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THE MKR GROUP, INC.
7

8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10 SAN FRANCISCO DIVISION
11

12 CAPCOM CO., LTD. AND CAPCOM
ENTERTAINMENT, INC.,

13 Plaintiffs,

14 v.

15 THE MKR GROUP, INC.,

16 Defendant.

Case No. 3:08-CV-00904 (JSW)

THE MKR GROUP, INC.'S AMENDED
ANSWER, COUNTERCLAIMS AND THIRD-
PARTY COMPLAINT

17 THE MKR GROUP, INC.,

18 Counterclaim-Plaintiff and Third-Party
19 Plaintiff

20 v.

21 CAPCOM CO., LTD. AND CAPCOM
ENTERTAINMENT, INC.,

22 Counterclaim Defendants

23 and

24 CAPCOM U.S.A., INC.

25 Third-Party Defendant
26
27
28

JURY TRIAL DEMANDED

1 Defendant/Counterclaim-Plaintiff The MKR Group, Inc. (“MKR”), as and for its Answer
 2 to the Complaint filed by Capcom Co., Ltd. and Capcom Entertainment, Inc. (sometimes
 3 collectively, “Capcom”), responds as follows, through its undersigned attorneys:

4 1. Responding to the allegations set forth in paragraph 1 of the Complaint, MKR
 5 admits that the Complaint purports to set forth claims for declaratory judgment, and otherwise
 6 denies said allegations.

7 2. Responding to the allegations set forth in paragraph 2 of the Complaint, MKR
 8 admits that the Complaint purports to set forth claims for declaratory judgment, and otherwise
 9 denies said allegations.

10 3. Admitted.

11 4. MKR admits that it transacts business through various agents and representatives
 12 in the State of California. The allegations set forth in paragraph 4 of the Complaint are otherwise
 13 denied.

14 5. MKR is without knowledge or information sufficient to form a belief as to the
 15 truth of the allegations set forth in paragraph 5 of the Complaint concerning Capcom
 16 Entertainment, Inc., and denies such allegations on this basis. MKR otherwise denies the
 17 remaining allegations of this paragraph.

18 6. MKR is without knowledge or information sufficient to form a belief as to the
 19 truth of the allegations set forth in paragraph 6 of the Complaint, and denies such allegations on
 20 this basis.

21 7. MKR is without knowledge or information sufficient to form a belief as to the
 22 truth of the allegations set forth in paragraph 7 of the Complaint, and denies such allegations on
 23 this basis.

24 8. Admitted.

25 9. MKR admits that it transacts business through various agents and representatives
 26 in the State of California. The allegations set forth in paragraph 9 are otherwise denied.

1 10. MKR is without knowledge or information sufficient to form a belief as to the
2 truth of the allegations set forth in paragraph 10 of the Complaint, and denies such allegations on
3 this basis.

4 11. MKR is without knowledge or information sufficient to form a belief as to the
5 truth of the allegations set forth in paragraph 11 of the Complaint, and denies such allegations on
6 this basis.

7 12. Responding to the allegations set forth in paragraph 12 of the Complaint, MKR
8 admits that Capcom released the “DEAD RISING” game (“DEAD RISING”) on August 8, 2006,
9 and that, prior thereto, Microsoft Corporation (“Microsoft”) released a demo version of “DEAD
10 RISING”. MKR is without knowledge or information sufficient to form a belief as to the truth of
11 the remaining allegations set forth in paragraph 12 of the Complaint, and denies such allegations
12 on this basis.

13 13. MKR avers that the contents of “DEAD RISING” speak for themselves, and
14 denies the allegations set forth in paragraph 13 of the Complaint on this basis.

15 14. MKR admits that “DEAD RISING” has been commercially successful. MKR is
16 without knowledge or information sufficient to form a belief as to the truth of the remaining
17 allegations set forth in paragraph 14 of the Complaint, and denies such allegations on this basis.

18 15. MKR is without knowledge or information sufficient to form a belief as to the
19 truth of the allegations set forth in paragraph 15 of the Complaint, and denies such allegations on
20 this basis.

21 16. In response to the allegations of paragraph 16 of the Complaint, MKR admits that
22 records of the United States Patent and Trademark Office (“USPTO”) reflect that on May 20,
23 2005, Capcom Co., Ltd. apparently filed an intent to use application for the mark “DEAD
24 RISING” for “computer game software; computer game cartridges; computer game cassettes;
25 computer game discs; computer game tapes; video game cartridges; video game machines for use
26 with television receivers; downloadable game software; downloadable computer games;
27 downloadable game software for playing on mobile phones,” which was assigned Application
28 Serial No. 78/633,771. MKR is without knowledge or information sufficient to form a belief as

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1 to the truth of the remaining allegations set forth in paragraph 16 of the Complaint, and denies
2 such allegations on this basis.

3 17. MKR admits that the film “GEORGE A. ROMERO’S DAWN OF THE DEAD”
4 was released in 1979. MKR avers that the content and marketing elements of “GEORGE A.
5 ROMERO’S DAWN OF THE DEAD” speak for themselves, and denies the remaining
6 allegations set forth in paragraph 17 of the Complaint on this basis.

7 18. MKR admits that the 2004 remake of “GEORGE A. ROMERO’S DAWN OF
8 THE DEAD” (the “2004 Remake”) was distributed in the United States, Canada and certain other
9 territories by Universal Pictures (pursuant to MKR’s grant of a “one-picture” license) with
10 notable success in the marketplace. MKR avers that the 2004 Remake credits the screenplay for
11 “GEORGE A. ROMERO’S DAWN OF THE DEAD” as its source. The allegations set forth in
12 paragraph 18 of the Complaint are otherwise denied.

13 19. MKR admits that it is the sole owner of all right, title and interest in and to the
14 United States copyright in “GEORGE A. ROMERO’S DAWN OF THE DEAD”, created as a
15 work made for hire by George A. Romero and others, which is partially evidenced by its
16 ownership of Certificate of Registration (Reg. No. PA0000033519), issued by the United States
17 Register of Copyrights. MKR further admits that the 2004 Remake, released by Universal
18 Pictures under license from MKR, is an authorized derivative work based on “GEORGE A.
19 ROMERO’S DAWN OF THE DEAD”. MKR admits that those elements from the 2004 Remake
20 which were copied from “GEORGE A. ROMERO’S DAWN OF THE DEAD” are owned by
21 MKR. The allegations set forth in paragraph 19 of the Complaint are otherwise denied.

22 20. MKR admits that it is the exclusive owner of the trademarks and service marks
23 “DAWN OF THE DEAD”, “GEORGE A. ROMERO’S DAWN OF THE DEAD”, and the
24 “Zombie Head” Design (collectively, the “DAWN OF THE DEAD Trademarks”) for use in
25 connection with a wide variety of products and services, including without limitation computer
26 games. MKR further admits that it owns federal trademark applications and registrations for
27 “GEORGE A. ROMERO’S DAWN OF THE DEAD” and the “Zombie Head” Design. The
28 allegations set forth in paragraph 20 of the Complaint are otherwise denied.

21. MKR admits that on March 17, 2006, MKR's agent, New Line Cinema Corporation ("New Line"), sent a letter to Capcom, the contents of which speak for themselves. MKR further admits that prior thereto, in or about April 2004, Capcom had approached MKR to enquire if the video game adaptation rights to either "GEORGE A. ROMERO'S DAWN OF THE DEAD" or the 2004 Remake were available, but then had not pursued a license. MKR subsequently became aware of Capcom's promotional "work in progress" video excerpts and still photographs from "DEAD RISING", which had been released on the Internet to promote the upcoming release of "DEAD RISING". MKR and New Line observed that a noticeable and significant number of images from "DEAD RISING" were strikingly similar to iconic images and characters in "GEORGE A. ROMERO'S DAWN OF THE DEAD" and/or the 2004 Remake, and that the setting for "DEAD RISING"'s images and clips appeared to be in and around a large indoor shopping mall. "DEAD RISING"'s plot further appeared to revolve around humans fighting large numbers of zombies ("the living dead") for control of this mall. The violence in "DEAD RISING" was graphic and highly stylized, which was also a critically and publicly acknowledged characteristic of "GEORGE A. ROMERO'S DAWN OF THE DEAD". (In fact, "GEORGE A. ROMERO'S DAWN OF THE DEAD" was released theatrically in the United States without a rating from the Motion Picture Association of America (the "MPAA") because the MPAA demanded too many cuts in order to achieve an "R" rating. In a similar fashion, "DEAD RISING" was banned in Germany in 2007 for excessive, stylized on-screen violence.) MKR's personnel then began to read video game industry press and fan blogs which also saw strong similarities between the major elements of "GEORGE A. ROMERO'S DAWN OF THE DEAD" and "DEAD RISING", and several journalists went so far as to write that "DEAD RISING" was clearly based on "GEORGE A. ROMERO'S DAWN OF THE DEAD". Some were less polite and blatantly wrote that "DEAD RISING" was a rip off of "GEORGE A. ROMERO'S DAWN OF THE DEAD". In particular, many noticed the similarity of titles, and the play on words between "DEAD RISING" and "DAWN OF THE DEAD". MKR thus began to believe that "DEAD RISING" was created by Capcom with the intent of trading on "GEORGE A. ROMERO'S DAWN OF THE DEAD", which had been found by a federal court some 25

1 years earlier to have achieved recognition and secondary meaning among the public. *See, Dawn*
 2 *Associates v. Links*, 203 U.S.P.Q. 831, 836 (N.D. Ill. 1978). As a consequence of the foregoing,
 3 New Line sent Capcom the above-referenced March 17, 2006 letter. MKR further admits that
 4 New Line also sent Capcom a letter dated June 9, 2006, the contents of which speak for
 5 themselves. The allegations set forth in paragraph 21 of the Complaint are otherwise denied.

6 22. MKR admits that the parties engaged in settlement discussions; otherwise denied.

7 23. MKR admits that Capcom released “DEAD RISING” on August 8, 2006 without
 8 obtaining a license from MKR, despite having contacted MKR in or about April 2004 to enquire
 9 about the availability of such a license. MKR further admits that it did not commence litigation
 10 against Capcom, because Capcom successfully dissuaded MKR from taking legal action to
 11 protect its rights by Capcom’s repeated professions of a desire to settle, while simultaneously
 12 failing to follow through on same. MKR further admits that a “notice” – which was neither
 13 requested nor authorized by MKR – appears on the packaging for “DEAD RISING”, which
 14 states:

15 “THIS GAME WAS NOT DEVELOPED,
 16 APPROVED OR LICENSED BY THE OWNERS
 17 OR CREATORS OF GEORGE A. ROMERO’S
 18 DAWN OF THE DEAD”

19
 20 MKR is without knowledge or information sufficient to form a belief as to the truth of the
 21 remaining allegations set forth in paragraph 23 of the Complaint, and denies such allegations on
 22 this basis.

23 24. MKR admits that since 2006 Capcom has successfully dissuaded MKR from
 24 taking legal action to protect its rights by Capcom’s repeated professions of a desire to settle,
 25 while simultaneously failing to follow through on same. MKR further admits that, through its
 26 counsel, it notified Capcom as well as Microsoft, the distributor of demo versions of “DEAD
 27 RISING”, and Best Buy Corporation, one of the largest retailers of “DEAD RISING”, of the
 28

1 parties' inability to reach settlement. The allegations set forth in paragraph 24 of the Complaint
2 are otherwise denied.

3 25. MKR admits that on January 29, 2007, it filed a Notice of Opposition
4 (No. 91175392) against Capcom Co., Ltd.'s application to register "DEAD RISING" as a
5 trademark in the USPTO under Application Serial No. 78/633,771. MKR avers that the contents
6 of such Notice of Opposition speak for themselves. MKR further admits that on December 21,
7 2007, Capcom Co., Ltd. filed its Answer to such Notice of Opposition. The remaining allegations
8 set forth in paragraph 25 of the Complaint are otherwise denied.

9 26. MKR admits that its outside counsel sent a letter dated February 6, 2008 and copy
10 of a draft complaint, the contents of which speak for themselves. The remaining allegations set
11 forth in paragraph 26 of the Complaint are otherwise denied.

12 27. MKR denies the allegations set forth in paragraph 27 of the Complaint.

13 28. MKR responds to the allegations realleged and incorporated by reference in
14 paragraph 28 of the Complaint in the same manner as set forth above.

15 29. MKR denies the allegations set forth in paragraph 29 of the Complaint.

16 30. MKR denies the allegations set forth in paragraph 30 of the Complaint.

17 31. MKR denies the allegations set forth in paragraph 31 of the Complaint.

18 32. MKR denies the allegations set forth in paragraph 32 of the Complaint.

19 33. Responding to the allegations set forth in paragraph 33 of the Complaint, MKR
20 admits that the Complaint purports to set forth claims for declaratory judgment, and otherwise
21 denies said allegations.

22 34. MKR responds to the allegations realleged and incorporated by reference in
23 paragraph 34 of the Complaint in the same manner as set forth above.

24 35. MKR denies the allegations set forth in paragraph 35 of the Complaint.

25 36. MKR denies the allegations set forth in paragraph 36 of the Complaint.

26 37. MKR denies the allegations set forth in paragraph 37 of the Complaint.

38. Responding to the allegations set forth in paragraph 38 of the Complaint, MKR admits that the Complaint purports to set forth claims for declaratory judgment, and otherwise denies said allegations.

39. MKR responds to the allegations realleged and incorporated by reference in paragraph 39 of the Complaint in the same manner as set forth above.

40. MKR denies the allegations set forth in paragraph 40 of the Complaint.

41. MKR denies the allegations set forth in paragraph 41 of the Complaint.

42. Responding to the allegations set forth in paragraph 42 of the Complaint, MKR admits that the Complaint purports to set forth claims for declaratory judgment, and otherwise denies said allegations.

43. MKR responds to the allegations realleged and incorporated by reference in paragraph 43 of the Complaint in the same manner as set forth above.

44. MKR denies the allegations set forth in paragraph 44 of the Complaint.

45. MKR denies the allegations set forth in paragraph 45 of the Complaint.

46. Responding to the allegations set forth in paragraph 46 of the Complaint, MKR admits that the Complaint purports to set forth claims for declaratory judgment, and otherwise denies said allegations.

47. MKR responds to the allegations realleged and incorporated by reference in paragraph 47 of the Complaint in the same manner as set forth above.

48. MKR denies the allegations set forth in paragraph 48 of the Complaint.

49. MKR denies the allegations set forth in paragraph 49 of the Complaint.

50. MKR denies the allegations set forth in paragraph 50 of the Complaint.

51. Responding to the allegations set forth in paragraph 51 of the Complaint, MKR admits that the Complaint purports to set forth claims for declaratory judgment, and otherwise denies said allegations.

52. MKR responds to the allegations realleged and incorporated by reference in paragraph 52 of the Complaint in the same manner as set forth above.

53. MKR denies the allegations set forth in paragraph 53 of the Complaint.

1 54. MKR denies the allegations set forth in paragraph 54 of the Complaint.

2 55. MKR denies the allegations set forth in paragraph 55 of the Complaint.

3 56. Responding to the allegations set forth in paragraph 56 of the Complaint, MKR
4 admits that the Complaint purports to set forth claims for declaratory judgment, and otherwise
5 denies said allegations.

6
7 AFFIRMATIVE DEFENSES

8 1. The Complaint fails to state a claim on which relief can be granted.

9 2. The Complaint is barred by unclean hands.
10

11 COUNTERCLAIMS AND THIRD-PARTY COMPLAINT

12 MKR hereby counterclaims, by and through its counsel, based upon knowledge with
13 respect to itself and its own acts, and upon information and belief as to all other matters, against
14 Capcom Co., Ltd. and Capcom Entertainment, Inc. and asserts its Third-Party Complaint against
15 Third-Party Defendant Capcom U.S.A., Inc. (sometimes collectively, "Capcom"), as follows:
16

17 INTRODUCTION
18

19 1. This is an action at law and in equity to remedy acts of, *inter alia*, copyright
20 infringement, trademark infringement, false designation of origin and misrepresentation, false
21 advertising, dilution, unfair competition, misappropriation and deceptive trade practices.

22 2. Counterclaim-Plaintiff MKR is a New York corporation with its principal place of
23 business at 1133 Avenue of the Americas, Suite 1621, New York, New York 10036.

24 3. Counterclaim-Defendant Capcom Co. Ltd. is a corporation organized under the
25 laws of Japan, with its principal place of business at 3-1-3 Uchihiranomachi, Chuo-ku, Osaka,
26 Japan. Counterclaim-Defendant Capcom Entertainment, Inc. is a California corporation with its
27 principal place of business at 800 Concar Drive, Suite 300, San Mateo, California 94402. Third-
28 Party-Defendant Capcom U.S.A., Inc. is a California corporation with its principal place of

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1 business at 800 Concar Drive, Suite 300, San Mateo, California 94402. Upon information and
 2 belief, Capcom U.S.A., Inc. is a wholly-owned subsidiary of Capcom Co. Ltd., and Capcom
 3 Entertainment, Inc. is, in turn, a wholly-owned subsidiary of Capcom U.S.A., Inc.

4 JURISDICTION AND VENUE

5
 6 4. These counterclaims arise under the Copyright Act of 1976, 17 U.S.C. § 101 *et*
 7 *seq.*, the Lanham Act of 1946 (as amended), 15 U.S.C. § 1051 *et seq.*, and related state statutes
 8 and common law doctrines. Subject matter jurisdiction over this action is conferred upon this
 9 Court by 15 U.S.C. §1121 and 28 U.S.C. §§ 1331, 1338 and 1367. Additionally, because this
 10 action concerns an amount in controversy which exceeds \$75,000, exclusive of costs and interest,
 11 and is between citizens of different states, subject matter jurisdiction is also proper pursuant to 28
 12 U.S.C. § 1332. This Court has supplemental jurisdiction over all state law claims under 28
 13 U.S.C. § 1367(a), and under principles of pendent jurisdiction.

14 5. Venue is proper pursuant to 28 U.S.C. § 1391(b) and (c) because Capcom is doing
 15 and transacting business in this Judicial District; has substantial contacts with this Judicial
 16 District; has advertised in this Judicial District; and has caused many of the tortious acts
 17 complained of herein in this Judicial District.

18 GENERAL ALLEGATIONS

19
 20 6. MKR's primary business almost since its inception in 1977 has been to monetize
 21 the value of the copyrights and trademarks it owns in and to two feature motion pictures,
 22 "GEORGE A. ROMERO'S DAWN OF THE DEAD" (1979) and "MARTIN" (1978). Through
 23 authorized licensees, MKR is also a seller of ancillary merchandise. Both of the foregoing films
 24 were produced by MKR's president and principal shareholder, Richard P. Rubinstein, and both
 25 films were directed by George A. Romero, one of the most respected and critically honored
 26 "horror film" directors worldwide since the early 1970s. The principal individual financial
 27 beneficiaries of MKR's exploitation of its rights in and to "GEORGE A. ROMERO'S DAWN OF
 28 THE DEAD" are Messrs. Rubinstein and Romero. In addition, Mr. Rubinstein has been

1 producing other financially and critically successful feature films and television programs in the
 2 horror, fantasy and science fiction genres for almost thirty years, including “STEPHEN KING’S PET
 3 SEMATARY” (1989), “STEPHEN KING’S THE STAND” (1994), “FRANK HERBERT’S DUNE” (2000),
 4 and the 2004 remake of “GEORGE A. ROMERO’S DAWN OF THE DEAD” (the “2004
 5 Remake”), which was distributed in the United States by Universal Pictures, grossing over 100
 6 million dollars worldwide.

7 7. MKR’s “DAWN OF THE DEAD” motion pictures constitute an enormously
 8 successful film franchise. Both the original film and Universal’s authorized remake are
 9 extremely well known to the public; they have been profitable theatrically, on cable television,
 10 and on DVD to this day. “GEORGE A. ROMERO’S DAWN OF THE DEAD” was released on
 11 or about May 24, 1979, and has been continuously exploited in the marketplace for more than 29
 12 years. It continues to earn significant revenue, as evidenced from the more than one million DVD
 13 units which have been shipped by its DVD distributor in the United States since 2004, and from
 14 the October 4, 2007 Blu-ray DVD release by Starz Media, which earned MKR over \$80,000 in
 15 royalties within 90 days. Considering that the budget for “GEORGE A. ROMERO’S DAWN OF
 16 THE DEAD” was approximately \$650,000, and the film earned over \$7,000,000 in its first two
 17 years of theatrical release, “GEORGE A. ROMERO’S DAWN OF THE DEAD” is one of the
 18 most profitable horror films of all time.

19 8. “GEORGE A. ROMERO’S DAWN OF THE DEAD” has garnered unparalleled
 20 critical acclaim for over thirty years. Roger Ebert, Pulitzer Prize-winning, renowned film critic
 21 for *The Chicago Sun-Times*, noted that ““DAWN OF THE DEAD”” is one of the best horror films
 22 ever made...,” and gave the film his top four star rating. A true and correct copy of Roger Ebert’s
 23 May 4, 1979 review of “GEORGE A. ROMERO’S DAWN OF THE DEAD” is attached hereto
 24 as Exhibit “A.” In 2005, the DVD release of “GEORGE A. ROMERO’S DAWN OF THE
 25 DEAD” won the Academy of Science Fiction, Fantasy & Horror Films’ prestigious “Saturn
 26 Award” for “Best DVD Classic Film Release.” (By comparison, E.T.: THE EXTRA-TERRESTRIAL
 27 won this category in 2002.)
 28

1 9. The 2004 Remake was produced and released by Universal Pictures under a one
 2 picture license from MKR. The 2004 Remake was the most popular film in the United States on
 3 its opening weekend, grossing nearly 26.7 million dollars in U.S. box office receipts. To date, the
 4 2004 Remake -- with the 1979 film as its birthright -- has grossed over \$100 million dollars in
 5 worldwide box office. Film critics have also praised the 2004 Remake. For example, *The Los*
 6 *Angeles Times* stated, "Good zombie fun, the remake of George A. Romero's 'DAWN OF THE
 7 DEAD' is the best proof in ages that cannibalizing old material sometimes works fiendishly
 8 well." A true and correct copy of the March 19, 2004 review is attached hereto as Exhibit "B."

9 10. MKR's DAWN OF THE DEAD motion pictures have spawned an extensive
 10 merchandise licensing program via MKR's licensing agent, New Line Cinema Corporation
 11 ("New Line"), a division of Time Warner, Inc. Over ten licensees have been placed by New Line
 12 in the past two years, and MKR has received advances and royalties from authorized licensees
 13 who are selling such items as action figures, Dawn Shopping Mall replicas, t-shirts, wallets, belts,
 14 wristbands, Halloween costumes, Halloween masks, posters, calendars, playing cards, postcards,
 15 button pins, patches and stickers. Illustrations of MKR's DAWN OF THE DEAD licensed
 16 merchandise are attached hereto as Exhibit "C."

17 11. MKR is the exclusive owner of the trademarks and service marks "DAWN OF
 18 THE DEAD", "GEORGE A. ROMERO'S DAWN OF THE DEAD", and the "Zombie Head"
 19 Design (collectively, the "DAWN OF THE DEAD Trademarks") for use in connection with a
 20 wide variety of products and services, including without limitation computer games. A list of
 21 these trademarks, including corresponding registrations and applications in the United States
 22 Patent and Trademark Office (the "PTO"), and true and correct copies of the registration
 23 certificates, are set forth in Exhibit "D" attached hereto.

24 12. MKR's "DAWN OF THE DEAD" Motion Pictures uniquely combine zombies
 25 ("dead people who have returned to life to attack and eat the living") with the rise of shopping
 26 mall culture in the United States in the 1970s. Mr. Romero uses the metaphor of flesh-eating
 27 zombies who take over a shopping mall as a device to showcase the insidious perils of
 28 consumerism and suburbia. Ultimately, all of the worldly goods available in a shopping mall are

1 not enough to defeat the zombies. By juxtaposing shockingly profane and gory zombies with the
 2 hopelessly mundane and antiseptic shopping mall, Romero's unique take (the rights to which are
 3 owned by MKR) allows the viewer to bear witness to rampant consumerism incapable of solving
 4 the world's evils.

5 13. Mr. Romero's unique commentary on suburban mall culture (the rights to which
 6 are owned by MKR) is so well known that it is regularly discussed by commentators around the
 7 world. Indeed, during the past year alone (and almost thirty years after the release of the 1979
 8 film), journalists in prominent magazines have written:

- 9 • *The Economist*, December 22, 2007.

10 "George Romero's 'Dawn of the Dead' is ostensibly a story about a group of people
 11 struggling to survive in a world taken over by flesh-eating zombies. But it is also a commentary
 12 on the lurid appeal of shopping malls....

- 13 • *Asia Times Online*, January 3, 2008.

14 "The American economy may very well come to resemble scenes from the
 15 two *Dawn of the Dead* movies. And that's the good news.

16 True and correct copies of the above-referenced articles are attached hereto as
 17 Exhibit "E."

18 14. In or about April 2004, an executive of Capcom U.S.A., Inc. contacted MKR to
 19 enquire about the availability of a license to use elements from MKR's "DAWN OF THE
 20 DEAD" motion pictures in a video game. MKR advised the executive that the rights were
 21 available. However, Capcom failed to pursue the matter further, and no license was ever
 22 negotiated or granted. On or about March 17, 2006, MKR became aware of Capcom's
 23 promotional videos for "DEAD RISING", which embodied scenes which were strikingly similar
 24 to scenes in "GEORGE A. ROMERO'S DAWN OF THE DEAD" and the 2004 Remake.
 25 MKR's belief that Capcom was intentionally capitalizing on the outstanding fame of the 1979
 26 film to market "DEAD RISING" was swiftly confirmed by game industry experts and fans, who
 27 also noted that "DEAD RISING" was a blatant "rip off" of the legendary 1979 film.

1 15. On or about August 8, 2006, Capcom released “DEAD RISING” without the
 2 consent of MKR. Capcom markets “DEAD RISING” as essentially a computer game version of
 3 MKR’s “DAWN OF THE DEAD” motion pictures. Moreover, both “GEORGE A. ROMERO’S
 4 DAWN OF THE DEAD” and “DEAD RISING” explore this conceit using eerily similar tone,
 5 mood and settings. Both works are dark comedies. In both, the zombies’ recreational activities
 6 and the absurdly grotesque “kill scenes” provide unexpected comedic relief. As noted above,
 7 both works are much more than a garden variety “slasher” film or “shoot ‘em up” game,
 8 respectively. Both works provide thoughtful social commentary on the “mall culture” zeitgeist, in
 9 addition to serving up a sizable portion of sensationalistic violence. The violence and special
 10 effects in both works are very similar, and the gore, which is often absurd, ensures that both
 11 works are perceived as social commentaries. Additional similarities between “GEORGE A.
 12 ROMERO’S DAWN OF THE DEAD” and “DEAD RISING” include (without limitation) the
 13 following:

14 a. Both works are set in a bi-level “mega” shopping mall in a rural area. The
 15 shopping mall is the center of these communities.

16 b. Both works are set in motion by a helicopter that takes the lead characters
 17 to the mall which is under siege by crazed, flesh-eating zombies. In addition, in both works, the
 18 helicopter is the survivors’ means of escape from the zombie-infested mall.

19 c. In both works, the leading male characters are hard-boiled, tough, cynical
 20 journalists. Both works feature a subtext critique of sensationalistic journalism. For example,
 21 “DEAD RISING”’s male protagonist, Frank West, who is a freelance photographer, is *literally*
 22 awarded points for taking photographs which capture graphic violence.

23 d. At times, the works have similar dialogue. For example, in “DEAD
 24 RISING”, a survivor, dressed oddly in a shirt that Elvis may have owned, tells Frank West that
 25 “This [the zombie infested mall] is hell”. This line is a direct reference to the copyrighted
 26 memorable line from “GEORGE A. ROMERO’S DAWN OF THE DEAD” wherein a survivor
 27 says to Stephen, the traffic reporter: “When there’s no more room in hell, the dead will walk the
 28 earth.” This line has been the tagline for the 1979 film since its initial release.

1 Many elements of the 1979 film are repeated in the 2004 Remake.

2 16. Above and beyond copying the films' major elements, Capcom has sought to
3 capitalize on the fame of George A. Romero, and on the fame of the title "DAWN OF THE
4 DEAD", by using the similar title "DEAD RISING", and by placing a "notice" on the packaging
5 for "DEAD RISING" which reads:

6 "THIS GAME WAS NOT DEVELOPED,
7 APPROVED OR LICENSED BY THE OWNERS
8 OR CREATORS OF GEORGE A. ROMERO'S
9 DAWN OF THE DEAD"

10 This "notice" – which was neither authorized nor requested by MKR – actually highlights
11 the connection between MKR's "DAWN OF THE DEAD" motion pictures and "DEAD
12 RISING". It exploits Mr. Romero's fame, and the fame of the "DAWN OF THE DEAD" title, to
13 attract buyers. In addition, Capcom displays a colorable imitation of MKR's famous ZOMBIE
14 HEAD trademark on the packaging for "DEAD RISING". A true and correct copy of "DEAD
15 RISING"'s packaging is attached hereto as Exhibit "F."

16 17. Capcom's wholesale exploitation of Mr. Romero's name, the "DAWN OF THE
17 DEAD" brand, and the films' major elements, is so brazen that the creator of "DEAD RISING",
18 Keiji Inafune, wore a "DAWN OF THE DEAD" t-shirt in an interview. In another interview, Mr.
19 Inafune admitted that he wanted to "create a different type of zombie game ... [one with] a sort of
20 comical element ... like in the George Romero movies." Mr. Inafune remarked, "[W]e also
21 wanted to add ... what zombies are to us is a symbol of mankind's greed, of their desire to eat, of
22 their hunger. And that's what they're supposed to be in this game: a symbol." True and correct
23 copies of Mr. Inafune's interviews (with *Gamespy.com* and *TeamXbox.com*) are attached hereto
24 as Exhibit "G."

25 18. A significant number of industry critics, commentators and reporters have
26 recognized the high degree of similarity between the films' major elements and "DEAD
27 RISING". For example:

1 a. “The video game’s setup is a complete theft of the 1978 George A. Romero
2 classic ‘Dawn of the Dead,’ right down to the Muzak being piped through the mall speakers.”
3 *San Francisco Chronicle*, August 15, 2006.

4 b. “*Dead Rising* is best described as an interactive version of George A.
5 Romero’s horror flick, *Dawn of the Dead*, in which a flesh-eating mob of zombies attempts to
6 break into a shopping mall to attack the people inside.” *USA Today*, August 17, 2006.

7 c. “It’s a gorgeous and fully interactive game world ripped straight out of
8 George Romero’s *Dawn of the Dead*. Just like in that movie, the characters in *Dead Rising*
9 choose to take refuge in the best place to find food and weapons.” *Computerandvideogames.com*,
10 March 23, 2006.

11 d. “Taking a page directly from George Romero’s classic gorefest *Dawn of*
12 *the Dead*, the majority of *Dead Rising*’s action takes place inside a large mall that’s been overrun
13 by the undead.” *Gamespy.com*, January 6, 2006.

14 e. “You won’t have to look at more than a few frames of *Dead Rising* to
15 realize its similarities to Romero’s *Dawn of the Dead*.” *Teamxbox.com*, May 12, 2006.

16 f. “Lately however, zombie movies have gone from cheesy to cheesier,
17 taking a back seat to other horrifying tales until a few years ago when George A. Romero’s
18 original *Dawn of the Dead* was remade for present times. It was both satirical and horrifying,
19 taking a place in a world where zombies had overrun the rest of civilization, less a few survivors
20 who took to the once safe haven of a shopping mall. Replace the title of *Dawn of the Dead* with
21 *Dead Rising* and you’ve basically got the premise for Capcom’s first voyage on the Xbox 360.”
22 *Teamxbox.com*, July 12, 2006.

23 g. “[D]awn of the Dead”...took a satirical look at everything from the
24 consumer culture permeating American society to racism to the skewed way the media covers
25 disasters....I was a bit surprised, then, that Capcom would so obviously lift the setting for their
26 latest zombiefest, called *Dead Rising*, from George Romero’s masterpiece. Didn’t they know that
27 fans would cry foul?” *Gamespy.com*, July 6, 2006.
28

1 21. In or about April 2004, Capcom U.S.A., Inc. approached MKR regarding a license
2 to use elements from MKR's "DAWN OF THE DEAD" motion pictures in a video game.
3 However, Capcom failed to pursue the matter further.

4 22. In or about March 2006, MKR discovered that Capcom was proceeding with
5 "DEAD RISING", and MKR immediately placed Capcom on notice of its objection by a letter
6 dated March 17, 2006 from MKR's agent, New Line. A true and correct copy of this letter is
7 attached hereto as Exhibit "M."

8 23. Later in 2006, MKR discovered that Capcom Co., Ltd. had applied to register
9 "DEAD RISING" as a trademark in the USPTO under Application Serial No. 78/633,771. On
10 January 29, 2007, MKR filed a Notice of Opposition (No. 91175392) against this application
11 before the Trademark Trial and Appeal Board of the USPTO. This opposition proceeding is
12 currently pending.

13 24. Following their initial communications regarding this matter, the parties engaged
14 in settlement discussions, but these discussions have been unsuccessful. Moreover, in an effort to
15 forestall MKR from taking legal action to protect its rights, Capcom strung MKR along by
16 professing a desire to settle, while at the same time failing to respond to MKR's good faith
17 settlement proposals. For example, in November 2007, Capcom requested a suspension of the
18 deadline for answering MKR's aforementioned Notice of Opposition, on the ground that
19 settlement discussions were ongoing. When MKR pointed out to Capcom that Capcom had yet to
20 respond to MKR's settlement proposal of September 4, 2007, Capcom, through its counsel,
21 represented that a response would promptly follow. Based on this express representation, MKR
22 consented to the suspension. However, Capcom used the additional time *not* to respond to
23 MKR's settlement proposal, but instead to prepare and file its Answer to the Notice of
24 Opposition. Capcom's actions – namely, procuring an extension of time under false pretenses –
25 are reflective of its blatant disregard for MKR's rights throughout the history of this matter.

26 25. By engaging in the aforesaid acts and conduct, Capcom has caused and will
27 continue to cause grave injury to MKR's ability to profit from its intellectual property. Given the
28 enormous popularity of "DEAD RISING", as evidenced by sales of over a million units, MKR

1 has suffered irreparable harm, and has been wrongfully denied its rightful share of “DEAD
2 RISING”’s huge gross proceeds.

3 FIRST COUNTERCLAIM

4 COPYRIGHT INFRINGEMENT

5
6 26. This count is to remedy acts of copyright infringement, and arises under 17
7 U.S.C. § 101 *et seq.*

8 27. MKR repeats and realleges each and every allegation contained in paragraphs 1
9 through 25 of this Counterclaim as though fully set forth herein.

10 28. The expression contained in “GEORGE A. ROMERO’S DAWN OF THE DEAD”
11 is wholly original, and is copyrightable subject matter under the copyright laws of the United
12 States.

13 29. As of January 30, 1979, a Certificate of Registration was issued by the Register of
14 Copyrights for the 1979 film, and bears registration number PA0000033519. A true and correct
15 copy of a print-out from the U.S. Copyright Office’s database setting forth the particulars of this
16 registration is attached hereto as Exhibit “N”.
17

18 30. MKR is the sole owner of all right, title and interest in and to the copyright in the
19 1979 film and the expression it contains. MKR has complied in all respects with the provisions
20 of the Copyright Act of 1976.

21 31. The 2004 Remake is an authorized derivative work based on the 1979 film, and
22 was distributed and financed by Universal Pictures under a one-picture license from MKR. Those
23 creative elements from the 2004 Remake which were replicated from the 1979 film are owned by
24 MKR.

25 32. The expression contained in the 2004 Remake is wholly original, and is
26 copyrightable subject matter under the copyright laws of the United States.

27 33. As of April 21, 2004, a Certificate of Registration was issued by the Register of
28

1 Copyrights for the 2004 Remake, and bears registration number PA0001212817. A true and
2 correct copy of a print-out from the U.S. Copyright Office's database setting forth the particulars
3 of this registration is attached hereto as Exhibit "O." MKR has complied in all respects with the
4 provisions of the Copyright Act of 1976.

5 34. Capcom has knowingly and willfully copied major elements of the "DAWN OF
6 THE DEAD" motion pictures in the creation, distribution, promotion and marketing of "DEAD
7 RISING". Capcom had direct access to the "DAWN OF THE DEAD" motion pictures by virtue
8 of the films' widespread distribution and exhibition beginning over 29 years ago. Indeed,
9 "GEORGE A. ROMERO'S DAWN OF THE DEAD" is uniformly considered the seminal
10 zombie film, and, as noted *supra*, "DEAD RISING"'s creator even mentioned in an interview that
11 he based "DEAD RISING" on "GEORGE A. ROMERO'S DAWN OF THE DEAD".

12 35. Capcom has infringed MKR's copyright rights in the "DAWN OF THE DEAD"
13 motion pictures. Capcom knew or should have known that the "DAWN OF THE DEAD" motion
14 pictures are protected by copyright. Capcom continues to infringe on MKR's rights in and to its
15 copyrighted works by producing, marketing and distributing "DEAD RISING", and, upon
16 information and belief, intends to produce a sequel to "DEAD RISING", and otherwise exploit
17 the copyrights associated with the "DAWN OF THE DEAD" motion pictures.

18 36. The natural, probable and foreseeable consequence of Capcom's wrongful conduct
19 has been, and will continue to be, to deprive MKR of the benefits of exploiting its copyright
20 rights and of the licensing, marketing and promotion of the "DAWN OF THE DEAD" motion
21 pictures.

22 37. As a direct and proximate result of Capcom's infringing use of MKR's
23 copyrighted material, Capcom has realized and will continue to realize profits and other benefits
24 rightfully belonging to MKR. Accordingly, MKR has suffered and will continue to suffer severe
25 injuries and damage, and is entitled to those damages permitted by federal copyright law. MKR
26 therefore seeks an award of damages pursuant to 17 U.S.C. § 504, as well as its costs and
27 attorneys' fees pursuant to 17 U.S.C. § 505, in amounts to be determined at the time of trial.
28

38. To halt the ever-mounting injury to MKR, MKR hereby requests that the Court issue temporary, preliminary and permanent injunctive relief, restraining Capcom from further infringing or otherwise violating MKR's copyright rights as herein described, and, in particular, from developing, producing or marketing a prequel, sequel, character spinoff, remake or other derivative work or ancillary product based upon "DEAD RISING". MKR has no adequate remedy at law.

SECOND COUNTERCLAIM
VIOLATIONS OF LANHAM ACT

39. This count is to remedy acts of trademark infringement, false designation of origin, false description and representation, unfair competition, false advertising in commerce, and dilution, and arises under 15 U.S.C. § 1051 *et seq.*

40. MKR repeats and realleges each and every allegation contained in paragraphs 1 through 38 of this Counterclaim as though fully set forth herein.

41. Capcom's extensive use in "DEAD RISING" of major elements from the "DAWN OF THE DEAD" motion pictures, and its marketing of "DEAD RISING" in ways which highlight such elements-- including without limitation use of the title "DEAD RISING," a Zombie Head image on packaging, and a "disclaimer" which displays George A. Romero's name and the "DAWN OF THE DEAD" title – reflect Capcom's intent to trade off of the fame of Mr. Romero and the "DAWN OF THE DEAD" franchise to entice consumers to purchase "DEAD RISING". Specifically, Capcom seeks to lure consumers who are fans of Mr. Romero and "DAWN OF THE DEAD" into connecting them with "DEAD RISING".

42. Capcom's unlawful and improper actions as set forth above are likely to cause confusion, mistake or deception as to the source, origin or sponsorship of "DEAD RISING", and to falsely mislead the trade and public into believing that "DEAD RISING" originates from, is affiliated or connected with, or is sponsored, authorized, approved or sanctioned by, MKR.

43. MKR's "DAWN OF THE DEAD" Trademarks are inherently distinctive and, by virtue of MKR's extensive use, advertising and promotion of the "DAWN OF THE DEAD" THE MKR GROUP, INC.'S AMENDED ANSWER, COUNTERCLAIMS AND THIRD-PARTY COMPLAINT

Trademarks as set forth above, the “DAWN OF THE DEAD” Trademarks serve as an exclusive designation of origin of MKR and of its goods and services, and as a symbol of the goodwill and unique reputation represented by the famous “DAWN OF THE DEAD” Trademarks. MKR’s “DAWN OF THE DEAD” Trademarks have developed enormous secondary meaning and goodwill among the public and trade. Such secondary meaning (in favor of one of MKR’s predecessors-in-interest) was expressly recognized in federal court almost thirty years ago. *See, Dawn Associates v. Links*, 203 U.S.P.Q. 831, 836 (N.D. Ill. 1978). MKR’s trademark “DEAD RISING” is confusingly similar to MKR’s trademark “DAWN OF THE DEAD”. Equally unlawful is Capcom’s displaying a colorable imitation of MKR’s “Zombie Head” Design on “DEAD RISING”’s packaging.

44. Capcom’s activities constitute an infringement of MKR’s registered “DAWN OF THE DEAD” Trademarks under § 32(1) of the Trademark Act (15 U.S.C. § 1114(1)).

45. Capcom’s activities constitute the use by Capcom of a false designation of origin; false description and representation in commerce; unfair competition; and false advertising in commerce, all in violation of § 43(a) of the Trademark Act (15 U.S.C. §1125(a)).

46. MKR’s “DAWN OF THE DEAD” Trademarks are famous marks under § 43 (c) of the Trademark Act (15 U.S.C. § 1125(c)). Capcom’s unlawful activities alleged herein constitute dilution of the “DAWN OF THE DEAD” Trademarks in violation of 15 U.S.C. § 1125(c).

47. Capcom’s acts of trademark infringement, false designation of origin, false description and representation, unfair competition, false advertising and dilution have caused MKR to sustain monetary damage, loss and injury, in an amount to be determined at the time of trial.

48. Capcom has engaged and continues to engage in this activity knowingly, deliberately and willfully, so as to justify the assessment of treble damages against it, in an amount to be determined at the time of trial.

49. To halt the ever-mounting injury to MKR, MKR hereby requests that the Court

1 issue temporary, preliminary and permanent injunctive relief, restraining Capcom from further
 2 infringing or otherwise violating MKR's intellectually property rights as herein described,
 3 particularly with respect to pre-quels, sequels, spinoffs, remakes or other derivative works or
 4 ancillary products based upon "DEAD RISING". MKR has no adequate remedy at law.

5 50. For the reasons hereinabove set forth, MKR hereby requests that the Court deny
 6 registration to Capcom Application Serial No. 78/633,771 for "DEAD RISING," pursuant to § 37
 7 of the Trademark Act (15 U.S.C. § 1119).

8 THIRD COUNTERCLAIM

9 VIOLATION OF CALIFORNIA

10 BUSINESS AND PROFESSIONS CODE

11 51. This count is to remedy acts of dilution, injury to business reputation, and
 12 deceptive acts or practices, and arises under California Business and Professions Code, Sections
 13 17200 *et seq.* and 14330.

14 52. MKR repeats and realleges each and every allegation contained in paragraphs 1
 15 through 50 of this Complaint as though fully set forth herein.

16 53. Capcom's activities constitute dilution and injury to the business reputation of
 17 MKR, in violation of MKR's rights under California Business and Professions Code § 14330.

18 54. Capcom's activities constitute deceptive acts or practices in the conduct of
 19 business, trade or commerce, or in the furnishing of services in the State of California, in
 20 violation of California Business and Professions Code, Sections 17200 *et seq.* MKR has been
 21 injured by reason of such deceptive acts or practices.

22 55. Capcom's violations of California Business and Professions Code, Sections 17200
 23 *et seq.* and 14330 have caused MKR to sustain monetary damage, loss and injury, in an amount to
 24 be determined at the time of trial.

25 56. Capcom has engaged and continues to engage in this activity knowingly,
 26 deliberately and willfully, so as to justify the assessment of exemplary and punitive damages
 27 against it, in an amount to be determined at the time of trial.

28 57. To halt the ever-mounting injury to MKR, MKR hereby requests that the Court

1 issue temporary, preliminary and permanent injunctive relief, restraining Capcom from further
 2 violating California Business and Professions Code Sections 17200 *et seq.* and 14330, as herein
 3 described, particularly with respect to prequels, sequels, spinoffs, remakes or other derivative
 4 works or ancillary products based upon “DEAD RISING”. MKR has no adequate remedy at law.

5 FOURTH COUNTERCLAIM

6 TRADEMARK INFRINGEMENT, UNFAIR COMPETITION,

7 MISAPPROPRIATION AND DILUTION (COMMON LAW)

8 58. This count is to remedy acts of trademark infringement, unfair competition,
 9 misappropriation and dilution under the common law of, *inter alia*, the State of California.

10 59. MKR repeats and realleges each and every allegation contained in paragraphs 1
 11 through 57 of this Complaint as though fully set forth herein.

12 60. Capcom’s activities as described herein constitute common law trademark
 13 infringement; unfair competition; misappropriation of and trading upon the fine reputation and
 14 goodwill of MKR; unjust diversion from MKR to Capcom of the benefits arising therefrom; and
 15 dilution.

16 61. Capcom’s acts of common law trademark infringement, unfair competition,
 17 misappropriation and dilution have caused MKR to sustain monetary damage, loss and injury, in
 18 an amount to be determined at the time of trial.

19 62. Capcom has engaged and continues to engage in this activity knowingly,
 20 deliberately and willfully, so as to justify the assessment of exemplary and punitive damages
 21 against it, in an amount to be determined at the time of trial.

22 63. To halt the ever-mounting injury to MKR, MKR hereby requests that the Court
 23 issue temporary, preliminary and permanent injunctive relief, restraining Capcom from further
 24 infringing or otherwise violating MKR’s intellectually property rights as described herein,
 25 particularly with respect to prequels, sequels, spinoffs, remakes or other derivative works or
 26 ancillary products based upon “DEAD RISING”. MKR has no adequate remedy at law.

DEMAND FOR JURY TRIAL

Pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, MKR demands a trial by jury as to all issues in this lawsuit.

PRAYER FOR RELIEF

WHEREFORE, MKR prays for judgment against Capcom as follows:

A. Dismiss Capcom's Complaint with prejudice in its entirety;

B. That Capcom take nothing by its Complaint;

C. For a temporary, preliminary and permanent injunction enjoining and restraining the Capcom parties and each of their officers, agents, servants, employees and attorneys, and those persons acting in concert or participation with them who receive actual notice of the Order by personal service or otherwise, from:

(1) producing, distributing, selling or otherwise exploiting any sequels, prequels, spinoffs, remakes or other derivative works or ancillary products based upon "DEAD RISING";

(2) engaging in any infringement of MKR's copyright rights in and to the "DAWN OF THE DEAD" motion pictures;

(3) using MKR's "DAWN OF THE DEAD" Trademarks (however spelled, whether capitalized, abbreviated, singular or plural, printed or stylized, whether used alone or in combination with any word or words, and whether used in caption, text, orally or otherwise), or any other reproduction, counterfeit, copy, colorable imitation or confusingly similar variation of MKR's "DAWN OF THE DEAD" Trademarks, as trade names, trademarks or service marks, or in any other manner which suggests in any way that Capcom and/or its activities, products or services originate from, are affiliated with, or are sponsored, authorized, approved or sanctioned by MKR, or that MKR and/or its activities, products or services are affiliated in any way with Capcom;

(4) infringing or diluting the "DAWN OF THE DEAD" Trademarks;

(5) using in connection with Capcom's activities, products or services any

1 false or deceptive designation, representation, description or advertisement of Capcom or of its
 2 activities, products or services, whether by symbols, words or statements, which would damage or
 3 injure MKR or give Capcom an unfair competitive advantage in the marketplace;

4 (6) violating California Business and Professions Code, Sections 17200 *et seq.*
 5 and 14330;

6 (7) engaging in acts of state or common law trademark infringement, unfair
 7 competition, misappropriation or dilution which would damage or injure MKR; or

8 (8) inducing, encouraging, instigating, aiding, abetting or contributing to any
 9 of the aforesaid acts.

10 D. That Capcom file with the Court and serve on counsel for MKR within thirty (30)
 11 days after service on Capcom of such Order, or within such extended time period as this Court
 12 may direct, a report in writing and under oath, setting forth in detail the manner and form in
 13 which Capcom has complied with the Order.

14 E. For an award of Capcom's profits and MKR's damages resulting from Capcom's
 15 unlawful acts set forth herein, in an amount to be proven at the time of trial, together with legal
 16 interest from the date of accrual thereof.

17 F. For an award of treble damages pursuant to 15 U.S.C. § 1117.

18 G. For an award of punitive damages, in an amount to be proven at the time of trial.

19 H. That MKR be awarded the costs of this civil action, together with MKR's
 20 reasonable attorney fees, pursuant to 17 U.S.C. § 505, 15 U.S.C. § 1116 and/or 15 U.S.C. § 1117,
 21 and the equity powers of the Court.

22 I.. That MKR be awarded such other and further relief as the Court may deem
 23 equitable and proper.

1 Dated: May 12, 2008

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