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Plaintiff Terrence Ferguson*

THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Terrence Ferguson, an
individual, aka 2 Milly,

Plaintiff,

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.**

Demand for Jury Trial

1 Plaintiff Terrence Ferguson, aka 2 Milly, (“Plaintiff” or “Ferguson”),
2 by and through his undersigned counsel, asserts the following claims
3 against Defendant Epic Games, Inc. (“Epic”) and Does 1 through 50
4 (collectively referred to as “Defendants”), and alleges as follows:

5 I. OVERVIEW

6 1. Through its unauthorized misappropriation of Ferguson’s
7 highly popular dance craze, the “Milly Rock,” in its video game, Fortnite
8 Battle Royale (“Fortnite”), Epic has unfairly profited from exploiting
9 Ferguson’s protected creative expression and likeness.

10 2. Ferguson, also known by the alter ego and stage name, “2
11 Milly,” is a professional rapper, who created the self-named Milly Rock
12 dance, which exploded in popularity following Ferguson’s 2014 release
13 of his hit song, also titled, “Milly Rock,” and its accompanying music
14 video that demonstrates the dance.

15 3. Defendants capitalized on the Milly Rock’s popularity,
16 particularly with its younger fans, by selling the Milly Rock dance as an
17 in-game purchase in Fortnite under the name “Swipe It,” which players
18 can buy to customize their avatars for use in the game. This dance was
19 immediately recognized by players and media worldwide as the Milly
20 Rock. Although identical to the dance created, popularized, and
21 demonstrated by Ferguson, Epic did not credit Ferguson nor seek his
22 consent to use, display, reproduce, sell, or create a derivative work
23 based upon Ferguson’s Milly Rock dance or likeness.

24 4. Since being released in or around September 2017, Fortnite
25 has become among the most popular video games ever with sales far in
26 excess of \$1 billion. Indeed, Fortnite made approximately \$318 million
27 in May 2018 alone, the “biggest month ever for a video game.” As a free-
28 to-play game, Fortnite derives its sales exclusively through these types

1 of in-game purchases. Epic should not be able to profit from Ferguson’s
2 fame and hard work by its intentional misappropriation of Ferguson’s
3 original content or likeness. Ferguson seeks injunctive relief and
4 damages, including, but not limited to, Epic’s profits attributed to its
5 improper use of the Milly Rock and Ferguson’s likeness.

6 **II. THE PARTIES**

7 5. Ferguson resides in Brooklyn, New York. He is better
8 known as the popular rapper, 2 Milly.

9 6. Epic is a North Carolina business corporation with its
10 principal place of business at 620 Crossroads Boulevard, Cary, NC
11 27518. Epic is the creator and developer of the Fortnite video game
12 franchise, which was first released in July 2017.

13 **III. SUBJECT MATTER JURISDICTION AND** 14 **VENUE**

15 7. The Court has subject matter jurisdiction over this action
16 pursuant to 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1332
17 (diversity), and 28 U.S.C. § 1367 (supplemental jurisdiction).

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

24 **IV. FACTUAL BACKGROUND**

25 **A. 2 Milly and the Creation of the Milly Rock**

26 9. Raised in the New York City borough of Brooklyn, Ferguson
27 has been rapping with his childhood friends since he was 13 years old
28 under the name “2 Milly.” Ferguson’s music focuses on his life as a

1 rapper growing up in a rough, predominantly African-American
2 Brooklyn neighborhood, and emphasizes his unique style and
3 perspectives.

4 10. In 2011, four years before releasing the “Milly Rock” single,
5 Ferguson created a dance, which he later named the Milly Rock after
6 himself, while listening and dancing to music with his friends. The
7 dance is distinctive and immediately recognizable.

8 11. Since creating the dance, Ferguson incorporated it into his
9 performances around New York City. Ferguson also posted videos of
10 himself and his friends, who later formed the rap group, Stack Paper,
11 performing the dance on YouTube and other social media platforms
12 including Instagram and Facebook.

13 12. In August 2014, Ferguson released “Milly Rock,” a rap that
14 celebrates the dance he created years ago. The song was accompanied
15 by a music video posted on YouTube, where Ferguson is depicted
16 performing the dance that he named after his stage name, 2 Milly, with
17 his friends in his hometown of Brooklyn. The hook of the song features
18 Ferguson, as 2 Milly, rapping the lyric, “I Milly Rock on any block.” The
19 Milly Rock song made the iTunes top 200 chart in its first week and was
20 the most added single on urban radio.

21 13. The song exploded in popularity the following summer as
22 various celebrities, including Rihanna, Chris Brown, and Wiz Khalifa
23 posted themselves performing the dance on social media. By the end of
24 the 2015 summer, the Milly Rock music video had over one million
25 views on YouTube and thousands of people began posting their own
26 videos showing themselves performing the Milly Rock. The video now
27 has nearly 18 million views on YouTube. The video can be found at
28 <https://www.youtube.com/watch?v=PMzDoFuVgRg>.

1 14. Since its release in 2014 and its rise to fame in 2015, the
2 Milly Rock song and dance maintained its popularity. Ferguson
3 continues to successfully use the Milly Rock commercially. Ferguson
4 performs the Milly Rock song and dance at concerts, events and
5 festivals. Indeed, in 2015, the recording artist, Jacques Webster II, also
6 known as Travis Scott, performed the Milly Rock, alongside Ferguson,
7 at the popular Summer Jam Festival. Moreover, other artists have
8 sought and been granted licenses from Ferguson in exchange for
9 compensation to perform the Milly Rock in their concerts and
10 performances.

11 15. The Milly Rock has become synonymous with Ferguson, who
12 is unanimously credited with creating the dance that bears his stage
13 name, and who performs the Milly Rock song and dance at every
14 performance. Ferguson has also been interviewed several times about
15 the creation of the Milly Rock and how to properly perform it.
16 Accordingly, the Milly Rock is a part of Ferguson's identity and the
17 dance's unique movements readily evoke imagery of Ferguson's Milly
18 Rock music video.

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

20 16. Even prior to releasing Fortnite, which would become among
21 the most popular and successful video games ever, Epic had already
22 developed two popular video game franchises: Unreal and Gears of
23 War. Since releasing the first Gears of War game in 2005, Epic released
24 several subsequent Gears of War video games, and the franchise has
25 made has made over \$1 billion in total sales.

26 17. At or around 2011, following the release of the third Gears
27 of War installment, Fortnite began from an Epic internal video game
28 hackathon, or a gathering of Epic developers to brainstorm ideas and

1 create games in a short period. Although the Fortnite game was not
2 developed during the hackathon, the idea to merge building games (*i.e.*,
3 Minecraft) and shooter games (*i.e.*, Gears of War or Call of Duty)
4 emerged during the Hackathon.

5 18. On or around July 2017, Epic released the initial version of
6 Fortnite as a paid early-access video game. However, by September
7 2017, after PlayerUnknown's Battlegrounds—a game which occupied
8 the same “battle royale” genre as Fortnite—became a worldwide
9 success, Epic released Fortnite Battle Royale, a free-to-play battle
10 royale third person shooting game on the Windows, macOS, PlayStation
11 4 and Xbox One platforms. Epic subsequently released Fortnite on the
12 iOS, Nintendo and Android platforms on April 2, 2018, June 12, 2018,
13 and August 9, 2018, respectively.

14 19. Similar to PlayerUnknown's Battlegrounds, Fortnite
15 utilizes the battle royale format where up to 100 players, alone, in pairs,
16 or groups, compete to be the last player or group alive.

17 20. As a free-to-play video game, Epic allows players to
18 download and play Fortnite for free. Fortnite is supported by in-game
19 transactions where players can purchase virtual currency, called
20 “Vinderbucks” or “V-Bucks.” The players in turn use V-Bucks to
21 purchase customizations for their in-game avatars, including new
22 characters, pickaxe modifications, glider skins, clothes and emotes
23 (dances or movements). Fortnite also sells “Battle Passes” or additional
24 levels that allow you to unlock skins, gliders, and emotes unique to that
25 Pass. Fortnite offers four pricing levels for purchasing V-Bucks:

- 26 1) 1,000 V-Bucks for \$9.99;
27 2) 2,500 (+300 Bonus) V-Bucks for \$24.99;
28 3) 6,000 (+1,500 Bonus) V-Bucks for \$59.99; or

1 4) 10,000 (+3,500 Bonus) V-Bucks for \$99.99.

2 21. There are four types of emotes: common emotes, uncommon
3 emotes, rare emotes, and epic emotes. The rarer the emote, the more
4 expensive or harder it is to obtain. Uncommon emotes cost 200 V-
5 Bucks. Rare emotes cost 500 V-Bucks. And Epic emotes cost 800 V-
6 Bucks.

7 22. To start, Fortnite provides each player with the Dance
8 Moves emote, a common emote, for no compensation. Players can then
9 obtain other emotes by purchasing and playing additional levels in
10 Battle Passes (950 V-Bucks each) that come with emotes unique to that
11 Pass, or by purchasing certain emotes directly with V-Bucks. On some
12 occasions, Fortnite sells Battle Pass emotes directly, without requiring
13 the player to purchase the Battle Pass.

14 23. Emotes are incredibly popular and are fundamental to
15 Fortnite's success. Players purchase emotes, alongside clothing and
16 skins, to personalize their Fortnite experience. Emotes have also
17 become popular outside Fortnite. Professional athletes in soccer and
18 other sports have based their celebrations on Fortnite emotes. Young
19 adults, teenagers, and kids also post videos of themselves on YouTube
20 and social media performing emotes under various hashtags, including
21 #fortnitedance or #fortnitevideos.

22 24. Upon information and belief, Epic creates emotes by copying
23 and coding dances and movements directly from popular videos, movies,
24 and television shows without consent. Epic does so by coding still
25 frames of the source material. For example, upon and information and
26 belief, Epic coded the "Ride the Pony" emote, frame-by-frame, from the
27 "Gangnam Style" dance made famous by the Korean entertainer, Psy.
28 The Ride the Pony emote and Psy's dance are identical in every respect.

1 On information and belief, Epic did not obtain Psy's authorization for
2 copying the dance and including it in Fortnite.

3 25. However, Epic has consistently sought to exploit African-
4 American talent in particular in Fortnite by copying their dances and
5 movements. Epic has copied the dances and movements of numerous
6 African-American performers, including, for example, the dance from
7 the 2004 Snoop Dogg music video, "Drop It Like It's Hot" (named the
8 "Tidy" emote), Alfonso Ribeiro's performance of his famous "Carlton"
9 dance on The Fresh Prince of Bel-Air television show (named the
10 "Fresh" emote), the dance performed by Will Smith on the same
11 television show (named the "Rambunctious" emote), the dance in
12 Marlon Webb's popular "Band of the Bold" video (named the "Best
13 Mates" emote), Donald Faison's signature dance seen on the NBC
14 television show Scrubs (named the "Dance Moves" emote), and, most
15 pertinent here, Terrence Ferguson's Milly Rock dance. Upon
16 information and belief, Epic did not seek consent or authorization to use
17 any of these movements or dances.

18 26. Soon after its release, Fortnite became an international
19 phenomenon. The game eclipsed 10 million players merely two weeks
20 after its release; 125 million players by July 2018. In November 2018,
21 Bloomberg announced that Fortnite had 200 million player accounts
22 across all platforms.

23 27. Fortnite's popularity has translated into record sales for
24 Epic. Analysts have estimated that since its release, Fortnite has
25 generated between \$1 billion to \$2 billion in revenue through in-game
26 purchases such as emotes. In May 2018, Fortnite broke its own record
27 by generating approximately \$318 million in revenue, the biggest
28 month ever for a video game. In fact, nearly 80 million people played

1 Fortnite in August 2018. Because of Fortnite’s success, Epic’s estimated
2 valuation rose from about \$825 million to about \$5 billion. Bloomberg
3 estimates that Epic’s valuation could grow to \$8.5 billion by 2018’s end.

4 28. Upon information and belief, Epic will likely continue
5 adding popular emotes to Fortnite without the artists’ or creators’
6 consent or approval to attract more players and add to its ever-growing
7 revenue.

8 **C. Fortnite’s Unauthorized Use of the Milly Rock**

9 29. On July 12, 2018, Fortnite released its Season 5 Battle Pass.
10 Players could purchase the Battle Pass, alongside its accompanying
11 emotes and other customizations, for the regular price of 950 V-Bucks.
12 As part of the Season 5 Pass, Fortnite offered a new rare emote that it
13 called “Swipe It.” According to Fortnite, players can obtain the Swipe
14 It emote as a reward from Tier 63 of the Season 5 Battle Pass. Also, on
15 certain occasions, Fortnite sold the Swipe It emote separately for 500
16 V-Bucks.

17 30. The “Swipe It” emote is identical to Ferguson’s Milly Rock
18 dance. If obtained or purchased, the Fortnite player’s avatar can
19 perform the dance during Fortnite gameplay. The reaction from many
20 players worldwide was immediate recognition of the emote as
21 embodying the “Milly Rock” while others likely believed it was Epic’s
22 original creation.

23 31. Upon information and belief, Epic intentionally developed
24 the Swipe It emote to intentionally mimic Ferguson performing the
25 Milly Rock. In fact, players had asked for it by name in various online
26 forums relating to Fortnite.

1 32. Epic did not seek to obtain Ferguson’s authorization or
2 consent for its use of his likeness and the Milly Rock for the Swipe It
3 emote.

4 33. Moreover, Ferguson did not give Epic express or implied
5 consent for its use of his likeness and the Milly Rock for the Swipe It
6 emote. Epic also did not compensate Ferguson for its use of his likeness
7 and the Milly Rock for the Swipe It emote.

8 34. Upon information and belief, Epic added the Swipe It emote
9 to intentionally exploit the popularity of Ferguson, Ferguson’s Milly
10 Rock song, and the Milly Rock dance without providing Ferguson any
11 form of compensation.

12 35. Epic profited from its improper misappropriation of the
13 Milly Rock and Ferguson’s likeness by, *inter alia*: 1) selling the
14 infringing Swipe It emote directly to players; 2) selling the Season 5
15 Battle Pass that contains the Swipe It emote; 3) advertising the Swipe
16 It emote to attract additional players, including 2 Milly’s fans or those
17 persons familiar with the Milly Rock to play Fortnite and make in-game
18 purchases; 4) staying relevant to its current players to incentivize those
19 players to continue playing Fortnite; 5) impliedly representing that
20 Ferguson consented to Epic’s use of his likeness; 6) erroneously cause
21 the association of the Swipe It with the Milly Rock; 7) creating the false
22 impression that 2 Milly endorsed Fortnite; and 8) inducing and/or
23 contributing to Fortnite players’ avatars performing the Milly Rock
24 dance.

25 36. Upon information and belief, Epic uses the Milly Rock, and
26 other dances, to create the false impression that Epic started these
27 dances and crazes or that the artist who created them is endorsing the
28 game. Indeed, players have posted thousands of videos of themselves

1 performing the “Swipe It” emote with the hashtag, #fortnitedance,
2 without referencing the Milly Rock or crediting Ferguson as the dance’s
3 creator and owner. Accordingly, upon information and belief, Epic
4 actively and knowingly directs, causes, induces, and encourages others,
5 including, but not limited to, its players, designers, suppliers,
6 distributors, resellers, software developers, and repair providers, to
7 misappropriate Ferguson’s likeness and the Milly Rock dance.

8 37. Ferguson has stated in interviews that he does not consent
9 or approve Epic’s use of his likeness and the Milly Rock for the Swipe It
10 emote. Other prominent artists, including Chancelor Bennett, known
11 as Chance the Rapper, have also publicly disapproved of Epic’s
12 practices, and advocated for Epic sharing profits with the artists that
13 created these dances.

14 38. Accordingly, Epic made a fortune from unlawfully and
15 unfairly misappropriating Ferguson’s and other artists’ creative
16 expression and likeness without crediting or compensating these
17 artists. Ferguson thus bring this lawsuit to prevent Fortnite from
18 further using his likeness and the Milly Rock, and to recover the profits
19 rightfully owed to him.

20 FIRST CAUSE OF ACTION

21 (For Direct Infringement of Copyright Against All Defendants)

22 39. Ferguson hereby repeats and realleges the allegations set
23 forth in paragraphs 1 through 38, above, as though fully set forth
24 herein.

25 40. On or around August 2014, Ferguson’s “Milly Rock” music
26 video was published to YouTube where it can be accessed by millions of
27 people. The Milly Rock music video shows Ferguson, as 2 Milly, rapping
28 and performing the Milly Rock dance with his friends.

1 41. Ferguson is the undisputed creator of the wildly popular and
2 immediately recognizable Milly Rock dance. Ferguson’s videos are the
3 original depictions of the Milly Rock dance.

4 42. Ferguson is in the process of registering the Milly Rock
5 dance with the United States Copyright Office. On December 4, 2018,
6 Ferguson submitted an application for copyright registration of the
7 Milly Rock dance and assigned Copyright Office case number 1-
8 7192939861.

9 43. Defendants have infringed and continue to infringe
10 Ferguson’s copyrights in the Milly Rock by selling the Milly Rock dance
11 emote as an in-game purchase, under the name “Swipe It” that, if
12 purchased, a player can use to make his or her avatar perform during
13 Fortnite gameplay; substantially copying the Milly Rock in digital form
14 to the Fortnite game; advertising the Milly Rock in its promotional
15 materials; and creating the Swipe It emote as a derivative work of the
16 Milly Rock.

17 44. Defendants did not seek to obtain Ferguson’s permission for
18 its use of the Milly Rock for the Swipe It emote. Nor have Defendants
19 compensated or credited Ferguson for their use of the Milly Rock.

20 45. Moreover, Defendants actively and knowingly directed,
21 caused, induced, and encouraged others, including, but not limited to,
22 its players, designers, suppliers, distributors, resellers, software
23 developers, and repair providers, to misappropriate Ferguson’s likeness
24 and the Milly Rock dance.

25 46. Defendants’ acts of infringement have been willful,
26 intentional, and purposeful, in disregard of and with indifference to
27 Plaintiff’s rights.

28

1 47. Defendants' willful and continued unauthorized use of the
2 Milly Rock for commercial gain has caused and will continue to cause
3 confusion and mistake by leading the public to erroneously associate
4 the Swipe It emote offered by Epic with the Milly Rock in violation of
5 17 U.S.C. §§ 101 et seq.

6 48. As a result of Defendants' conduct, Ferguson has been
7 damaged by being precluded from receiving his rightful share of the
8 profits earned by Epic for its improper and unlicensed use of Ferguson's
9 exclusive copyrights in the Milly Rock dance in Fortnite.

10 49. Ferguson is entitled to permanent injunctive relief
11 preventing Defendants, and their officers, agents, and employees, and
12 all related persons from further using the Milly Rock and engaging in
13 other acts in violation of Copyright law.

14 50. As a direct and proximate result of Defendants'
15 infringement of Plaintiff's copyrights and exclusive rights under
16 copyright, Ferguson is also entitled to recover damages, including
17 attorneys' fees, and any profits obtained by Defendants as a result of
18 the infringements alleged above, in an amount according to proof to be
19 determined at the time of trial.

20 51. In doing the acts herein alleged, Defendants acted
21 fraudulently, willfully, and with malice, and Ferguson is therefore
22 entitled to punitive damages according to proof at the time of trial.

23 **SECOND CAUSE OF ACTION**

24 **(For Contributory Infringement of Copyright Against All**
25 **Defendants)**

26 52. Ferguson hereby repeats and realleges the allegations set
27 forth in paragraphs 1 through 51, above, as though fully set forth
28 herein.

1 53. Ferguson is in the process of registering the Milly Rock
2 dance with the United States Copyright Office. On December 4, 2018,
3 Ferguson submitted an application for copyright registration of the
4 Milly Rock dance and assigned Copyright Office case number 1-
5 7192939861.

6 54. Defendants have infringed and continue to infringe
7 Ferguson's copyrights in the Milly Rock by selling the Milly Rock dance
8 emote as an in-game purchase, under the name "Swipe It" that, if
9 purchased, a player can use to make his or her avatar perform during
10 Fortnite gameplay; substantially copying the Milly Rock in digital form
11 to the Fortnite game; advertising the Milly Rock in its promotional
12 materials; and creating the Swipe It emote as a derivative work of the
13 Milly Rock.

14 55. By providing the Swipe It emote necessary for its players to
15 commit direct copyright infringement, Defendants has and continues to
16 materially contribute to the unauthorized reproductions and
17 distributions by its players of the Milly Rock.

18 56. Defendants did not seek to obtain Ferguson's permission for
19 its use of the Milly Rock for the Swipe It emote. Nor have Defendants
20 compensated or credited Ferguson for their use of the Milly Rock.

21 57. Moreover, Defendants actively and knowingly directed,
22 caused, induced, and encouraged others, including, but not limited to,
23 its players, designers, suppliers, distributors, resellers, software
24 developers, and repair providers, to misappropriate Ferguson's likeness
25 and the Milly Rock dance.

26 58. Defendants' acts of infringement have been willful,
27 intentional, and purposeful, in disregard of and with indifference to
28 Plaintiff's rights.

1 59. Defendants' willful and continued unauthorized use of the
2 Milly Rock for commercial gain has caused and will continue to cause
3 confusion and mistake by leading the public to erroneously associate
4 the Swipe It emote offered by Epic with the Milly Rock in violation of
5 17 U.S.C. §§ 101 et seq.

6 60. As a result of Defendants' conduct, Ferguson has been
7 damaged by being precluded from receiving his rightful share of the
8 profits earned by Epic for its improper and unlicensed use of Ferguson's
9 exclusive copyrights in the Milly Rock dance in Fortnite.

10 61. Defendants' conduct is causing and, unless enjoined and
11 restrained by this Court, will continue to cause Plaintiff great and
12 irreparable injury that cannot be compensated or measured in money.
13 Plaintiff has no adequate remedy at law. Pursuant to 17 U.S.C. § 502,
14 Plaintiff is entitled to injunctive relief, prohibiting further contributory
15 infringements of Plaintiff's copyrights.

16 62. As a direct and proximate result of Defendants'
17 infringement of Plaintiff's copyrights and exclusive rights under
18 copyright, Ferguson is also entitled to recover damages, including
19 attorneys' fees, and any profits obtained by Defendants as a result of
20 the infringements alleged above, in an amount according to proof to be
21 determined at the time of trial.

22 63. In doing the acts herein alleged, Defendants acted
23 fraudulently, willfully, and with malice, and Ferguson is therefore
24 entitled to punitive damages according to proof at the time of trial.

25 **THIRD CAUSE OF ACTION**

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

1 64. Ferguson hereby repeats and realleges the allegations set
2 forth in paragraphs 1 through 63, above, as though fully set forth
3 herein.

4 65. Through their use of Milly Rock dance as an in-game dance
5 emote that can be purchased, Defendants misappropriated Ferguson's
6 identity. The Swipe it emote depicts Ferguson performing the Milly
7 Rock dance. Upon information and belief, Defendants created the
8 Swipe It emote by capturing and digitally copying Ferguson performing
9 the Milly Rock. Defendants then utilized the digital copy to create code
10 that, if purchased, allows player avatars to perform the Milly Rock
11 dance.

12 66. Defendants did not seek or obtain Ferguson's authorization
13 or consent for its use of his likeness for the Swipe It emote. Nor have
14 Defendants compensated or credited Ferguson for their use of the Milly
15 Rock.

16 67. Defendants used Ferguson's likeness to generate significant
17 wealth by: 1) selling the infringing Swipe It emote directly to players;
18 2) selling the Season 5 Battle Pass that contains the Swipe It emote; 3)
19 advertising the Swipe It emote to attract additional players, including
20 2 Milly's fans or those persons familiar with the Milly Rock to play
21 Fortnite and make in-game purchases; 4) staying relevant to its current
22 players to incentivize those players to continue playing Fortnite; 5)
23 impliedly representing that Ferguson consented to Epic's use of his
24 likeness; 6) erroneously cause the association of the Swipe It with the
25 Milly Rock; 7) creating the false impression that 2 Milly endorsed
26 Fortnite; and 8) inducing and/or contributing to Fortnite players'
27 avatars performing the Milly Rock dance.

28

1 68. As the rapper, 2 Milly, Ferguson exploits his identity by
2 performing at concerts, events and festivals. Ferguson was damaged by
3 Defendants' conduct as he was prevented from reaping the profits of
4 licensing his likeness to Defendants for commercial gain.

5 69. Defendants' conduct caused and will continue to cause
6 confusion and mistake by leading the public to erroneously believe that
7 Ferguson consented to the use of his likeness in the Fortnite game.

8 70. Ferguson is entitled to permanent injunctive relief
9 preventing Defendants, and their officers, agents, and employees, and
10 all related persons from further using his likeness.

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

15 **FOURTH CAUSE OF ACTION**

16 **(For Violation of the Right of Publicity Under Cal. Civ. Code §**
17 **3344 Against All Defendants)**

18 72. Ferguson hereby repeats and realleges the allegations set
19 forth in paragraphs 1 through 71, above, as though fully set forth
20 herein.

21 73. Through their use of Milly Rock dance as an in-game dance
22 emote that can be purchased, Defendants misappropriated Ferguson's
23 identity. The Swipe it emote depicts Ferguson performing the Milly
24 Rock dance. Upon information and belief, Defendants created the
25 Swipe It emote by capturing and digitally copying Ferguson performing
26 the Milly Rock. Defendants then utilized the digital copy to create code
27 that, if purchased, allows player avatars to perform the Milly Rock
28 dance.

1 74. Defendants did not seek or obtain Ferguson’s authorization
2 or consent for its use of his likeness for the Swipe It emote. Nor have
3 Defendants compensated or credited Ferguson for their use of the Milly
4 Rock.

5 75. Defendants used Ferguson’s likeness to generate significant
6 wealth by: 1) selling the infringing Swipe It emote directly to players;
7 2) selling the Season 5 Battle Pass that contains the Swipe It emote; 3)
8 advertising the Swipe It emote to attract additional players, including
9 2 Milly’s fans or those persons familiar with the Milly Rock to play
10 Fortnite and make in-game purchases; 4) staying relevant to its current
11 players to incentivize those players to continue playing Fortnite; 5)
12 impliedly representing that Ferguson consented to Epic’s use of his
13 likeness; 6) erroneously cause the association of the Swipe It with the
14 Milly Rock; 7) creating the false impression that 2 Milly endorsed
15 Fortnite; and 8) inducing and/or contributing to Fortnite players’
16 avatars performing the Milly Rock dance.

17 76. As the rapper, 2 Milly, Ferguson exploits his identity by
18 performing at concerts, events and festivals. Ferguson was damaged by
19 Defendants’ conduct as he was prevented from reaping the profits of
20 licensing his likeness to Defendants for commercial gain.

21 77. Defendants’ conduct caused and will continue to cause
22 confusion and mistake by leading the public to erroneously believe that
23 Ferguson consented to the use of his likeness in the Fortnite game.

24 78. Ferguson is entitled to permanent injunctive relief
25 preventing Defendants, and their officers, agents, and employees, and
26 all related persons from further using his likeness.

27 79. Ferguson is 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 **FIFTH CAUSE OF ACTION**

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

5 80. Ferguson hereby repeats and realleges the allegations set
6 forth in paragraphs 1 through 79, above, as though fully set forth
7 herein.

8 81. By misappropriating Ferguson's copyright and likeness
9 through the improper use of the Milly Rock dance, Defendants have
10 engaged in business acts or practices that constitute unfair competition
11 in violation of Cal. Bus. & Prof. Code. § 17200.

12 82. As a result of Defendants' violations, Defendants have
13 unjustly enriched themselves by: 1) selling the infringing Swipe It
14 emote directly to players; 2) selling the Season 5 Battle Pass that
15 contains the Swipe It emote; 3) advertising the Swipe It emote to attract
16 additional players, including 2 Milly's fans or those persons familiar
17 with the Milly Rock to play Fortnite and make in-game purchases; 4)
18 staying relevant to its current players to incentivize those players to
19 continue playing Fortnite; 5) impliedly representing that Ferguson
20 consented to Epic's use of the Milly Rock and his likeness; 6) erroneously
21 cause the association of the Swipe It with the Milly Rock; 7) creating
22 the false impression that 2 Milly endorsed Fortnite; and 8) inducing
23 and/or contributing to Fortnite players' avatars performing the Milly
24 Rock dance.

25 83. As a result of Defendants' conduct, Ferguson has been
26 damaged by being precluded from receiving his rightful share of the
27 profits from selling or licensing his exclusive copyright in the Milly Rock
28 dance.

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

2 11. For an order restraining Defendants from using, selling, or
3 displaying Ferguson's copyright in its Fortnite game;

4 12. For an award of damages according to proof; and

5 13. For punitive and/or exemplary damages;

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

7 14. For an order restraining Defendants from using, selling, or
8 displaying Ferguson's copyright in its Fortnite game;

9 15. For an award of damages according to proof; and

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

11 16. For costs of suit; and

12 17. For such other and further relief as the Court may deem
13 proper.

14 Dated: December 5, 2018

Respectfully Submitted,

16 **Pierce Bainbridge Beck Price &
17 Hecht LLP**

18
19 By: /s/Carolynn Beck
20 Carolynn Beck
21 *Attorneys for Plaintiff Terrence
22 Ferguson*
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JURY TRIAL

Plaintiff Terrence Ferguson requests a trial by jury on all issues to which it is entitled a jury.

Dated: December 5, 2018

Respectfully Submitted,

Pierce Bainbridge Beck Price & Hecht LLP

By: /s/Carolynn Beck

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