

FILED
09 JUL 14 PM 3:50
RICHARD W. HENNING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

1 Larry W. McFarland (Bar No. 129668)
E-Mail: lmcfarland@kmwlaw.com
2 Dennis Wilson (Bar No. 155407)
E-Mail: dwilson@kmwlaw.com
3 David K. Caplan (Bar No. 181174)
E-Mail: dcaplan@kmwlaw.com
4 Christopher T. Varas (Bar No. 257080)
E-Mail: cvaras@kmwlaw.com
5 KEATS McFARLAND & WILSON LLP
9720 Wilshire Boulevard
6 Penthouse Suite
Beverly Hills, California 90212
7 Telephone: (310) 248-3830
Facsimile: (310) 860-0363

E-filing

Handwritten initials/signature

8 Attorneys for Plaintiff
9 ZYNGA GAME NETWORK, INC.

11 UNITED STATES DISTRICT COURT
12 NORTHERN DISTRICT OF CALIFORNIA
13 SAN FRANCISCO DIVISION

15 ZYNGA GAME NETWORK, INC. CV CASE NO. 09 3210

17 Plaintiff,

18 v.

19 JOHN DOES 1-5 d/b/a
Cheerchips.blogspot.com

21 Defendants.

COMPLAINT FOR:

HRL

- (1) VIOLATION OF 15 U.S.C. § 1125(a);
- (2) VIOLATION OF CAL. BUS. & PROF. CODE § 17200;
- (3) STATE COMMON LAW TRADEMARK INFRINGEMENT
- (4) COMMON LAW PASSING OFF AND UNFAIR COMPETITION;
- (5) BREACH OF CONTRACT; AND
- (6) INTENTIONAL INTERFERENCE WITH CONTRACTUAL RELATIONS

DEMAND FOR JURY TRIAL

CASE NO. _____
COMPLAINT

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 Plaintiff Zynga Game Network, Inc. ("Zynga") brings this action against John
2 Does 1-5 ("Defendants") for injunctive relief and damages under the laws of the
3 United States and the State of California.

4 **Nature of the Action**

5 1. This is an action for violation of the federal Lanham Act, 15 U.S.C. §
6 1125(a); violation of the California statutory law of unfair competition, Cal. Bus. &
7 Prof. Code § 17200; California common law trademark infringement, passing off and
8 unfair competition; breach of contract; and for intentional interference with
9 contractual relations.

10 **The Parties**

11 2. Plaintiff Zynga is a corporation organized and existing under the laws of
12 the State of Delaware and has its principal place of business in San Francisco,
13 California.

14 3. Zynga is currently unaware of the identities of Defendants John Does 1-5
15 ("Defendants"), and therefore sues such defendants by such fictitious acronyms.
16 Zynga is informed and believes that discovery will reveal the true identities of the
17 Defendants. On information and belief, the actions alleged herein to have been
18 undertaken by Defendants were undertaken by each Defendant individually, were
19 actions that each Defendant caused to occur, were actions that each Defendant
20 authorized, controlled, directed, or had the ability to authorize, control or direct,
21 and/or were actions in which each Defendant assisted, participated or otherwise
22 encouraged, and are actions for which each Defendant is liable. Each Defendant aided
23 and abetted the actions of the Defendants set forth below, in that each Defendant had
24 knowledge of those actions, provided assistance and benefitted from those actions, in
25 whole or in part. Each of the Defendants was the agent of each of the remaining
26 Defendants, and in doing the things hereinafter alleged, was acting within the course
27
28

1 and scope of such agency and with the permission and consent of each and every one
2 of the other Defendants.

3 Jurisdiction and Venue

4 4. This action arises under the trademark laws of the United States, 15
5 U.S.C. § 1051, *et seq.*, particularly under 15 U.S.C. § 1125(a); state unfair
6 competition law; and the common law of trademark infringement, passing off and
7 unfair competition; breach of contract; and the common law of intentional interference
8 with contractual relations. This Court has jurisdiction of the federal claims under 28
9 U.S.C. §§ 1331 and 1338, 15 U.S.C. §§ 1116, 1121, and 1125. This Court has
10 supplemental jurisdiction of the state unfair competition claims under 28 U.S.C. §
11 1338(b), those claims being joined with a substantial and related claim under the
12 Trademark Laws of the United States, and supplemental jurisdiction of all of the state
13 law claims under 28 U.S.C. § 1367(a), those claims being so related to the federal
14 claims that they form part of the same case or controversy and derive from a common
15 nucleus of operative fact.

16 5. Venue is proper in this district under 28 U.S.C. §§ 1391(b)(2), and
17 because Defendants have consented to venue in this district.

18 Intradistrict Assignment

19 6. This being an Intellectual Property Action, the Court's Assignment Plan
20 provides for assignment of this Action on a district-wide basis. To the extent this
21 Action may be deemed to have arisen in a particular county within this District, that
22 county is San Francisco County on the grounds that a substantial part of the events or
23 omissions which give rise to Zynga's claims occurred in San Francisco County, where
24 Zynga is located.

25 Factual Allegations

26 7. Zynga is the largest social gaming company, providing, *inter alia*, online
27 poker games, word games, board games, role playing games and party games
28

1 including Texas Hold'Em Poker, Mafia Wars, YoVille, Vampires, Street Racing,
2 Scramble and Word Twist. Zynga's games are available on Facebook, MySpace,
3 Bebo, Hi5, Friendster, Tagged, Yahoo!, the iPhone and iPod Touch, among others.

4 8. Zynga coined the trademark and service mark (collectively "mark")
5 ZYNGA and has made use of the mark ZYNGA in commerce since June 2007.

6 9. Zynga's games have been a runaway success. In July, 2008, Zynga had
7 over 1.3 million daily active users and 20 million registered users. As of January 1,
8 2009, Zynga had over 75 million registered users. As of May, 2009, Zynga had more
9 than 9.5 million daily users.

10 10. Zynga's success and the success of the ZYNGA mark have been widely
11 reported in the press, on the Internet and in blogs.

12 11. The mark ZYNGA is inherently distinctive, and furthermore, by virtue of
13 the extensive online sales and advertising under the mark ZYNGA, the ZYNGA mark
14 has become well-known within social gaming circles as a source identifier for Zynga's
15 games.

16 12. Zynga currently owns United States Federal Trademark Application
17 Serial No. 77684104 for the mark ZYNGA in International Class 009 for
18 downloadable software for games and entertainment on wireless devices and
19 computers, and International Class 041 for entertainment services, namely providing
20 on-line computer games. The application has not been withdrawn or opposed.

21 13. One of Zynga's most popular properties is Zynga's Texas Hold'em Poker
22 (the "Game"), a computerized version of the world-famous poker game.

23 14. Zynga makes the Game available through social networking websites and
24 applications (collectively "Providers"), including but not limited to those identified in
25 Paragraph 7 above.

26 15. Zynga's Terms of Service govern users' play of the Game.
27
28

1 16. When users sign up with Zynga to play the Game, they receive a certain
2 number of virtual “chips” that they use to compete in games with other players using
3 the Providers’ sites and/or applications. Players can increase their total number of
4 “chips” through their play, and can also purchase “chips” from Zynga.

5 17. Zynga has not authorized any third party to sell the “chips” required to
6 play the Game.

7 18. The Terms of Service that govern users’ play of the Game provide that
8 the “chips” used in the Game “are not redeemable for any sum of ‘real world’ money
9 or monetary value.” The Terms of Service also prohibit sale of “chips” “for ‘real
10 world’ money” and prohibit the use of the Game for unacceptable purposes, including
11 activity in “conflict with the spirit or intent of” the Game.

12 19. Without Zynga’s authorization or approval, Defendants have created and
13 currently operate or previously operated a website at the Internet URL
14 <cheerchips.blogspot.com> (the “Website”).

15 20. Through the Website, Defendants “sell” “chips” that users, playing the
16 Game through the Providers’ websites and/or applications, can use to compete with
17 other players who obtained their “chips” directly from Zynga.

18 21. Defendants advertise the Website using the ZYNGA mark and/or
19 confusingly similar misspellings or variations of the ZYNGA mark.

20 22. Defendants “sell” “chips” for use in the Game at prices that are
21 substantially lower than the prices paid by users who obtain their “chips” from Zynga.

22 23. Defendants have used the Game itself as part of their scheme,
23 transferring the “chips” they “sell” during game play in contravention of the Game’s
24 terms of service and/or security measures.

25 24. Zynga has never authorized Defendants to use the mark ZYNGA or any
26 variations or misspellings thereof, or to sell “chips” for use in the Game, nor has
27
28

1 Zynga authorized Defendants to use the Game to transfer “chips” that they have
2 “sold” to players through the Website.

3 **FIRST CAUSE OF ACTION**

4 **(False Designation of Origin Regarding the Mark ZYNGA)**

5 **(15 U.S.C. § 1125(a))**

6 25. Zynga repeats, realleges and incorporates each and every allegation of the
7 foregoing paragraphs, as though fully set forth in this cause of action.

8 26. Defendants’ use of the mark ZYNGA and/or of confusingly similar
9 misspellings or variations thereof constitutes use of a false designation of origin or
10 false and misleading representation in interstate commerce that wrongfully and falsely
11 designates, describes and represents that Defendants’ products are connected,
12 affiliated or associated with Zynga, and is likely to cause confusion as to Defendants’
13 affiliation, connection or association with Zynga, or as to the origin, sponsorship, or
14 approval of Defendants’ products or activities by Zynga.

15 27. Defendants’ conduct as alleged herein has caused and will continue to
16 cause Zynga irreparable harm for which there is no adequate remedy at law, and is
17 also causing damage to Zynga in an amount which cannot be accurately computed at
18 this time but will be proven at trial.

19 **SECOND CAUSE OF ACTION**

20 **(California Statutory Unfair Competition)**

21 **(California Business and Professions Code § 17200, et seq.)**

22 28. Zynga repeats, realleges and incorporates each and every allegation of the
23 foregoing paragraphs, as though fully set forth in this cause of action.

24 29. Defendants compete directly with Zynga by “selling” the “chips” that are
25 required to play the Game.

26 30. Defendants are making unauthorized commercial use of the mark
27 ZYNGA and/or confusingly similar misspellings or variations thereof in a deliberate,
28

1 willful, intentional and wrongful attempt to trade on Zynga's goodwill, reputation and
2 financial investments in the mark ZYNGA.

3 31. By reason of their conduct as alleged herein, Defendants have engaged in
4 unlawful, unfair and/or fraudulent ongoing business practices.

5 32. As a direct result of their unfair competition with regard to the mark
6 ZYNGA, Defendants have unlawfully acquired, and continue to acquire on an
7 ongoing basis, an unfair competitive advantage and have engaged, and continue to
8 engage in, wrongful business conduct to their monetary advantage and to the
9 detriment of Zynga.

10 33. Defendants' illegal and unfair business practices are continuing, and
11 injunctive relief pursuant to California Business and Professions Code § 17203 is
12 necessary to prevent and restrain further violations by Defendants.

13 34. This Court has jurisdiction over the subject matter of this claim pursuant
14 to the provisions of 28 U.S.C. § 1338(b), this being a claim of unfair competition
15 joined with a substantial and related claim under the Trademark Laws of the United
16 States, and under 28 U.S.C. § 1367.

17 **THIRD CAUSE OF ACTION**

18 **(Common Law Trademark Infringement of the Mark ZYNGA)**

19 35. Zynga repeats, realleges and incorporates each and every allegation of the
20 foregoing paragraphs, as though fully set forth in this cause of action.

21 36. Defendants' unauthorized use of the mark ZYNGA and/or confusingly
22 similar misspellings or variations thereof constitutes trademark infringement and is
23 likely to cause confusion, deception and mistake among the consuming public and
24 trade as to the source of, and authorization for the products and/or services sold by
25 Defendants in violation of the common law of the State of California.

26 37. As well as harming the public, Defendants' conduct as alleged herein has
27 caused and will continue to cause Zynga irreparable harm for which there is no
28

1 adequate remedy at law, and is also causing damage to Zynga in an amount which
2 cannot be accurately computed at this time but will be proven at trial.

3 38. This Court has jurisdiction over the subject matter of this claim pursuant
4 to the provisions of 28 U.S.C. § 1338(b), this being a claim of infringement joined
5 with a substantial and related claim under the Trademark Laws of the United States,
6 and under 28 U.S.C. § 1367.

7 **FOURTH CAUSE OF ACTION**

8 **(California Common Law Passing Off and Unfair Competition)**

9 39. Zynga repeats, realleges and incorporates each and every allegation of the
10 foregoing paragraphs, as though fully set forth in this cause of action.

11 40. By virtue of their conduct as alleged herein, Defendants have engaged
12 and are engaging in unfair competition and passing off under the common law of the
13 State of California.

14 41. As well as harming the public, Defendants' conduct as alleged herein has
15 caused and will continue to cause Zynga irreparable harm for which there is no
16 adequate remedy at law, and is also causing damage to Zynga in an amount which
17 cannot be accurately computed at this time but will be proven at trial.

18 42. Defendants' actions were undertaken intentionally to obtain an unfair
19 advantage over Zynga and in conscious disregard of Zynga's rights, and were
20 malicious, oppressive and/or fraudulent. Zynga requests punitive or exemplary
21 damages pursuant to California Civil Code § 3294(a) in an amount sufficient to punish
22 and deter Defendants and to make an example of them.

23 43. This Court has jurisdiction over the subject matter of this claim pursuant
24 to the provisions of 28 U.S.C. § 1338(b), this being a claim of unfair competition
25 joined with a substantial and related claim under the Trademark Laws of the United
26 States, and under 28 U.S.C. § 1367.

27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

FIFTH CAUSE OF ACTION

(Breach of Contract)

44. Zynga repeats, realleges and incorporates each and every allegation of the foregoing paragraphs, as though fully set forth in this cause of action.

45. By participating in the Game, Defendants have agreed to be bound by the Terms of Service governing use of the Game as alleged above.

46. Zynga has performed all conditions, covenants and promises required to be performed on its part in accordance with the Terms of Service except as excused by Defendants' failure to perform all conditions, covenants and promises required to be performed on their part.

47. By "selling" "chips" for use in the Game through the Website, and by using the Game itself to transfer the "chips" they sell, Defendants have breached the Terms of Service, which specifically prohibit Game users from exchanging "chips" "for 'real world' money or otherwise exchange items for value outside of the Game."

48. Defendants' conduct as alleged herein has caused and will continue to cause Zynga irreparable harm for which there is no adequate remedy at law, and is also causing damage to Zynga in an amount which cannot be accurately computed at this time but will be proven at trial.

49. This Court has jurisdiction over the subject matter of this claim pursuant to the provisions of 28 U.S.C. § 1367.

SIXTH CAUSE OF ACTION

(Intentional Interference with Contractual Relations)

50. Zynga repeats, realleges and incorporates each and every allegation of the foregoing paragraphs, as though fully set forth in this cause of action.

51. Zynga has existing valid contracts with users of the Game.

52. Zynga is informed and believes, and on that basis alleges, that Defendants have knowledge of those contracts, and that Defendants have acted

1 intentionally to induce a breach or disruption of those contractual relationships by
2 “selling” “chips” for the Game without authorization, at prices that are substantially
3 lower than the prices paid by users who obtain their “chips” from Zynga, and by
4 distributing “chips” to users in a manner prohibited by the Terms of Service.

5 53. Defendants’ actions as alleged herein have caused actual disruption or
6 breach of Zynga’s contractual relationships with individual users.

7 54. Defendants’ conduct as alleged herein has caused and will continue to
8 cause Zynga irreparable harm for which there is no adequate remedy at law, and is
9 also causing damage to Zynga in an amount which cannot be accurately computed at
10 this time but will be proven at trial.

11 55. This Court has jurisdiction over the subject matter of this claim pursuant
12 to the provisions of 28 U.S.C. § 1367.

13 **REQUEST FOR RELIEF**

14 Zynga requests that this Court:

15 A. Enter a permanent injunction enjoining Defendants, their officers,
16 directors, agents, employees, representatives and all persons or entities acting in
17 concert or participation with them from using the mark ZYNGA, or any misspellings
18 or variations thereof, alone or in combination with any other words or phrases, in a
19 manner that is likely to cause confusion with respect to the mark ZYNGA or with
20 respect to Zynga’s approval or authorization of Defendants’ actions, including but not
21 limited to enjoining Defendants, their agents, employees, representatives and all
22 persons or entities acting in concert or participation with them from registering any
23 Internet domain names containing the term ZYNGA, or any variations or misspellings
24 of the term ZYNGA, alone or in combination with any other terms;

25 B. Enter a permanent injunction enjoining Defendants, their officers,
26 directors, agents, employees, representatives and all persons or entities acting in
27
28

1 concert or participation with them, from accessing, playing, or otherwise participating
2 in the Game;

3 C. Enter a permanent injunction requiring Defendants, their officers,
4 directors, agents, employees, representatives and all persons or entities acting in
5 concert or participation with them, to immediately cease any conduct suggesting or
6 tending to suggest that any products or services he advertises or offers for sale are
7 directly or indirectly sponsored or approved by, or affiliated with Zynga;

8 D. Enter a finding that Defendants' actions were willful, deliberate, and
9 malicious;

10 E. As to the First Cause of Action, award damages in an amount to be
11 proven at trial that will be trebled pursuant to 15 U.S.C. § 1117(a);

12 F. As to the First Cause of Action, enter an order, pursuant to 15 U.S.C. §
13 1118 and other applicable law, directing Defendants to deliver for destruction all
14 products in their possession or under their control that infringe Zynga's intellectual
15 property rights;

16 G. As to the Third, Fourth, Fifth and Sixth Causes of Action, award
17 damages in an amount to be proven at trial;

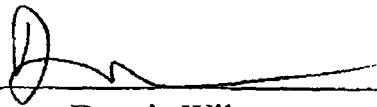
18 H. As to the Fourth Cause of Action, award punitive damages in an amount
19 sufficient to punish and deter Defendant;

20 I. Enter an award of attorneys' fees and costs; and

21 J. Award any such other and further relief as this Court deems just and
22 proper.

23 **PLAINTIFF ZYNGA HEREBY DEMANDS A TRIAL BY JURY.**

24
25 Dated: July 14, 2009

By: 

Dennis Wilson
Keats McFarland & Wilson LLP
Attorneys for Plaintiff
ZYNGA GAME NETWORK, INC.

26
27
28
CASE NO. _____
COMPLAINT