LAW OFFICES OF
VENABLE, CAMPILLO, LOGAN & MEANEY, P.C.
1938 EAST OSBORN ROAD
PHOENIX, ARIZONA 85016
TELEPHONE (602) 631-9100
FACSIMILE (602) 631 4529
E-MAIL DOCKETING@VCLMLAW.COM

Lance C. Venable (AZ Bar No 017074)
Joseph R. Meaney (AZ Bar No. 017371)
Attorneys for Plaintiff MDY Industries, LLC
and Third-Party Defendant Michael Donnelly

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

MDY INDUSTRIES, LLC, Plaintiff and Counterdefendant, vs. **BLIZZARD ENTERTAINMENT, INC., and VIVENDI GAMES, INC.,** Defendants and Counterclaimants,	**Case No.: CV06-02555-PHX-DGC** **MDY Industries, LLC and Michael Donnelly's Response to Blizzard Entertainment, Inc. and Vivendi Games, Inc.'s Motion for Permanent Injunction or in the Alternative to Amend the Judgment Entered July 14, 2008**
BLIZZARD ENTERTAINMENT, INC., and VIVENDI GAMES, INC., Third-Party Plaintiffs, vs. **MICHAEL DONNELLY, an individual** Third-Party Defendant.	**The Honorable David G. Campbell** **Oral Argument Requested**

Preliminary Statement

Blizzard has requested that the Court enter a permanent injunction against MDY and Michael Donnelly. Blizzard alleges that the Court issued the order against MDY and Michael Donnelly collectively. This is inaccurate. The Court did not find Michael Donnelly individually liable of any of Blizzard's claims. On page 2 of the Order, the

Court exclusively defines MDY Industries, LLC as "MDY" – not Michael Donnelly. And on page 26, the Order applies only to MDY as the Court defined it on page 2. Thus, the Court's Order does not apply to Michael Donnelly.[1]

Additionally, by definition, a permanent injunction is an injunction granted after trial or a final judgment on all claims.[2] Because the parties have not tried the case, nor has the Court issued a final judgment, the Court must consider Blizzard's request as one for a preliminary, not permanent injunction.

Within the context of MDY's response, this distinction is important. If the Court analyzes Blizzard's motion contextually as one for a permanent injunction, MDY would not argue that MDY would have some interest in continuing to distribute Glider after trial and after MDY has exhausted its appellate remedies. But within the context of a preliminary injunction, for the reasons discussed below, MDY opposes Blizzard's position that the Court should enjoin MDY before MDY has exhausted its options.

Alternatively, if the Court does grant Blizzard's motion for preliminary injunction, MDY requests that the Court immediately issue a final judgment under Rule 54(b) on Blizzard's claims for secondary copyright infringement and tortious interference with contract.

Issues to be Decided

The issues facing this Court boil down to three straightforward questions regarding the equitable nature of injunctive relief:

1. The U.S. Supreme Court has held that a party must affirmatively demonstrate irreparable harm to obtain injunctive relief. Blizzard waited nearly 1.5 years before it filed suit and over three years before it sought an injunction. Also, during the three years of Glider's sales,

[1] MDY raises this point not to argue that the court could not include Donnelly as part of the injunction due to his relationship to MDY. But Blizzard never demonstrated in court, nor has it disclosed evidence in discovery that individually Donnelly has infringed Blizzard's copyrights or tortiously interfered with Blizzard's contracts. MDY will be filing a motion to dismiss Donnelly from this lawsuit.

[2] BLACK'S LAW DICTIONARY 788 (7th ed. 1999).

Blizzard's subscriptions to World of Warcraft soared from 3.5 Million to nearly 11 Million. Has Blizzard suffered irreparable harm?

2. The balance of hardships must favor the moving party seeking injunctive relief. If MDY's business shuts down, it will never recover - even if MDY prevails on appeal. And without its income, MDY could not exhaust its legal remedies. But if the Court maintains the status quo, Blizzard's subscription base will likely grow, and World of Warcraft will still generate well over $67.5 Million dollars per month in revenue. Does the balance of hardships favor Blizzard?

3. A movant must establish that an adequate remedy at law would be insufficient. Blizzard has not proven that it has suffered damage to its reputation because of Glider, nor has Blizzard proven that MDY cannot satisfy a future monetary judgment. Has Blizzard demonstrated that it has no adequate remedy at law?

These are the questions pertaining to Blizzard's request for preliminary injunctive relief. In this response, MDY seeks to develop these issues and to treat the subissues as succinctly as possible.

Argument

I. As the U.S. Supreme Court requires under the *eBay* factors, Blizzard has neither suffered irreparable harm, nor has it tipped the balance of hardships in its favor.

A. Because Blizzard has not demonstrated that it has suffered irreparable harm resulting from MDY's Glider sales, the Court must not grant a preliminary injunction against MDY.

Blizzard argues that because this court ruled that MDY secondarily infringed Blizzard's copyright and tortiously interfered with Blizzard's contracts, Blizzard has suffered irreparable harm. Blizzard is wrong.

In its landmark decision of *eBay, Inc. v. MercExchange, LLC*, the Court rejected Blizzard's argument that a court must presume irreparable harm follows a showing of

liability.[3] The Court held that the traditional notion of granting injunctive relief based solely on liability and a by presuming irreparable harm was improper.[4] The Court now requires that a movant for permanent injunctive relief must demonstrate that:

- it has suffered irreparable harm;
- remedies available at law, such as monetary damages, do not adequately compensate for any harm suffered;
- when considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and
- the public interest would not be disserved by a permanent injunction.[5]

Although *eBay* was a patent infringement case, several courts have interpreted the ruling to apply to all intellectual property cases. For instance, the Fourth Circuit has held that *eBay's* holding applies to copyright infringement cases.[6] The Western District of Washington has also held that under *eBay*, a movant must establish all four equitable factors in a copyright infringement case to obtain an injunction.[7] Thus, Blizzard's citations to *MAI Sys. Corp. v. Peak Computer*[8] and *Graham v. Mary Kay, Inc*.[9] – all pre-*eBay* cases – have no bearing on this case.

---

[3] *eBay, Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006).
[4] *See id*.
[5] *Id*.
[6] *Christopher Phelps & Assocs., LLC v. Galloway*, 492 F.3d 532, 543 (4th Cir. 2007).
[7] *Propet USA, Inc. v. Shugart, Case No*. 2007 WL 4376201, 3 (W.D. Wash. 2007).
[8] *MAI Sys. Corp. v. Peak Computer*, 991 F.2d 511 (9th Cir. 1993).
[9] *Graham v. Mary Kay, Inc*., 25 S.W.3d 749 (Tex.App. Houston 2000).

B. Blizzard's three-year delay in requesting a preliminary injunction, and World of Warcraft's overwhelming success despite 3.5 years of Glider sales, demonstrates Blizzard has not suffered irreparable harm.

1. *Blizzard's sixteen-month delay in filing suit and three year delay in requesting injunctive relief militates against finding irreparable harm.*

The Court must consider when a party delays seeking a remedy an important factor bearing on the need for a preliminary injunction.[10] Absent a good explanation, a substantial delay militates against the Court issuing an injunction by demonstrating that the moving party sensed no apparent urgency to the request for injunctive relief.[11] For example, in one post-eBay ruling, the Eastern District of Michigan denied a permanent injunction to a successful plaintiff in a patent infringement suit due to an excessive delay in bringing suit.[12] The Court held that the delay was a significant factor in finding no irreparable harm.[13]

Many courts have offered guidance on the unreasonable delay issue. In *Le Sportsac, Inc. v. Dockside Research, Inc*., the Southern District of New York denied a preliminary injunction in a trademark suit based on a plaintiff's one-year delay in filing suit.[14] The Court reasoned that the one-year delay "undercuts the sense of urgency that ordinarily accompanies a motion for preliminary relief and suggests that there is, in fact, no irreparable injury."[15] In *High Tech Medical Instrumentation, Inc. v. New Image Industries, Inc*., the Federal Circuit held that filing suit after a seventeen-month delay was evidence refuting irreparable harm.[16] In *Citibank, N.A. v. Citytrust*, the Second Circuit concluded that a nine-month delay in filing suit undercut the movant's claim for

---

[10] *See High Tech Medical Instrumentation, Inc. v. New Image Industires, Inc.*, 49 F.3d 1551, 1557 (Fed. Cir. 1995).

[11] *Id*.

[12] *Sundance, Inc. v. Demonte Fabricating Ltd*., 2007 WL 37742, 3 (E.D. Mich. 2007).

[13] *See id*.

[14] *Le Sportsac, Inc. v. Dockside Research, Inc.*, 478 F.Supp. 602, 609 (S.D.N.Y. 1979).

[15] *Id*.

[16] *See High Tech Medical Instrumentation v. New Image*, 459 F.3d at 1557. (finding irreparable harm on other grounds, the court still issued a permanent injunction).

irreparable harm.[17] And in *Gianni Cereda Fabrics, Inc. v. Bazaar Fabrics*, Inc., the Southern District of New York indicated that when the plaintiff delayed filing suit for over seven months, the plaintiff's "claimed need for immediate relief is undercut by the slow pace with which plaintiff has sought to obtain it."[18]

Blizzard cannot dispute that it knew MDY had been selling Glider as early as June, 2005. Yet Blizzard inexplicably waited until October 25, 2006 to threaten a lawsuit against MDY – nearly a year and a half later.[19]

Another significant sign of Blizzard's lax attitude toward MDY is that Blizzard never requested temporary or preliminary injunctive relief until now – over three years after it first knew MDY had been selling Glider. Since June, 2005, Blizzard had ample opportunities to seek an injunction, but it chose not to do so. Thus, in the three-year period since Blizzard first learned MDY sold Glider, Blizzard never acted with urgency to enjoin Glider sales, which indicates that MDY has never caused Blizzard irreparable harm.

2. *Blizzard's active World of Warcraft subscriptions and revenues have steadily soared despite MDY having sold Glider for the past three plus years.*

Since June, 2005, when MDY first began selling Glider, Blizzard's active World of Warcraft subscriptions have risen from roughly 3.5 Million to nearly 11 Million at present. Likewise, Blizzard's revenues from World of Warcraft have increased to well over $100 Million dollars per month.[20] Whatever damage MDY has caused, it certainly has not affected World of Warcraft's popularity, subscription numbers, or revenues.

---

[17] *Citibank, N.A. v. Citytrust*, 756 F.2d 273, 276 (2d Cir. 1985).

[18] *Gianni Cereda Fabrics, Inc. v. Bazaar Fabrics, Inc.*, 335 F.Supp. 278, 280 (S.D.N.Y. 1971).

[19] Technically, Blizzard never filed suit until March 15, 2007 when it filed its answer and counterclaims against MDY and Donnelly.

[20] *See* Exhibit D - *Blizzard Entertainment, Inc*., http://www.blizzard.com/us/press/080122.html/, January 28, 2008. Last accessed August 14, 2008. (On January 22, 2008, Blizzard announced it had reached the 10 million subscriber milestone. Blizzard charges $14.95 per month to its 4.5 million North American and European Union customers. Thus, the $67.5 Million dollar monthly

Further, MDY will present expert testimony at trial that Glider has had a negligible and even non-existent effect on Blizzard's subscriptions and revenues. In fact, MDY's expert will present credible evidence that Glider has given Blizzard a net *increase* in subscriptions and sales. Glider users purchasing multiple accounts and playing the game longer than non-Glider users once they reach Level 70 in the game fueled this increase. Thus, MDY has not irreparably harmed Blizzard's business.

3. *Blizzard has offered no credible evidence that its customers are abandoning World of Warcraft due to Glider.*

Blizzard will likely argue that it has received numerous customer complaints about players using bot programs while playing World of Warcraft. And that these complaints demonstrate that Glider damages Blizzard's reputation. But Blizzard can attribute few, if any, of these complaints to Glider customers.

Furthermore, whatever damage three years of Glider use has done to Blizzard's reputation, the damage has been done and Blizzard should have addressed the issue long ago. If MDY can continue to sell Glider for the next several months, Blizzard will not suffer any more irreparable harm than it has already suffered. More importantly, Blizzard can provide nothing more than speculative testimony from its expert that the complaints Blizzard received will lead to either its customers quitting the game, or potential customers not playing the game because Glider discourages them.

Moreover, Blizzard does not dispute that its customers use numerous bot software programs with World of Warcraft. These other bot programs directly compete with MDY's Glider program.[21] MDY does not dispute that some of Blizzard's customers do not favor bots, and in particular, Glider being used with World of Warcraft. But whatever distaste these customers may have for bot programs, Glider has had no

---

income does not include the revenue Blizzard receives from its 5.5 million subscribers in Asia. MDY estimates that Blizzard's total worldwide revenue greatly exceeded $100 Million. As of today, Blizzard's total-active subscribers are closer to 11 million).

[21] *See* Affidavit of Michael Donnelly ¶ 2 – attached as Exhibit A to this Response.

quantifiable effect on World of Warcraft's popularity, subscription levels, or revenues. Thus, Glider use does not cause irreparable harm to Blizzard.

C. If Blizzard has suffered any damage resulting from MDY's liability for secondary copyright infringement, the damage is not irreparable.

Blizzard does not dispute that a computer will transfer World of Warcraft code from a customer's hard drive to RAM regardless whether the customer uses Glider. Additionally, regardless whether a World of Warcraft player uses Glider, World of Warcraft still functions and Blizzard's customers still pay Blizzard $14.95 per month to play the game. Although Blizzard may disapprove that its customer's computers transfer World of Warcraft software from a hard drive to RAM, the transfer itself does not result in irreparable economic or reputational harm to Blizzard.

D. Despite Blizzard's claim it incurs harm from Glider users, Blizzard knowingly allows previously-banned Glider users to open new accounts to play World of Warcraft so that they can continue using Glider.

Although Blizzard argues that MDY harms Blizzard by spending time and money to secure World of Warcraft from Glider users, Blizzard does not even do everything it can to stop Glider users from opening a new account once Blizzard bans their old accounts. Blizzard has successfully banned tens of thousands of Glider users' accounts, which prevent them from playing World of Warcraft.[22] In fact, on May 20, 2008, Blizzard successfully detected and banned every account using Glider or InnerSpace over a one-week period – effectively wiping out tens of thousands of World of Warcraft accounts using Glider.[23] But once Blizzard bans the accounts, Blizzard allows the users to immediately sign up for a new account using the same identification and credit card information they used for the banned account.[24]

---

[22] *Id* ¶ 3.
[23] *Id*.
[24] *Id* ¶ 4.

Blizzard knows that many Glider users will open new accounts in this manner, but Blizzard does nothing to stop it.[25] For the last three years, Blizzard could have easily blacklisted previously banned Glider users by preventing them from reusing their identification and credit card information – yet Blizzard chose not to so. Blizzard's choice not to take minimal, yet effective steps to exclude repeat Glider offenders from playing World of Warcraft further demonstrates Blizzard's lack of irreparable harm.

Accordingly, Blizzard's lack of urgency in filing suit and requesting injunctive relief, coupled with the undisputed fact that Blizzard's World of Warcraft subscriptions and revenues have soared despite MDY selling Glider for over three years, suggests that MDY has not caused Blizzard irreparable harm.

II. Because MDY can compensate Blizzard for any past or ongoing acts, Blizzard has adequate remedies at law

In addition to demonstrating irreparable harm, a movant must also establish that it has no adequate remedy at law.[26]

MDY will provide credible evidence that Blizzard has experienced little if any actual damages resulting from MDY's Glider sales. MDY's expert will testify that, at best, Blizzard speculates what its monetary losses are resulting specifically from Glider use. In fact, Blizzard does not dispute that it cannot discern these losses from the numerous other bot programs used with World of Warcraft.[27] Further, MDY's expert will testify that Glider use has actually resulted in a net income to Blizzard.

Blizzard may present evidence of time and costs associated with policing Glider use among World of Warcraft players. But regardless whether the Court enjoins MDY from selling Glider, for the near future Blizzard will continue incurring these costs to police other bot programs and related violations of its EULA. Blizzard can quantify the

---

[25] *See* Deposition excerpt of Gregory Ashe at 253-55 – attached to this Response as Exhibit B.
[26] *See eBay, Inc. v. MercExchange, LLC*, 547 U.S. at 391.
[27] *See* Exhibit B at 181-83.

costs to police Glider and can include them as part of a judgment against MDY. Thus, Blizzard has adequate remedies at law to compensate it for any alleged harm.

III. Because an injunction precluding further Glider sales will likely put MDY out of business, the balance of hardships favors MDY.

The Court must also balance the hardships facing each party to determine whether it should grant an injunction.[28] When an injunction would result in devastating effects to a defendant's business, but a lack of injunction would have a minimal effect on the plaintiff's business, the balance of hardships favors the defendant.[29] Further, when a plaintiff cannot attribute losses in revenues and business to the defendant because there are several competitors, the balance of hardships does not favor the plaintiff.[30]

A. A preliminary injunction will permanently shut down MDY's business.

If the Court enjoins MDY from selling Glider, MDY will simply have no other basis to continue its business.[31] At present, MDY's sole business involves selling Glider software.[32] Without revenues from Glider sales, MDY will likely have to lay off its employees and shut down its business.[33] Once MDY loses its customer base, MDY's customers may use other software or may never return as an MDY customer if an injunction lasts for several months – even if the Court subsequently vacates the injunction.[34] More importantly, without revenues from Glider sales, MDY may not have the resources to prosecute its case through trial and appeal.[35]

---

[28] *See eBay, Inc. v. MercExchange, LLC*, 547 U.S. at 391

[29] *See Sundance, Inc. v. Demonte Fabricating Ltd*., at *4-5; s*ee also, Geritrex Corp. v. Demarite Industries*, 910 F.Supp. 955, 965 (S.D.N.Y. 1996).

[30] *See Geritrex Corp. v. Demarite Industries*, at 965 (S.D.N.Y. 1996).

[31] Affidavit of Michael Donnelly ¶ 5.

[32] *Id* ¶ 6.

[33] *Id* ¶ 7.

[34] *Id* ¶ 8.

[35] *Id* ¶ 9.

B. If MDY continues to sell Glider for the next several months through trial and appeal, the impact on Blizzard will be minimal or negligible.

If the Court maintains the status quo for the next several months, Blizzard will see little or no impact to its business. Over the past three plus years, while MDY sold over 100,000 Glider accounts, active World of Warcraft subscriptions increased by nearly eight million and Blizzard's revenues increased by approximately tens of millions of dollars per month. And World of Warcraft's four-year history indicates that the steady increase in Blizzard's subscription numbers will not slow down in the near future.

Even if Blizzard has received thousands of complaints from its customers regarding World of Warcraft users who play the game with bot software, Blizzard cannot refute two things: (1) hardly any of these complaints identified Glider as the offending bot, and (2) an even fewer number of the total complaints ever claimed to have quit playing World of Warcraft because of bots. In short, the number of World of Warcraft players that have quit resulting from Glider and caused a billion-dollar-per-year company to lose money is infinitesimal.

Thus, regardless whether MDY sells Glider, Blizzard will continue to earn enormous profits and see its subscription numbers rise. But without Glider, MDY will have to shut down and will effectively close its doors for good. Clearly, the balance of hardships favors MDY.

IV. The public interest would not be served by issuing a preliminary injunction against MDY.

Blizzard must also establish that the public interest would be served by issuing a preliminary injunction against MDY.[36] Although the public has an interest in redressing infringement, if the injunction would harm third parties, namely MDY's employees, and have a negligible effect on Blizzard's business, this factor does not weigh in Blizzard's

[36] *See eBay, Inc. v. MercExchange, LLC*, 547 U.S. at 391.

favor.[37] This is particularly true since Blizzard waited over three years to ask the Court to enjoin MDY.

V. If the Court does issue an injunction, the Court should limit its scope solely to prevent Glider sales and marketing.

In copyright infringement matters, an injunction cannot serve a fundamentally punitive purpose.[38] A court must carefully craft an injunction's scope to be coterminous with the infringement.[39] Moreover, courts disfavor blanket injunctions to obey the law.[40] A court should narrowly tailor an injunction to fit specific legal violations.[41] Most importantly, a district court should only include injunctive terms that have a common sense relationship to specific case's needs, and the conduct for which the defendant has been held liable.[42]

If enjoined, MDY does not oppose restrictions on marketing or selling Glider, or maintaining its authentication server. But Blizzard requested several restrictions, which punish MDY rather than protect Blizzard from potential infringers. As discussed below, this court should reject Blizzard's proposed restraints as unrelated to marketing or distributing Glider, or maintaining MDY's authorization server.

---

[37] *See Sundance, Inc. v. Demonte Fabricating Ltd*, at *5.

[38] *See Bucklew v. Hawkins, Ash Baptie & Co*., 329 F.3d 923, 931 (7th Cir. 2003)

[39] *See Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd*. 518 F.Supp.2d 1197, 1226 (C.D. Cal. 2007).

[40] *Mulcahy v. Cheetah Learning LLC*, 386 F.3d 849, 852 n.1 (8th Cir. 2004).

[41] *See Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd*., at 1226. (citing *Waldman Pub. Corp. v. Landoll, Inc*., 43 F.3d 775, 785 (2d Cir. 1994).

[42] *See Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd*., at 1226-27.

A. Any restriction preventing MDY from developing or maintaining Glider is outside the scope of the Court's July 14 Order.

Blizzard asks the Court to enjoin MDY from "developing or maintaining Glider."[43] The Court's Order found MDY liable for acts pertaining to Glider's use with World of Warcraft only. Because Blizzard's EULA and TOU do not prohibit MDY from developing or maintaining Glider on MDY's computers if Glider does not interact with World of Warcraft, Blizzard's request is outside the scope the Court's Order.

Even if the Court enjoins MDY from selling, marketing or remotely activating Glider, enjoining MDY from developing or maintaining Glider on MDY's own computers is cumulative and could not possibly violate Blizzard's EULA or TOU. Thus, Blizzard's proposed restriction does not narrowly address MDY's liability under the Court's July 14 Order. And the Court should deny Blizzard's request to enjoin MDY from developing or maintaining Glider.

B. Blizzard's arguments that MDY must be enjoined from releasing its Glider source code to the public are meritless.

Blizzard further argues that it is concerned MDY may release its Glider software to third parties who may distribute Glider as a way to circumvent the Court's judgment.[44] Blizzard cites statements Glider users made on MDY's message boards encouraging MDY to release its software as a way "flout the efficacy of the judgment."[45] Blizzard's argument is speculative and completely without merit. Certainly, MDY has no control over what its customers may say on its message boards, but Blizzard is ridiculous to imply that message board posters' suggestions would cause MDY to give up its most important asset.

---

[43] Blizzard's Motion at 8.

[44] *Id* at 6.

[45] *Id*.

Simply stated, in the past MDY never threatened or implied that it would release its Glider software to third parties to harm Blizzard.[46] MDY has made it clear to Blizzard that it will likely appeal the Court's July 14 ruling.[47] If MDY released Glider to the public as open source software, MDY's only capital asset would become worthless and cause MDY to shut down its business.[48] Releasing Glider to the public would prevent MDY from generating income if this court's ruling is reversed.

MDY, however, could conceivably want to sell Glider or its company to a third party. The Court's July 14 order did not hold that Glider infringes Blizzard's copyright or causes a breach of Blizzard's contracts – only Glider's use with World of Warcraft created liability. Third parties can use Glider's underlying technology to develop other software, which is wholly unrelated to World of Warcraft. If the Court enjoins MDY from selling Glider under all circumstances, the injunction would be an overbroad view of the Court's order.

C. An injunction preventing MDY from consulting with third-parties on issues pertaining to bot software would not relate to conduct that the Court has found MDY liable.

The Court's July 14 order found MDY liable for copyright infringement and tortious interference with contract for selling Glider to third parties who used Glider with World of Warcraft. The ruling, however, did not hold MDY liable for consulting with, or providing advice to third parties on developing bot software that a court has never adjudicated to infringe or violate Blizzard's contracts. Not only would Blizzard's proposed language prohibiting MDY from consulting exceed the scope of the Court's July 14 order, but an injunction prohibiting "giving advice" likely violates MDY's First Amendment rights.

---

[46] Affidavit of Michael Donnelly ¶ 10.

[47] *See* MDY's letter of July 25, 2008 to Blizzard – attached as Exhibit C.

[48] Affidavit of Michael Donnelly ¶ 11.

Therefore, because Blizzard's proposed language enjoining MDY from consulting or providing advice to third parties about bot programs is beyond the order's scope, the Court should reject Blizzard's proposal.

VI. Conclusion

To summarize, Blizzard provides no support for the Court to issue a preliminary injunction. Blizzard cannot demonstrate irreparable harm because:

- Blizzard allowed MDY to sell Glider for sixteen months before filing suit and nearly two additional years before requesting a preliminary injunction;
- Blizzard's subscriptions soared from approximately 3.5 million to nearly 11 million despite MDY selling over 100,000 Glider accounts during a three-year time period;
- Blizzard's approximate monthly revenues increased tens of millions of dollars while MDY sold over 100,000 Glider accounts during a three-year time period;
- any irreparable harm that three years of Glider sales has caused to Blizzard's reputation has already occurred. If the Court allows MDY to sell Glider for the next several months, Blizzard will not experience additional irreparable harm; and
- only a relatively infinitesimal amount of World of Warcraft customers have ever quit playing the game resulting from their concern for botting software during the three years of Glider sales.

Also, Blizzard cannot demonstrate the balance of hardships tips in its favor. Even if MDY continued selling Glider through the appeal of this case, Glider sales would have little impact on World of Warcraft's subscriptions and revenues. But if the Court enjoins MDY, it would essentially shut down MDY's business with no hope of recovering its market if the injunction remained in place through MDY's appeal.

Further, Blizzard provided no evidence that MDY could not compensate Blizzard

with money damages for any harm it has experienced, or that an injunction would serve the public interest by enjoining MDY until it has exhausted its appellate rights.

WHEREFORE, MDY requests that this court deny Blizzard's motion in all respects. If the Court, however does enjoin MDY, the Court should enjoin MDY only to preclude MDY from marketing or selling Glider, operating its activation server with products that interoperate with World of Warcraft and nothing more. Specifically, Blizzard's Proposed Order should be modified to include the following changes:

- Page 1, lines 18-19 should be amended to, "WHEREAS, this Court has found that MDY Industries, LLC ("MDY") is liable to Blizzard Entertainment, Inc. and Vivendi Games, Inc. …"
- Page 1, line 28 should be amended to "…other automation (a/k/a "bot"), or cheat software that may be used…" The words "circumvention software" should be stricken since the Court ruled in MDY's favor on the anti-circumvention issues under the DMCA.
- Page 2 – subparagraphs "d," "e," and "f" should all be stricken for the reasons discussed above.
- Page 2, line 26, the word "Consent" should be stricken.

Dated this 14th day of August, 2008

Venable, Campillo, Logan & Meaney, P.C.

By /s/Lance C. Venable

Lance C. Venable SBN 017074
Joseph R. Meaney SBN 017371
1938 East Osborn Road
Phoenix, Arizona 85016
Tel: 602-631-9100
Fax: 602-631-9796
E-Mail docketing@vclmlaw.com

Attorneys for Plaintiff MDY Industries, LLC and Third-Party Defendant Donnelly

CERTIFICATE OF SERVICE

☒ I hereby certify that on August 14th, 2008, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

Name	Email Address
Christian Genetski, Esq. Scott Jeremy Stein, Esq. Shane McGee, Esq.	cgenetski@sonnenschein.com sstein@sonnenschein.com wanderson@sonnenschein.com smcgee@sonnenschein.com

☐ I hereby certify that on _____, I served the attached document by FIRST CLASS MAIL on the following, who are not registered participants of the CM/ECF System:

Name	Physical or Email Address

s/ Lance C. Venable