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*Attorneys for Plaintiff Epic Games, Inc.*

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

EPIC GAMES, INC.,

Plaintiff,

- against -

SICK PICNIC MEDIA, LLC and MATTHEW F.  
GEILER,

Defendants.

Case No. 19-cv-11215

ECF Case

JURY TRIAL DEMANDED

**COMPLAINT FOR DECLARATORY JUDGMENT OF NON-INFRINGEMENT**

Plaintiff Epic Games, Inc. (“Epic Games”), by and through its attorneys, Kirkland & Ellis LLP, for its Complaint, hereby alleges against Defendants Sick Picnic Media, LLC (“Sick Picnic”) and Matthew F. Geiler (“Geiler”) (collectively, “Defendants”) as follows:

### NATURE OF THE ACTION

1. Epic Games has been forced to bring this action seeking a declaration that, contrary to infringement claims asserted by Defendants, the Pump It Up Emote in Epic Games' fantastical, multiplayer video game, *Fortnite*, does not infringe their copyright or trademark rights.

2. *Fortnite* is set in a fictional world in which players, represented by original characters of various genders, ethnicities, and species, compete in a battle royale with a variety of accessories and weapons. The players choose how their in-game characters look and move, including by selecting short, pre-programmed movements that allow the player to express his or her emotions in the game or to taunt other players. These are known as emotes.

3. This case concerns one of those emotes: a Halloween-themed emote called "Pump It Up" that Epic Games made available for a single day shortly before Halloween in the fall of 2019 as part of its annual *Fortnitemales* event (the "Pump It Up Emote"). In the Pump It Up Emote, the avatar performs a brief dance to a Halloween-themed song developed by Epic Games while the head of whatever avatar the player has selected is transformed into a jack-o'-lantern face designed by Epic Games. The jack-o'-lantern face has moving green flames pouring from the eyes, nose and mouth, a broad, grinning mouth, a long, prominent stem that curves, and dark striations delineating the segments of the pumpkin giving it a yellow-and-orange design. The Pump It Up Emote can be performed by any avatar in the game, including fantastically dressed male avatars, female avatars, and avatars of other species.

4. Defendants have alleged that the Pump It Up Emote infringes their copyright to a "character," which they refer to as the "Dancing Pumpkin Man," that appeared in a video in which Defendant Geiler is dressed in a plain black unitard he did not make, wearing as a mask a

jack-o'-lantern decoration he did not create, dancing to a song he did not write in front of a static, generic graveyard image (the "Video"). A true and correct copy of the Video is attached hereto as **Exhibit 1**. There is no infringement here, however, as Defendants do not own a protectable character and the jack-o'-lantern-headed figures are in any case not substantially similar as a matter of law. Defendants' alleged "character" is not protectable as it is not "sufficiently delineated" as a matter of law. Rather, it is simply the idea of an ordinary jack-o'-lantern head on a non-descript, plain black unitard body. This does not rise to the level of specificity needed, as a matter of law, to create a copyrightable character.

5. Moreover, Defendants did not create the attributes of that alleged "character," and thus they cannot own a copyright to them. Defendants have admitted that Geiler did not create the face of the jack-o'-lantern—rather he took a preexisting, third-party Halloween jack-o'-lantern decoration from his company's holiday lobby display and fashioned it into a mask. Nor did Geiler create the simple black unitard.

6. In any case, these preexisting materials are not substantially similar to *Fortnite's* Pump It Up Emote. In contrast to *Fortnite's* Pump It Up Emote, the Defendants' alleged character's jack-o'-lantern face has a narrower mouth and a smaller aperture to the eyes and nose, there are no moving green flames shining through the holes, its jack-o'-lantern head is smaller than *Fortnite's* Pump It Up Emote and is a uniform orange color, as opposed to a striated, yellow-and-orange-toned design. The stem on Defendants' jack-o'-lantern is smaller than the stem in the Pump It Up Emote. The bodies and costumes of the figures are also not substantially similar. The body of Defendants' alleged "character" is an ordinary man in a plain black unitard. *Fortnite* has over 200 avatars (including female avatars and avatars of other species) whose heads can be briefly replaced by the Pump It Up Emote—none of these avatars'

bodies wear a plain black unitard. Nor is the music used in the Video the same music as used in the Pump It Up Emote. A comparison of the Defendants’ alleged “character” with multiple examples of *Fortnite* avatars performing the Pump It Up Emote is shown below:



7. Defendants’ trademark claims similarly fail because symbols may serve as trademarks only where used in commerce to identify the source or origin of a product or service. They also must be distinctive for such product or service—the Dancing Pumpkin Man is none of these things. Moreover, the First Amendment protects expressive works like *Fortnite*’s Pump It Up Emote, as Epic Games’ use is artistically relevant because it allows *Fortnite* players to express themselves during gameplay using a culturally-relevant reference to Halloween, as part of *Fortnite*’s Halloween-themed *Fortnitemales* event, and the use is not explicitly misleading. Nor does the Pump It Up Emote create a likelihood of confusion as to source, affiliation, or sponsorship with Defendants or their claimed trademark.

8. Moreover, as discussed in detail below, Defendants’ claims also are fundamentally flawed as no protectable elements of the Video, or any “character,” have been used in *Fortnite* without Defendants’ authorization. This is because Defendants already granted Epic Games a license to the “character,” the Video and the content therein.

9. As Defendants have refused to accept these fundamental intellectual property principles, Epic Games brings this action to clarify the parties' rights and seeks a declaratory judgment that the Pump It Up Emote does not infringe any copyright or trademark rights held by Defendants.

### **THE PARTIES**

10. Plaintiff Epic Games, Inc. is a Maryland corporation having its principal place of business in North Carolina. It is a multinational publisher, developer, and distributor of video games and software, including *Fortnite*.

11. Upon information and belief, Defendant Sick Picnic Media, LLC is a Nebraska limited liability company registered to do business and having offices in Omaha, Nebraska.

12. Upon information and belief, Sick Picnic serves as Geiler's agency for professional contracting and licensing of Geiler's live entertainment performances.

13. Defendant Matthew F. Geiler is an individual who, upon information and belief, is the CEO and owner of Sick Picnic and resides in the State of Nebraska.

### **JURISDICTION AND VENUE**

14. This is an action arising under the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, the Copyright Act, 17 U.S.C. § 101 *et seq.*, and the Lanham Act, 15 U.S.C. § 1051 *et seq.*

15. This Court has subject matter jurisdiction under 28 U.S.C. §§ 2201 and 2202 because there is a substantial and concrete controversy between the parties of sufficient immediacy that warrants a declaratory judgment. This Court has jurisdiction over this matter pursuant to 15 U.S.C. § 1121, 28 U.S.C. §§ 1331 and 1338 in that this matter involves an action arising under the Copyright Act and the Lanham Act.

16. The Court has personal jurisdiction over Defendants and venue is proper in this District because Defendants consented to personal jurisdiction and venue in New York via the forum selection clause contained in the agreement that they entered into with Epic Games concerning the Video and the Pump It Up Emote (the “License”), which provides that the “parties hereby consent to the jurisdiction of the state and federal courts of general jurisdiction located within New York County, New York for the resolution of disputes arising out of or relating to this agreement.” This dispute arises out of or relates to the License, a true and correct copy of which is attached hereto as **Exhibit 2**. Moreover, numerous consumers in New York have downloaded and played *Fortnite*, including the Pump It Up Emote. Epic Games also has held *Fortnite* tournaments in New York, New York, including the Fortnite World Cup.

**ALLEGATIONS COMMON TO ALL CLAIMS FOR RELIEF**

**Plaintiff and Its *Fortnite* Video Game Series**

17. *Fortnite* was released in the United States on July 25, 2017 for Windows and on September 26, 2017 for PlayStation 4 and Xbox One. A true and correct copy of *Fortnite* is attached hereto as **Exhibit 3**.<sup>1</sup>

18. *Fortnite* is a creative work.

19. *Fortnite* reflects creative choices in, among other things, its characters, setting, plot, graphics, animations, music, dialogue, and other expressive elements.

20. *Fortnite* is composed of a single-player or cooperative “Save the World” mode, a multiplayer “Battle Royale” mode, and a “Creative” sandbox mode.

21. Epic Games periodically releases updates to *Fortnite*, including releases of new “Seasons” of the game, as well as limited availability features within the game. The release of a

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<sup>1</sup> Epic Games has attached the Xbox One version of *Fortnite* to this Complaint. For the convenience of the Court, Epic Games also will make an Xbox One console available to the Court upon request.

new “Season” and its content often reflect the time of year and holidays occurring simultaneously in real life. For example, Chapter 1 Season 7 of *Fortnite*, which was available between December 2018 and February 2019, was winter themed and included snow, a large iceberg dubbed “Polar Peak,” and features in the game map that celebrated the “Festivus” holiday. Each Season contains new items and game rewards that players may be able to obtain.

22. *Fortnite* is a game where up to 100 players—alone, in pairs, or groups—compete to be the last player or group alive. *Fortnite* features an extensive world in which players explore, build, and destroy, and also battle against each other via player-to-player combat. At the beginning of each round of *Fortnite*’s “battle royale,” each player is dropped onto *Fortnite*’s sprawling map by a purple flying school bus called the “Battle Bus” after which they float down to earth with the help of a hang glider or a large metal umbrella. Once aground, the players’ avatars explore the map’s various areas—which may include a megamall, a volcano, and floating sky platforms—while scavenging for weapons and supplies, building fortifications, setting traps, and using launch pads to soar through the air and move quickly from one location to another. As the round progresses, the map shrinks down in size due to an incoming storm, forcing the players to move closer together and accelerating the confrontations between them. The winner is the last player or team standing in each game.

#### ***Fortnite*’s Avatar Customizations**

23. Before a game begins, players may select an avatar or “skin.” *Fortnite*’s avatars, or “skins,” are all fanciful, fictional characters: some have non-human features (such as a tomato head or a giant banana with arms, legs, and a face); others are more human and follow certain fictional tropes (such as a soldier or gunslinger). There are over 200 player skins.

24. Examples of player “skins” are shown below.



25. There is no avatar “skin” in *Fortnite* that consists of a man (woman or other figure) wearing a plain black unitard.

26. Players cannot alter the “skin” of their avatars. Accordingly, an avatar’s appearance cannot be modified to look like any particular person.

### ***Fortnite’s Emotes***

27. A *Fortnite* player also can customize his or her game experience with a variety of “emotes,” which are movements or short dance steps that a player may choose to have his or her avatar perform during gameplay to express emotions or interact with other players, such as celebrating a victory on the battlefield or taunting an opponent.

28. Emotes in *Fortnite* are triggered by the players of the game with a button press or keyboard shortcut. Upon triggering an emote, an avatar will perform a short movement or combination of dance steps. Emotes are often accompanied by a brief piece of music that lasts for the duration of the emote.

29. There have been over 200 emotes available to players since *Fortnite* was released in 2017, including the “Snap” emote, the “Golf Clap” emote, the “Time Out” emote, and, at issue in this lawsuit, the Pump It Up Emote.

30. The Pump It Up Emote, as with all emotes in *Fortnite*, can be used with any avatar, without regard to the avatar’s appearance.



31. Emotes in general, and the Pump It Up Emote in particular, are a tiny aspect of *Fortnite* and incidental to overall game play.

32. A player may play *Fortnite* without downloading or using any emotes, including the Pump It Up Emote.

### **The Pump It Up Emote**

33. The Pump It Up Emote was available to download for a single day between October 29, 2019 and October 30, 2019 during Chapter 2, Season 1 of *Fortnite*.

34. The Pump It Up Emote was released as part of *Fortnite's* annual *Fortnitemares* 2019 event, which included limited-time game features that relate to Halloween.

35. The Pump It Up Emote causes an avatar to perform a set of movements, which are not at issue in this dispute. It is accompanied by original music developed by Epic Games, which also is not at issue here.

36. As shown below, the Pump It Up Emote causes a jack-o'-lantern to appear in place of the avatar's head while the player's avatar performs certain movements:





37. The jack-o'-lantern head in the Pump It Up Emote has triangles for the eyes and nose, and a broad, grinning smile.

38. Through the carved openings of the Pump It Up Emote's jack-o'-lantern, moving green flames appear.

39. The jack-o'-lantern head in the Pump It Up Emote has darkened striations giving it a yellow-and-orange-toned design.

40. The jack-o'-lantern head in the Pump It Up Emote has a long, pronounced stem that curves.

41. The Pump It Up Emote's jack-o'-lantern is an original design created by Epic Games.

42. Performing the Pump It Up Emote does not change the avatar's appearance aside from the addition of a jack-o'-lantern head.

43. Performing the Pump It Up Emote does not cause the avatar to wear a black unitard.

44. No avatar in *Fortnite* wears a plain black unitard.

45. The Pump It Up Emote can be used with any avatar, without regard to appearance or any particular likeness.

**The Marketing for *Fortnite***

46. The marketing and promotion of *Fortnite* indicates that the source of the video game is Epic Games.

47. For example, *Fortnite's* product packaging for the Xbox One game displays Epic Games' trademarks and logos, as shown below.

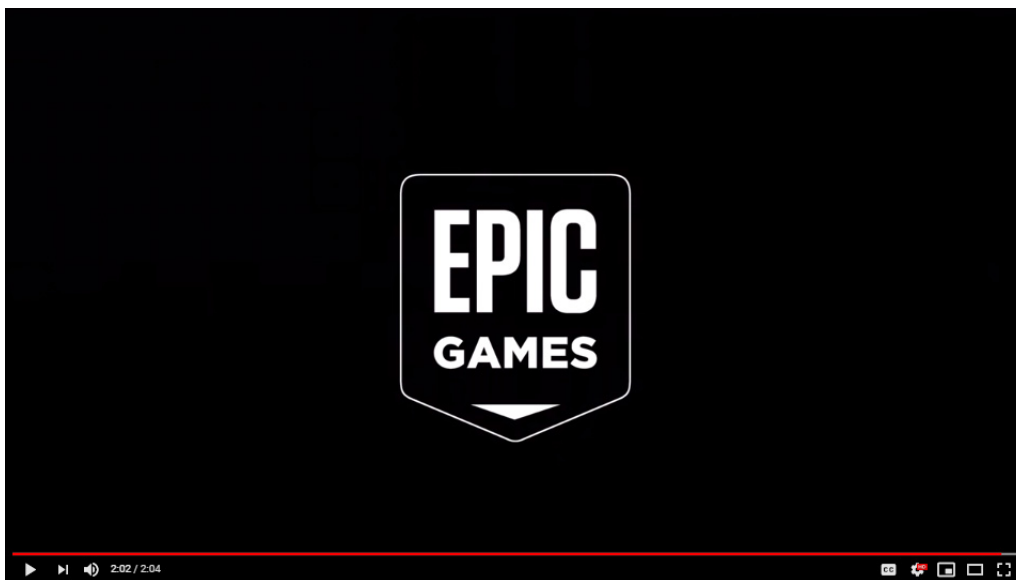


48. Similarly, *Fortnite's* product page in the Epic Games Store states that Epic Games is the developer and publisher of *Fortnite* and displays Epic Games' trademarks and logos. A true and correct copy of *Fortnite's* product page in the Epic Games Store is attached hereto as **Exhibit 4**.

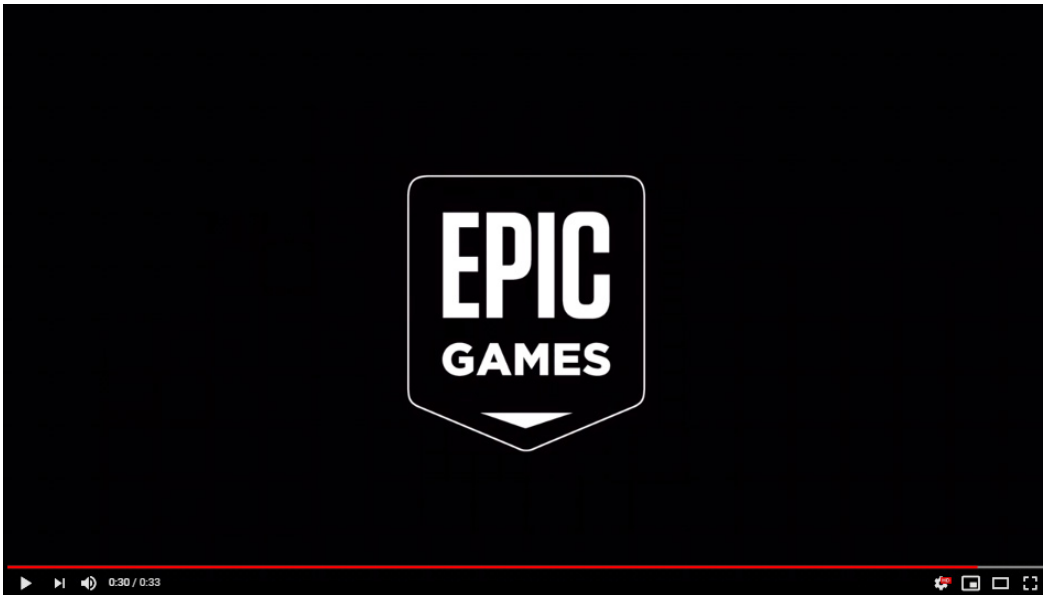
49. The *Fortnite* product page in the PlayStation Games Store indicates that Epic Games is the source of *Fortnite*. A true and correct copy of the *Fortnite* product page in the PlayStation Games Store is attached hereto as **Exhibit 5**.

50. The *Fortnite* product page in the Microsoft Store for Xbox One indicates that Epic Games is the source of *Fortnite*. A true and correct copy of the *Fortnite* product page in the Microsoft Store for Xbox One is attached hereto as **Exhibit 6**.

51. Epic Games has released a variety of trailers for *Fortnite*. In particular, *Fortnite* has a cinematic “launch” trailer to promote the recent release of “Chapter 2” of the game (the “Launch Trailer”). The Launch Trailer prominently displays Epic Games’ trademarks and logos, as shown in the screenshot below. A true and correct copy of the Launch Trailer is attached hereto as **Exhibit 7**.



52. *Fortnite* also has a trailer to promote the Battle Pass for Chapter 2, Season 1 of the game (the “Battle Pass Trailer”). The Battle Pass Trailer prominently displays Epic Games’ trademarks and logos, as shown in the screenshot below. A true and correct copy of the Battle Pass Trailer is attached hereto as **Exhibit 8**.



53. *Fortnite* also has a trailer to promote its seasonal *Fortnitemares* event for Halloween, which launched on October 29, 2019 (the “Fortnitemares Trailer”). The Fortnitemares Trailer depicts Halloween-themed characters and prominently displays Epic Games’ trademarks and logos. It does not include the Pump It Up Emote. A true and correct copy of the Fortnitemares Trailer is attached hereto as **Exhibit 9**.

**Defendants and Their Claimed “Dancing Pumpkin Man” Character**

54. Upon information and belief, from approximately September 2006 to August 2008, Geiler was an anchor for a 10 o’clock nightly newscast at the Omaha, Nebraska CW affiliate, KXVO. In this role, Geiler was responsible for filling airtime with content, which in various instances went beyond providing news updates.

55. Upon information and belief, Defendants’ alleged “character” first appeared in the Video, which was posted on the KXVO 10:00 News’ YouTube channel on November 2, 2006 under the title “KXVO Pumpkin Dance.”

56. Upon information and belief, Geiler is the performer who appears in the Video.

57. Upon information and belief, and as shown in the screenshot below, Geiler dances in the Video in front of a static cemetery image while wearing a generic jack-o'-lantern mask and a plain black unitard. Geiler dances to The Music Makers' song "Cazafantasmas" from the film *Ghostbusters*.



58. Upon information and belief, the jack-o'-lantern mask in the Video is a preexisting Halloween decoration that Geiler found among the holiday decorations in the lobby of his news station and that he fashioned into a makeshift mask. A true and correct copy of a transcript from a radio interview in which Geiler discusses the origin of the jack-o'-lantern mask is attached hereto as **Exhibit 10**.

59. Upon information and belief, the jack-o'-lantern decoration that Geiler wears as a mask in the Video differs from the jack-o'-lantern head in the Pump It Up Emote because it has a narrower mouth and a smaller aperture to the eyes and nose, there are no moving green flames shining through the holes, its jack-o'-lantern head is smaller, and the mask is a uniform orange color.

60. Upon information and belief, Geiler did not create the jack-o'-lantern decoration or black unitard that he wears in the Video.

61. Upon information and belief, Defendants do not use the jack-o'-lantern mask, black unitard, or the alleged Dancing Pumpkin Man character as a trademark.

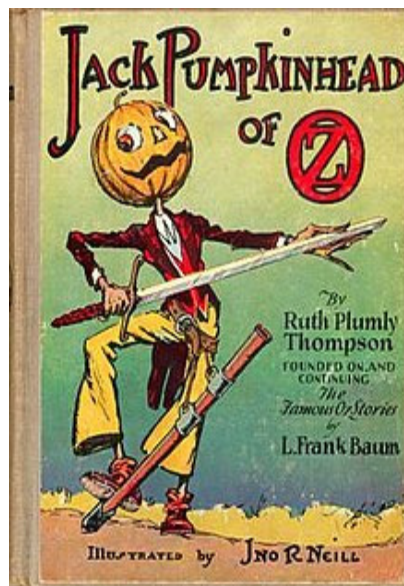
**There Are Numerous Jack-o'-Lantern Head Characters That Pre-Date Defendants' Alleged Dancing Pumpkin Man Character**

62. The idea of a figure with a jack-o'-lantern head is not unique or original to Defendants.

63. Jack-o'-lanterns are commonly associated with Halloween.

64. There are numerous examples of works that incorporate a character with a jack-o'-lantern head that pre-date Defendants' alleged Dancing Pumpkin Man character in the 2006 Video. Examples of such third party uses are listed below.

65. The 1904 children's novel *The Marvelous Land of Oz* featured the character Jack Pumpkinhead, which also subsequently appeared in the 1994 *Oz* comic book series. An image of the Jack Pumpkinhead character is shown below:



66. In 1949, Disney released an animated adaptation of the classic, *The Legend of Sleepy Hollow*, which depicted the iconic Headless Horseman holding a jack-o'-lantern to represent his head. An image of the Headless Horseman character is shown below:



67. Jack O'Lantern from Marvel Comics' *Spider-Man* and *Civil War* series first appeared in 1981. An image of the Jack O'Lantern character is shown below:

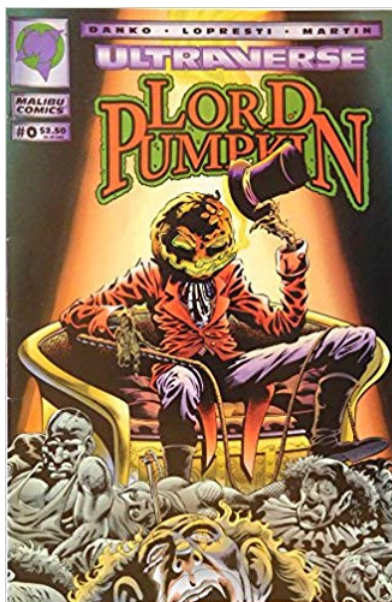


68. Merv Pumpkinhead, a recurring character in Neil Gaiman's *The Sandman* comic book series, first appeared in 1989. An image of the Merv Pumpkinhead character is shown below:





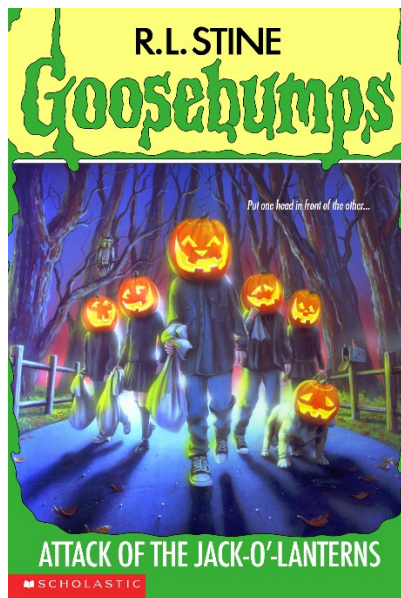
69. Lord Pumpkin from the *Ultraverse* line of superhero comics from Malibu Comics first appeared in 1993. An image of the Lord Pumpkin character is shown below:



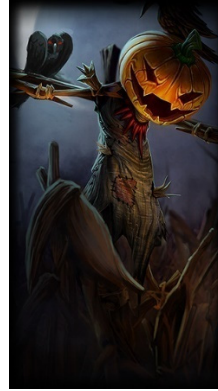
70. *The Nightmare Before Christmas*, which included The Pumpkin King character, was released in 1993. An image of The Pumpkin King character is shown below:



71. The book *Attack of the Jack-O'-Lanterns*, a novel in the *Goosebumps* series, was published in 1996 and includes characters known as the "Pumpkin Heads." An image of these characters is shown below:



72. Stingy Jack from Irish folklore, which is regarded as one of the origins of decorating jack-o'-lanterns, also has featured a figure with a jack-o'-lantern for a head and long pre-dates Defendants' character. Although Stingy Jack has been depicted over time by different artists in different ways, the character frequently has a jack-o'-lantern head, as shown below:



**Fortnite and Its Marketing Do Not Depict the Alleged Dancing Pumpkin Man Character or Reference Defendants**

73. Defendants' only basis for claiming that *Fortnite* infringes his intellectual property rights is *Fortnite's* use of a jack-o'-lantern head with the Pump It Up Emote.

74. The Pump It Up Emote does not depict the same jack-o'-lantern mask worn in the Video.

75. *Fortnite* does not depict the same jack-o'-lantern mask worn in the Video.

76. The Pump It Up Emote does not depict the black unitard worn in the Video.

77. *Fortnite* does not depict the black unitard worn in the Video.

78. The Pump It Up Emote does not depict the same cemetery scene that appears in the Video.

79. *Fortnite* does not depict the same cemetery scene that appears in the Video.

80. The Pump It Up Emote does not depict Geiler.

81. *Fortnite* does not depict Geiler.

82. The Pump It Up Emote does not reference Defendants or "Dancing Pumpkin Man."

83. *Fortnite* does not reference Defendants or "Dancing Pumpkin Man."

84. The Pump It Up Emote does not include the song “Cazafantasma” by The Music Makers.

85. *Fortnite* does not include the song “Cazafantasma” by The Music Makers.

86. The License allows Epic Games to use the choreography in the Video in *Fortnite*.

87. *Fortnite*'s product packaging for the Xbox One game does not depict the jack-o'-lantern mask worn by the alleged Dancing Pumpkin Man character in the Video.

88. *Fortnite*'s product packaging for the Xbox One game does not depict the Pump It Up Emote.

89. *Fortnite*'s product packaging for the Xbox One game does not depict the black unitard worn by the alleged Dancing Pumpkin Man character in the Video.

90. *Fortnite*'s product packaging for the Xbox One game does not depict the cemetery scene that appears in the Video.

91. *Fortnite*'s product packaging for the Xbox One game does not depict Geiler.

92. *Fortnite*'s product packaging for the Xbox One game does not reference Defendants or “Dancing Pumpkin Man.”

93. *Fortnite*'s product page in the Epic Games Store does not depict the Pump It Up Emote.

94. *Fortnite*'s product page in the Epic Games Store does not depict the jack-o'-lantern mask worn by the alleged Dancing Pumpkin Man character in the Video.

95. *Fortnite*'s product page in the Epic Games Store does not depict the black unitard worn by the alleged Dancing Pumpkin Man character in the Video.

96. *Fortnite*'s product page in the Epic Games Store does not include the song “Cazafantasma” by The Music Makers.

97. *Fortnite's* product page in the Epic Games Store does not depict the cemetery scene that appears in the Video.

98. *Fortnite's* product page in the Epic Games Store does not depict Geiler.

99. *Fortnite's* product page in the Epic Games Store does not reference Defendants or "Dancing Pumpkin Man."

100. *Fortnite's* product page in the PlayStation Games Store does not depict the Pump It Up Emote.

101. *Fortnite's* product page in the PlayStation Games Store does not depict the jack-o'-lantern mask worn by the alleged Dancing Pumpkin Man character in the Video.

102. *Fortnite's* product page in the PlayStation Games Store does not depict the black unitard worn by the alleged Dancing Pumpkin Man character in the Video.

103. *Fortnite's* product page in the PlayStation Games Store does not include the song "Cazafantomas" by The Music Makers.

104. *Fortnite's* product page in the PlayStation Games Store does not depict the cemetery scene that appears in the Video.

105. *Fortnite's* product page in the PlayStation Games Store does not depict Geiler.

106. *Fortnite's* product page in the PlayStation Games Store does not reference Defendants or "Dancing Pumpkin Man."

107. *Fortnite's* product page in the Microsoft Store for Xbox One does not depict the Pump It Up Emote.

108. *Fortnite's* product page in the Microsoft Store for Xbox One does not depict the jack-o'-lantern mask worn by the alleged Dancing Pumpkin Man character in the Video.

109. *Fortnite's* product page in the Microsoft Store for Xbox One does not depict the black unitard worn by the alleged Dancing Pumpkin Man character in the Video.

110. *Fortnite's* product page in the Microsoft Store for Xbox One does not include the song "Cazafantasmas" by The Music Makers.

111. *Fortnite's* product page in the Microsoft Store for Xbox One does not depict the cemetery scene that appears in the Video.

112. *Fortnite's* product page in the Microsoft Store for Xbox One does not depict Geiler.

113. *Fortnite's* product page in the Microsoft Store for Xbox One does not reference Defendants or "Dancing Pumpkin Man."

114. *Fortnite's* Launch Trailer does not depict the Pump It Up Emote.

115. *Fortnite's* Launch Trailer does not depict the jack-o'-lantern mask worn by the alleged Dancing Pumpkin Man character in the Video.

116. *Fortnite's* Launch Trailer does not depict the black unitard worn by the alleged Dancing Pumpkin Man character in the Video.

117. *Fortnite's* Launch Trailer does not include the song "Cazafantasmas" by The Music Makers.

118. *Fortnite's* Launch Trailer does not depict the cemetery scene that appears in the Video.

119. *Fortnite's* Launch Trailer does not depict Geiler.

120. *Fortnite's* Launch Trailer does not reference Defendants or "Dancing Pumpkin Man."

121. The Battle Pass Trailer does not depict the Pump It Up Emote.

122. The Battle Pass Trailer does not depict the jack-o'-lantern mask worn by the alleged Dancing Pumpkin Man character in the Video.

123. The Battle Pass Trailer does not depict the black unitard worn by the alleged Dancing Pumpkin Man character in the Video.

124. The Battle Pass Trailer does not include the song "Cazafantasmas" by The Music Makers.

125. The Battle Pass Trailer does not depict the cemetery scene that appears in the Video.

126. The Battle Pass Trailer does not depict Geiler.

127. The Battle Pass Trailer does not reference Defendants or "Dancing Pumpkin Man."

128. The Fortnitemares Trailer does not depict the Pump It Up Emote.

129. The Fortnitemares Trailer does not depict the jack-o'-lantern mask worn by the alleged Dancing Pumpkin Man character in the Video.

130. The Fortnitemares Trailer does not depict the black unitard worn by the alleged Dancing Pumpkin Man character in the Video.

131. The Fortnitemares Trailer does not include the song "Cazafantasmas" by The Music Makers.

132. The Fortnitemares Trailer does not depict the cemetery scene that appears in the Video.

133. The Fortnitemares Trailer does not depict Geiler.

134. The Fortnitemares Trailer does not reference Defendants or "Dancing Pumpkin Man."

**The Video and Defendants' Alleged Dancing Pumpkin Man Character Is Different From Fortnite**

135. *Fortnite's* plot is a battle royale game where players compete to be the last player alive.

136. The setting of *Fortnite* is a game map with various areas for game players to battle, including but not limited to a neighborhood of houses, a swamp, a lake, retail stores, a shipyard, a farm, and a beach.

137. *Fortnite's* mood changes depending on the Season of the game, the game mode, and the player's location on the game map.

138. *Fortnite's* pace is relatively fast.

139. *Fortnite's* themes are fantasy and warfare.

140. *Fortnite's* sequence of events involves air dropping from the flying "Battle Bus," floating down to earth with the help of a hang glider or a large metal umbrella, a search for weapons and resources using tools called "pickaxes," and a game arena with an incoming storm which causes the map to shrink in size and bring players closer together to battle. The winner is the last player or team standing in each game.

141. *Fortnite* has over 200 fanciful avatar characters.

142. *Fortnite* does not include The Music Makers' song "Cazafantomas" from the film *Ghostbusters*.

143. *Fortnite* does not include a static cemetery backdrop.

144. The Pump It Up Emote does not include a static cemetery backdrop.

145. The Pump It Up Emote can be used with male avatars that are wearing a variety of fanciful outfits, but not a plain black unitard.



146. The Pump It Up Emote can be used with all avatars in *Fortnite*, including females and other figures wearing a variety of fanciful outfits, but not a plain black unitard.

147. The Pump It Up Emote does not include The Music Makers' song "Cazafantomas" from the film *Ghostbusters*.

148. Defendants' "character" does not include a jack-o'-lantern head with moving green flames pouring from the eyes, nose, and mouth.

149. Defendants' "character" does not include a jack-o'-lantern head with a long, pronounced stem that curves.

150. Defendants' "character" does not include a jack-o'-lantern head with dark striations highlighting the segments of the pumpkin giving it a yellow-and-orange-toned design.

151. Defendants' "character" does not include a jack-o'-lantern head with glowing eyes.

152. Defendants' "character" includes a jack-o'-lantern mask that is smaller than the jack-o'-lantern head depicted in the Pump It Up Emote.

153. Defendants' "character" includes a jack-o'-lantern mask with a narrow smile pointing up to the "eyes" of the mask, while the Pump It Up Emote includes a jack-o'-lantern head with a broad, grinning mouth that extends considerably past the "eyes" of the head.

154. The Video does not depict a battle royale-themed video game where players compete to be the last player or group alive.

155. The Video does not have a battle royale plot.

156. The Video has no plot at all.

157. The setting of the Video is a static cemetery backdrop.

158. The Video has an upbeat, light, and comical mood as the Dancing Pumpkin Man dances to The Music Makers' song "Cazafantomas" from the film *Ghostbusters*.

159. The pace of the Video is slow to moderate.

160. The Video's theme is Halloween.

161. The Video does not involve warfare.

162. The Video has no sequence of events. The only "event" is that the Dancing Pumpkin Man dances for the duration of the Video.

163. The only figure in the Video is the alleged Dancing Pumpkin Man character.

164. The Video does not depict *Fortnite's* fanciful avatar characters.

165. The Video does not depict a "Battle Bus" from which game players are dropped.

166. The Video does not depict a hang glider or a large metal umbrella from which game players float down to earth.

167. The Video does not depict gameplay arenas.

168. The Video does not depict weapons.

169. The Video does not depict tools.

170. The Video does not depict a video game map.

171. The Video does not depict an incoming storm that forces video game players to move closer together.

172. The Video does not depict all of *Fortnite's* emotes.

173. The Video does not include *Fortnite's* original music.

174. The Video does not include the original music associated with the Pump It Up Emote.

**The License Between Epic Games and Sick Picnic**

175. On August 23, 2019, Epic Games, Inc. and Sick Picnic Media, LLC f/s/o Matthew F. Geiler entered into the License.

176. The License grants Epic Games the right to use the “audio-visual work,” as shown in the Video, in *Fortnite*.

177. The License provides that the “agreement constitutes the entire understanding between the parties hereto regarding the subject matter hereof and cannot be altered or waived except by a writing signed by both parties.”

178. In October 2019, Defendants admitted that the License covered the rights that they have now sought to enforce against Epic Games. Specifically, before the release of the Pump It Up Emote, Geiler commented on a Facebook comment displaying *Fortnite*’s “Hollowhead” skin, which was originally released on October 13, 2018, and made available again during the 2019 *Fortnitemares* event.

179. As shown below, Geiler commented, “Luckily they did a licensing deal with me ahead of time!”



180. As the post did not reflect Defendants' dance, but rather just a jack-o'-lantern headed character, it is a clear admission that Defendants recognized that the License conveyed the rights that they now seek to enforce against Epic Games.

**There Is an Actual Controversy Between the Parties**

181. On October 30, 2019, Defendants sent Epic Games a cease-and-desist letter (the "October 30 Letter").

182. The October 30 Letter claimed that the Dancing Pumpkin Man is a character protected by Defendants' intellectual property rights and that the Pump It Up Emote was an unlicensed use of that alleged "character's likeness."

183. The October 30 Letter demanded that Epic Games "cease and desist" use of Defendants' "character's likeness immediately" and indicated that Defendants were "prepared to take all necessary actions to protect the Dancing Pumpkin Man character."

184. On November 6, 2019, Epic Games (through outside counsel) responded by letter to the October 30 Letter (the "November 6 Response Letter"). The November 6 Response Letter explains various reasons why Defendants' infringement claims are without merit.

185. On November 12, 2019, Geiler responded by e-mail indicating that "any continuing unauthorized use of [his] character's likeness . . . continues to compound the problems and the damage suffered by [him] and [his] company."

186. On November 25, 2019, Geiler followed up with another e-mail in which he explained that if he did not receive "a substantive response to [his] [settlement] proposal" by December 9th, he was "prepared to engage legal counsel to assist in seeking injunctive relief pending a resolution of the dispute."

187. On December 3, 2019, Epic Games' counsel responded by letter reiterating that it disagreed with Defendants' claims.

188. Geiler's letters and threats to sue Epic Games have given rise to uncertainty and controversy with respect to Epic Games' ongoing right to use the Pump It Up Emote in *Fortnite*. Epic Games thus seeks to resolve this dispute as promptly as possible so that it can focus on creating innovative video games that entertain players without the threat of litigation.

189. To resolve the claims raised by Defendants and to afford relief from the uncertainty and controversy caused by Defendants' actions, Epic Games is entitled to a declaratory judgment that *Fortnite* does not infringe any copyright or trademark rights Defendants may own.

190. Defendants' assertion that Epic Games has infringed their copyrights and trademarks adversely affects Epic Games. Unless resolved by the Court, the uncertainty and controversy between the parties will continue to harm Epic Games.

## **CLAIMS FOR RELIEF**

### **COUNT I**

#### **Declaratory Judgment for Non-Infringement of Copyright**

191. Epic Games repeats and realleges each and every allegation above as if fully set forth herein.

192. Defendants claim to own the copyright for the Dancing Pumpkin Man character, which originally appeared in the Video, and allege that the Pump It Up Emote in *Fortnite* infringes their copyrights thereto.

193. The Pump It Up Emote does not infringe Defendants' claimed copyrights because Defendants do not own a protectable character and, regardless, the parties' respective works are not substantially similar as a matter of law.

194. Defendants' Dancing Pumpkin Man is not protected by copyright because it is not "sufficiently delineated," as a matter of law, to constitute protected expression. Rather, Defendants' alleged character simply reflects the idea of an ordinary jack-o'-lantern head on a non-descript, plain black unitard body. This is not sufficiently specific to establish a character protected by copyright.

195. Moreover, Defendants did not create the attributes of the alleged Dancing Pumpkin Man character, and thus cannot own a copyright to them. For instance, Geiler did not create the face of the jack-o'-lantern, but rather used a preexisting, third-party Halloween decoration that he found. Nor did he create the plain unitard that he wears in the Video.

196. Even if Defendants' alleged Dancing Pumpkin Man character were somehow entitled to copyright protection, and Defendants owned a copyright thereto, the Pump It Up Emote does not infringe that character, as it is not substantially similar as a matter of law. For instance, in contrast to *Fortnite's* Pump It Up Emote, the Defendants' alleged character's jack-o'-lantern face has a narrower mouth and a smaller aperture to the eyes and nose, there are no moving green flames shining through the holes, its jack-o'-lantern head is smaller than *Fortnite's* Pump It Up Emote and is a uniform orange color, as opposed to a striated, yellow-and-orange-toned design. The stem on Defendants' jack-o'-lantern is smaller than the stem in the Pump It Up Emote and does not curve. The bodies and costumes of the figures also are not substantially similar. Whereas the Dancing Pumpkin Man wears a plain black unitard, *Fortnite* features over 200 avatar "skins" (including female avatars and avatars of different species) who wear a variety of different costumes, but none of which wear a plain black leotard. Nor is the music used in the Video the same as the music used in the Pump It Up Emote.

197. Moreover, any alleged use of content that appears in the Video including the Dancing Pumpkin Man, is within the scope of the License.

198. Because Defendants have threatened to take legal action to prevent Epic Games from continuing to use the Pump It Up Emote, and a declaration by this Court that *Fortnite* does not infringe Defendants' alleged copyright in the Dancing Pumpkin Man character will allow the

distribution of *Fortnite* with the Pump It Up Emote to continue without disruption and fear of litigation, Epic Games is entitled to a declaratory judgment of non-infringement.

**COUNT II**  
**Declaratory Judgment for Non-Infringement of Trademark**

199. Epic Games repeats and realleges each and every allegation above as if fully set forth herein.

200. Defendants have alleged that they own trademark rights to the Dancing Pumpkin Man character, and that Epic Games' Pump It Up Emote in *Fortnite* infringes their trademark rights thereto.

201. Defendants have no trademark rights in the alleged Dancing Pumpkin Man character, as the alleged character is not used in commerce as a distinctive identifier to differentiate or identify the source or origin of any product or service, and thus is not a trademark.

202. Epic Games' use of the Pump It Up Emote does not infringe Defendants' alleged trademark rights because *Fortnite* and its contents are protected by the First Amendment. *Fortnite* is a creative work, the use of the Pump It Up Emote is artistically relevant, and its inclusion is not explicitly misleading. For instance, the Pump It Up Emote is artistically relevant as it was released as a part of *Fortnite's* Halloween-themed *Fortnitemales* event to commemorate the Halloween season. The inclusion of the emote is not explicitly misleading as, among other reasons, *Fortnite's* product packaging and marketing materials do not suggest Defendants' sponsorship of or affiliation with *Fortnite*. The Pump It Up Emote also is incidental to the *Fortnite* video game overall.

203. Epic Games' use of the Pump It Up Emote does not infringe Defendants' alleged trademark rights in the Dancing Pumpkin Man character for the additional reason that there is no



likelihood of confusion between the parties and their respective products or services. For instance, the parties' respective goods and services are different. Epic Games offers video games, such as *Fortnite*, and other software products. In contrast, Geiler is a performer and Sick Picnic is his related company, neither of which offers video games or software products. The parties' respective uses of the Pump It Up Emote and the Dancing Pumpkin Man character also are very different, both visually and in terms of their overall context. In light of the foregoing, among other factors, consumers are unlikely to mistakenly believe that there is a connection, affiliation, or relationship between the parties. Nor would consumers mistakenly believe that *Fortnite* was produced by, associated with, or sponsored by Defendants, or that Epic Games or *Fortnite* produced, sponsored, or was associated with Defendants or the Dancing Pumpkin Man.

204. Moreover, any alleged trademark infringement is within the scope of the License.

205. Because Defendants have threatened to take legal action to prevent Epic Games from continuing to use the Pump It Up Emote, and a declaration by this Court that *Fortnite* does not infringe Defendants' alleged trademark in the Dancing Pumpkin Man character will allow the distribution and playing of *Fortnite* with the Pump It Up Emote to continue without disruption and fear of litigation, Epic Games is entitled to a declaratory judgment of non-infringement.

#### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiff Epic Games respectfully requests Judgment against Defendants as follows:

1. Find and declare that Epic Games does not infringe Defendants' copyright, trademark, or other rights;

2. Award Epic Games reasonable attorneys' fees, expenses, and costs in this action;
- and
3. Grant such other, further, and different relief as the Court deems just and proper.

**DEMAND FOR TRIAL BY JURY**

Epic Games demands trial by jury on all issues so triable in this action.

Dated: December 6, 2019

/s/ Dale M. Cendali

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