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11 Attorneys for Defendants
UBISOFT ENTERTAINMENT and
12 UBISOFT, INC.

13 UNITED STATES DISTRICT COURT
14 FOR THE NORTHERN DISTRICT OF CALIFORNIA

16 OG INTERNATIONAL LTD. and O-GAMES,
INC.,

Case No. 11-cv-4980

17 Plaintiffs,

**UBISOFT ENTERTAINMENT AND
UBISOFT, INC'S COUNTERCLAIM AND
ANSWER**

19 v.

DEMAND FOR JURY TRIAL

20 UBISOFT ENTERTAINMENT and
UBISOFT, INC.,

21 Defendants.

22 **UBISOFT'S COUNTERCLAIM AND ANSWER**

23
24 Defendants Ubisoft Entertainment and Ubisoft, Inc. (collectively, "Ubisoft") hereby
25 counterclaim against OG International Ltd. and O-Games, Inc. (collectively, "OG"), and answer
26 OG's declaratory judgment counts as follows:
27
28

FILED
OCT 11 2011
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND

1 **UBISOFT'S CLAIMS AGAINST OG**

2 **Factual Background**

3 1. Ubisoft seeks to immediately stop OG's improper efforts to capitalize on the success
4 of Ubisoft's highly popular *Just Dance* series of dance-based video games.

5 2. Ubisoft Entertainment develops the *Just Dance* series of dance-based video games.
6 Ubisoft, Inc. distributes the *Just Dance* series of video games in the United States. The *Just Dance*
7 series of games allow players to interact with the game by physically performing dance routines
8 according to instructions provided by the games.

9 3. Ubisoft released *Just Dance* for the Nintendo Wii video game platform in November
10 2009 to significant commercial success. Ubisoft built upon that success with *Just Dance 2*, released
11 in October 2010, which became the largest selling third-party game for the Nintendo Wii platform.
12 To date, Ubisoft has shipped more than 16 million copies of the *Just Dance* series worldwide.

13 4. The franchise continues as Ubisoft released *Just Dance 3* in the United States on
14 October 7, 2011. *Just Dance 3* is currently available on the Nintendo Wii and Microsoft Xbox 360
15 video game platforms, and will be released for the Sony Playstation 3 platform later this year.

16 5. OG International Ltd. and O-Games, Inc. plan to release their first entry in the dance-
17 based video game genre, *Get Up and Dance*, in the United States on or about November 1, 2011.
18 Ex. A. *Get Up and Dance* will be available on both the Nintendo Wii and Sony Playstation 3 video
19 game platforms.

20 6. As detailed below, OG's *Get Up and Dance* game copies key elements of expression
21 from the *Just Dance* series that are unique to Ubisoft's popular video game franchise, despite the
22 fact that those elements could have been expressed in innumerable different ways that would not
23 infringe Ubisoft's copyrighted works and trade dress.

24 7. If released, OG's *Get Up and Dance* will compete directly with Ubisoft's *Just Dance*
25 series of games. *Get Up and Dance* is currently being marketed as a pre-release in the same
26 marketing channels as the *Just Dance* series, and will be offered for sale from the same national
27
28

1 retailers. Ex. A (GameStop Pre-Release Order; Wal-Mart Pre-Release Order); Ex. B (*Just Dance 3*
2 from Wal-Mart; *Just Dance 3* from Game Stop).

3 8. If *Get Up and Dance* is released in the United States as planned on November 1,
4 2011, Ubisoft will be irreparably harmed.

5 Procedural Background

6 1. This lawsuit involves Ubisoft's claims against OG for copyright infringement, trade
7 dress infringement, and unfair competition.

8 2. In an effort to resolve these claims without litigation, Ubisoft began corresponding
9 with OG in August 2011. After OG repeatedly refused to address Ubisoft's concern with in-game
10 content in *Get Up and Dance*, counsel for Ubisoft sent a Cease and Desist demand and stated,
11 clearly and explicitly, that Ubisoft would file a lawsuit no later than October 10, 2011 if OG would
12 not agree to modify its game:

13 You must either modify the game to remove, at a minimum, the similarities with *Just Dance*
14 outlined above, or stop distribution altogether. If you refuse to do so, Ubisoft will file suit
15 for copyright infringement, unfair competition, and trade dress infringement no later than
16 October 10, 2011.

17 3. Ubisoft later clarified that, because the federal court was scheduled to be closed on
18 October 10, 2011 for a federal holiday, "Ubisoft will file suit no later than October 11, 2011."

19 4. Rather than seek to remedy Ubisoft's copyright, trade dress, and unfair competition
20 claims, OG chose a race to the courthouse. On October 7, 2011 – four days before the specified date
21 on which Ubisoft had informed OG it would file suit if the parties could not reach an accord – OG
22 filed a declaratory judgment action against Ubisoft for the very claims that Ubisoft informed OG it
23 would be filing. As of the date of this filing, OG still has not informed Ubisoft that it filed the
24 instant lawsuit.

25 5. Because Ubisoft provided OG with a specific, concrete indication that it would file
26 suit by October 11, 2011 if the parties had not reached an accord, OG's race to the courthouse is
27 anticipatory and improper. See *Z-Line Designs, Inc. v. Bell'O Int'l LLC*, 218 F.R.D. 663, 665 (N.D.

28

1 California Business and Professions Code §§ 17200 *et seq.* under 28 U.S.C. §§ 1331, 1338, and
2 1367.

3 **FACTUAL ALLEGATIONS**

4 13. Multiple dance-based video games exist in the market place both before and
5 contemporaneous with Ubisoft's *Just Dance* series of games.

6 14. The primary protectable visual elements in nearly all games of this genre are (1) a
7 central dancing figure, or "avatar," that performs the dance routine players attempt to emulate and
8 (2) "instructor" elements that identify the particular dance moves players must attempt to perform
9 during the game. These prominent visual elements garner the visual focus of both players and non-
10 players alike, and are thus key identifying features that serve to distinguish between competing
11 games of the genre.

12 **Ubisoft's Unique and Original Protected Expression**

13 15. Ubisoft's *Just Dance* series is set apart from competitors by its unique, original, and
14 immediately identifiable expression of its "avatar" and "instructor" elements.



26 Ex. C (*Just Dance* Screenshots).
27
28

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