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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

ATARI INTERACTIVE, INC.,
Plaintiff,
vs.
NESTLÉ, SA; NESTLÉ UK LTD; and
NESTLÉ USA, INC.,
Defendants.

Case No.
COMPLAINT FOR:
(1) TRADEMARK INFRINGEMENT
UNDER 15 U.S.C. § 1114;
(2) COPYRIGHT INFRINGEMENT
UNDER 17 U.S.C. §§ 101 et seq.;
(3) FALSE DESIGNATION OF
ORIGIN UNDER 15 U.S.C. § 1125(a);
(4) DILUTION UNDER 15 U.S.C. §
1125(c);
(5) UNFAIR COMPETITION
UNDER CAL. BUS. & PROF. CODE §
17200; AND
(6) COMMON LAW UNFAIR
COMPETITION
DEMAND FOR JURY TRIAL

PRELIMINARY STATEMENT

1
2 1. Atari brings this action to remedy Nestlé’s blatant invasion and
3 misappropriation of its intellectual property rights related to the iconic *Breakout*
4 video game.

5 2. In 1975, two little known but up-and-coming developers – Steve Jobs
6 and Steve Wozniak – created *Breakout* for Atari, which was then looking to follow-
7 up on its groundbreaking hit game, *Pong*.¹ The new simple, addictive game was
8 also a hit, and helped propel Atari to its long-held spot on top of the video game
9 industry.

10 3. Forty years later Nestlé decided that it would, without Atari’s
11 authorization, leverage *Breakout* and the special place it holds among nostalgic
12 Baby Boomers, Generation X, and even today’s Millennial and post-Millennial
13 “gamers” in order to maximize the reach of worldwide, multi-platform
14 advertisements for Nestlé KIT KAT bars.

15 4. To be clear, this is not a case where a good faith dispute could exist
16 between the rights holder and alleged infringer. Instead, Nestlé simply took the
17 classic *Breakout* screen, replaced its bricks with KIT KAT bars, and invited
18 customers to “*Breakout*” and buy more candy bars.

19 5. Adding insult to injury, Nestlé’s “Breakout” campaign was
20 comprehensive, and the infringement continues to this very moment. KIT KAT ads
21 centered on the exploitation and misuse of the Breakout name, and the Breakout
22 look, feel, sound, and imagery remain on Twitter, under Nestlé’s Twitter handle,
23 and on Facebook, on Nestlé’s Facebook page, for all the world to see. Nestlé’s

24 _____
25 ¹ The late Mr. Jobs subsequently explained that the \$5,000 he was paid for
26 *Breakout* served as seed money for his nascent company, Apple. Mr. Wozniak has
said that the process of engineering *Breakout* led to several innovations later
employed in the landmark Apple II personal computer.

27 Unless otherwise indicated, all emphasis is added and internal citations
28 omitted. Citations to website addresses in this Complaint were last viewed on
August 14, 2017.

1 York 10016. Atari is a pioneer in the video game industry, with titles including the
2 seminal and instantly recognizable *Pong*, *Breakout*, *Asteroids*, and others. Atari
3 remains a multi-platform, global interactive entertainment company, having adapted
4 many of its classic games for online platforms like Facebook, as well as for
5 smartphones and tablets. It also develops and distributes interactive entertainment
6 for video game consoles from Microsoft and Sony. As a licensor, Atari extends its
7 brand and franchises into other media, merchandising, and publishing categories.
8 Atari is the owner, by assignment, of all right, title, and interest in Atari intellectual
9 property (“Atari IP”), including the trademarks and copyrights relating to *Breakout*.
10 Atari trades publicly on the Euronext Paris stock exchange.

11 9. Defendant Nestlé SA is a Swiss corporation having an address and
12 principal place of business of Avenue Nestlé 55, Vevey, Switzerland.

13 10. Defendant Nestlé UK Ltd is a subsidiary of Nestlé and is a company
14 organized under the laws of the United Kingdom having a business address of 1 City
15 Place, Gatwick, England.

16 11. Defendant Nestlé USA, Inc. is a subsidiary of Nestlé SA and is a
17 California corporation with a business address of 800 North Brand Boulevard,
18 Glendale, California. This Complaint refers to the three Nestlé entities, collectively
19 and individually, as “Nestlé” or “Defendants.”

20 12. Nestlé, its products, and its advertisements are ubiquitous; it is among
21 the largest and best known food companies in the world. It is an international
22 conglomerate that sells everything from baby food (Gerber) to snacks (Chips Ahoy!,
23 Toll House cookies, PowerBar) to petcare products (Fancy Feast, Purina) to mineral
24 water (Arrowhead, Ozarka). It owns dozens of top-name brands, many with annual
25 sales of over one billion U.S dollars. Nestlé is particularly well-known for its
26 chocolate and confectionary offerings, which include Nestlé Crunch, Baby Ruth,
27 100 Grand Bar, Butterfinger, Raisinets, Smarties, and Wonka brand products.
28 Nestlé’s jingles, too, are famous, from “Nestlé makes the very best” (Nestlé Quik),

1 to “Nobody better lay a finger on my Butterfinger” (Butterfinger). Nestlé’s logos
2 and associated “characters” – like the Gerber baby and Keebler Elves – are similarly
3 recognized and memorable. Nestlé is, accordingly, a savvy, ultra-experienced
4 marketer with a long history of licensing intellectual property and protecting its
5 own. At all relevant times Nestlé has been responsible for marketing KIT KAT and
6 is responsible for the infringing advertisements at issue.

7 **JURISDICTION AND VENUE**

8 13. This Court has subject matter jurisdiction over this action pursuant to
9 15 U.S.C. § 1121, and 28 U.S.C. §§ 1331 and 1338 because the action arises under
10 the Federal Copyright and Lanham Acts, 17 U.S.C. § 101, *et seq.*, and 15. U.S.C. §
11 1051, *et seq.* This Court also has supplemental jurisdiction pursuant to 28 U.S.C. §
12 1367 and 28 U.S.C. § 1338(b).

13 14. Venue in this county is proper under 28 U.S.C. § 1391 because
14 Defendants are subject to personal jurisdiction in this district and Atari has suffered
15 injury in this district.

16 15. This Court has personal jurisdiction over Defendants because (a)
17 Defendants have committed tortious acts in this district, and Plaintiff’s claims arise
18 out of such acts; (b) Defendants regularly conduct business in this district; and (c)
19 Defendants have otherwise made or established contacts in this district sufficient to
20 permit the exercise of personal jurisdiction.

21 **NESTLÉ’S UNAUTHORIZED, BLATANT MISAPPROPRIATION AND** 22 **MISUSE OF ATARI’S TRADEMARK AND COPYRIGHTED PROPERTY**

23 **A. Atari’s Iconic Game, *Breakout***

24 16. *Breakout* was conceptualized by Atari founder Nolan Bushnell, along
25 with Steve Bristow, after the home version of Atari’s *Pong* became a breakaway
26 sensation in 1975. Atari sought to capitalize on *Pong*’s popularity and expand its
27 user base by developing a similarly popular game that could be played by one
28 person. One challenge Atari faced was the price of logic chips, with typical games

1 needing 100-175 chips apiece, multiplied by tens of thousands of units. Bushnell
2 challenged his engineers to reduce the number of chips, offering a bonus for each
3 chip removed in a prototype, in hopes to get below 75.

4 17. One young engineer, Steve Jobs, claimed he could hit that mark in four
5 days. In reality, Mr. Jobs enlisted his friend, Steve Wozniak, then an engineer at
6 Hewlett Packard, to do the legwork in exchange for half of the bonus. Mr. Wozniak
7 spent around 72 hours minimizing *Breakout's* circuitry, delivering an initial
8 prototype with just 20-30 circuits, and a final prototype with just 44 chips.² Mr.
9 Jobs was paid \$5,000 for the work.

10 18. *Breakout* cemented Atari's place atop the gaming industry, becoming a
11 huge hit. Its success has spawned multiple reinventions of the game – e.g. Super
12 *Breakout* and *Breakout 2000* – which, together with the original *Breakout*, remain
13 available across countless platforms including Video Pinball, PC, Apple,
14 PlayStation, Xbox 360, mobile, and multiple Atari consoles. Atari's iPhone version
15 of *Breakout* has been downloaded more than **2 million times** since its 2008 release
16 via the iTunes store.³

17 19. *Breakout* is a widely acknowledged classic of its genre, “arguably
18 second only to Pong” in its influence on gaming.⁴ The game's appeal and resonance
19 continue to this day. In recent years, in honor of the 37th anniversary of the game's
20 release, and with the prior written authorization of Atari, Google released a secret
21

22 ² Mr. Wozniak's design was said to be so compact and ingenious that it could
23 not be replicated on a mass production level, so the final *Breakout* board shipped
24 with 100 chips. See Damien McFerran, *Atari's Breakout is 40 today - all gamers
25 need to know how it came to be*, (Apr. 13, 2016),
26 <http://www.digitalspy.com/gaming/feature/a790432/atari-breakout-40-today-all-gamers-need-to-know-how-it-came-to-be>. Later, after Mr. Jobs and Mr. Wozniak
formed Apple with funds earned developing *Breakout*, Mr. Wozniak incorporated
his *Breakout* innovations into the engineering of Apple's first great personal
computer, the Apple II. *Id.*

27 ³ Atari, Interactive, *Breakout: Boost*, Apple iTunes (Jan. 14, 2016),
<https://itunes.apple.com/us/app/breakout-boost/id476059948?mt=8>.

28 ⁴ See McFerran, *supra* note 2.

1 “Easter Egg” version of the game via its Google Image search feature.⁵

2 **B. Atari’s Intellectual Property Program**

3 20. As an icon of early Silicon Valley ingenuity; a touchstone, especially,
4 of the 1970’s and 1980’s; a brand with worldwide recognition in its own name, and
5 in its games; and an entity that continues as a global entertainment developer and
6 licensor, Atari maintains a robust, valuable, and highly desirable portfolio of
7 intellectual property.

8 21. The Atari group is comprised of Atari Interactive, Atari, Inc., and other
9 Atari-related entities. Atari owns the Atari IP that includes the trademarks and
10 copyrights relating to *Breakout*.

11 22. *Breakout* is one of the key elements of the licensing program. In
12 addition to being created by towering legends of the tech world, its name, visuals,
13 and game play are recognizable, familiar, and famous worldwide. *Breakout*
14 achieved instant, widespread popularity as the best-selling video game in 1978.⁶
15 That fame and goodwill has persisted for decades. *Breakout* routinely ranks on
16 published lists of the best video games of all time.⁷

17 23. *Breakout’s* name recognition, familiarity, fame, and value in Atari’s
18 robust IP licensing portfolio has attracted potential licensors. Atari has generated
19 substantial revenue in licensing *Breakout* and has very valuable ongoing licensing
20 agreements with major corporations.

21 _____
22 ⁵ See *Breakout (video game)*, Wikipedia (May 30, 2017, 4:27 PM),
23 [https://en.wikipedia.org/wiki/Breakout_\(video_game\)](https://en.wikipedia.org/wiki/Breakout_(video_game)); Danny Goodwin, *Google*
24 *Images Easter Egg: Search ‘Atari Breakout’ to Play Image Breakout Game* (May
14, 2013), <https://searchenginewatch.com/sew/news/2267999/google-images-easter-egg-search-atari-breakout-to-play-image-breakout-game>.

25 ⁶ Hanuman Welch, *The Best Selling Video Game Of Every Year Since 1977*
26 *Complex* (Apr. 23, 2013), <http://uk.complex.com/pop-culture/2013/04/the-best-video-games-to-come-out-every-year-since-the-atari-2600/breakout>.

27 ⁷ See, e.g., Chris Bonanno, *The Complete List of the 50 Greatest Video Games*
28 *Ever*, Florida Today (last updated Sept. 23, 2016, 12:19 AM),
<http://www.floridatoday.com/story/tech/gaming/2016/09/21/complete-list-50-greatest-video-games-ever/90809786/>.

C. Atari's IP Rights In *Breakout*

24. The BREAKOUT mark has been in use continuously since 1975, first on arcade games and then later on home game consoles and computers. Atari owns a collection of BREAKOUT trademarks registered with the United States Patent and Trademark Office ("USPTO"):

Mark	Registration No.	Registration Date	Status	Goods/Services
BREAKOUT	2553961	March 26, 2002	Incontestable	Computer game programs and video game cartridges
SUPER BREAKOUT	1241326	June 7, 1983	Incontestable	Non-coin-operated electronic amusement game equipment
BREAKOUT BOOST	4168075	July 3, 2012	Registered	Downloadable electronic games via the Internet

25. All of the aforementioned registrations are valid and subsisting, and the registrations for BREAKOUT and SUPER BREAKOUT have become incontestable pursuant to 15 U.S.C. § 1065. Copies of the certificates of registration are attached as Exhibit A.

26. Atari also owns all right, title, and interest in several copyrights related to the *Breakout* game, each of which is registered with the United States Copyright Office:

Registration No.	Registration Date	Publication Date	Description
PA0000175216	June 9, 1983	Nov. 9, 1978	<i>Breakout</i> , Computer File: 12 videogames, 1 instruction booklet, 1 sticker; New Matter: new sounds in

			audiovisual work & new artwork & text on package & instructions.	
1	PA0000610716	Feb. 6, 1987	May 15, 1976	Breakout , Computer File: Videogame.
2	TX0000058926	June 29, 1978	June 26, 1978	Breakout , Text: Game Program Instructions.
3	VA0000015994	Oct. 27, 1978	Jan. 2, 1978	Breakout , Visual Material: Video computer system game program, printed carton.
4	VAu000008876	April 4, 1979	<i>not listed</i>	Super Breakout , Visual Material: Fabrication, schematic diagram, depiction of circuits and wiring.
5	TX0000452507	April 14, 1980	March 10, 1980	The Original Super Breakout , Visual Material.
6	PA0000175215	June 9, 1983	Jan. 8, 1982	Super Breakout , Computer File: 9 videogames, 1 instruction booklet, 1 sticker; New Matter: new sounds in audiovisual work & new artwork & text on package & instructions.
7	PA0000662697	Oct. 7, 1988	June 15, 1978	Super Breakout , Computer File: Videogame; New Matter: sounds and images in audiovisual work.
8	TX0000180834	Jan. 22, 1979	Sept. 9, 1978	Super Breakout , Text: operation, maintenance and service manual, complete with illustrated parts catalog.
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D. Nestlé's Unauthorized "Breakout" Campaign

27. In 2016, Nestlé unveiled a new ad campaign for its ubiquitous KIT KAT chocolate bars. The ads varied in style and platform, but all contained a

1 common thread: each blatantly pilfered Atari's mark and/or the look, feel, sound,
2 and imagery of *Breakout*.

3 28. In at least one video advertisement, Nestlé's ad begins with four actors
4 – two young, two middle-aged, in keeping with *Breakout's* multi-generational
5 appeal – sitting on a couch playing a video game. The game is revealed to be
6 *Breakout*, with the nominal and insignificant difference between the classic version
7 and Nestlé's unauthorized version being that the long, rectangular bricks players
8 "break" in the former are replaced with long, rectangular bricks made of KIT KAT
9 chocolate bars in the latter.

10 29. Nestlé's video advertisement is entitled "Breakout."⁸

11 30. On information and belief, the video advertisement originally appeared
12 in the UK on internet and television, and was later uploaded to the YouTube website
13 (presumably by Defendants), obtaining a worldwide audience (inclusive of the
14 United States), in order to maximize the impact of Nestlé's "Breakout" campaign.
15 YouTube alone has approximately 1 billion active users each month.⁹ A screen shot
16 of that advertisement is attached as Exhibit B.

17 31. The video advertisement continues to be readily available to any viewer
18 with an internet connection.¹⁰

19 32. Nestlé's "Breakout" video advertisements depict imagery of the
20 *Breakout* game which is covered and protected by Atari's valid registered
21 copyrights.

22 33. The game simulation depicted in Nestlé's video advertisement is
23 substantially similar to the *Breakout* graphics covered by Atari's valid registered
24

25 ⁸ *PRODUCER: Dale Healy – 'Kit Kat: Breakout' (Commercial – TVC)*, 2AM
Films (Feb. 16, 2017, 8:06 AM), <https://vimeo.com/204352144>.

26 ⁹ Reuters, *YouTube Stats: Site Has 1 Billion Active Users Each Month*,
Huffington Post (March 21, 2013),
27 http://www.huffingtonpost.com/2013/03/21/youtube-stats_n_2922543.html.

28 ¹⁰ See Dale Healy, *supra* note 9.

1 copyrights.

2 34. Nestlé placed a second infringing advertisement on Facebook, one of
3 the world's largest and most significant advertising platforms.¹¹ That advertisement
4 also copies *Breakout's* imagery and gameplay, with the nominal and insignificant
5 difference, again, of *Breakout* bricks being replaced by Nestlé's KIT KAT bars.
6 Beneath the image, KIT KAT's Facebook page invites users to "Get your game on
7 Breakout Breakers!" A screenshot of the ad is attached as Exhibit C.

8 35. The Facebook advertisement remains available to all Facebook users.¹²

9 36. Nestlé's "Breakout" advertisements placed on Facebook violate Atari's
10 duly-registered, incontestable trademark in the term "Breakout."

11 37. Nestlé's "Breakout Breakers" Facebook ad depicts imagery of the
12 *Breakout* game which is covered and protected by Atari's valid registered
13 copyrights.

14 38. The game simulation depicted in the "Breakout Breaker" Facebook
15 advertisement is substantially similar to the *Breakout* graphics covered by Atari's
16 valid registered copyrights.

17 39. Nestlé placed additional infringing advertisements on the Twitter
18 platform. Twitter has approximately 328 million active monthly users.¹³ Nestlé's
19 Twitter handle has, as of the date of this filing, approximately 190,000 followers.
20 The KIT KAT U.S. Twitter handle has 362,000 followers. Nestlé's Twitter ad

21 _____
22 ¹¹ See, e.g., Kathleen Chaykowski, *Sheryl Sandberg: Facebook's 4 Million*
23 *Advertisers Are 'Proof' Of The Power Of Mobile*, Forbes (Sept. 27, 2016, 1:34 PM),
24 [https://www.forbes.com/sites/kathleenchaykowski/2016/09/27/sheryl-sandberg-](https://www.forbes.com/sites/kathleenchaykowski/2016/09/27/sheryl-sandberg-facebooks-4-million-advertisers-are-proof-of-the-power-of-mobile/#a2f3d5c1f17b)
25 [facebooks-4-million-advertisers-are-proof-of-the-power-of-mobile/#a2f3d5c1f17b](https://www.forbes.com/sites/kathleenchaykowski/2016/09/27/sheryl-sandberg-facebooks-4-million-advertisers-are-proof-of-the-power-of-mobile/#a2f3d5c1f17b);
26 Mathew Ingram, *How Google and Facebook Have Taken Over the Digital Ad*
27 *Industry*, Fortune (Jan. 4, 2017), [http://fortune.com/2017/01/04/google-facebook-ad-](http://fortune.com/2017/01/04/google-facebook-ad-industry/)
28 [industry/](http://fortune.com/2017/01/04/google-facebook-ad-industry/).

¹² KitKat, Facebook (Mar. 4, 2016),
<https://www.facebook.com/KitKatSA/videos/1073282116069651/>.

¹³ Daniel Sparks, *How Many Users Does Twitter Have?*, The Motley Fool, (Apr.
27, 2017, 11:06 PM), [https://www.fool.com/investing/2017/04/27/how-many-users-](https://www.fool.com/investing/2017/04/27/how-many-users-does-twitter-have.aspx)
28 [does-twitter-have.aspx](https://www.fool.com/investing/2017/04/27/how-many-users-does-twitter-have.aspx).

1 explicitly uses the BREAKOUT mark in conjunction with the infringing video
2 posted there. The video posted to Twitter, like the other offending videos, features
3 Atari's *Breakout*, with KIT KAT chocolate bars replacing *Breakout*'s bricks. The
4 tagline of one of Nestlé's Twitter advertisements asks: "Is it time to break out of the
5 Breakout?!" Another repeats the tagline used on Facebook: "Get your game on
6 Breakout Breakers!" In an attempt to capture a wider audience, Nestlé also posted a
7 similar Twitter ad in Spanish, using the tagline "Es hora de romper el Breakout (?)".
8 Screenshots of the Twitter advertisements are attached as Exhibit D.

9 40. At least some of the infringing advertisements remain available to all
10 Twitter users.

11 41. The use of the term "Breakout" – capitalized and all one word –
12 amplifies the connection to *Breakout*, deepening KIT KAT's (false) association with
13 Atari and reinforcing the connection created by the infringing video portion of the
14 advertisement.

15 42. Nestlé's "Breakout" advertisements placed on Twitter violate Atari's
16 duly-registered, incontestable trademark in the term "Breakout," *i.e.* the
17 BREAKOUT mark.

18 43. Nestlé's "Breakout" advertisements placed on Twitter depict imagery
19 of the *Breakout* game which is covered and protected by Atari's valid registered
20 copyrights.

21 44. Nestlé's game simulation depicted in its video advertisement is
22 substantially similar to the *Breakout* graphics covered by Atari's valid registered
23 copyrights.

24 **E. Atari Has Been Damaged, And Continues To Be Damaged, By Nestlé's**
25 **Unauthorized "Breakout" Advertising Campaign**

26 45. Atari's IP licensing activities are responsible for a significant portion of
27 its annual revenues. Revenues from its best-known games make up a significant
28 portion of those revenues.

1 46. Without the benefit of its licensing revenues, profits of Atari would be
2 significantly lower.

3 47. As an initial, straightforward matter, Nestlé has denied Atari the
4 licensing fees it would have charged Nestlé for use of Atari’s intellectual property in
5 the widely distributed KIT KAT “Breakout” campaign, had Atari agreed to such
6 use.

7 48. In addition, on information and belief, a significant factor in a
8 licensee’s decision to license is whether the subject property has been licensed to
9 marketers in the advertiser’s market. For example, if a licensor licenses
10 trademarked or copyrighted property to Coca-Cola, it is extraordinarily unlikely that
11 it can license the same property to Pepsi, whether because of contract, custom, or
12 common sense.

13 49. On information and belief, this factor – the inability to license property
14 to licensees in the same market – extends to adjacent markets. For example, if a
15 licensor licenses trademarked or copyrighted property to Coca-Cola, it is
16 extraordinarily unlikely that it can license the same property to a manufacturer of
17 bottled water, whether because of contract, custom, or common sense.

18 50. Whether considered as the market for candy, chocolate,
19 confectionaries, foodstuffs, or some similar market or sub-market, KIT KAT bars
20 are sold in an enormous market featuring billions of dollars of annual advertising
21 dollars.

22 51. In one fell swoop, Nestlé has unilaterally eliminated Atari from these
23 markets. For example, the Hershey Company spends over \$500 million annually
24 advertising its products.¹⁴ Mars Inc. spends over \$700 million annually advertising
25

26 ¹⁴ See *Advertising Expenditure of the Hershey Company Worldwide from 2008*
27 *to 2016 (in million U.S. dollars)*, Statista (2017)
28 <https://www.statista.com/statistics/294536/hershey-company-advertising-expenditure>.

1 its products.¹⁵ The broader markets for candy, chocolate, confectionaries, and
2 foodstuffs are, obviously, many times those amounts. Atari almost assuredly cannot
3 license to Hershey, Mars, or Nestlé’s myriad other competitors, and it has likely
4 been eliminated as a potential licensor by scores of additional companies.

5 52. On information and belief, the dynamic described in this section applies
6 beyond the potential licensees of *Breakout*. That is, Atari can almost assuredly not
7 license *Asteroids*, *Centipede*, or more than 200 other games to Hershey, Mars, or
8 Nestlé’s other competitors, and it has likely been eliminated as potential licensor by
9 scores of additional companies for all of its offerings.

10 53. To the extent Atari’s IP offerings have not been eliminated by Nestlé in
11 markets related to or adjacent to KIT KAT bars, Atari’s bargaining position has
12 been significantly reduced, which will likely result in diminished revenues from
13 licensees willing to license Atari IP notwithstanding its involuntary association with
14 KIT KAT and Nestlé.

15 54. Accordingly, Nestlé’s “Breakout” campaign has diluted the value of
16 Atari’s trademarks and degraded the value of its copyrights, on a going-forward
17 basis.

18 55. On information and belief, Nestlé’s “Breakout” campaign has also
19 engendered consumer confusion. One natural takeaway of Nestlé’s “Breakout”
20 campaign is that Atari endorses KIT KAT bars. Many consumers, presumably, do
21 not care for KIT KAT bars, and Nestlé has unilaterally associated Atari with
22 products that many in Atari’s target demographics may find unlikable, overly
23 “corporate,” unhealthy, boring, tired, or otherwise.

24 56. More broadly, simple Google searches indicate that Nestlé has been
25

26 _____
27 ¹⁵ See *Mars Inc.’s Advertising Spending in the United States from 2009 to 2015*
28 (in million U.S. dollars), Statista (2017),
<https://www.statista.com/statistics/463074/mars-ad-spend-usa/>.

1 associated with numerous scandals over the years.¹⁶ Those scandals include
2 allegations that Nestlé falsely advertised to impoverished nations that its baby
3 formula was as good, or nearly as good, as breast milk, leading to reams of bad
4 press and a consumer boycott.¹⁷ Nestlé's chocolate business, it has been alleged, has
5 been associated with slave and child labor.¹⁸ Nestlé has also been associated with
6 pollution and environmental degradation; the demanding of repayment of debt from
7 Ethiopia while it was experiencing famine; the striking of a multi-million deal with
8 Zimbabwe's tyrannical dictator, Robert Mugabe, and a massive price fixing
9 scandal.¹⁹

10 57. Nestlé has also been associated with consumer endangerment and
11 illness. The U.S. Food and Drug Administration, in 2009, warned consumers to
12 avoid eating any varieties of prepackaged Nestlé Toll House refrigerated cookie
13 dough due to risk of contamination with E. coli, leading to a massive recall.²⁰
14 number of Nestlé's other offerings have been recalled for similar reasons.²¹ Most
15 relevant for present purposes, earlier this year, Nestlé recalled a batch of **KIT KAT**
16 Original Milk Chocolate Bites Pouch Bags.²²

17 _____
18 ¹⁶ See, e.g., Mihai Andrei, *Why Nestle Is One Of The Most Hated Companies In*
19 *The World*, ZME Science (May 19, 2017, 8:53 PM),
<http://www.zmescience.com/science/nestle-company-pollution-children>.

20 ¹⁷ *Id.*

21 ¹⁸ *Id.*

22 ¹⁹ *Id.*

23 ²⁰ *Updated on Recalled Nestlé Toll House Cookie Dough*, U.S. Food And Drug
Administration (July 15, 2009),
<https://www.fda.gov/ForConsumers/ConsumerUpdates/ucm168012.htm>.

24 ²¹ *Nestlé USA Announces Voluntary Recall of a Limited Number of DiGiorno*
25 *Pizzas, Lean Cuisine and Stouffer's Products Due to the Potential Presence of*
26 *Foreign Material*, Nestlé USA (Mar 10, 2016),
[http://www.nestleusa.com/media/pressreleases/nestle-digiorno-stouffers-lean-](http://www.nestleusa.com/media/pressreleases/nestle-digiorno-stouffers-lean-cuisine-voluntary-recall)
27 [cuisine-voluntary-recall](http://www.nestleusa.com/media/pressreleases/nestle-digiorno-stouffers-lean-cuisine-voluntary-recall) (Nestlé press release noting recall of DiGornio, Lean
Cuisine, and Stouffers products).

28 ²² *KitKat Bites recall and peanut/nut allergy warning*, Nestlé USA (Apr 14,
2017), <http://www.nestle.co.uk/media/pressreleases/kitkat-bites-recall-and-nut->

1 62. The infringing conduct is not, by any stretch, “fair use” of Atari’s IP.
2 Nestlé’s appropriation of Atari’s IP was commercial. It did not use Atari’s IP for
3 purposes of criticism, commentary, or education. Nestlé made creative (if only
4 somewhat creative) use, not factual or utilitarian use, of Atari’s IP. Nestlé made
5 significant, not fleeting, use of Atari’s IP. Indeed, as is obvious from the name of
6 the campaign – “Breakout” – Atari’s IP was at the heart of Nestlé’s ads. Nestlé did
7 not meaningfully “transform” Atari’s IP – Atari’s IP was used to depict or invoke
8 Breakout, notwithstanding the slight tweak it made to the game, and the look, sound,
9 imagery, and terminology deployed in the ads could only have been deployed to
10 invoke the original. Finally, Nestlé has not created a “parody” of *Breakout*, as it
11 offers no critique or commentary on the *Breakout* game itself.

12 63. Atari is not estopped from making these claims. Atari discovered
13 Nestlé’s acts of infringement in or around October of 2016, and promptly demanded
14 that Nestlé cease its infringement by letter dated October 28, 2016. Nestlé’s UK
15 counsel responded by letter of November 25, 2016, disclaiming any wrongful acts
16 by Nestlé and asserting that UK law applied to this dispute.²⁴ Atari retained U.S.
17 counsel to respond to Nestlé’s UK counsel. By letter dated December 15, 2016,
18 Atari’s US counsel responded to Nestlé’s UK counsel and explained why U.S. law
19 applied. From October 2016 through at least February 2017, Defendants continued
20 their infringing acts but ultimately claimed to have removed the infringing
21 advertisements from Twitter, YouTube, and elsewhere. As shown above, that
22 representation was untrue, as Nestlé’s ads remain posted under Nestlé’s name in a
23 variety of fora.

24 64. Finally, Atari has not “abandoned” its rights in *Breakout*. To the
25

26 ²⁴ This argument is frivolous given, among other things, the ads’ reach into the
27 United States, the protection afforded to Atari’s IP by federal law, and the absence
28 of any contract between Nestlé and Atari containing a choice of law provision
naming UK law as governing.

1 contrary, it continues to maintain its trademark and copyrights, and it actively
2 licensed them before Nestlé's infringement. *Breakout* is also available for download
3 from the iTunes store.

4 **FIRST CAUSE OF ACTION**

5 **(Federal Trademark Infringement Under 15 U.S.C. § 1114)**

6 **(Against All Defendants)**

7 65. Plaintiff re-alleges and incorporates herein by reference paragraphs 1
8 through 64 of this Complaint as if fully set forth here.

9 66. The BREAKOUT trademark is distinctive, strong, valid, and
10 incontestable, and is owned by Atari.

11 67. Nestlé's use of the BREAKOUT trademark was in connection with an
12 advertisement which also infringes the copyright in Atari's copyrighted
13 BREAKOUT game. Atari has demanded that Defendants refrain from the use of the
14 BREAKOUT trademark, but Defendants have continued to use, without Atari's
15 authorization, the BREAKOUT trademark.

16 68. Nestlé's unauthorized use of the BREAKOUT mark has diluted, and
17 degraded, Atari's trademark in BREAKOUT and the value thereof.

18 69. Nestlé's use of the BREAKOUT trademark has created, and continues
19 to create, consumer confusion, mistake, or deception as to the source or sponsorship
20 of Nestlé's products and/or is likely to lead the consuming public to believe that
21 Atari has authorized, approved, or somehow sponsored Nestlé's marketing
22 campaign.

23 70. Nestlé's conduct, as alleged above, constitutes trademark infringement
24 in violation of the Federal Lanham Act, 15 U.S.C. § 1114(1).

25 71. Atari has been, and will continue to be, damaged and irreparably
26 harmed by Nestlé's actions, which will continue unless Defendants are enjoined by
27 this Court. Although Nestlé claims to have removed the infringing advertisement
28 from Twitter, Nestlé has denied liability and therefore is free to re-post the

1 advertisement absent an injunction. The ads remain on Facebook, and they are
2 available elsewhere on the internet. Atari has no adequate remedy at law in that the
3 amount of damage to Plaintiff's business and reputation and the diminution of the
4 goodwill of BREAKOUT trademark is difficult to ascertain with specificity. Atari
5 is therefore entitled to injunctive relief pursuant to 15 U.S.C. § 1116.

6 72. Atari is entitled to recover damages and/or Nestlé's profits in an
7 amount to be determined at trial.

8 73. Nestlé's actions were undertaken willfully and with the intention of
9 causing confusion, mistake, and deception, making this an exceptional case entitling
10 Plaintiff to recover treble damages, reasonably attorneys' fees, and costs pursuant to
11 15 U.S.C. § 1117, as well as prejudgment interest.

12 **SECOND CAUSE OF ACTION**

13 **(Copyright Infringement Under The Copyright Act, 17 U.S.C. §§ 01 *et seq.*)**

14 **(Against All Defendants)**

15 74. Plaintiff re-alleges and incorporates herein by reference paragraphs 1
16 through 73 of this Complaint as if fully set forth here.

17 75. Atari owns copyright interests in the BREAKOUT video game, which
18 is an original copyrighted work under the laws of the United States.

19 76. Atari has the exclusive right to prepare derivative works based upon the
20 copyrighted work, the BREAKOUT game, pursuant to 17 U.S.C. § 106 (2).

21 77. Nestlé's unauthorized use, modification, reproduction, display, and
22 distribution of elements of the BREAKOUT game in its advertisements constitutes a
23 violation of the United States Copyright Act, 17 U.S.C. §§ 106(1), (2), and (3), and
24 Defendants were acting as infringers within the meaning of 17 U.S.C. § 501(a).

25 78. Defendants willfully, intentionally, and purposefully infringed Atari's
26 copyrights in the BREAKOUT game through the conduct described above.

27 79. As a direct and proximate result of said infringement by Defendants,
28 Plaintiff is entitled to actual or statutory damages in an amount to be proven at trial.

1 Plaintiff has sustained and will sustain substantial, immediate, and irreparable
2 injury, for which there is no adequate remedy at law.

3 **FOURTH CAUSE OF ACTION**

4 **(Dilution by Blurring Under 15 U.S.C. § 1125(c))**

5 **(Against All Defendants)**

6 89. Plaintiff re-alleges and incorporates herein by reference paragraphs 1
7 through 88 of this Complaint as if fully set forth here.

8 90. The BREAKOUT mark is widely recognized by the general consuming
9 public of the United States and is owned by Atari.

10 91. Nestlé’s commercial advertisement depicted a game simulation that is
11 very similar to and virtually indistinguishable from the distinctive *Breakout* graphics
12 covered by Atari’s valid registered copyrights.

13 92. Nestlé has used and continues to use Atari’s famous *Breakout* imagery
14 and the term “Breakout.” Through these activities, Nestlé intended to create an
15 association with Atari’s famous BREAKOUT mark. There is, however, no actual
16 association between Nestlé’s “Breakout” ad campaign and the Atari Breakout game
17 or the BREAKOUT mark.

18 93. Atari is entitled to recover damages and/or Nestlé’s profits in an
19 amount to be determined at trial.

20 94. Atari is entitled to an order from this Court preliminarily and
21 permanently enjoining Nestlé from using the BREAKOUT mark in furthering its
22 KIT KAT ad campaign.

23 95. Because Nestlé has willfully intended to cause dilution of the
24 BREAKOUT mark, Atari is further entitled to recover its costs of suit and
25 reasonable attorney’s fees, pursuant to 15 U.S.C. § 1117 and 1125(c)(2).
26
27
28

1 **FIFTH CAUSE OF ACTION**

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

3 **(Against All Defendants)**

4 96. Plaintiff re-alleges and incorporates herein by reference paragraphs 1
5 through 95 of this Complaint as if fully set forth here.

6 97. Nestlé has, without permission, license, or consent, used Atari's
7 BREAKOUT mark and Breakout gameplay imagery in its KIT KAT ad campaign.
8 Such action is likely to cause confusion amongst consumers in California as to
9 Atari's sponsorship, approval, or endorsement of Nestlé's KIT KAT ad campaign.

10 98. Such blatant misappropriation of Atari's IP is unlawful and/or unfair
11 under the California Unfair Competition Law ("UCL") Cal. Bus. & Prof. Code §
12 17200.

13 99. Nestlé's wrongful activities have caused Atari irreparable harm.
14 Unless the abovementioned conduct is enjoined by this Court, Nestlé is free to
15 continue expanding its unlawful activities and to cause further injury to Atari. This
16 injury includes a reduction to the distinctiveness of Atari's BREAKOUT mark and
17 reputation that cannot be remedied through damages.

18 100. Atari has no adequate remedy at law.

19 **SIXTH CAUSE OF ACTION**

20 **(Common Law Unfair Competition)**

21 **(Against All Defendants)**

22 101. Plaintiff re-alleges and incorporates herein by reference paragraphs 1
23 through 100 of this Complaint as if fully set forth here.

24 102. The BREAKOUT trademark and trade dress is valid, legally
25 protectable and has acquired significant secondary meaning over the last 42 years.

26 103. Atari's use of the BREAKOUT mark and trade dress predates any use
27 by Nestlé.

28 104. Nestlé's unauthorized use of the BREAKOUT trademark and trade

1 dress in advertisements for its KIT KAT products is likely to cause confusion,
2 mistake, or deception as to the source or origin of the products and/or is likely to
3 lead the consuming public to believe that Atari has licensed, authorized, approved,
4 or somehow sponsored Nestlé's products.

5 105. Atari has been, and will continue to be, damaged and irreparably
6 harmed by the actions of Nestlé unless Nestlé is enjoined by this Court.

7 106. Atari has no adequate remedy at law.

8 107. Atari is entitled to recover damages and/or Nestlé's profits in an
9 amount to be determined at trial.

10 108. Atari is informed and believes, and thereon alleges, that Defendants
11 committed the foregoing acts with the intention of depriving Plaintiff of its legal
12 rights, with oppression, fraud, and/or malice, and in conscious disregard of
13 Plaintiff's rights. Plaintiff is, therefore, entitled to an award of exemplary and
14 punitive damages, according to proof.

15 **PRAYER FOR RELIEF**

16 WHEREFORE, Plaintiff prays for the relief and judgment, as follows:

17 1. That Plaintiff be granted permanent injunctive relief;

18 2. That Defendants and all of their respective officers, agents, servants,
19 representatives, employees, attorneys, parent and subsidiary corporations, assigns
20 and successors in interest, and all other persons acting in concert with them be
21 permanently enjoined from using the BREAKOUT trademark and *Breakout* trade
22 dress and/or copyrights, or any mark or design confusingly similar thereto, in
23 connection with the marketing, promotion, advertising, sale, or distribution of any of
24 Nestlé's products;

25 3. That Defendants file, within ten (10) days from entry of an injunction, a
26 declaration with this Court signed under penalty of perjury certifying the manner in
27 which Defendants have complied with the terms on the injunction;

28 4. That Defendants be adjudged to have violated 15 U.S.C. § 1114 by

1 infringing Plaintiff's BREAKOUT trademark;

2 5. That Atari recover actual damages, Defendants' profits, and/or
3 statutory damages in an amount to be proven at trial;

4 6. That Atari be awarded three times Nestlé's profits attributable to the
5 infringement and three times all of Atari's damages, including lost licensing profits,
6 loss of goodwill, and lost opportunities suffered as a result of Defendants willful,
7 intentional, and deliberate acts in violation of the Lanham Act, as well as Plaintiff's
8 costs, attorneys' fees, and expenses in this suit under the Lanham Act and Copyright
9 Act;

10 7. That Atari recover punitive damages;

11 8. That Atari be granted pre-judgment and post-judgment interest;

12 9. That Atari be granted costs associated with the prosecution of this
13 action; and

14 10. That Atari be granted such further relief as the Court may deem just
15 and equitable.

16 DATED: August 17, 2017

BROWNE GEORGE ROSS LLP

Keith J. Wesley

K.C. Maxwell

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19 By: s/ Keith J. Wesley

20 Keith J. Wesley

21 Attorneys for Plaintiff Atari Interactive, Inc.
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DEMAND FOR JURY TRIAL

Pursuant to Rule 38(b)(1) of the Federal Rules of Civil Procedure, Plaintiff hereby demands trial by jury in this action of all issues so triable.

DATED: August 17, 2017

BROWNE GEORGE ROSS LLP
Keith J. Wesley
K.C. Maxwell

By: s/ Keith J. Wesley
 Keith J. Wesley
Attorneys for Plaintiff Atari Interactive, Inc.

EXHIBIT A

EXHIBIT A
CERTIFICATES OF U.S. TRADEMARK REGISTRATIONS FOR BREAKOUT, SUPER BREAKOUT AND
BREAKOUT BOOST

(THREE (3) DOCUMENTS ATTACHED)

United States of America
United States Patent and Trademark Office

BREAKOUT BOOST

Reg. No. 4,168,075

Registered July 3, 2012

Int. Cl.: 9

TRADEMARK

PRINCIPAL REGISTER

ATARI INTERACTIVE, INC. (DELAWARE CORPORATION)
417 FIFTH AVENUE
NEW YORK, NY 10016

FOR: DOWNLOADABLE ELECTRONIC GAMES VIA THE INTERNET AND WIRELESS DEVICES; ELECTRONIC, VIDEO AND MULTIMEDIA GAME SOFTWARE FOR USE ON PERSONAL COMPUTERS AND ELECTRONIC GAME PLAYING MACHINES; DOWNLOADABLE RECORDED COMPUTER GAME SOFTWARE PROGRAMS; GAME SOFTWARE FOR COMPUTERS, DOWNLOADABLE VIDEO GAME SOFTWARE, IN CLASS 9 (U.S. CLS. 21, 23, 26, 36 AND 38).

FIRST USE 12-15-2011; IN COMMERCE 12-15-2011.

THE MARK CONSISTS OF STANDARD CHARACTERS WITHOUT CLAIM TO ANY PARTICULAR FONT, STYLE, SIZE, OR COLOR.

OWNER OF U.S. REG. NOS. 1,241,326, 2,553,961, AND 3,364,305.

SER. NO. 85-498,845, FILED 12-19-2011.

DEIRDRE ROBERTSON, EXAMINING ATTORNEY



David J. Kybas

Director of the United States Patent and Trademark Office

**REQUIREMENTS TO MAINTAIN YOUR FEDERAL
TRADEMARK REGISTRATION**

**WARNING: YOUR REGISTRATION WILL BE CANCELLED IF YOU DO NOT FILE THE
DOCUMENTS BELOW DURING THE SPECIFIED TIME PERIODS.**

Requirements in the First Ten Years*

What and When to File:

First Filing Deadline: You must file a Declaration of Use (or Excusable Nonuse) between the 5th and 6th years after the registration date. See 15 U.S.C. §§1058, 1141k. If the declaration is accepted, the registration will continue in force for the remainder of the ten-year period, calculated from the registration date, unless cancelled by an order of the Commissioner for Trademarks or a federal court.

Second Filing Deadline: You must file a Declaration of Use (or Excusable Nonuse) and an Application for Renewal between the 9th and 10th years after the registration date.* See 15 U.S.C. §1059.

Requirements in Successive Ten-Year Periods*

What and When to File:

You must file a Declaration of Use (or Excusable Nonuse) and an Application for Renewal between every 9th and 10th-year period, calculated from the registration date.*

Grace Period Filings*

The above documents will be accepted as timely if filed within six months after the deadlines listed above with the payment of an additional fee.

The United States Patent and Trademark Office (USPTO) will NOT send you any future notice or reminder of these filing requirements.

***ATTENTION MADRID PROTOCOL REGISTRANTS:** The holder of an international registration with an extension of protection to the United States under the Madrid Protocol must timely file the Declarations of Use (or Excusable Nonuse) referenced above directly with the USPTO. The time periods for filing are based on the U.S. registration date (not the international registration date). The deadlines and grace periods for the Declarations of Use (or Excusable Nonuse) are identical to those for nationally issued registrations. See 15 U.S.C. §§1058, 1141k. However, owners of international registrations do not file renewal applications at the USPTO. Instead, the holder must file a renewal of the underlying international registration at the International Bureau of the World Intellectual Property Organization, under Article 7 of the Madrid Protocol, before the expiration of each ten-year term of protection, calculated from the date of the international registration. See 15 U.S.C. §1141j. For more information and renewal forms for the international registration, see <http://www.wipo.int/madrid/en/>.

NOTE: Fees and requirements for maintaining registrations are subject to change. Please check the USPTO website for further information. With the exception of renewal applications for registered extensions of protection, you can file the registration maintenance documents referenced above online at <http://www.uspto.gov>.

Int. Cl.: 9

Prior U.S. Cls.: 21, 23, 26, 36, and 38

Reg. No. 2,553,961

United States Patent and Trademark Office

Registered Mar. 26, 2002

**TRADEMARK
PRINCIPAL REGISTER**

BREAKOUT

ATARI INTERACTIVE, INC. (DELAWARE COR-
PORATION)
1027 NEWPORT AVENUE
PAWTUCKET, RI 02862

FIRST USE 9-23-2000; IN COMMERCE 9-23-2000.

OWNER OF U.S. REG. NO. 1,241,326.

FOR: COMPUTER GAME PROGRAMS AND VI-
DEO GAME CARTRIDGES, IN CLASS 9 (U.S. CLS.
21, 23, 26, 36 AND 38).

SN 76-062,330, FILED 6-2-2000.

RUSS HERMAN, EXAMINING ATTORNEY

Int. Cl.: 28

Prior U.S. Cl.: 22

United States Patent and Trademark Office

Reg. No. 1,241,326

Registered Jun. 7, 1983

TRADEMARK
Principal Register

SUPER BREAKOUT

Atari, Inc. (Delaware corporation)
1265 Borregas Ave.
Sunnyvale, Calif. 94086

For: NON-COIN-OPERATED ELECTRONIC
AMUSEMENT GAME EQUIPMENT, in CLASS
28 (U.S. Cl. 22).

First use Dec. 7, 1979; in commerce Dec. 14, 1979.
Owner of U.S. Reg. Nos. 1,134,005 and 1,202,554.

Ser. No. 363,481, filed May 7, 1982.

W. A. CONN, Examining Attorney

EXHIBIT B

EXHIBIT B

SCREEN CAPTURES OF KITKAT ONLINE ADVERTISEMENT AND ORIGINAL BREAKOUT GAME PLAY

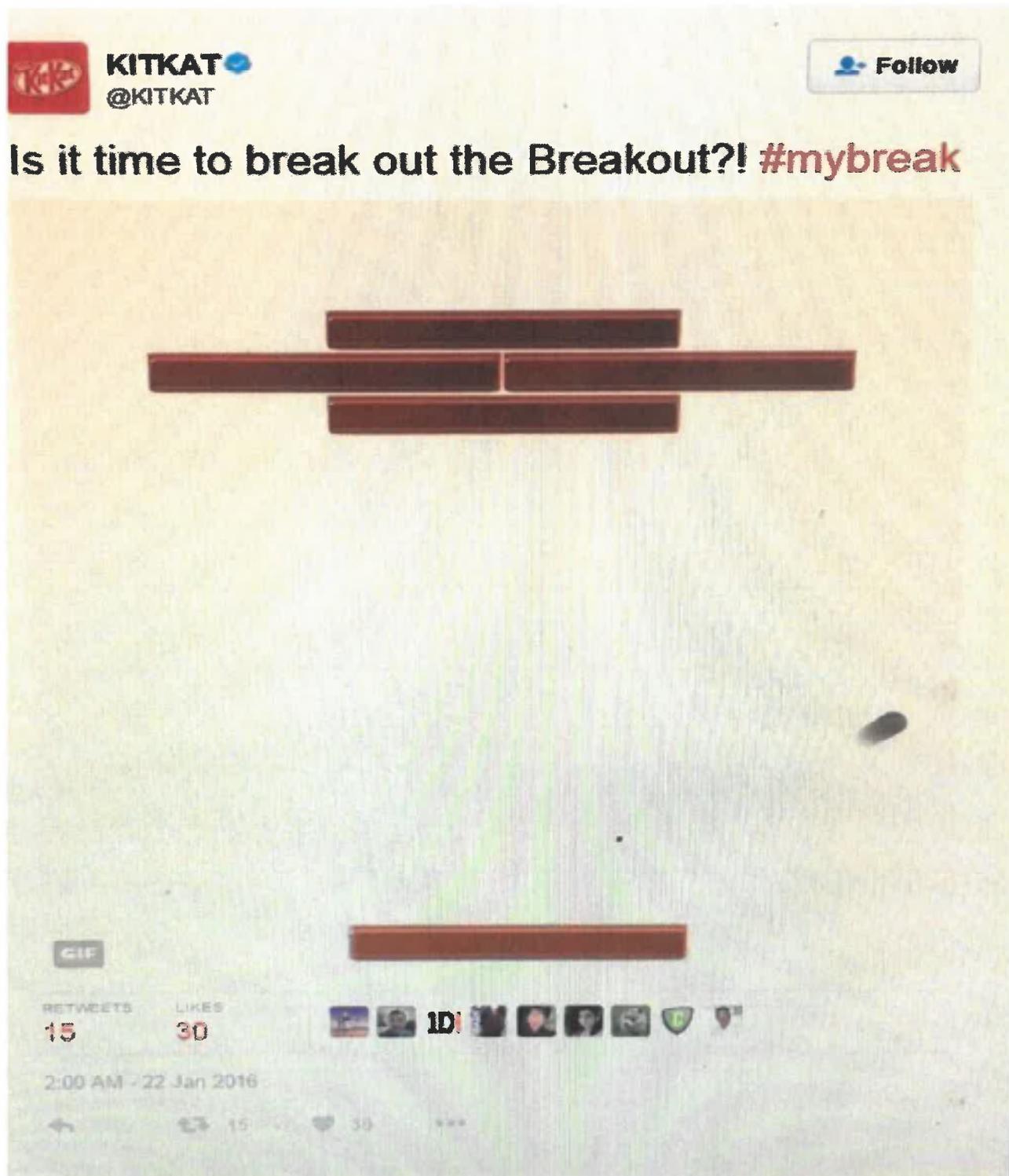


EXHIBIT B
SCREEN CAPTURES OF KITKAT ONLINE ADVERTISEMENT AND ORIGINAL BREAKOUT GAMEPLAY –
(CON'T)



EXHIBIT B
SCREEN CAPTURES OF KITKAT ONLINE ADVERTISEMENT AND ORIGINAL BREAKOUT GAMEPLAY –
(CON'T)

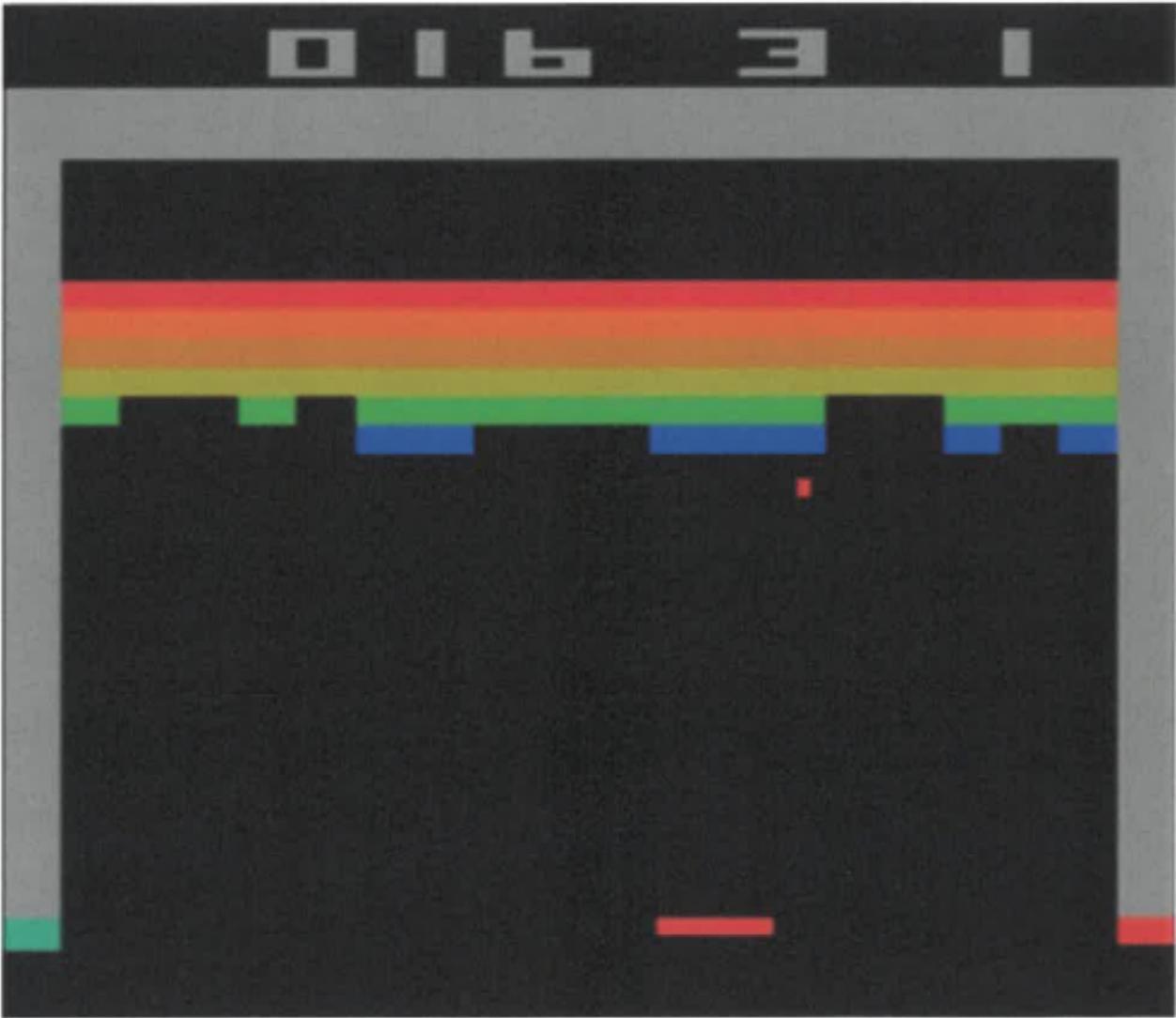


EXHIBIT C

EXHIBIT C
SCREEN CAPTURE OF KITKAT ONLINE FACEBOOK ADVERTISEMENT

The screenshot shows a Facebook advertisement for KitKat. At the top, there is a search bar with the Facebook 'f' logo and a magnifying glass icon. Below the search bar is a large image area. The image depicts a game interface with a grey background. In the center, there are several brown KitKat bars arranged in a pattern, with a black paddle with white ends positioned below them. A red banner at the bottom right of the image area contains the KitKat logo. Below the image area, the Facebook post information is visible: the KitKat logo, the name 'KitKat' with a verified account icon, the date 'March 4, 2016', and a 'Like Page' button. The text of the post reads 'Get your game on Breakout Breakers! Who's ready to play? #mybreak'. Below the text, it says '35K Views'. At the bottom of the post, there are buttons for 'Like', 'Comment', and 'Share', along with a small profile picture icon.

EXHIBIT D

EXHIBIT D
SCREEN CAPTURE OF KITKAT ONLINE TWITTER ADVERTISEMENT

<https://twitter.com/search?q=es%20hora%20de%20romper%20el%20breakout&src=typd>

