if it has some artistic relevance, unless it explicitly misleads
16 as to the source or content of the work.

17 16. Gameloft noted that, to the extent the “Nick” character may remind
18 people of the “Naked Cowboy,” it is because he, like the other icons featured in the
19 Game, is part of the Times Square landscape that evokes the realistic look and feel
20 of the city. Gameloft also stated that there is nothing in the Game that would
21 explicitly mislead users into thinking that the “Naked Cowboy” produced or
22 sponsored the Game. Not only is the “Nick” character a minor part of the Game,
23 but he is a humorous caricature that imitates the style of Times Square street
24 performers for comic effect, and is not a literal depiction of the “Naked Cowboy.”

25 17. Mr. Rubenstein responded and, without even mentioning Gameloft’s
26 First Amendment argument, stated: “[W]e are completely dissatisfied with your
27 response and you will be notified of our action with regard to Gameloft’s
28

1 unauthorized use of the Naked Cowboy registered trademark for commercial
2 purposes in the game 'New York Nights.'”

3
4 **CLAIM FOR RELIEF**

5 **(Declaratory Judgment - No Trademark Infringement:**

6 **15 U.S.C. § 1121 et seq.)**

7 18. Gameloft realleges and incorporates by this reference the allegations
8 contained in paragraphs 1 through 17, inclusive, as though they were fully set forth
9 herein.

10 19. By reason of the foregoing facts, an actual controversy has arisen
11 between the parties as to whether the Game infringes Defendants' alleged
12 trademarks rights, either as registered or as protected under the common law.
13 Gameloft contends that it has not used Defendants' registered trademark in any
14 manner; that the Game's "Nick" character is a humorous caricature that is fully
15 protected by the First Amendment to the extent it reminds players of the "Naked
16 Cowboy"; and that Gameloft has not directly or indirectly infringed any trademarks
17 or other rights owned or held by Defendants.

18 20. Defendants dispute these contentions. They claim that Gameloft has
19 infringed their trademark rights in the "Naked Cowboy," and have threatened
20 Gameloft with legal action unless Gameloft pays Defendants a license fee.

21 21. In view of the foregoing, an actual controversy has arisen and exists
22 between Gameloft and Defendants within the meaning of the Declaratory Judgment
23 Act, 28 U.S.C. § 2201. Accordingly, Gameloft hereby requests a declaration of this
24 Court under the provisions of 28 U.S.C. § 2201, setting forth the respective rights
25 and other legal relations of Gameloft and Defendants. In particular, Gameloft
26 requests a declaration that the Game does not directly or indirectly infringe
27 Defendants' trademark rights (if any), so there will be no controversy clouding the
28 right of Gameloft or its licensees to continue distributing the Game.

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PRAYER

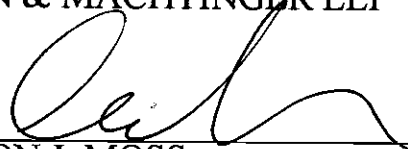
WHEREFORE, Gameloft prays judgment against Defendants as follows:

1. For a declaration that Gameloft has not infringed any trademarks owned or held by Defendants;
2. For injunctive relief restraining Defendants, their agents, licensees, servants, employees, successors, and assigns, and all others in concert or privity with them, from bringing any lawsuit or threat against Gameloft or any other person or entity for trademark infringement in connection with the development, marketing or distribution of the Game;
3. For an award of the costs, expenses and attorneys' fees incurred by Gameloft herein; and
4. For such other and further relief as the Court may deem just and proper.

DATED: May 27, 2009

GREENBERG GLUSKER FIELDS
CLAMAN & MACHTINGER LLP

By: _____



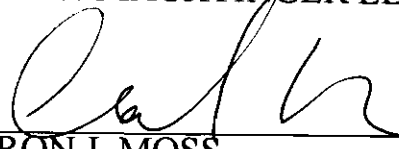
AARON J. MOSS
Attorneys for Plaintiffs Gameloft S.A.
and Gameloft, Inc.

DEMAND FOR JURY TRIAL

Plaintiffs hereby request a jury trial on all issues so triable.

DATED: May 27, 2009

GREENBERG GLUSKER FIELDS
CLAMAN & MACHTINGER LLP

By: 
AARON J. MOSS
Attorneys for Plaintiffs Gameloft S.A.
and Gameloft, Inc.

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I (a) PLAINTIFFS (Check box if you are representing yourself)
GAMELOFT S.A. and GAMELOFT, INC.

DEFENDANTS
ROBERT BURCK d/b/a THE NAKED COWBOY and NAKED COWBOY ENTERPRISES, and DOES 1 through 10, inclusive

(b) Attorneys (Firm Name, Address and Telephone Number. If you are representing yourself, provide same.)
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1900 Avenue of the Stars, 21st Floor, Los Angeles, CA 90067
Tel: 310.553.3610 Fax: 310.553.0687

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an X in one box only.)

1 U.S. Government Plaintiff 3 Federal Question (U.S. Government Not a Party)

2 U.S. Government Defendant 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES - For Diversity Cases Only (Place an X in one box for plaintiff and one for defendant.)

Citizen of This State	PTF <input type="checkbox"/> 1	DEF <input type="checkbox"/> 1	Incorporated or Principal Place of Business in this State	PTF <input type="checkbox"/> 4	DEF <input type="checkbox"/> 4
Citizen of Another State	<input type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated and Principal Place of Business in Another State	<input type="checkbox"/> 5	<input type="checkbox"/> 5
Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6

IV. ORIGIN (Place an X in one box only.)

1 Original Proceeding 2 Removed from State Court 3 Remanded from Appellate Court 4 Reinstated or Reopened 5 Transferred from another district (specify): 6 Multi-District Litigation 7 Appeal to District Judge from Magistrate Judge

V. REQUESTED IN COMPLAINT: JURY DEMAND: Yes No (Check 'Yes' only if demanded in complaint.)

CLASS ACTION under F.R.C.P. 23: Yes No **MONEY DEMANDED IN COMPLAINT: \$**

VI. CAUSE OF ACTION (Cite the U. S. Civil Statute under which you are filing and write a brief statement of cause. Do not cite jurisdictional statutes unless diversity.)
15 U.S.C. Section 1121(a), 28 U.S.C. Section 2201

VII. NATURE OF SUIT (Place an X in one box only.)

<p>OTHER STATUTES</p> <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce/ICC Rates/etc. <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Act <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Info. Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes	<p>CONTRACT</p> <input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loan (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise <p>REAL PROPERTY</p> <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<p>TORTS</p> <p>PERSONAL INJURY</p> <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Fed. Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury-Med Malpractice <input type="checkbox"/> 365 Personal Injury-Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability <p>IMMIGRATION</p> <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 463 Habeas Corpus-Alien Detainee <input type="checkbox"/> 465 Other Immigration Actions	<p>TORTS</p> <p>PERSONAL PROPERTY</p> <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability <p>BANKRUPTCY</p> <input type="checkbox"/> 22 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 <p>CIVIL RIGHTS</p> <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 445 American with Disabilities - Employment <input type="checkbox"/> 446 American with Disabilities - Other <input type="checkbox"/> 440 Other Civil Rights	<p>PRISONER PETITIONS</p> <input type="checkbox"/> 510 Motions to Vacate Sentence Habeas Corpus <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus/Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <p>FORFEITURE/PENALTY</p> <input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other	<p>LABOR</p> <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act <p>PROPERTY RIGHTS</p> <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input checked="" type="checkbox"/> 840 Trademark <p>SOCIAL SECURITY</p> <input type="checkbox"/> 61 HIA(1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW 405(g) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) <p>FEDERAL TAX SUITS</p> <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS-Third Party 26 USC 7609
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FOR OFFICE USE ONLY: Case Number: **CV09-3769**

AFTER COMPLETING THE FRONT SIDE OF FORM CV-71, COMPLETE THE INFORMATION REQUESTED BELOW.

VIII(a). IDENTICAL CASES: Has this action been previously filed in this court and dismissed, remanded or closed? No Yes
 If yes, list case number(s): _____

VIII(b). RELATED CASES: Have any cases been previously filed in this court that are related to the present case? No Yes
 If yes, list case number(s): _____

Civil cases are deemed related if a previously filed case and the present case:

- (Check all boxes that apply) A. Arise from the same or closely related transactions, happenings, or events; or
 B. Call for determination of the same or substantially related or similar questions of law and fact; or
 C. For other reasons would entail substantial duplication of labor if heard by different judges; or
 D. Involve the same patent, trademark or copyright, and one of the factors identified above in a, b or c also is present.

IX. VENUE: (When completing the following information, use an additional sheet if necessary.)

(a) List the County in this District; California County outside of this District; State if other than California; or Foreign Country, in which EACH named plaintiff resides.
 Check here if the government, its agencies or employees is a named plaintiff. If this box is checked, go to item (b).

County in this District:*	California County outside of this District; State, if other than California; or Foreign Country
GAMELOFT S.A. GAMELOFT, INC.	France, doing business in Los Angeles Delaware, doing business in Los Angeles

(b) List the County in this District; California County outside of this District; State if other than California; or Foreign Country, in which EACH named defendant resides.
 Check here if the government, its agencies or employees is a named defendant. If this box is checked, go to item (c).

County in this District:*	California County outside of this District; State, if other than California; or Foreign Country
ROBERT BURCK d/b/a THE NAKED COWBOY NAKED COWBOY ENTERPRISES	New York, doing business in Los Angeles New York, doing business in Los Angeles

(c) List the County in this District; California County outside of this District; State if other than California; or Foreign Country, in which EACH claim arose.
Note: In land condemnation cases, use the location of the tract of land involved.

County in this District:*	California County outside of this District; State, if other than California; or Foreign Country
Los Angeles County	

* Los Angeles, Orange, San Bernardino, Riverside, Ventura, Santa Barbara, or San Luis Obispo Counties
Note: In land condemnation cases, use the location of the tract of land involved

X. SIGNATURE OF ATTORNEY (OR PRO PER):  Date May 27, 2009
AARON J. MOSS

Notice to Counsel/Parties: The CV-71 (JS-44) Civil Cover Sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law. This form, approved by the Judicial Conference of the United States in September 1974, is required pursuant to Local Rule 3 -1 is not filed but is used by the Clerk of the Court for the purpose of statistics, venue and initiating the civil docket sheet. (For more detailed instructions, see separate instructions sheet.)

Key to Statistical codes relating to Social Security Cases:

Nature of Suit Code	Abbreviation	Substantive Statement of Cause of Action
861	HIA	All claims for health insurance benefits (Medicare) under Title 18, Part A, of the Social Security Act, as amended. Also, include claims by hospitals, skilled nursing facilities, etc., for certification as providers of services under the program. (42 U.S.C. 1935FF(b))
862	BL	All claims for "Black Lung" benefits under Title 4, Part B, of the Federal Coal Mine Health and Safety Act of 1969. (30 U.S.C. 923)
863	DIWC	All claims filed by insured workers for disability insurance benefits under Title 2 of the Social Security Act, as amended; plus all claims filed for child's insurance benefits based on disability. (42 U.S.C. 405(g))
863	DIWW	All claims filed for widows or widowers insurance benefits based on disability under Title 2 of the Social Security Act, as amended. (42 U.S.C. 405(g))
864	SSID	All claims for supplemental security income payments based upon disability filed under Title 16 of the Social Security Act, as amended.
865	RSI	All claims for retirement (old age) and survivors benefits under Title 2 of the Social Security Act, as amended. (42 U.S.C. (g))