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**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

MDY INDUSTRIES, LLC,)
)
Plaintiff and Counter-Claim)
Defendant)
)
vs.)
)
BLIZZARD ENTERTAINMENT, INC.,)
and VIVENDI GAMES, INC.)
)
Defendants and)
Counter-Claim Plaintiffs.)
)

Case No.: CV06-02555-PHX-DGC

**BLIZZARD ENTERTAINMENT,
INC. AND VIVENDI GAMES,
INC. RESPONSES TO
MDY’S STATEMENT OF
FACTS IN SUPPORT OF
SUMMARY JUDGMENT**

The Honorable David G. Campbell

BLIZZARD ENTERTAINMENT, INC.,)
and VIVENDI GAMES, INC.)
)
Third-Party Plaintiffs,)
)
vs.)
)
MICHAEL DONNELLY,)
)
Third-Party Defendant.)
)

Pursuant to Local Rule 56.1 and Federal Rule of Civil Procedure 56, Blizzard Entertainment, Inc. and Vivendi Games, Inc. (together, “Blizzard”) hereby submit the following response to Defendants’ Statement of Facts in Support of Summary Judgment.

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1. World of Warcraft is a massive multi-player online roll playing game (MMORPG). Blizzard Entertainment developed the game and distributes the game through various retail stores where it can be purchased on compact disc and installed to a computer. Blizzard also distributes the game through its internet website where it can be freely downloaded and installed directly to a hard drive. Blizzard first released WOW to the public on November 23, 2004. See generally, Exhibit A (Wikipedia entry); Exhibit B (Deposition of Greg Ashe pp 15-23).

OBJECTIONS:

Blizzard objects to the compound nature of these statements; they do not comply with Local Rule 56.1.

RESPONSE TO FIRST SENTENCE:

Blizzard does not dispute this statement, but notes that World of Warcraft is a massively multi-player online roll playing game (MMORPG). SOF ¶ 9.¹

RESPONSE TO SECOND SENTENCE:

Blizzard disputes this statement. The WoW client is licensed, not purchased; all users agree to the End User License Agreement (“EULA”) and the Terms of Use (“TOU”) which define the scope of the license. SOF ¶ 84-88.

RESPONSE TO THIRD SENTENCE:

Blizzard does not dispute this statement for purposes of MDY’s Motion for Summary Judgment.

RESPONSE TO FOURTH SENTENCE:

¹ References to “SOF” in Blizzard’s responses cite to materials included in Blizzard’s Statement of Facts submitted in support of its own Motion for Summary Judgment. References to “SOF Supp.” cite to Blizzard’s Supplemental Statement of facts submitted herein, which continue sequentially from the SOF beginning at paragraph 265.

1 Blizzard does not dispute this statement for purposes of MDY's Motion for
2 Summary Judgment.

3
4 2. Since its initial release, Blizzard has steadily increased the number of active
5 subscriptions of its game. On average, Blizzard has increased its total number of
6 active subscriptions by one million every three to four months. In June, 2005,
7 Blizzard's active subscription total was approximately three million and has
8 steadily increased to a total of ten million as of January 22, 2008. *See Exhibit B*
(Deposition of Greg Ashe, pp 211-222); *Exhibit C* (Blizzard Press Release
dated January 22, 2008).

8 RESPONSE:

9 Blizzard does not dispute this statement for purposes of MDY's Motion for
10 Summary Judgment.

11
12 3. Each active subscription account requires that a user pay a monthly fee to play
13 the game. In the U.S., the monthly cost is fifteen dollars per month. *Exhibit B*,
at 218.

14 RESPONSE:

15 Blizzard does not dispute this statement for purposes of MDY's Motion for
16 Summary Judgment.

17 4. In the WoW game, a person controls a character avatar within a persistent game
18 world, exploring the landscape, fighting monsters, performing quests, building
19 skills, and interacting with computer-generated characters, as well as other
20 players. The game rewards success with in-game currency (gold), items,
21 experience and reputation, which in turn allow players to improve their skill and
22 power. A player begins the game at level 1. Players can raise their characters
23 from level one to level 60 without an expansion module, and level 70 if they
24 have purchased an expansion module of the World of Warcraft game entitled,
25 "The Burning Crusade." Additionally, players may opt to take part in battles
26 against other players of an enemy faction, in player vs. player battlegrounds or
27 in normal world zones subject to the rules in place on the particular server.
28 Duels can also be fought between members of the same or opposing factions,
although these do not provide rewards. Many players also choose to join guilds.
Short term parties and raid groups can be formed to conduct raids against enemy
territories. *See Exhibit A*, at 2; *Exhibit B*, pp 19-20.

26 RESPONSE:

27 Blizzard does not dispute this statement for purposes of MDY's Motion for
28 Summary Judgment.

1 5. While players play the game for many reasons, one of the primary reasons to
2 play the game is to reach level 70. Exhibit B, at 19.

3 RESPONSE:

4 Blizzard disputes this statement; this statement is not supported by the record.
5 Blizzard's Greg Ashe testified that WoW players enjoy the game for a variety of
6 reasons, including leveling characters, role-playing, and the social immersion. SOF ¶
7 28-29.

8
9 6. When a player reaches level 70, the player no longer accumulates experience,
10 but can still accumulate in-game wealth. *Id.* at 21.

11 RESPONSE:

12 Blizzard does not dispute this statement for purposes of MDY's Motion for
13 Summary Judgment.

14 7. At level 70, the player has access to WoW's high end content such as an "epic
15 mount" and an "epic flying mount", which are considered the two most prized
16 possessions in the game. In fact, according to Blizzard, many people feel the
17 game does not really begin until one reaches level 60 because of that. *Id.*

18 OBJECTION:

19 Blizzard objects to the compound nature of these statements; they do not
20 comply with Local Rule 56.1.

21 RESPONSE TO SENTENCE 1:

22 Blizzard disputes this statement. The deposition transcript cited by MDY
23 indicates that the epic mount and the epic flying mount are "two of the most prized
24 possessions," not "the two most prized possessions" as indicated by MDY. SOF Supp.
25 ¶ 269.

26 8. Even if a player reaches the highest level (60 or 70) in the game, there is plenty
27 of other content to explore within the game and one can continue playing the
28 game indefinitely. *Id.* at 24.

RESPONSE:

1 Blizzard does not dispute this statement for purposes of MDY’s Motion for
2 Summary Judgment.

3 9. Prior to installing the game on a computer hard drive, Blizzard requests that the
4 account holder agree to the terms of Blizzard’s EULA and TOU. Generally, the
5 agreements grant the end user a non-exclusive license to operate the WoW game
6 client software by installing it on an unlimited number of computers that the
7 user owns, as well as the right to make one archival copy of the compact discs
8 containing the game client software. See Exhibit D (Blizzard’s current EULA
9 updated February 2, 2007, Paragraph 1).

10 OBJECTION:

11 Blizzard objects to the compound nature of these statements; they do not
12 comply with Local Rule 56.1.

13 RESPONSE TO SENTENCE 1:

14 Blizzard disputes this statement. Blizzard requires – not requests – that the
15 registrant of an account agree to the terms of Blizzard’s EULA and TOU. Failure to do
16 so will prevent the user from playing the game. SOF ¶ 84-88.

17 10. The current version of the TOU (last updated January 11, 2007) also includes
18 many restrictions on the licensee. Pertinent to this case, the TOS in Paragraph
19 4(B) states:

20 “You agree that you will not (i) modify or cause to be modified any files that are
21 a part of the Program or the Service; (ii) create or use cheats, bots, "mods",
22 and/or hacks, or any other third-party software designed to modify the World of
23 Warcraft experience; or (iii) use any third-party software that intercepts,
24 "mines", or otherwise collects information from or through the Program or the
25 Service. Notwithstanding the foregoing, you may update the Program with
26 authorized patches and updates distributed by Blizzard, and Blizzard may, at its
27 sole and absolute discretion, allow the use of certain third party user interfaces.”
28 See **Exhibit E** (Blizzard’s current TOU, Paragraph 4(B)).

RESPONSE:

Blizzard does not dispute this statement for purposes of MDY’s Motion for Summary
Judgment.

11. Regarding termination of the TOU, Paragraph 10 of the TOU states: “This
Agreement is effective until terminated.” Blizzard does not provide a basis in
the TOU that terminates the TOU upon violating paragraph 4(B). *See Id.*

1 RESPONSE TO SENTENCE 1:

2 Blizzard does not dispute this statement for purposes of MDY's Motion for
3 Summary Judgment.

4 RESPONSE TO SENTENCE 2:

5 Blizzard disputes this statement. Both Paragraphs 7 and 10 of the TOU provide
6 Blizzard the unqualified right to immediately terminate the TOU for violation of
7 Paragraph 4(B). MDY SOF , Exhibit E, ¶¶ 7, 10. Additionally, the WoW EULA,
8 which incorporates the TOU by reference secures Blizzard's right to terminate for
9 violations of the TOU. MDY SOF, Exhibit D.

10 12. The current version of Blizzard's EULA also includes many restrictions on the
11 licensee. Pertinent to this case, regarding the responsibilities of the end user, the
12 EULA in Paragraph 4 states:

13 A. Subject to the license granted hereunder, you may not, in whole or in part,
14 copy, photocopy, reproduce, translate, reverse engineer, derive source code
15 from, modify, disassemble, decompile, or create derivative works based on the
16 Game, or remove any proprietary notices or labels on the Game. Failure to
17 comply with the restrictions and limitations contained in this Section 4 shall
18 result in the immediate, automatic termination of the license granted hereunder
19 and may subject you to civil and/or criminal liability. Notwithstanding the
20 foregoing, you may make one (1) copy of the Game Client and the Manuals for
21 archival purposes only.”

22 B. You agree that you shall not, under any circumstances,

23 (i) sell, grant a security interest in or transfer reproductions of the Game to other
24 parties in any way not expressly authorized herein, nor shall you rent, lease or
25 license the Game to others;

26 (ii) exploit the Game or any of its parts, including without limitation the Game
27 Client, for any commercial purpose, including without limitation use at a cyber
28 cafe, computer gaming center or any other location-based site without the
express written consent of Blizzard;

 (iii) host, provide or develop matchmaking services for the Game or intercept,
emulate or redirect the communication protocols used by Blizzard in any way,
including without limitation through protocol emulation, tunneling, packet
sniffing, modifying or adding components to the Game, use of a utility program
or any other techniques now known or hereafter developed, for any purpose,
including without limitation unauthorized network play over the Internet,
network play utilizing commercial or non-commercial gaming networks, or as
part of content aggregation networks; or

1 (iv) facilitate, create or maintain any unauthorized connection to the Game or
2 the Service, including without limitation any connection to any unauthorized
3 server that emulates, or attempts to emulate, the

4 Service. All connections to the Game and/or the Service, whether created by the
5 Game Client or by other tools and utilities, may only be made through methods
6 and means expressly approved by Blizzard. Under no circumstances may you
7 connect, or create tools that allow you or others to connect, to the Game's
8 proprietary interface other than those expressly provided by Blizzard for public
9 use. *Id.*

10 RESPONSE:

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Blizzard does not dispute this statement for purposes of MDY's Motion for
Summary Judgment.

13. Paragraph 5 of the EULA also includes specific language that allows Blizzard to
monitor the licensee's computer to detect if the licensee is violating the EULA.
Specifically, paragraph 5 states:

5. Consent to Monitor. WHEN RUNNING, THE GAME MAY MONITOR
YOUR COMPUTER'S RANDOM ACCESS MEMORY (RAM) FOR
UNAUTHORIZED THIRD PARTY PROGRAMS RUNNING
CONCURRENTLY WITH THE GAME. AN "UNAUTHORIZED THIRD
PARTY PROGRAM" AS USED HEREIN SHALL BE DEFINED AS ANY
THIRD PARTY SOFTWARE, INCLUDING WITHOUT LIMITATION ANY
"ADDON," "MOD," "HACK," "TRAINER," OR "CHEAT," THAT IN
BLIZZARD'S SOLE DETERMINATION: (i) ENABLES OR FACILITATES
CHEATING OF ANY TYPE; (ii) ALLOWS USERS TO MODIFY OR HACK
THE GAME INTERFACE, ENVIRONMENT, AND/OR EXPERIENCE IN
ANY WAY NOT EXPRESSLY AUTHORIZED BY BLIZZARD; OR (iii)
INTERCEPTS, "MINES," OR OTHERWISE COLLECTS INFORMATION
FROM OR THROUGH THE GAME. IN THE EVENT THAT THE GAME
DETECTS AN UNAUTHORIZED THIRD PARTY PROGRAM, THE GAME
MAY (a) COMMUNICATE INFORMATION BACK TO BLIZZARD,
INCLUDING WITHOUT LIMITATION YOUR ACCOUNT NAME,
DETAILS ABOUT THE UNAUTHORIZED THIRD PARTY PROGRAM
DETECTED, AND THE TIME AND DATE THE UNAUTHORIZED THIRD
PARTY PROGRAM WAS DETECTED; AND/OR (b) EXERCISE ANY OR
ALL OF ITS RIGHTS UNDER THIS AGREEMENT, WITH OR WITHOUT
PRIOR NOTICE TO THE USER. (**Exhibit D**).

RESPONSE:

Blizzard does not dispute this statement for purposes of MDY's Motion for
Summary Judgment.

1 14. The EULA and TOU have evolved from when the World of Warcraft software
2 first became available in November 2004. In the current version of the TOU,
3 Blizzard restricts the use of certain types of third party software that can be used
4 with the WoW software. One type of prohibited software is a “bot” program.
5 See **Exhibit E**, at Paragraph 4(B).

6 OBJECTION:

7 Blizzard objects to the compound nature of these statements; they do not
8 comply with Local Rule 56.1.

9 RESPONSE:

10 Blizzard does not dispute this statement for purposes of MDY’s Motion for
11 Summary Judgment.

12 15. A bot program is a software program that enables a person to run another
13 software program on auto-pilot with minimal assistance from the person.

14 RESPONSE:

15 Blizzard does not dispute this statement for purposes of MDY’s Motion for
16 Summary Judgment.

17 16. Blizzard did not explicitly prohibit “bot” programs until it modified its EULA
18 on December 11, 2006. Blizzard modified its EULA and TOU several times
19 from November, 2004 to December, 2006. See e.g. Exhibit F (Copy of original
20 Blizzard TOU, Paragraph 4(c)).

21 OBJECTION:

22 Blizzard objects to the compound nature of these statements; they do not
23 comply with Local Rule 56.1.

24 RESPONSE TO FIRST SENTENCE:

25 Blizzard disputes this statement. Prior to December 11, 2006, the EULA and
26 the TOU both prohibited bot programs. SOF ¶¶ 97-102, 104.

27 17. Blizzard used the word “bot” in its earliest version of its TOU (6/2/2005).
28 Blizzard explicitly prohibited the use of “bots” in 3(B)(vi) “to collect
information from World of Warcraft or any forum or website owned or
administered by Blizzard...”. In Paragraph 2(C) of the same agreement,

1 Blizzard did not, however, list “bots” as one of its prohibited third-party
2 software programs. *See* Exhibit F.

3 **OBJECTIONS:**

4 Blizzard objects to the compound nature of these statements; they do not
5 comply with Local Rule 56.1.

6 **RESPONSE TO FIRST SENTENCE:**

7 Blizzard does not dispute this statement for purposes of MDY’s Motion for
8 Summary Judgment.
9

10 **RESPONSE TO SECOND SENTENCE:**

11 Blizzard does not dispute this statement for purposes of MDY’s Motion for
12 Summary Judgment.
13

14 **RESPONSE TO THIRD SENTENCE:**

15 Blizzard disputes the import of this statement. Bots and other unauthorized
16 third party programs are prohibited by the section of the TOU cited by MDY, even if
17 the word “bot” is not used. SOF ¶¶ 99.

18 18. On December 11, 2006 Blizzard added the word “bots” as a prohibited program.
19 Of note, Blizzard did not add the provision until nearly two months after
20 Blizzard first appeared at Donnelly’s home on October 25, 2008 [sic] (also the
21 day Donnelly filed suit). Compare Exhibit F, Paragraph 2(c) with Exhibit G,
Paragraph 4(c).

22 **OBJECTIONS:**

23 Blizzard objects to the compound nature of these statements; they do not
24 comply with Local Rule 56.1.

25 **RESPONSE TO FIRST AND SECOND SENTENCE:**

26 Blizzard disputes this statement, because the addition of the word “bot” first
27 occurred in the October 16, 2006 update, prior to its meeting with Mr. Donnelly and
28

1 his filing suit. SOF ¶¶ 99, 101. Blizzard further disputes this statement because the
2 word “bots” was added not as an additional type of prohibited program, but as a further
3 example of a category of programs that had clearly been prohibited since the release of
4 World of Warcraft. SOF ¶ 103.

5
6 Blizzard notes that Blizzard representatives arrived at Donnelly’s home on
7 October 25, 2006, not October 25, 2008.

8 19. Blizzard does not utilize any access or copy protection measures to prevent the
9 copying of its WoW Game Client Software. Blizzard uses no form of copy
10 protection for the compact discs that contain the WoW game client software.
See Exhibit B, at 38-44.

11 **OBJECTIONS:**

12 Blizzard objects to the compound nature of these statements; they do not
13 comply with Local Rule 56.1.

14 **RESPONSE TO FIRST SENTENCE:**

15
16 Blizzard disputes this statement. Blizzard uses safeguards, including Warden
17 (and its scan.dll component), to prevent users from making unauthorized copies of the
18 WoW game client software in RAM. SOF ¶¶ 109-111, 115-18.

19 **RESPONSE TO SECOND SENTENCE:**

20
21 Blizzard does not dispute this statement for purposes of MDY’s Motion for
22 Summary Judgment.

23 20. Despite the prohibition from making more than one archival copy of the
24 software in the EULA, the compact discs may be easily copied or installed to an
25 unlimited number of computer hard drives. *Id.*

26 **OBJECTIONS:**

27 MDY’s statement is argumentative, and not factual as required by Local Rule
28 56.1.

1 RESPONSE:

2 Blizzard does not dispute that the WoW CDs may be copied.

3
4 21. Moreover, despite the prohibition of making unauthorized copies, Blizzard
5 makes its WoW software freely available for downloading from its website and
6 to anyone who creates a user account. See **Exhibit B**, at 293.

7 OBJECTIONS:

8 MDY's statement is argumentative, and not factual as required by Local Rule
9 56.1.

10 RESPONSE:

11 Blizzard does not dispute that Blizzard makes its WoW software freely available
12 for downloading from its website and to anyone who creates a valid user account.

13 22. Warden is a mechanism Blizzard uses to detect the presence of third-party
14 software that Blizzard deems is unauthorized under its EULA or TOS. See
15 **Exhibit H** (Bates No. BLIZZM00335490, BLIZZM00335507).

16 RESPONSE:

17 Blizzard disputes this statement; it represents an inadequate explanation of
18 Warden. Warden is much more, and includes features that removes users from the
19 game, suspends users and/or bans user accounts where certain third-party software,
20 including MDY's Glider program, is detected. SOF ¶¶ 115-118.

21 23. When a licensee is running the WoW game client, Warden detects changes to
22 the licensee's computer memory (RAM) and reports any changes back to
23 Blizzard. Blizzard then compares the changes in the licensee's RAM for known
24 patterns of code that indicate that an unauthorized third-party software program
25 is running. Once Blizzard confirms the licensee's use of an "unauthorized"
26 third-party program, such as a bot program, Blizzard decides whether it will ban
27 the licensee's account. See **Exhibit I** (Deposition of Matthew Versluys), at 18-
28 22.

OBJECTIONS:

1 Blizzard objects to the compound nature of these statements; they do not
2 comply with Local Rule 56.1.

3 RESPONSE TO FIRST SENTENCE:

4 Blizzard disputes this statement. The Scan.dll portion of Warden does not
5 report any information back to Blizzard. SOF Supp. ¶ 270. Moreover, when the
6 resident portion of Warden detects the presence of an unauthorized program, it only
7 notifies a Blizzard server that a specific program has been found. SOF Supp. ¶ 271.
8 There is nothing in the record to indicate that Warden detects changes in RAM and
9 “reports any changes back to Blizzard.”
10

11
12 RESPONSE TO SECOND SENTENCE:

13 Blizzard disputes this statement. The resident portion of Warden scans that part
14 of the RAM dedicated to the World of Warcraft process. *Id.* If it detects changes
15 known to be caused by a specific unauthorized third party program, the resident portion
16 of Warden will only notify a Blizzard server that the specific program has been found.
17
18 *Id.*

19 RESPONSE TO THIRD SENTENCE:

20 Blizzard disputes this statement. Blizzard decides whether it will ban accounts
21 based on which cheat program is detected. SOF Supp. ¶ 272. This decision is usually
22 made before the program is located in an impacted user’s RAM. *Id.*

23
24 24. Blizzard does not ban, nor has it ever banned the licensee itself. If Blizzard bans
25 a licensee’s account, the licensee may immediately sign up for a new account
26 using the licensee’s name and same credit card number that it previously used
for the banned account. *See Exhibit B*, at 254.

27 OBJECTION:
28

1 Blizzard objects to the compound nature of these statements; they do not
2 comply with Local Rule 56.1.

3 **RESPONSE:**

4 Blizzard disputes this statement to the extent it mischaracterizes “licensees.”
5
6 Blizzard terminates the license of WoW licensees for breach of their license, at which
7 point they are no longer “licensees.” Blizzard does not dispute that it does not
8 permanently bar individuals from creating new, valid accounts.

9 25. Warden is not a copy protection program in that it cannot:

- 10 a. prevent a person from accessing the WoW game client software code;
11 b. Prevent a person from copying the WoW game client software from a
12 compact disc or DVD to another form of storage medium;
13 c. Prevent a person from copying a downloaded version of the WoW
14 game client obtained from Blizzard’s server to another form of storage
15 medium;
16 d. Prevent a person from distributing copies of the WoW game client
17 software;
18 e. Prevent a person from making derivative works of the WoW game
19 client software. *See Exhibit B*, at 43-44.

20 **OBJECTIONS:**

21 Blizzard objects to the compound nature of these statements; they do not
22 comply with Local Rule 56.1. Blizzard further objects to the legal conclusions
23 included in, and the argumentative nature of, this statement; this statement does not
24 constitute a “statement of fact” as required by Local Rule 56.1.

25 **RESPONSE:**

26 To the extent they are qualified by the statement “Warden is not a copy
27 protection program,” Blizzard disputes the statements set forth in subsections (a)
28 through (e). Warden prohibits users from continuing to make copies of the game client

1 in RAM once it detects a cheat program. SOF ¶¶ 109-111, 115-118. Standing alone,
2 the statements in (b) through (e) are not disputed.

3
4 26. Scan.dll is the second element of Warden’s cheat detection system. Scan.dll is a
5 dynamic link library file that is part of the WoW game client. After the WoW
6 game client is loaded into a licensee’s RAM, the computer executes the Scan.dll
7 file. The file scans the inside of the licensee’s RAM and WoW game data files
8 and checks for changes or modifications to the WoW game client code and
9 game files to determine whether the licensee has loaded any “unauthorized”
10 third-party programs. If Scan.dll detects an unauthorized program, the WoW
11 game client will present an error message and will not allow the licensee to log
12 onto WoW server to play WoW. *See Exhibit B*, at 53-56, 63.

9 OBJECTION:

10
11 Blizzard objects to the compound nature of these statements; they do not
12 comply with Local Rule 56.1.

13 RESPONSE TO FIRST SENTENCE:

14
15 Blizzard does not dispute this statement for purposes of MDY’s Motion for
16 Summary Judgment.

17 RESPONSE TO SECOND SENTENCE:

18
19 Blizzard does not dispute this statement for purposes of MDY’s Motion for
20 Summary Judgment.

21 RESPONSE TO THIRD SENTENCE:

22
23 Blizzard disputes this statement. It would be “very impractical” to load the
24 entire game into RAM at one time; a user would have to have a “massive amount of
25 RAM” for that to be possible. SOF Supp. ¶ 266. Various portions of the game are
26 loaded into the licensee’s RAM as the game progresses, and only the authentication
27 module is loaded before scan.dll’s scanning process runs. SOF ¶ 51, 112.

28 RESPONSE TO FOURTH SENTENCE:

1 Blizzard does not dispute this statement for purposes of MDY’s Motion for
2 Summary Judgment.

3 RESPONSE TO FIFTH SENTENCE:

4 Blizzard does not dispute this statement for purposes of MDY’s Motion for
5 Summary Judgment.

6 27. If any of the three tests fail, then the WoW game client will present an error
7 message and will not allow the licensee to log into the WoW game client to play
8 WoW. *See id.*

9 OBJECTIONS:

10 Blizzard objects to the compound nature of these statements; they do not
11 comply with Local Rule 56.1. Blizzard objects to the vague nature of this statement;
12 MDY’s statement does not indicate what it means by “the three tests.”

13 RESPONSE:

14 Blizzard disputes this statement as the vague nature of the statement prevents
15 Blizzard from evaluating it, but generally does not dispute that when scan.dll identifies
16 the presence of an unauthorized third-party program running with WoW, it does not
17 permit further loading of game content into RAM nor access to the game. SOF ¶ 109-
18 113.

19 28. Like Warden, Scan.dll is not a copy protection program in that it cannot:

- 20 a. Prevent a person from accessing the WoW game client software code;
- 21 b. Prevent a person from copying the WoW game client software from a
22 compact disc or DVD to another form of storage medium;
- 23 c. Prevent a person from copying a downloaded version of the WoW game
24 client obtained from Blizzard’s server to another form of storage
25 medium;
- 26 d. Prevent a person from distributing copies of the WoW game client
27 software;
- 28 e. Prevent a person from making derivative works of the WoW game client
software. See **Exhibit B**, at 43-44.

OBJECTIONS:

1 Blizzard objects to the compound nature of these statements; they do not
2 comply with Local Rule 56.1. Blizzard further objects to the legal conclusions
3 included in, and the argumentative nature of, this statement; this statement does not
4 constitute a “statement of fact” as required by Local Rule 56.1.
5

6 **RESPONSE:**

7 To the extent they are qualified by the statement “Like Warden, Scan.dll is not a
8 copy protection program,” Blizzard disputes the statements set forth in subsections (a)
9 through (e). Scan.dll prohibits users from continuing to make copies of the game client
10 in RAM once it detects a cheat program. SOF ¶¶ 109-113. Standing alone, the
11 statements in (b) through (e) are not disputed.
12

13 29. MDY Industries LLC is an Arizona Limited Liability Company that was formed
14 on December 6, 2004. See **Exhibit J** (Affidavit of Michael M. Donnelly), at ¶1.

15 **RESPONSE:**

16 Blizzard does not dispute this statement for purposes of MDY’s Motion for
17 Summary Judgment.

18 30. Michael Donnelly is the sole member of MDY. *Id.*, at 2.

19 **RESPONSE:**

20 Blizzard does not dispute this statement for purposes of MDY’s Motion for
21 Summary Judgment.

22 31. Donnelly formed MDY solely for the purpose of keeping his computer contract
23 work that he had been doing separate from his personal finances. *Id.*, at 3.

24 **OBJECTIONS:**

25 Blizzard objects to this self-serving statement. This statement is not
26 corroborated by any evidence in the record.

27 **RESPONSE:**

28

1 Blizzard does not dispute this statement for purposes of MDY's Motion for
2 Summary Judgment.

3 32. At the time Donnelly formed MDY, he had not yet begun creating the Glider
4 software. *Id.* at 4.

5 OBJECTIONS:

6 Blizzard objects to this self-serving statement. This statement is not
7 corroborated by any evidence in the record.

8 RESPONSE:

9 Blizzard does not dispute this statement for purposes of MDY's Motion for
10 Summary Judgment.

11 33. When Donnelly formed MDY, he had no intention of creating the Glider
12 software and then using MDY as a shield against potential creditors if Blizzard
13 ever filed a lawsuit against him for creating Glider. *Id.* at 5.

14 OBJECTIONS:

15 Blizzard objects to this self-serving statement. This statement is not
16 corroborated by any evidence in the record. An uncorroborated description of a party's
17 state of mind is not appropriate for an SOF.

18 RESPONSE:

19 Blizzard does not dispute this statement for purposes of MDY's Motion for
20 Summary Judgment.
21

22 34. When Blizzard released WoW in late 2004, Donnelly became an avid player of
23 WoW. Like many others who play WoW, Donnelly became frustrated with the
24 amount of time it took to advance his character in WoW. *Id.* at 6.

25 OBJECTION:

26 Blizzard objects to the compound nature of these statements; they do not
27 comply with Local Rule 56.1. With regard to the second sentence, Blizzard further
28

1 objects to this self-serving statement which is not corroborated by any evidence in the
2 record. An uncorroborated description of a party's state of mind is not appropriate for
3 an SOF.

4 RESPONSE:

5
6 Blizzard does not dispute this statement for purposes of MDY's Motion for
7 Summary Judgment.

8 35. Inspired by his desire to advance his character's level to the same level several
9 of his friends had reached, Donnelly searched online for any available programs
10 that would help him speed up the time it took to level his character up to where
11 his friends were. *Id.* at 7.

12 OBJECTIONS:

13
14 Blizzard objects to this self-serving statement. This statement is not
15 corroborated by any evidence in the record. An uncorroborated description of a party's
16 state of mind is not appropriate for an SOF.

17 RESPONSE:

18
19 Blizzard does not dispute this statement for purposes of MDY's Motion for
20 Summary Judgment.

21 36. After searching and being unsuccessful in locating a software program to meet
22 his needs, Donnelly decided to write software code to assist him in catching up
23 with his friends in the game without having to be physically playing WoW. *Id.*
24 at 8.

25 OBJECTIONS:

26
27 Blizzard objects to this self-serving statement. This statement is not
28 corroborated by any evidence in the record. An uncorroborated description of a party's
state of mind is not appropriate for an SOF.

RESPONSE:

1 Blizzard does not dispute this statement for purposes of MDY’s Motion for
2 Summary Judgment.

3
4 37. Between March 2005 and May, 2005, Donnelly went through several iterations
5 in the development of a software program that became known as WoWGlider
6 (“Glider”). *Id.* at 9.

7
8
9
10 RESPONSE:

11 Blizzard does not dispute this statement for purposes of MDY’s Motion for
12 Summary Judgment.

13
14 38. Generally, Glider allows a person to play a piece of software on autopilot by
15 automating the keystrokes that are necessary to play the game. *Id.* at 10.

16
17
18
19 RESPONSE:

20 Blizzard disputes this statement. This statement implies that Glider works with
21 software other than World of Warcraft. In fact, Glider was designed to automate
22 World of Warcraft exclusively, and only works in conjunction with World of Warcraft;
23 MDY’s own Frequently Asked Questions (“FAQ”) available at MMOGLIDER.com
24 talks exclusively about World of Warcraft, and mentions no other programs. See SOF
25 ¶ 182 and FAQ, Exhibit 39 to Blizzard’s SOF.

26
27 39. A Glider user must be an active, paying customer of Blizzard in order to use the
28 Glider program with WoW. *Id.* at 11.

RESPONSE:

 Blizzard disputes this statement. According to Donnelly’s own testimony,
Glider can be – and indeed is – used by users of “private servers,” that is, unauthorized
servers that host World of Warcraft games. SOF Supp. ¶ 273.

40. MDY has since developed several current and potential uses for Glider with
other software programs. *Id.* at 12.

OBJECTIONS:

1 Blizzard objects to this self-serving statement. This statement is not
2 corroborated by any evidence in the record.

3 RESPONSE:

4 Blizzard disputes this statement. MDY's own Frequently Asked Questions
5 ("FAQ") available at MMOGLIDER.com talks exclusively about World of Warcraft,
6 and mentions no other programs or uses. See SOF ¶ 182 and FAQ, Exhibit 39 to
7 Blizzard's SOF.
8

9 41. Under certain conditions, Glider can help a WoW player raise the level of his
10 character to level 60 or 70 by playing the character when the customer is idle or
11 absent from his computer. *Id.* at 13.

12 RESPONSE:

13 Blizzard disputes this statement; it is inadequate and incomplete. Glider
14 continues to function after level 70, and permits users to continue accumulating
15 reputation points, wealth and items just as it does prior to level 70. SOF Supp. ¶ 275;
16 MDY SOF 4 (second sentence), 6.
17

18 42. Once a player reaches the highest level in the game, however, Glider does not
19 allow the player to accumulate any more experience points in the game and its
utility is drastically reduced. *Id.* at 14.

20 RESPONSE:

21 Blizzard disputes this statement. Although a player cannot obtain experience
22 points after level 70, Glider allows the player to continue accumulating reputation
23 points, wealth and items just as it does prior to level 70. SOF Supp. ¶ 275. In fact, a
24 user can accumulate more gold using Glider after level 70 than they could before,
25 because rewards that were awarded as experiences points prior to level 70 are, after
26 level 70, awarded in gold. SOF Supp. ¶ 276.
27
28

1 43. Glider can also assist handicapped persons with limited use of their limbs by
2 minimizing the need to use the keyboard to play WoW. *Id.* at 15.

3 OBJECTIONS:

4 Blizzard objects to this self-serving statement. This statement is not
5 corroborated by any evidence in the record.

6 RESPONSE:

7 Blizzard disputes this statement; there is no evidence to support it.

8
9 44. Glider can be loaded either before or after WoW is loaded into the user's RAM
10 memory. *Id.* at 16.

11 RESPONSE:

12 Blizzard disputes this statement; it is incomplete. Although it is possible to
13 launch Glider after World of Warcraft, Donnelly's own testimony indicates that doing
14 so would subject Glider to detection by Warden. SOF Supp. ¶ 277.

15 45. Glider works by reading the player's state information (character health, nearby
16 monsters, nearby chests and mines, the character's spells) from the user's RAM
17 memory. It then sends keystrokes into the WoW client software on behalf of the
18 user to try to kill the monsters and do other repetitive tasks such as collecting
19 loot from killed monsters and harvestable objects. Under no circumstances can
20 Glider:

- 21 a. alter the WoW client game software in anyway;
- 22 b. give the WoW player the ability to do anything that a human player
23 could not already do;
- 24 c. give the WoW player additional power, wealth, or in-game advantage
25 over any player other than allowing the player not to be present when
26 playing the game;
- 27 d. give the WoW player the ability to make any copies of, make derivative
28 works of, or publicly distribute copies of the WoW client software. *Id.* at
17.

25 OBJECTIONS:

26 Blizzard objects to the compound nature of these statements; they do not comply with
27 Local Rule 56.1.

28 RESPONSE TO FIRST SENTENCE:

1 Blizzard does not dispute this statement for purposes of MDY’s Motion for
2 Summary Judgment.

3 RESPONSE TO SECOND SENTENCE:

4 Blizzard disputes this statement; it is incomplete. In addition to keystrokes,
5 Glider is also capable of sending mouse commands to the WoW client software. SOF
6 Supp. ¶ 280.

7
8 RESPONSE TO THIRD SENTENCE:

9 Blizzard disputes this statement. This statement is not supported by the record cited,
10 and constitutes legal argument that belongs in a brief as opposed to MDY’s statements
11 of fact. Specifically, subsections (a) and (d) seek to establish legal conclusions as to
12 Glider’s effect on the game. With respect to those subsections (a) and (d), Blizzard
13 maintains that Glider fundamentally changes the game and the game experience. SOF
14 ¶ 132-36, 171-73.

15
16 Blizzard disputes subsections (b) and (c). Glider gives Glider users a
17 tremendous advantage over players that do not cheat, by allowing those players to
18 accumulate more experience, reputation points, in-game items and gold than players
19 that follow the rules. SOF ¶¶ 56-57. From a simple game-play perspective, Glider
20 allows its users several obvious advantages, including the ability to “see” through walls
21 and other terrain, and the ability to react to situations with the speed and reliability of a
22 computer instead of using human judgment and human reflexes. SOF Supp. ¶ 277.

23
24
25 46. A Glider user must actively manage the program on regular intervals or the
26 program will not provide any additional experience points that increase the level
of the player toward 60 or 70. *Id.* at 18.

27 RESPONSE:

1 Blizzard disputes this statement; it is vague and incomplete. Experience points
2 constitute only one type of resource that can be gathered by a character in-game
3 whether controlled by Glider or a human player. MDY SOF ¶ 4(second
4 sentence)(“The game rewards success with in-game currency (gold), items, experience
5 and reputation, which in turn allow players to improve their skill and power.”) Glider
6 may run for days at a time – or even longer – and continue to accumulate gold,
7 reputation points and in-game items the entire time. SOF Supp. ¶ 278.

9 47. MDY has only marketed the game as an alternate method to reduce the time it
10 takes to level a character to 60 or 70. *Id.* at 19.

11 **RESPONSE:**

12 Blizzard disputes this statement. First, MDY has spent advertising dollars to
13 promote Glider as only two things – a “World of Warcraft cheat” and a “World of
14 Warcraft bot.” SOF ¶¶ 246-47. MDY also hosted a forum on its website dedicated to
15 gold-farming, and noted that the forum “is about hardcore use of Glider for things that
16 it wasn't necessarily born to do... but can do.” SOF ¶ 188; SOF Supp. ¶ 281. MDY has
17 also created marketing relationships with businesses involved in WoW account and
18 virtual property sales. SOF ¶ 127, 129, 189, 190, 193 and 197.

21 48. Based upon Donnelly’s personal success using Glider, Donnelly decided to see
22 if he could sell the Glider software for profit. In June, 2005 Donnelly began
23 selling the Glider software through MDY. *Id.* at 20.

23 **OBJECTION:**

24 Blizzard objects to the compound nature of these statements; they do not
25 comply with Local Rule 56.1.

26 **RESPONSE:**

1 Blizzard does not dispute this statement for purposes of MDY’s Motion for
2 Summary Judgment.

3
4 49. Since its release, MDY has made the program available solely by downloading
5 it from MDY’s website located at www.mmoglider.com at a cost of \$15.00 per
6 license. Moreover, MDY has increased its sales from approximately twenty in
the first month, to over 100,000 as of February, 2008 (although only
approximately 30,000 are active accounts). *Id.* at 21.

7 OBJECTION:

8 Blizzard objects to the compound nature of these statements; they do not comply with
9 Local Rule 56.1.

10 RESPONSE TO FIRST SENTENCE:

11
12 Blizzard disputes this statement. MDY’s SOF ¶ 50 contains a more accurate
13 description of Glider pricing. Specifically, ¶ 50 notes that “[i]n November, 2005,
14 Donnelly raised the price of a Glider license from \$15.00 to \$25.00.” MDY SOF 50.

15 RESPONSE TO SECOND SENTENCE:

16 Blizzard does not dispute this statement for purposes of MDY’s Motion for
17 Summary Judgment.

18
19 50. In November, 2005, Donnelly raised the price of a Glider license from \$15.00 to
20 \$25.00. *Id.* at 22.

21 RESPONSE:

22 Blizzard does not dispute this statement for purposes of MDY’s Motion for
23 Summary Judgment.

24 51. Glider is inefficient as a gold farming tool, and many other programs are
25 available that do a much better job at gold farming than Glider does or can. *Id.*
at 23.

26 OBJECTIONS:

27 Blizzard objects to this self-serving, uncorroborated statement.

28 RESPONSE:

1 Blizzard disputes both statements. Glider makes an efficient gold farming tool, as
2 demonstrated by the gold farming forum once hosted on the WoWGlider.com website,
3 and the messages on that forum indicating that Glider users utilize Glider to farm gold.
4 SOF ¶¶ 188-197; SOF Supp. ¶ 281. Additionally, one of MDY’s forum moderators
5 testified that he gold farms exclusively with Glider, and he has promoted Glider use to
6 customers by explaining that a \$25 investment in Glider allows botters to use the
7 program to acquire and sell in-game virtual property at a profit. SOF ¶ 131, 197. That
8 same MMOGlider forum moderator acknowledged that Glider enables players to
9 collect large amounts of in-game gold and items for RMT (real world sale). SOF ¶ 157.
10

11
12 52. MDY utilizes Google AdWords to draw traffic to its website and to advertise
13 the availability of the program. MDY also markets the program using an
14 affiliate structure whereby third-parties can post ads for the Glider program on
15 their website and are compensated if a Glider sale originates from the
16 advertisement. *Id.* at 24.

17 RESPONSE:

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Blizzard does not dispute this statement for purposes of MDY’s Motion for
Summary Judgment.

53. MDY has only marketed the game as an alternate method to reduce the time it
takes to level a character to 60 or 70. *Id.* at 25.

RESPONSE:

Blizzard disputes this statement. First, MDY has spent advertising dollars to promote
Glider as only two things – a “World of Warcraft cheat” and a “World of Warcraft
bot.” SOF ¶¶ 246-47. MDY has also created marketing relationships with businesses
involved in WoW account and virtual property sales. 127, 129, 189, 190, 193 and 197.
MDY at one point promoted gold farming by hosting a forum on its website dedicated
to gold-farming, and noted that the forum “is about hardcore use of Glider for things
that it wasn't necessarily born to do... but can do.” SOF ¶ 188; SOF Supp. ¶ 281.

1 Additionally, one of MDY's forum moderators that he has promoted Glider use to
2 customers by explaining that a \$25 investment in Glider allows botthers to use the
3 program to acquire and sell in-game virtual property at a profit. SOF ¶ 131, 197. That
4 same MMOGlider forum moderator acknowledged that Glider enables players to
5 collect large amounts of in-game gold and items for RMT (real world sale). SOF ¶ 157.
6

7 54. Although Glider can be used as a tool to help WoW licensees to "farm gold"
8 within the WoW game, MDY has never marketed the program for that purpose
9 and actively discourages persons from using Glider as a gold farming tool. *Id.* at
10 26.

11 RESPONSE:

12 Blizzard disputes this statement. MDY has created marketing relationships with
13 businesses involved in WoW account and virtual property sales. 127, 129, 189, 190,
14 193 and 197. MDY at one point promoted gold farming by hosting a forum on its
15 website dedicated to gold-farming, and noted that the forum "is about hardcore use of
16 Glider for things that it wasn't necessarily born to do... but can do." SOF ¶ 188; SOF
17 Supp. ¶ 281. Additionally, one of MDY's forum moderators that he has promoted
18 Glider use to customers by explaining that a \$25 investment in Glider allows botthers to
19 use the program to acquire and sell in-game virtual property at a profit. SOF ¶ 131,
20 197.
21

22 55. In fact, MDY actively discourages persons from using Glider as a gold farming
23 tool. *Id.* at 27.

24 RESPONSE:

25 Blizzard disputes this statement. There is no evidence in the record to corroborate this
26 self-serving statement. To the contrary, MDY has created marketing relationships with
27 businesses involved in WoW account and virtual property sales. 127, 129, 189, 190,
28 193 and 197. MDY at one point promoted gold farming by hosting a forum on its

1 website dedicated to gold-farming, and noted that the forum “is about hardcore use of
2 Glider for things that it wasn't necessarily born to do... but can do.” SOF ¶ 188; SOF
3 Supp. ¶ 281. Additionally, one of MDY’s forum moderators that he has promoted
4 Glider use to customers by explaining that a \$25 investment in Glider allows botters to
5 use the program to acquire and sell in-game virtual property at a profit. SOF ¶ 131,
6 197.

8 56. MDY also actively discourages Glider users from skipping the game content. *Id.*
9 at 28.

10 RESPONSE:

11 Blizzard disputes this statement. There is no evidence in the record to corroborate this
12 self-serving statement. Glider is designed to allow its users to “play” without a human
13 at the keyboard. SOF ¶ 230. When a user “plays” a game while not at the computer to
14 enjoy the content, s/he is necessarily “skip[ping] ahead,” and thus missing content.
15

16 SOF ¶ 256.

17 57. Prior to September, 2005, Donnelly was unaware that Blizzard would object to
18 anyone using Glider with WoW. Donnelly did not become aware that Blizzard
19 was attempting to detect the use of Glider until September, 2005 when Blizzard
banned certain Glider customers’ accounts. *Id.* at 29; *See Exhibit K* at 54-55.

20 OBJECTIONS:

21 Blizzard objects to the compound nature of these statements; they do not comply with
22 Local Rule 56.1. Blizzard objects to these self-serving, uncorroborated statements. An
23 uncorroborated description of a party’s state of mind is not appropriate for an SOF.
24

25 RESPONSE:

26 The EULA and TOU prohibited unauthorized third party programs, including bots like
27 WoWGlider, prior to September 2005. See SOF ¶ 99; MDY’s Exhibit F sec. 2(C)
28 (June 2005 TOU) (“You agree that you will not...create or use cheats, ‘mods’ and/or

1 hacks, or any other third-party software designed to modify the World of Warcraft
2 experience [or] use any third-party software that intercepts, ‘mines’, or otherwise
3 collects information from or through World of Warcraft....”). Donnelly admits to
4 having read and agreed to the TOU and the EULA several times, having seen a
5 prohibition on the use of unauthorized third-party programs with WoW, and further
6 admits he never sought nor received such authorization for Glider. SOF ¶¶ 179-80;
7 SOF Supp. ¶ 282.

8
9 58. Prior to that time, Donnelly had not developed any software component that
10 would avoid detection by Blizzard. *See Exhibit J* at ¶30; *Exhibit K* at 55.

11 **RESPONSE:**

12 Blizzard does not dispute this statement for purposes of MDY’s Motion for
13 Summary Judgment.

14 59. Donnelly responded to Blizzard’s efforts to detect and ban Glider users by
15 developing software counter-measures to avoid being detected by either
16 Blizzard’s Warden or Scan.dll programs. In late September, 2005, Glider began
17 avoiding detection by Warden and Scan.dll so that Blizzard’s licensees could
18 use Glider with the WoW game client software without interference from
19 Blizzard. *See Exhibit J* at ¶ 31. *See Exhibit J* at ¶76.

18 **OBJECTIONS:**

19 Blizzard objects to the compound nature of these statements; they do not
20 comply with Local Rule 56.1. Blizzard further objects to the legal conclusions
21 included in, and the argumentative nature of, this statement; this statement does not
22 constitute a “statement of fact” as required by Local Rule 56.1.

23
24 **RESPONSE TO FIRST SENTENCE:**

25 Blizzard does not dispute this statement for purposes of MDY’s Motion for
26 Summary Judgment.

27
28 **RESPONSE TO SECOND SENTENCE:**

1 Blizzard disputes this statement. By policing its own game, Blizzard is not
2 “interfering” with Glider users. However, Blizzard does not dispute that on or before
3 September 2005, Glider began circumventing detection by Warden/scan.dll.
4

5 60. Glider, however, cannot circumvent Warden or Scan.dll for the purpose of
6 allowing a person to:

- 7 a. make an unauthorized copy of the WoW game client software;
- 8 b. make an unauthorized derivative work of the WoW game client software;
- 9 or
- 10 c. make an unauthorized distribution of the WoW game client software. See
11 Exhibit J at ¶32.

12 **OBJECTIONS:**

13 Blizzard objects to the compound nature of these statements; they do not
14 comply with Local Rule 56.1. Blizzard further objects to the legal conclusions
15 included in, and the argumentative nature of, this statement; this statement does not
16 constitute a “statement of fact” as required by Local Rule 56.1.

17 **RESPONSE:**

18 Blizzard disputes this statement. Large portions of Blizzard’s Motion for Summary
19 Judgment and the accompanying brief are dedicated to establishing that Glider
20 circumvents Warden/scan.dll for purposes of allowing a person to make an
21 unauthorized copy of the WoW game client software. See Blizzard’s Motion for
22 Summary Judgment.

23 61. Although Blizzard’s acts of detecting Glider and banning Glider users’ accounts
24 led Donnelly to believe that Blizzard considered Glider an unauthorized third-
25 party software program under its EULA and TOU, Donnelly did not agree with
26 Blizzard’s interpretation of its agreements. Donnelly believed that Blizzard had
27 no right to control MDY’s ability to sell Glider because he had no contractual
28 relationship with Blizzard. Id. at 33. Exhibit K at 293-94.

OBJECTIONS:

1 Blizzard objects to the compound nature of these statements; they do not
2 comply with Local Rule 56.1. Blizzard objects to these self-serving, uncorroborated
3 statements. An uncorroborated description of a party's state of mind is not appropriate
4 for an SOF.

5
6 RESPONSE:

7 The EULA and TOU prohibited unauthorized third party programs, including
8 bots like WoWGlider, prior to September 2005. See SOF ¶ 99; MDY's Exhibit F sec.
9 2(C) (June 2005 TOU) ("You agree that you will not...create or use cheats, 'mods'
10 and/or hacks, or any other third-party software designed to modify the World of
11 Warcraft experience [or] use any third-party software that intercepts, 'mines', or
12 otherwise collects information from or through World of Warcraft..."). Donnelly
13 admits to having read and agreed to the TOU and the EULA several times, having seen
14 a prohibition on the use of unauthorized third-party programs with WoW, and further
15 admits he never sought nor received such authorization for Glider. SOF ¶¶ 179-80;
16 SOF Supp. ¶ 282.

17
18
19 62. Prior to September, 2005, Donnelly was unaware that Blizzard would object to
20 anyone using Glider with WoW. See Exhibit J at ¶33; Exhibit K at 76.

21 OBJECTIONS:

22 Blizzard objects to the compound nature of these statements; they do not
23 comply with Local Rule 56.1. Blizzard objects to these self-serving, uncorroborated
24 statements. An uncorroborated description of a party's state of mind is not appropriate
25 for an SOF.

26
27 RESPONSE:

28

1 The EULA and TOU prohibited unauthorized third party programs, including
2 bots like WoWGlider, prior to September 2005. See SOF ¶ 99; MDY’s Exhibit F sec.
3 2(C) (June 2005 TOU) (“You agree that you will not...create or use cheats, ‘mods’
4 and/or hacks, or any other third-party software designed to modify the World of
5 Warcraft experience [or] use any third-party software that intercepts, ‘mines’, or
6 otherwise collects information from or through World of Warcraft...”). Donnelly
7 admits to having read and agreed to the TOU and the EULA several times, having seen
8 a prohibition on the use of unauthorized third-party programs with WoW, and further
9 admits he never sought nor received such authorization for Glider. SOF ¶¶ 179-80;
10 SOF Supp. ¶ 282.

13 63. In September, 2007, MDY began developing functionality in the Glider
14 software to allow it to work with other games besides WoW including both non
15 MMORPG and non-MMORPG games. See Exhibit J at ¶34.

16 **OBJECTIONS:**

17 Blizzard objects to this self-serving statement. This statement is not
18 corroborated by any evidence in the record.

19 **RESPONSE:**

20 Blizzard disputes this statement. Glider was designed to automate World of
21 Warcraft exclusively, and only works in conjunction with World of Warcraft; MDY’s
22 own Frequently Asked Questions (“FAQ”) available at MMOGLIDER.com talks
23 exclusively about World of Warcraft, and mentions no other programs. See SOF ¶ 182
24 and FAQ, Exhibit 39 to Blizzard’s SOF.

26 64. MDY continued to sell Glider for several months. On the early morning of
27 October 25, 2006 and without any prior notice, the defendants’ counsel Shane
28 McGee, an officer of Vivendi Games Fritz Kryman, and an unidentified private
investigator appeared at Donnelly’s home. When they arrived, they presented

1 Donnelly with a copy of a complaint that they indicated they would file the next
2 day in the U.S. District Court for the Central District of California if Donnelly
3 did not immediately agree to stop selling Glider and return all profits that he
made from Glider sales. Id. at 35; Exhibit K at 283-84.

4 **OBJECTIONS:**

5 Blizzard objects to the compound nature of these statements; they do not
6 comply with Local Rule 56.1.

7 **RESPONSE TO THIRD SENTENCE:**

8
9 Blizzard disputes this statement. This statement mischaracterizes the nature of
10 Blizzard’s representatives’ visit. Moreover, Fritz Kryman is not an officer of Vivendi
11 Games, Inc. SOF Supp. ¶¶ 283-287.

12 65. Donnelly was offended by the audacious threats Blizzard’s representatives
13 made. Exhibit J at ¶36; Exhibit K at 283.

14 **OBJECTIONS:**

15 Blizzard objects both to the characterization of Blizzard’s communications
16 (“audacious threats”). Blizzard further objects to the inclusion of a self-serving,
17 uncorroborated description of a party’s state of mind as a “statement of fact.”
18

19 **RESPONSE:**

20 Blizzard denies that there were any “audacious threats.” SOF Supp. ¶¶ 283-287.

21 66. Donnelly immediately contacted his current counsel, who later that day, filed a
22 declaratory judgment action in this court. The defendants filed counterclaims
23 against Donnelly and MDY for contributory and vicarious copyright
24 infringement, violation of the Digital Millennium Copyright Act (17 U.S.C. §§
1201(a)(2) and (b)(1)) and tortious interference with Blizzard’s contractual
relations with its licensees. **Exhibit J** at ¶37.

25 **RESPONSE:**

26
27 Blizzard does not dispute this statement for purposes of MDY’s Motion for
28 Summary Judgment.

1 67. On the early morning of October 25, 2006 and without any prior notice,
2 Blizzard and Vivendi's counsel, Shane McGee, an officer of Vivendi Games,
3 Fritz Kryman, and an unidentified private investigator appeared at Donnelly's
home. See **Exhibit J** at ¶ 36; **Exhibit K** at 283.

4 **RESPONSE:**

5 Blizzard does not dispute this statement for purposes of MDY's Motion for
6 Summary Judgment, but notes that Kryman, McGee and the investigator appeared at
7 Donnelly's condominium, building, and only visited his unit after Donnelly permitted
8 them access to the building, invited them to take the elevator to the floor on which he
9 lived, and then invited them into his home. SOF Supp. ¶¶ 283-287.

11 68. Blizzard has offered its damages expert witness' report in support of Blizzard's
12 argument that it has suffered monetary harm. A copy of Dr. Edward
13 Castronova's report is attached as Exhibit L. A thorough review of the report
14 demonstrates that Blizzard has offered nothing more than speculative opinions
of how Glider use harms Blizzard. Specifically, Blizzard's expert argues that:

- 15 a) Because Glider can help advance a character's level faster, Blizzard loses
revenue from a licensee who uses Glider because of a shortened monthly
16 subscription time;
- 17 b) Because a portion of Blizzard's licensee's oppose the use of botting
programs such as Glider, many people quit in frustration thereby causing
18 Blizzard to lose revenue;
- 19 c) Because the gaming world perceives people who use Glider as having an
unfair advantage, many potential WoW players choose not to play WoW
20 thereby causing Blizzard to lose revenue;
- 21 d) Glider users can use the software to "farm gold" in WoW, which
damages the WoW game economy thereby causing people to quit the
22 game;
- 23 e) Blizzard must pay employees to deal with complaints about bot
programs; and
- 24 f) Blizzard must pay employees to locate Glider users in the WoW game
environment and verify Glider detections from Warden so Blizzard can
ban such accounts.

25 *Id.* at 25-28.

26 **OBJECTIONS:**

27
28

1 Blizzard objects to the compound nature of these statements; they do not
2 comply with Local Rule 56.1. Moreover, MDY's long series of statements is purely
3 argumentative and belongs in its brief instead of its statements of fact.
4

5 **RESPONSE:**

6 This series of statements mischaracterizes the import Blizzard's expert's report,
7 which speaks for itself. *See* Castronova Expert Report and Supplemental Expert
8 Report. (SOF Exhibits 7,13).

9 69. Castronova argued that these bases damage Blizzard in the amount of twenty
10 million dollars per year. *Id.* at 28. MDY disputes every aspect of Castronova's
11 conclusions. MDY's damages expert, Dr. Koleman Strumpf summarily
12 dismissed Castronova's conclusions in his rebuttal report. Castronova even
13 admitted as much in his report. Castronova stated on the issue of the points
14 listed above:

15 "[I]s it (sic) difficult for another user to confirm that the players gaining
16 levels at an accelerated pace are botting, so the average player concludes
17 that either he must be an incompetent player or the system is balanced
18 against them. Either way, he may quit the game and encourage others not
19 to purchase it. The more than 300,000 botting complaints that Blizzard
20 has received does not include complaints lodged by the many current and
21 former players whose game experience was adversely impacted by bots,
22 but did not know the reason for their less-than-perfect gaming
23 experience. Unfortunately, there is no way to ascertain this number or to
24 quantify these damages." (emphasis ours).

25 *Id.* at 6.

26 **OBJECTIONS:**

27 Blizzard objects to the compound nature of these statements; they do not
28 comply with Local Rule 56.1. Moreover, MDY's statement is purely argumentative
and belongs in its brief instead of its statements of fact.

RESPONSE:

 Blizzard does not dispute the text of Castronova's report, but disputes MDY's
characterization of its findings. Dr. Castronova's reports speak for themselves. (SOF

1 Exhibits 7,13). Moreover, while Castronova and MDY's expert disagree on the amount
2 that Blizzard is financially damaged by Glider as a result of decreased user demand and
3 other factors incorporated into Dr. Castronova's damages model, they do not disagree
4 that Blizzard is in fact harmed. MDY's expert Dr. Strumpf critiqued the numbers used
5 by Dr. Castronova as underlying assumptions in his damages model, and offered what
6 he deemed to be more realistic numbers. Even when using Strumpf's numbers,
7 quantifiable harm to Blizzard results. (SOF Supp. ¶ 288-89. ("The rebuttal expert and I
8 can disagree about, it's high, it's low, but zero is not in there.")). In fact, Strumpf's
9 figures indicate that Blizzard's damages reach five million dollars per year. *Id.*

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12 70. Simply stated, Castronova cannot quantify any alleged damages because
13 Castronova can provide no proof, just speculation, as to damages. In his
14 deposition, Castronova admitted that he had never conducted a single scientific or
15 economic study to support his conclusions. See Exhibit N (Deposition of Edward
16 Castronova) at 49-52, 55, 65-66, 74-75, 84-87, 101-02, 105-13, 123-24, 140-46,
17 173-74, 178-80, 203-05, 238-40, 293-95. He admitted that he had never
18 interviewed a single WoW player to support his conclusions. *Id.*

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21 **OBJECTIONS:**

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Blizzard objects to the compound nature of these statements; they do not
comply with Local Rule 56.1. Moreover, MDY's statements are purely argumentative
and belong in its brief instead of its statements of fact.

RESPONSE:

Blizzard disputes these statements as mischaracterizations of Blizzard's
arguments and theories of damages, as reflected in Dr. Castranova's reports. (SOF
Exhibits 7, 13). Moreover, Castronova studied World of Warcraft and Glider in the
most effective way possible, by actually using both programs. Castronova has played
World of Warcraft since 2004, building up 15-20 characters. (SOF Supp. ¶ 290).

1 Castronova purchased a Glider key and used Glider in conjunction with World of
2 Warcraft as part of his research. (SOF Supp. ¶ 291). Castronova supports his
3 conclusions with first-hand knowledge of the World of Warcraft environment. (SOF
4 Supp. ¶ 292). In addition, Castronova testified that he reviewed forum posts and
5 comments of WoW players in forming his conclusions. (SOF Supp. ¶ 293).
6

7 71. For example, Castronova could not rebut the fact that a if a person used Glider
8 to arrive at level 70 quicker than normal, that the person was just as likely to
9 play WoW for a longer period of time than a player who played WoW longer to
10 reach level 70, but quit shortly after reaching level 70 out of frustration. *Id.* at
11 49-50. In fact, Blizzard itself has unilaterally reduced the time it takes to level a
12 character to Level 70 by as much as 15% to 30%. Exhibit M (WoW Patch
13 Notes; Exhibit 7 to Castronova Depo.). Castronova provided no evidence, nor
14 has Blizzard, that despite receiving 300,000 complaints about bot programs, one
15 person ever quit WoW because of people using Glider in WoW. Exhibit N at
16 85-87. Castronova provided no evidence, nor did Blizzard that one person who
17 was a potential WoW player, ever chose not to play WoW because he perceived
18 people having an unfair advantage using Glider. *Id.* at 109-11. Castronova, at
19 best, speculated that Glider damages the WoW economy when people use it to
20 farm gold in WoW, but never offered any evidence that one WoW user has ever
21 used Glider to farm gold, nor did he provide evidence that one WoW player ever
22 terminated his account because of people who use Glider to farm gold in WoW.
23 Thus, Blizzard can provide no factual evidence to support its damages claim.

18 **OBJECTION:**

19 Blizzard objects to the compound nature of these statements; they do not
20 comply with Local Rule 56.1. Moreover, MDY's statements are purely argumentative
21 and belong in its brief instead of its statements of fact.

22 **RESPONSE:**

23
24 Blizzard disputes this series of statements as mischaracterizations of Blizzard's
25 arguments and theories of damages as reflected in Dr. Castronova's reports. (SOF
26 Exhibits 7, 13). Moreover, Castronova testified that in just 5-7 hours of Glider use, he
27 had accumulated several thousand experience points without actively playing the game.
28

1 (SOF Supp. ¶ 294). Castronova correctly notes that the amount of time a Level 70 user
2 continues to play the game is irrelevant, because regardless, the amount of time
3 required to get to Level 70 using Glider is less, and reduces the total subscription cost
4 commensurately. (SOF Supp. ¶ 295). As Castronova indicates, individual
5 hypotheticals are irrelevant to his analysis because "you don't make judgments about a
6 macro social phenomenon by focusing on individual cases. You have to look at what
7 the aggregate of those things are. (SOF Supp. ¶ 296). Regardless of individual
8 examples, Castronova testified that, based on his research and experience, when
9 players are upset with a game, revenues for the game are negatively affected because
10 the players quit, become less likely to sign up in the first place, and overall demand for
11 the game drops. (SOF Supp. ¶ 297). Thus, some percentage of the 300,000
12 complainers undoubtedly quit the game as a result of botting. (SOF Supp. ¶ 298).
13 Blizzard further disputes MDY's statement that Castronova "never offered any
14 evidence that one WoW user has ever used Glider to farm gold," where Castronova
15 testified that there is a switch in the Glider program that offers the Glider user the
16 option to sell loot obtained by gliding for gold. (SOF Supp. ¶ 299). He also testified
17 that Glider has no setting enabling users to kill monsters but NOT collect their gold.
18 (SOF Supp. ¶ 300). Finally, Castronova testified that he has seen and read where
19 Glider users brag about the effectiveness of Glider in farming gold. (SOF Supp. ¶
20 301). Blizzard also submitted evidence both of WoW players indicating they were
21 quitting WoW because of Glider, and of Glider users relying on the program to farm
22 gold. SOF ¶ 157-58, 164, 166-67, 193-97.

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27 72. Blizzard's employees enforce its EULA and TOU not just against Glider users,
28 but all potential bot and other "unauthorized third-party" software. Blizzard

1 provided no evidence, other than speculation, what portion of Blizzard's salaries
2 pertains to Glider.

3 OBJECTIONS:

4 Blizzard objects to the compound nature of these statements; they do not
5 comply with Local Rule 56.1. Moreover, MDY's statements are purely argumentative
6 and belong in its brief instead of its statements of fact.

7 RESPONSE:

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9 Blizzard disputes these statements. William Galey, the head of Blizzard's
10 customer service group, testified at his deposition that WoW users specifically mention
11 Glider as a cause of dissatisfaction when they contact Blizzard's customer service
12 personnel, and that "[i]t has become commonplace and acknowledged amongst our
13 players that, yes, they are aware of Glider specifically." (SOF ¶ 226.) Greg Ashe, the
14 head of Blizzard's bot enforcement group, similarly testified at his deposition, that
15 Glider is the longest-standing cheat, that Glider consumes more Blizzard resources
16 than any other cheat, and that Blizzard has to divert resources from game development
17 specifically to combat Glider. (SOF ¶ 221-23). Ashe further testified that Glider alone
18 has significantly increased Blizzard's costs because each time Blizzard has
19 implemented automatic detection of Glider use, MDY has revised the Glider code to
20 combat these measures, whereas other bots have not required a similar resource
21 commitment because Blizzard has been successful at quickly identifying and blocking
22 their use. (SOF ¶ 224).

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25 73. Finally, and perhaps most obviously, since MDY first released Glider,
26 Blizzard's total amount of active WoW subscription accounts has risen from
27 approximately three million to over ten million as of January, 2008. See Exhibit
28 C. Blizzard has offered no evidence whatsoever to show that Glider has caused
an overall negative effect on subscriptions. Blizzard also acknowledges that

1 many Glider users will actually purchase two or more WoW accounts that they
2 would not have purchased had they not used Glider. Exhibit B at 234-235. Thus,
3 Glider has actually increased Blizzard's WoW subscription revenue in many
4 cases.

4 **OBJECTIONS:**

5 Blizzard objects to the compound nature of these statements; they do not
6 comply with Local Rule 56.1. Moreover, MDY's statements are purely argumentative
7 and belong in its brief instead of its statements of fact.
8

9 **RESPONSE:**

10 Blizzard disputes these statements. Blizzard's expert Dr. Castronova testified
11 that the number of subscriptions or rate of increase are irrelevant to the analysis,
12 because the question is not whether WoW is successful, but whether Blizzard is
13 damaged by Glider use. (SOF Supp. ¶ 302). Dr. Castronova further testified that in
14 every instance where he has conducted a cost/benefit analysis, the aggregate effects of
15 user dissatisfaction are overwhelmingly greater than the effects of a few new accounts
16 from repeat Glider users. (SOF Supp. ¶ 303).
17

18 74. Blizzard does not dispute that MDY is only one of many "botters."
19

20 **RESPONSE:**

21 Blizzard disputes this statement in that it mischaracterizes Blizzard's position.
22 Blizzard does not dispute that there are other "bots," but maintains that WoWGlider is
23 the most popular bot by a very large margin. SOF ¶ 218-29.

24 **BLIZZARD'S SUPPLEMENTAL STATEMENT OF FACTS**

25
26 Pursuant to Local Rule 56.1, the following facts preclude summary judgment in
27 favor of MDY. These facts are in addition to those set forth in Blizzard
28 Entertainment, Inc. and Vivendi Games, Inc. Statement of Facts In Support of Their

1 Motion for Summary Judgment numbered 1 through 264. Accordingly, the numbering
2 for these additional facts will begin at 265.

3 265. Blizzard's WoW EULA states, in part:
4

5 1. Grant of a Limited Use License. If you agree to this License
6 Agreement, computer software (hereafter referred to as the "Game
7 Client") will be installed onto your hardware.... Subject to your
8 agreement to and continuing compliance with this License
9 Agreement, Blizzard hereby grants, and you hereby accept, a
10 limited, non-exclusive license.... All use of the Game Client is
11 subject to this License Agreement and to the Terms of Use
12 agreement, both of which you must accept before you can use your
13 Account to play the Game.

14 ...

15 3. Ownership. A. All title, ownership rights and intellectual property
16 rights in and to the Game and all copies thereof (including without
17 limitation any titles, computer code, themes, objects, characters,
18 character names, stories, dialog, catch phrases, locations, concepts,
19 artwork, character inventories, structural or landscape designs,
20 animations, sounds, musical compositions and recordings, audio-
21 visual effects, storylines, character likenesses, methods of operation,
22 moral rights, and any related documentation) are owned or licensed
23 by Blizzard.

24 ...

25 4. Responsibilities of End User. A. Subject to the license granted
26 hereunder, you may not, in whole or in part, copy, photocopy,
27 reproduce, translate, reverse engineer, derive source code from,
28 modify, disassemble, decompile, or create derivative works based on
the Game, or remove any proprietary notices or labels on the Game.
Failure to comply with the restrictions and limitations contained in
this Section 4 shall result in the immediate, automatic termination of
the license granted hereunder....

(Ex. 21 to Blizzard's SOF).

25 266. It would be "very impractical" to load the entire WoW game into RAM at one
26 time; a user would have to have a "massive amount of RAM" for that to be
27 possible. Versluys 27:13-28:6. (Nov. 14, 2007 Dep. of Matthew Versluys, Ex.
28 11 to Blizzard's SOF, at 27:13-28:6).

267. Section 4 of Blizzard's World of Warcraft Terms of Use is titled "Limitations
on Your Use of the Service." (Ex. 18 to Blizzard's SOF at § 4).

- 1 268. When asked whether he could name any bots other than Glider or Inner space
2 (which he described as an “open source platform for creating bots”), MDY’s
3 rebuttal expert, Koleman S. Strumpf, replied that he could not. (Jan. 24, 2008
4 Dep. of Koleman S. Strumpf, Phd. (“Strumpf Dep.”), Ex. 50 to Blizzard’s Supp.
5 SOF at 146:16-21, 176:25 to 177:15).
- 6 269. In his deposition, Greg Ashe indicated that the epic mount and the epic flying
7 mount are “two of the most prized possessions” in WoW. (Nov. 13, 2007 Dep.
8 of Greg Ashe Volume I, (“Ashe I”), Ex. 51 to Blizzard’s Supp. SOF at 21:16-
9 19).
- 10 270. The scan.dll component of Warden does not report any information back to
11 Blizzard. (Ashe I, Ex. 51 to Blizzard’s Supp. SOF at 63:7-10).
- 12 271. The resident portion of Warden scans that part of the RAM dedicated to the
13 World of Warcraft process and, if it detects the presence of an unauthorized
14 program, notifies a Blizzard server only that a specific program has been found.
15 (Versluys Dep., Ex. 52 to Blizzard’s Supp. SOF at 18:2 to 20:9).
- 16 272. Blizzard decides whether it will ban accounts based on which cheat program is
17 detected, and usually does so before the program is located in an impacted
18 user’s RAM. (Versluys Dep., Ex. 52 to Blizzard’s Supp. SOF at 21:5-13).
- 19 273. Glider can be – and indeed is – used by users of “private servers,” that is,
20 unauthorized servers that host World of Warcraft games. Donnelly Dep. at pg
21 22:8-14. (Sept. 25, 2007 Dep. of Michael M. Donnelly (“Donnelly I”), Ex. 53
22 to Blizzard’s Supp. SOF at 22:8-14).
- 23 274. After the initial rollout of scan.dll, MDY did not instruct users to bypass the
24 scan.dll file on their hard drive, but instead analyzed scan.dll and modified
25 Glider such that Glider could conceal itself from scan.dll’s detection measures.
26 (Apr. 3, 2008 Aff. Of Greg Ashe (“Ashe 2nd Aff.”), Ex. 54 to Blizzard’s Supp.
27 SOF at ¶ 3).
- 28 275. Glider continues to function after level 70, and permits users to continue
accumulating reputation points, wealth and items just as it does prior to level 70.
(Ashe 2nd Aff., Ex. 54 to Blizzard’s Supp. SOF at ¶ 4).
276. Users can accumulate more gold using Glider after level 70 than they could
before, because rewards that were awarded as experiences points prior to level
70 are, after level 70, awarded in gold. (Ashe 2nd Aff., Ex. 54 to Blizzard’s
Supp. SOF at ¶ 5).
277. Glider allows its users several advantages, including the ability to perceive of,
and react to creatures through walls and other terrain, and the ability to react to
situations with the speed and reliability of a computer instead of using human
judgment and human reflexes. (Ashe 2nd Aff., Ex. 54 to Blizzard’s Supp. SOF
at ¶ 6).

- 1 278. Glider may run for days at a time – or even longer – and continue to accumulate
2 gold, reputation points and in-game items the entire time. (Ashe 2nd Aff. at ¶
3 7).
- 4 279. Launching Glider after WoW would subject Glider to detection by Warden.
5 (Donnelly I, Ex. 53 to Blizzard’s Supp. SOF at 112:12-25; Donnelly I, Ex. 5 to
6 Blizzard’s SOF at 113:1-4).
- 7 280. Glider is capable of sending both keystrokes and mouse commands to the WoW
8 client software. (Donnelly I, Ex. 53 to Blizzard’s Supp. SOF at 124:22 to 125:1;
9 Sept. 26, 2007 Dep. of Michael Donnelly (“Donnelly II”), Ex. 55 to Blizzard’s
10 Supp. SOF at 285:19 to 286:1).
- 11 281. MDY hosted a forum on its website dedicated to gold-farming, and noted that
12 the forum was “about hardcore use of Glider for things that it wasn't necessarily
13 born to do... but can do.” (Ex. 56 to Blizzard’s Supp. SOF).
- 14 282. Donnelly admits to having reviewed and agreed to the TOU and the EULA
15 several times, having seen a prohibition on the use of unauthorized third-party
16 programs with WoW, and further admits he never sought nor received such
17 authorization for Glider. (Donnelly I, Ex. 53 to Blizzard’s Supp. SOF at 194:5-
18 25; Donnelly II, Ex. 55 to Blizzard’s Supp. SOF at 299:18 to 300:8).
- 19 283. When Fritz Kryman and Shane McGee visited Michael Donnelly on October 25,
20 2006, they rang Mr. Donnelly using the intercom near the building’s main
21 entrance and, when Donnelly answered, they explained exactly who they were,
22 who they represented, and the purpose for their visit. Kryman Affidavit. (Apr.
23 22, 2008 Aff. Of Fritz Kryman (“Kryman Aff.”), Ex. 57 to Blizzard’s Supp.
24 SOF ¶ 6).
- 25 284. When Fritz Kryman and Shane McGee visited Michael Donnelly on October 25,
26 2006, Mr. Donnelly allowed them access to the building and invited them up to
27 his condo where he invited them inside and sat them at his kitchen table.
28 (Kryman Affidavit, Ex. 57 to Blizzard’s Supp. SOF ¶ 7).
285. When Fritz Kryman and Shane McGee visited Michael Donnelly on October 25,
2006, Mr. Kryman and Mr. McGee explained to Mr. Donnelly that Glider was
damaging WoW, and causing WoW players to complain and even leave the
game, and further explained that VG and Blizzard had to act to stop Glider to
preserve the integrity of the game. (Kryman Affidavit, Ex. 57 to Blizzard’s
Supp. SOF ¶ 9).
286. When Fritz Kryman and Shane McGee visited Michael Donnelly on October 25,
2006, Mr. Kryman and Mr. McGee explained to Mr. Donnelly that they had
flown to Arizona in an effort to negotiate a settlement, but that we were
prepared to litigate against him if necessary to stop the damage that Glider was
doing to WoW. (Kryman Affidavit, Ex. 57 to Blizzard’s Supp. SOF ¶ 7).

- 1 287. When Fritz Kryman and Shane McGee visited Michael Donnelly on October 25,
2 2006, they spoke with Mr. Donnelly for about 30 minutes, and left once Mr.
3 Donnelly indicated that he would like to contact an attorney. (Kryman
4 Affidavit, Ex. 57 to Blizzard's Supp. SOF ¶ 11).
- 5 288. In critiquing the underlying numbers proffered by Dr. Castronova's damages
6 model to MDY's damages rebuttal expert, Dr. Strumpf, substituted what he
7 deemed more reasonable, realistic numbers that instead yielded a conclusion
8 that Blizzard's damages are 5 million dollars a year, as opposed to 20 million.
9 (Castronova Dep., Ex. 58 to Blizzard's Supp. SOF at 107-108:19; 273:3-18).
- 10 289. Even when using Strumpf's numbers, quantifiable harm to Blizzard results.
11 (Castronova Dep., Ex. 58 to Blizzard's Supp. SOF at 107-08 ("The rebuttal
12 expert and I can disagree about, it's high, it's low, but zero is not in there.")).
- 13 290. Blizzard's expert on harm and damages, Dr. Edward Castronova has played
14 World of Warcraft since 2004, building up 15-20 characters. (Castronova Dep.,
15 Ex. 58 to Blizzard's Supp. SOF at 18).
- 16 291. Dr. Castronova purchased a Glider key and used Glider in conjunction with
17 World of Warcraft as part of his research. (Castronova Dep., Ex. 58 to
18 Blizzard's Supp. SOF at 31-35).
- 19 292. Dr. Castronova supports his conclusions with first-hand knowledge of the World
20 of Warcraft environment. (Castronova Dep., Ex. 58 to Blizzard's Supp. SOF at
21 17-20, 23-26).
- 22 293. Dr. Castronova testified that he reviewed forum posts and comments of WoW
23 players in forming his conclusions. (Castronova Dep., Ex. 58 to Blizzard's
24 Supp. SOF at 37).
- 25 294. Dr. Castronova testified that in just 5-7 hours of Glider use, he had accumulated
26 several thousand experience points without actively playing the game.
27 (Castronova Dep., Ex. 58 to Blizzard's Supp. SOF at 58-59).
- 28 295. Dr. Castronova notes that the amount of time a Level 70 user continues to play
the game is irrelevant, because regardless, the amount of time required to get to
Level 70 using Glider is less, and reduces the total subscription cost
commensurately. (Castronova Dep., Ex. 58 to Blizzard's Supp. SOF at 70-71).
296. Dr. Castronova indicates that individual hypotheticals are irrelevant to his
analysis because "you don't make judgments about a macro social phenomenon
by focusing on individual cases. You have to look at what the aggregate of
those things are." (Castronova Dep., Ex. 58 to Blizzard's Supp. SOF at 73).
297. Dr. Castronova testified that, based on his research and experience, when
players are upset with a game, revenues for the game are negatively affected
because the players quit, become less likely to sign up in the first place, and

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overall demand for the game drops. (Castronova Dep., Ex. 58 to Blizzard's Supp. SOF at 75-77).

298. Dr. Castronova testifies that some percentage of the 300,000 complainers undoubtedly quit the game as a result of botting. (Castronova Dep., Ex. 58 to Blizzard's Supp. SOF at 78, 103).

299. There is a switch in the Glider program that offers the Glider user the option to sell loot obtained by gliding for gold. (Castronova Dep., Ex. 58 to Blizzard's Supp. SOF at 115).

300. Glider has no setting enabling users to kill monsters but NOT collect their gold. (Castronova Dep., Ex. 58 to Blizzard's Supp. SOF at 116).

301. Dr. Castronova testified that he has seen and read where Glider users brag about the effectiveness of Glider in farming gold. (Castronova Dep., Ex. 58 to Blizzard's Supp. SOF at 116).

302. Dr. Castronova testified that the number of subscriptions or rate of increase are irrelevant to the analysis, because the question is not whether WoW is successful, but whether Blizzard is damaged by Glider use. (Castronova Dep., Ex. 58 to Blizzard's Supp. SOF at 100).

303. Dr. Castronova testified that in every instance where he has conducted a cost/benefit analysis, the aggregate effects of user dissatisfaction are overwhelmingly greater than the effects of a few new accounts from repeat Glider users. (Castronova Dep., Ex. 58 to Blizzard's Supp. SOF at 106).

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Respectfully submitted,

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1 **CERTIFICATE OF SERVICE**

2

3 I hereby certify that on April 23, 2008, I electronically transmitted the attached

4 document to the Clerk's Office using the CM/ECF System for filing and

5 transmittal of a Notice of Electronic Filing to the following CM/ECF

6 registrants:

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13 /s/ Christian S. Genetski

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