

1 **CROSS-COMPLAINT**

2 Defendant and Cross-Complainant KIXEYE, Inc. (“KIXEYE”)¹ alleges as follows, in
3 support of its Cross-Complaint against Plaintiff and Cross-Defendant Zynga, Inc. (“Zynga” or
4 “Cross-Defendant”):

5 **NATURE OF THE ACTION**

6 1. KIXEYE and Zynga are both companies based in San Francisco that develop and
7 publish online social games using a platform provided by Facebook. They have little else in
8 common.

9 2. While Zynga is a large, multi-national enterprise whose games have over 48 million
10 daily active users, KIXEYE is a small company whose games have just over 1 million daily active
11 users, according to data available on www.appdata.com at the time of the filing of this Cross-Claim.

12 3. Furthermore, although they both publish games to Facebook, historically KIXEYE
13 and Zynga have made very different types of games that do not compete directly. KIXEYE makes
14 synchronous combat games that appeal to dedicated video game players in the “midcore” and
15 hardcore market. Zynga, on the other hand, has spent years making asynchronous games that target
16 “casual” social gaming consumers.

17 4. In short, KIXEYE is a smaller company that makes games specifically designed to
18 appeal to a niche market, while Zynga is large company that makes games targeted at obtaining mass
19 appeal. Comparing KIXEYE’s games to Zynga’s games is like comparing a Ducati racing
20 motorcycle to a minivan. Both are motorized vehicles, but Ducati motorcycles, like KIXEYE’s
21 midcore games, appeal to a small but passionate group of users who are focused on quality and
22 performance. Zynga is more concerned with cranking out games that will fit the whole family
23 without offending anyone.

24 5. Moreover, while KIXEYE prides itself on producing original, creative works, Zynga
25 is notorious for copying and cloning the games of its competition, often trampling those competitors’
26 intellectual property rights in the process. To the extent that Zynga has any kind of “playbook,”
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¹ KIXEYE in all capital letters is a trademarked name.

1 there is only one play inside and it is no secret—relentless and shameless copying of its competitors’
2 games.

3 6. At one time, Zynga financially flourished following that model, but its fortunes have
4 recently taken a sharp and public turn for the worse. In the last few months, it has become obvious
5 that Zynga is a company in distress. Its revenues and profitability have declined dramatically. After
6 what appeared to be a successful initial public offering of stock at \$10 per share in December 2011,
7 Zynga’s stock price has plummeted to \$2.10 per share as recently as November 12, 2012—just over
8 20% of its initial price. Its market capitalization is now less than its cash on hand. In October,
9 Zynga laid off hundreds of employees in multiple offices.

10 7. In the midst of its increasingly disappointing performance in the market, Zynga is
11 also suffering from well-publicized employee retention issues that have resulted in important talent
12 leaving the company in a mass exodus.

13 8. KIXEYE, on the other hand, is growing and has achieved remarkable revenue growth
14 and profitability. At the time of the filing of this Cross-Claim, KIXEYE’s games Battles Pirates and
15 War Commander were two of the eight highest grossing “apps” on Facebook, and by far the highest
16 grossing midcore offerings from any company. KIXEYE continues to expand its operations, and has
17 added upwards of 200 employees since December 2011. And because KIXEYE and Zynga are both
18 based in San Francisco and recruit employees from a similar talent base, KIXEYE’s success and
19 growth are attracting Zynga’s employees, such as Alan Patmore.

20 9. In recognition of the success of KIXEYE’s business model, positive growth
21 trajectory, and profitability, Zynga has initiated a clear shift in its corporate strategy and is seeking to
22 mimic KIXEYE in a desperate effort to re-invigorate its own moribund business model and achieve
23 respectable profitability.

24 10. Not content to fairly compete with KIXEYE in the marketplace, however, on October
25 12, 2012, Zynga filed the present action against Alan Patmore, alleging that Mr. Patmore breached
26 his employment contract with Zynga and that he misappropriated Zynga’s trade secrets when he
27 backed-up files from his computer at Zynga to DropBox, a cloud-storage program, before leaving
28 the company. Mr. Patmore responded to the lawsuit by cooperating fully with Zynga and acting

1 swiftly to secure all relevant information in his possession in the safe custody of a third party and to
2 ensure that KIXEYE had no access to it. Despite Mr. Patmore's cooperation and the fact that none
3 of the forensic computer analysis done by Zynga show that he disclosed any documents containing
4 trade secrets to KIXEYE, Zynga filed its First Amended Complaint on November 8, 2012, adding
5 KIXEYE as a party to the lawsuit.

6 11. The information provided by Mr. Patmore to Zynga clearly establishes that Zynga's
7 amendment of its lawsuit to add KIXEYE as a defendant is baseless. To the extent Mr. Patmore had
8 any Zynga trade secrets or proprietary information, that information has all been returned and/or
9 secured. Moreover, Mr. Patmore has informed Zynga that, at most, he may have communicated
10 information from two Zynga documents to other KIXEYE employees—neither of which contained
11 anything resembling a trade secret.

12 12. The purpose of Zynga's lawsuit is not to seek redress for alleged violations of its
13 contract rights and misappropriation of its trade secrets. Indeed, Zynga has absolutely refused to
14 communicate with Mr. Patmore or KIXEYE outside the litigation process in an effort to resolve this
15 dispute.

16 13. In reality, Zynga's lawsuit has two aims, both of which are calculated to give it an
17 unfair and illegal competitive advantage over KIXEYE: (1) to send a message to its employees about
18 the consequences of leaving Zynga to work at KIXEYE in an effort to chill the mobility of those
19 employees and/or to interfere with KIXEYE's own ability to produce competitive games and (2) to
20 use the litigation as a Trojan Horse to gain access to KIXEYE's own confidential, valuable
21 information and trade secrets and bog KIXEYE down in the wasted time and expense of litigation
22 while Zynga tries to enter the midcore market.

23 **THE PARTIES**

24 14. KIXEYE, Inc. is a Delaware corporation with its principal place of business at 333
25 Bush St., 19th Floor, San Francisco, California 94104.

26 15. Upon information and belief, Plaintiff Zynga, Inc. is a Delaware corporation with its
27 principal place of business in San Francisco, California.
28

1 **JURISDICTION AND VENUE**

2 16. Upon information and belief, the acts of Zynga herein alleged constituting unfair
3 competition occurred within the jurisdictional boundaries of this Court. KIXEYE alleges on
4 information and belief that Zynga's principal place of business is within the jurisdictional boundaries
5 of this Court. KIXEYE's injuries have occurred, and will continue to occur, in this district.

6 17. The amount in controversy in this cross-claim exceeds \$25,000.

7 **FACTUAL ALLEGATIONS**

8 **A. Zynga's Lawsuit Against KIXEYE Employee Alan Patmore**

9 18. Alan Patmore worked for Zynga from June 2011 until August 16, 2012, when he
10 resigned. Zynga had him escorted out of the building that same day. At no time that day did any
11 person at Zynga ever take the simple step of even asking Mr. Patmore what Zynga files or
12 documents were in his possession or requesting that he return anything.

13 19. After Mr. Patmore's last day, Zynga remained silent and did not reach out to him.

14 20. On September 21, 2012, thirty-six days after Mr. Patmore resigned from Zynga, a
15 computer forensics firm imaged Mr. Patmore's laptop at Zynga's direction to analyze its contents.

16 21. Whatever information Zynga learned from that analysis, it took no action at that time.

17 22. On September 24, 2012, three days after the forensic image was made, Mr. Patmore
18 started his new job at KIXEYE, as Vice President of Product Development.

19 23. Zynga continued to sit on the information it learned in its forensic analysis.

20 24. Finally, twenty-two days after Mr. Patmore's laptop was imaged, on October 12,
21 2012, Zynga filed its lawsuit against Mr. Patmore and immediately moved the Court *ex parte* to
22 issue a temporary restraining order.

23 25. Zynga's original Complaint alleges that Mr. Patmore breached his employment
24 contract with Zynga and misappropriated trade secrets when he took Zynga confidential information
25 without authorization, failed to return Zynga confidential information, and disclosed and/or used
26 Zynga confidential information on behalf of his new employer, KIXEYE.

27 26. Zynga's Complaint also makes multiple references to the fact that Mr. Patmore's
28 employment contract with Zynga contained a provision prohibiting Mr. Patmore from soliciting

1 away Zynga’s employees for the benefit of any other person or entity. Specifically, Zynga alleges
2 that “Patmore agreed that ‘for a period of one (1) year [after his employment ends, he] will not
3 directly or indirectly solicit away employees or consultants of the Company for [his] own benefit or
4 for the benefit of any other person or entity.” Compl. ¶ 23(f); *see also id.* ¶ 49 (same).

5 27. Despite these explicit mentions of the non-solicitation provision, the Complaint does
6 not allege that Mr. Patmore actually solicited Zynga employees and provides no other explanation
7 for the presence of these allegations.

8 28. At no time during the fifty-eight days following Mr. Patmore’s resignation did Zynga
9 contact Mr. Patmore regarding any concerns about a breach of contract or trade secret
10 misappropriation or otherwise attempt to provide notice of the issue or resolve the matter outside of
11 litigation.

12 29. When Zynga did file its lawsuit, it alleged that the trade secrets at issue are so
13 important and the threat to them so pressing that it was forced to seek the extraordinary relief of an
14 *ex parte* temporary restraining order against Mr. Patmore. Among the allegations it relied on to get
15 that relief were the following:

- 16 ▪ Mr. Patmore allegedly took “some of [Zynga’s] most sensitive and commercially
17 valuable data” (Compl. ¶ 2);
- 18 ▪ The files allegedly taken by Patmore “describe in detail Zynga’s confidential game
19 development and industry know-how that both Patmore and KIXEYE lack absent theft
20 of this information from Zynga” (Compl. ¶ 27);
- 21 ▪ “If Patmore is ***not immediately restrained*** from accessing, disclosing, using, and/or
22 destroying Zynga’s stolen data, Zynga will continue to suffer irreparable and
23 irreversible harm” (Compl. ¶ 33) (emphasis added);
- 24 ▪ “Patmore’s actual and threatened misappropriation of Zynga’s trade secrets, unless and
25 until enjoined and restrained by order of this Court, is causing and will continue to
26 cause great and irreparable harm to Zynga. Zynga is threatened with losing its
27 intellectual property as well as current and potential business” (Compl. ¶ 42); and
28

- 1 ▪ “The trade secrets and other non-public business data that Patmore stole from Zynga
2 have competitive value to Patmore and the competitor for whom he now works. Absent
3 immediate temporary and preliminary injunctive relief, Zynga will suffer *immediate*
4 *irreparable harm* as Zynga’s valuable business data . . . will be improperly possessed
5 and subject to actual and/or threatened misappropriation by the new employee of a
6 direct competitor of Zynga” (Zynga’s *Ex Parte* Application for Temporary Restraining
7 Order ¶ 3) (emphasis added).

8 30. Despite these repeated representations to this Court about the urgency of the need to
9 protect its alleged trade secrets or other confidential business information, Zynga failed to explain
10 why it took Zynga thirty-six days after Mr. Patmore’s resignation to conduct a forensic analysis of
11 Mr. Patmore’s computer. Even more tellingly, Zynga was silent regarding why Zynga waited
12 *another* twenty-two days after the forensic analysis resulted in an image of Mr. Patmore’s computer
13 to take *any step whatsoever* to protect its allegedly confidential or trade secret information.

14 **B. Zynga’s Struggles in the Market**

15 31. On December 16, 2011, Zynga made an initial public offering of stock at the price of
16 \$10 per share. Since the stock’s all-time high at \$15.91 per share in early March 2012, however,
17 Zynga’s stock price steadily and precipitously declined, commanding only \$2.10 per share as
18 recently as November 12, 2012.

19 32. Zynga’s revenues and profitability have also seen sharp declines over the past year.
20 Zynga’s market capitalization is now less than its cash on hand.

21 33. While Zynga has been struggling in its financial metrics, it has also seen its user base
22 diminish. For example, in early August 2012, CNN Money reported that Zynga’s “user base has
23 dropped 16% year-over-year.” JP Mangalindan, *4 Emergency Maneuvers for Zynga*, CNN MONEY
24 (Aug. 7, 2012, 5:00AM), <http://tech.fortune.cnn.com/2012/08/07/zynga-4/>.

25 34. Furthermore, Zynga has been struggling to retain its employees since at least August
26 of this year when it was reported in the media that Zynga was “offer[ing] incentives” such as stock
27 “to keep its employees from leaving” and prevent a “mass exodus.” Eric Abent, *Zynga Reportedly*
28 *Handed Out Stock To Keep Workers From Leaving*, SLASHGEAR (Aug. 10, 2012),

1 [http://www.slashgear.com/zynga-reportedly-handed-out-stock-to-keep-workers-from-leaving-](http://www.slashgear.com/zynga-reportedly-handed-out-stock-to-keep-workers-from-leaving-10242594/)
2 [10242594/](http://www.slashgear.com/zynga-reportedly-handed-out-stock-to-keep-workers-from-leaving-10242594/).

3 35. Mr. Patmore's resignation on August 16, 2012 followed shortly after media reports of
4 Zynga's difficulties with employee retention began to appear.

5 36. Mr. Patmore's departure marked a significant loss for Zynga, as Mr. Patmore was the
6 general manager of one of Zynga's most successful games, *CityVille*.

7 37. Moreover, media coverage of the loss of Mr. Patmore clearly publicized the fact that
8 Mr. Patmore left for the purpose of joining KIXEYE. *See, e.g.,* Tricia Duryee, *Zynga's CityVille*
9 *Loses Mayor to Kixeye*, ALL THINGS D (Aug. 23, 2012, 6:00 AM),
10 <http://allthingsd.com/20120823/zyngas-cityville-loses-mayor-to-kixeye/>.

11 38. Mr. Patmore's resignation was among the first of a string of high-profile departures
12 from Zynga that were also well-documented in the media. The investment website The Motley Fool
13 proclaimed that "The Zynga Exec Exodus Has Begun" in response to the news that six Zynga
14 executives (including Mr. Patmore) had left—including four after Mr. Patmore's resignation. Evan
15 Niu, *It's Official: The Zynga Exec Exodus Has Begun*, THE MOTLEY FOOL (Aug. 29, 2012),
16 [http://www.fool.com/investing/general/2012/08/29/its-official-the-zynga-exec-exodus-has-](http://www.fool.com/investing/general/2012/08/29/its-official-the-zynga-exec-exodus-has-begun.aspx)
17 [begun.aspx](http://www.fool.com/investing/general/2012/08/29/its-official-the-zynga-exec-exodus-has-begun.aspx).

18 39. Zynga would see the number of executive departures rise to eight by mid-September.
19 *See* Evan Niu, *Zynga Can't Stop Bleeding Execs*, THE MOTLEY FOOL (Sept. 11, 2012),
20 <http://www.fool.com/investing/general/2012/09/11/zynga-cant-stop-bleeding-execs.aspx>; *see also*
21 Sean Williams, *CEO Gaffe of the Week: Zynga*, THE MOTLEY FOOL (Sept. 16, 2012),
22 <http://www.fool.com/investing/general/2012/09/16/ceo-gaffe-of-the-week-zynga.aspx> (describing
23 Zynga as "suffering from a new type of game that can best be described as 'Exodus With Co-
24 Workers'").

25 40. Zynga's woes have continued since its lawsuit against Mr. Patmore was filed.

26 41. On October 23, 2012, Zynga announced through a statement from its CEO Mark
27 Pincus that it was closing its Boston studio, considering closing two other studios, and laying off
28 hundreds of employees, amounting to approximately 5% of its full time workforce.

1 **C. Zynga’s Attempt to Enter the Midcore Gaming Market**

2 42. In an effort to stop its downward spiral, Zynga has attempted to shift its business
3 model away from casual gaming and towards the midcore and hardcore markets where KIXEYE has
4 been successful.

5 43. On September 17, 2012, Zynga announced the acquisition of A Bit Lucky, a midcore
6 gaming company. *See* Kim-Mai Cutler, *Zynga Buys A Bit Lucky To Break Into Mid-Core Gaming*,
7 TECHCRUNCH (Sept. 17, 2012), <http://techcrunch.com/2012/09/17/zynga-acquisition-a-bit-lucky/>.

8 44. On November 9, 2012, Zynga announced that several months earlier, it had acquired
9 November Software, another midcore gaming company. *See* Eric Abent, *Zynga Acquires November*
10 *Software*, SLASHGEAR (Nov. 9, 2012), [http://www.slashgear.com/zynga-acquires-november-](http://www.slashgear.com/zynga-acquires-november-software-09256397/)
11 [software-09256397/](http://www.slashgear.com/zynga-acquires-november-software-09256397/).

12 45. Zynga’s move to the midcore market is a desperate attempt to resuscitate the
13 company by re-inventing itself. *See id.* (stating that “[t]he switch [to] mid-core gaming might be just
14 the thing that saves Zynga in the long run”); *see also* Yannick Lejacq, *Zynga Acquires November*
15 *Software to Focus On ‘Midcore’ Gaming*, INTERNATIONAL BUSINESS TIMES (Nov. 9, 2012, 3:33
16 PM), <http://www.ibtimes.com/zynga-acquires-november-software-focus-midcore-gaming-868386>
17 (stating that “Zynga has been actively pursuing the midcore market ever since the company’s weak
18 second-quarter earnings report shook investor confidence”). Zynga has acknowledged on its blog
19 that it is “excited and look[s] forward to building great mid-core mobile games at Zynga.” *See*
20 Szymon Swistun, *We’re Building Our Next Mid-Core Mobile Game At Zynga!*, ZYNGA BLOG (Nov.
21 9, 2012), <http://blog.zynga.com/2012/11/09/november/>.

22 46. With its concerted attempt to move into midcore gaming, Zynga is entering new
23 territory where KIXEYE is already an established player. *See* Cutler, *supra* ¶ 43 (acknowledging the
24 pressure on Zynga “to move into new market segments” such as the midcore gaming space where
25 “[t]here are competitors like Kixeye”).
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1 **D. Zynga’s Lawsuit Was Filed for the Purpose of Gaining an Unfair and Illegal**
2 **Competitive Advantage Against KIXEYE**

3 47. Knowing that it is far behind KIXEYE in the midcore market, Zynga seized on the
4 opportunity to blow a minor issue with Mr. Patmore far out of proportion and to attack KIXEYE
5 through meritless litigation.

6 48. In reality, Zynga’s lawsuit has two aims, both of which are calculated to give it an
7 unfair and illegal competitive advantage over KIXEYE: (1) to send a message to its employees about
8 the consequences of leaving Zynga to work at KIXEYE in an effort to chill the mobility of those
9 employees and/or to interfere with KIXEYE’s own ability to hire freely in the California
10 marketplace and produce competitive games and (2) to gain access to KIXEYE’s own confidential,
11 valuable information and trade secrets under the guise of the protection of its own trade secrets,
12 while bogging KIXEYE down in the wasted time and expense of meritless litigation.

13 **1. Zynga’s Lawsuit Illegally and Unfairly Aims to Chill Employee Mobility**
14 **and Interfere with KIXEYE’s Ability to Compete in the Social Gaming**
15 **Market**

16 49. Zynga’s lawsuit is a calculated attempt to send a message to its employees that they
17 may find themselves in litigation should they choose to depart Zynga for a competitor—especially if
18 that competitor is KIXEYE.

19 50. If Zynga’s lawsuit were truly about protecting its alleged trade secrets or other
20 confidential information, Zynga would not have waited over five weeks after Mr. Patmore’s
21 departure to scrub his computer for evidence of some potential wrongdoing.

22 51. Rather, Zynga finally launched its investigation into Mr. Patmore as its business woes
23 and employee departures continued to snowball out of control and its direction shifted further toward
24 midcore gaming.

25 52. Moreover, when the forensic analysis of Mr. Patmore’s computer revealed that Mr.
26 Patmore may be in possession of documents from Zynga, Zynga would not have waited to act so
27 long to act, never even taking the simple steps of asking Mr. Patmore to discuss the issue, if its true
28 goal was to protect that data.

1 53. Indeed, Zynga first had a forensics firm image Mr. Patmore's computer five weeks
2 after his last day at Zynga and three days before Mr. Patmore had even had his first day of work at
3 KIXEYE. And three more weeks would pass before Zynga would take any action at all to notify Mr.
4 Patmore or KIXEYE of a potential problem, which it only did when it sued Mr. Patmore without
5 notice.

6 54. Zynga's interest was never in taking prompt action to protect its information, but
7 rather trying to let just enough time pass after Mr. Patmore's departure so that it could take aim at
8 KIXEYE in addition to Mr. Patmore.

9 55. This ulterior motive also explains the allegations in Zynga's Complaint regarding the
10 non-solicitation clause in Mr. Patmore's employment contract. As noted above, *twice* Zynga
11 references Mr. Patmore's obligation not to solicit employees away from Zynga, yet Zynga *never*
12 alleges facts suggesting Mr. Patmore breached that obligation. These allegations can only be read as
13 a warning to other Zynga employees who might have considered reaching out to Mr. Patmore or
14 KIXEYE for employment opportunities.

15 56. As a direct result of Zynga's anticompetitive and illegal campaign to dissuade
16 talented workers from seeking new employment, both Zynga employees and KIXEYE have suffered
17 harm.

18 57. KIXEYE has been forced to incur specific and additional monetary expenses in
19 connection with its lawful recruiting and hiring of Zynga employees that would have otherwise been
20 unnecessary. Zynga's conduct unfairly increases the cost of recruiting and hiring talent in the online
21 social gaming market.

22 58. KIXEYE was further deprived of a fundamental right to lawfully recruit and hire
23 Zynga employees without fear of facing litigation.

24 59. Zynga's misconduct restricted the pool of qualified candidates in the online social
25 gaming space and limited the ability to compete for qualified employees.

26 60. All of these harms were the specifically intended result of Zynga's illegal scheme.
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1 **2. Zynga’s Lawsuit Illegally and Unfairly Aims to Use Litigation Give**
2 **Zynga Access to KIXEYE’s Proprietary Information and Trade Secrets**

3 61. Zynga’s lawsuit is also an unfair and unlawful attempt to use the litigation to gain
4 access to KIXEYE’s confidential business information and trade secrets to help Zynga’s desperate
5 attempt to move into the midcore market.

6 62. Mr. Patmore has worked with Zynga in good faith pursuant to the Court’s order to
7 ensure that all information from his employment at Zynga has been removed from his possession
8 and is not accessible to KIXEYE.

9 63. At this point, that information is quarantined and it is clear that, at most, Mr. Patmore
10 may have disclosed non-confidential information from two of the files on his DropBox account to
11 other KIXEYE employees before the suit was filed.

12 64. First, during one (or potentially two) conversations with KIXEYE’s Vice President of
13 Engineering, Mr. Patmore may have discussed the salary of a former Zynga employee named Niall
14 Hayes. At the time, KIXEYE was considering making a job offer to Mr. Hayes, and wanted to
15 confirm that Mr. Hayes’ representations regarding his salary at Zynga was accurate. Mr. Patmore
16 believes that in order to confirm Mr. Hayes’ salary at Zynga, he may have referenced a spreadsheet
17 within the Zynga folder containing a limited list of Zynga personnel and their compensation
18 information to confirm Mr. Hayes’ statements about his salary information. It is also possible,
19 however, that Mr. Patmore did not access the spreadsheet, but instead simply confirmed the salary
20 information based on memory.

21 65. Second, on September 26, 2012, Mr. Patmore sent a KIXEYE employee an email
22 entitled “Doc templates,” to which he attached a “Game Pitch,” which was a template he created in
23 April 2012. The purpose of sending the document to Mr. Rubinfeld was so that Mr. Rubinfeld
24 could consider the document’s format as a potential template for a project at KIXEYE. Although
25 Mr. Patmore attempted to remove all Zynga-related non-confidential data from the document before
26 he sent it, he did so quickly, and some Zynga-related data remained on the document. The template
27 of this document was not something that was unique to Zynga. In fact, Mr. Patmore had used
28

1 extremely similar templates at other companies prior to his employment with Zynga. Moreover, the
2 KIXEYE employee thought the template was useless and chose not to use it.

3 66. In both cases, Mr. Patmore did not consider the information he accessed to constitute
4 Zynga's confidential, proprietary or trade secret information. Moreover, it is objectively clear that
5 basic salary information and an industry-standard presentation template are *not* trade secrets.

6 67. Furthermore, the circumstances of those disclosures in no way show that KIXEYE
7 intended to seek or use confidential Zynga information.

8 68. There are no facts suggesting that KIXEYE obtained trade secrets via any other
9 manner and the universe of documents that was in Mr. Patmore's possession has been secured.

10 69. Moreover, Zynga already has forensic evidence provided to it per the Court's order
11 by Mr. Patmore that demonstrates his usage (or non-usage) of those files. But Zynga cites no facts
12 from its forensic examination of the data that indicates any conduct implicating KIXEYE.

13 70. In sum, there are no facts showing that KIXEYE misappropriated any trade secrets or
14 intentionally interfered with a contract. This utter lack of any support for the claim against KIXEYE
15 makes it clear that Zynga has added KIXEYE to this lawsuit in an improper attempt to expand the
16 scope of discovery to gain access to information about KIXEYE's business practices.

17 71. Zynga's scheme is consistent with its extensive and widely-recognized reputation for
18 stealing and copying the intellectual property and games of its competitors. *See, e.g.,* Nathan
19 Brown, *How Zynga cloned its way to success*, EDGE (Jan. 25, 2012, 4:37 PM), [http://www.edge-](http://www.edge-online.com/features/how-zynga-cloned-its-way-success/)
20 [online.com/features/how-zynga-cloned-its-way-success/](http://www.edge-online.com/features/how-zynga-cloned-its-way-success/) (chronicling history of accusations against
21 Zynga related to copying and/or cloning games). Indeed, copying the work of others appears to be
22 Zynga's core business strategy. *See, e.g.,* Peter Jamison, *FarmVillains*, SF WEEKLY (Sept. 8, 2010.),
23 <http://www.sfweekly.com/2010-09-08/news/farmvillains/> (summarizing Zynga's business strategy
24 as: "Steal someone else's game. Change its name. Make millions. Repeat.").

25 72. In a story on Zynga in the newspaper *SF Weekly*, former Zynga employees described
26 how Zynga's leadership openly admitted to copying its competitors internally. One former Zynga
27 senior employee recalled a meeting with Zynga CEO Mark Pincus, in which Pincus stated: "I don't
28 fucking want innovation. . . . You're not smarter than your competitor. Just copy what they do and

1 do it until you get their numbers.” *See id.* This sentiment was echoed in other interviews conducted
2 by *SF Weekly* where “several former Zynga workers indicate[d] that the practice of stealing other
3 companies’ game ideas—and then using Zynga’s market clout to crowd out the games’ originators—
4 was business as usual.” *Id.*

5 73. The list of companies that have accused Zynga of stealing its games and/or
6 intellectual property is staggering, and includes the following examples.

7 74. In February 2009, game creator David Maestri and his company Psycho Monkey sued
8 Zynga for copyright infringement, alleging that Zynga had copied his game *Mob Wars* when it
9 released its title *Mafia Wars*. *See* Jason Kincaid, *Mob Wars Puts a Hit Out on Zynga, Sues for*
10 *Copyright Infringement*, TECHCRUNCH (Feb. 14, 2009), [http://techcrunch.com/2009/02/14/mob-](http://techcrunch.com/2009/02/14/mob-wars-creator-sues-zynga-for-copyright-infringement/)
11 [wars-creator-sues-zynga-for-copyright-infringement/](http://techcrunch.com/2009/02/14/mob-wars-creator-sues-zynga-for-copyright-infringement/).

12 75. In July 2011, SocialApps LLP sued Zynga for copyright infringement, alleging that
13 Zynga’s game *FarmVille* copied its game, *MyFarm*. *See* Jordan Mallory, *Lawsuit filed against*
14 *Zynga over FarmVille source code*, JOYSTIQ (July 18, 2011, 10:30 PM),
15 <http://www.joystiq.com/2011/07/18/lawsuit-filed-against-zynga-over-farmville-source-code/>.
16 According to SocialApps, Zynga had approached it in May 2009 to discuss a potential deal to
17 acquire the intellectual rights and source code for *MyFarm* but took advantage of the due diligence
18 process to copy SocialApps’ source code, only to back out of the deal later.

19 76. In January 2012, independent game development studio NimbleBit accused Zynga of
20 copying its game *Tiny Tower* with Zynga’s *Dream Heights* in an open letter to Zynga. *See* Greg
21 Kumparak, *TinyTower Developers Call Out Zynga for Copying Their Game (After They Refused To*
22 *Be Acquired)*, TECHCRUNCH (Jan. 24, 2012), [http://techcrunch.com/2012/01/24/tiny-tower-](http://techcrunch.com/2012/01/24/tiny-tower-developers-call-out-zynga-for-their-look-alike-game/)
23 [developers-call-out-zynga-for-their-look-alike-game/](http://techcrunch.com/2012/01/24/tiny-tower-developers-call-out-zynga-for-their-look-alike-game/).

24 77. Later in January 2012, another independent game development studio, Buffalo
25 Studios, accused Zynga of copying its game *Bingo Blitz* in an open letter to Zynga. *See* Dean
26 Takahashi, *Buffalo Studios blasts Zynga for copying Bingo Blitz social game*, VENTUREBEAT (Jan.
27 29, 2012, 10:25 PM), [http://venturebeat.com/2012/01/29/buffalo-studios-blasts-zynga-for-copying-](http://venturebeat.com/2012/01/29/buffalo-studios-blasts-zynga-for-copying-bingo-blitz-social-game)
28 [bingo-blitz-social-game](http://venturebeat.com/2012/01/29/buffalo-studios-blasts-zynga-for-copying-bingo-blitz-social-game).

1 *de facto* non-compete agreement in violation of California Business &
2 Professions Code § 16600; and

3 (b) to slow and prevent the departure of Zynga employees who seek employment
4 with any competitor, including KIXEYE, including by threatening and
5 severely penalizing those who do.

6 85. Zynga's conduct in restricting KIXEYE's ability to hire former Zynga employees and
7 preventing its employees from leaving their employment with Zynga for a competitor created a *de*
8 *facto* non-compete that constitutes unlawful and unfair business practices in violation of California
9 Business and Professions Code sections 16600 *et seq.* and 17200 *et seq.* Zynga's conduct tampers
10 with the employment market and impairs the ability of its employees to seek better job opportunities
11 within the online social gaming industry, and adversely impacts KIXEYE, as well as other industry
12 competitors, preventing them from lawfully competing for Zynga's employees.

13 86. KIXEYE's success in this action will enforce important rights affecting the public
14 interest. There is a financial burden involved in pursuing this action, the action is seeking to
15 vindicate a public right, and it would be against the interests of justice to penalize KIXEYE by
16 forcing it to pay its own attorneys' fees from the recovery in this action. Attorneys' fees are
17 appropriate pursuant to California Code of Civil Procedure § 1021.5 and otherwise.

18 87. Zynga has also unfairly and unlawfully utilized, and continues to utilize, this lawsuit
19 as an anti-competitive means to gain access to KIXEYE's own trade secrets and confidential
20 business information, particularly with regard to midcore game development and business practices,
21 through the litigation process. Zynga's goal is to benefit itself at KIXEYE's expense by using
22 discovery into KIXEYE's business practices and information to learn how to operate in its new foray
23 into the midcore gaming market.

24 88. Zynga has also unfairly and unlawfully utilized, and continues to utilize, this lawsuit
25 as an anti-competitive means to subject KIXEYE to the costs and litigation and to force KIXEYE to
26 devote its time and resources to defending Zynga's meritless claim at a time when Zynga is trying to
27 enter the midcore market.

28 89. KIXEYE was the direct and intended object of Zynga's anti-competitive conduct.

1 90. The gravity of the consequences of Zynga’s conduct as described outweighs any
2 justification, motive or reason therefor, particularly considering the available legal alternatives that
3 exist in the marketplace.

4 91. As a direct and proximate result of Zynga’s unlawful and unfair business practices,
5 KIXEYE has suffered an injury in fact, and has lost money and/or property within the meaning of
6 California Business and Professions Code sections 17203 and 17204, including being forced to
7 unnecessarily incur additional costs to lawfully recruit and hire Zynga employees. KIXEYE has
8 been further injured because Zynga’s actions unduly burden its exercise of a fundamental liberty in
9 California and have increased the risk and costs of employing California residents in their chosen
10 profession.

11 92. Pursuant to California Business and Professions Code sections 17203 and 17204,
12 KIXEYE is entitled to injunctive relief enjoining Zynga, and individuals and entities acting in
13 concert with it, from engaging in further conduct constituting unfair competition designed to further
14 stifle competition in the marketplace. KIXEYE requests an entry of a preliminary and permanent
15 injunction:

- 16 (a) prohibiting Zynga from continuing litigation against KIXEYE with the intent
17 to interfere with the competitors’ right to recruit, hire and/or employ Zynga
18 employees or to gain access to KIXEYE’s business information;
- 19 (b) prohibiting Zynga from threatening or initiating litigation against its own
20 employees with the expressed intent to dissuade them from pursuing or
21 accepting employment with KIXEYE;
- 22 (c) prohibiting Zynga from interfering with KIXEYE’s business relations with
23 potential and actual employees in violation of California’s Unfair Competition
24 Law and public policy against restraints of trade including no-hire restrictions;
- 25 (d) requiring Zynga to affirmatively notify its employees of their rights to seek
26 employment with a competitor in the State of California, free of threat,
27 coercion, and/or objectively and subjectively baseless sham litigation; and
28

- 1 (e) requiring Zynga to provide the Court with quarterly sworn certifications of
2 compliance.

3
4 **PRAYER FOR RELIEF**

5 WHEREFORE, KIXEYE prays for judgment as follows:

- 6 1. Pursuant to its cause of action, for preliminary and permanent injunctive relief:
- 7 (a) prohibiting Zynga from continuing against KIXEYE with the intent to
8 interfere with the competitors' right to recruit, hire and/or employ Zynga
9 employees or to gain access to KIXEYE's business information;
- 10 (b) prohibiting Zynga from threatening or initiating litigation against its own
11 employees with the expressed intent to dissuade them from pursuing or
12 accepting employment with KIXEYE;
- 13 (c) prohibiting Zynga from interfering with KIXEYE's business relations with
14 potential and actual employees in violation of California's Unfair Competition
15 Law and public policy against restraints of trade including no-hire restrictions;
- 16 (d) requiring Zynga to affirmatively notify its employees of their rights to seek
17 employment with a competitor in the State of California, free of threat,
18 coercion, and/or objectively and subjectively baseless sham litigation; and
- 19 (e) requiring Zynga to provide the Court with quarterly sworn certifications of
20 compliance;
- 21 2. Restitution and/or disgorgement, in an amount to be proven at trial;
- 22 3. Attorneys' fees and costs; and
- 23 4. For such other and further relief as the Court may deem just and proper.
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1 Dated: November 13, 2012

Respectfully submitted,

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3 By:



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