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Attorneys for Defendants Vivendi Games, Inc. and Blizzard Entertainment, Inc.

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

Case No.: CV06-02555-PHX-DGC
**JOINT PROPOSED FINAL PRETRIAL
ORDER**

The Honorable David G. Campbell

The following is the joint Proposed Final Pretrial Order to be considered at the
Final Pretrial Conference set for September 24, 2008 at 4 p.m.

A. TRIAL COUNSEL FOR THE PARTIES
Plaintiffs/Counter Claim-Defendant/Third-Party Defendant:

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7 Defendant/Counter Claim-Plaintiffs:

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15 **B. STATEMENT OF JURISDICTION**

16 **1.** Jurisdiction in this case is based on the existence of a federal question under 28
17 U.S.C. § 1331 and diversity of citizenship under 28 U.S.C. § 1332.

18 **2.** Jurisdiction is not disputed.

19 **C. STIPULATIONS AND UNCONTESTED FACTS AND LAW**

20 In the interest of judicial economy and to eliminate the expense and uncertainty of
21 a jury trial on Blizzard's damages claims, the parties have filed concurrently with this
22 Pretrial Order a Proposed Order and Stipulated Judgment on the amount of damages that
23 Blizzard should be awarded pursuant to Counts I, II and III. In addition, the parties seek
24 to have the Court directly resolve the only remaining disputed issues of fact and law,
25 namely the remaining portions of the DMCA claim and the personal liability of Michael
26 Donnelly on Blizzard's copyright, tortious interference and DMCA claims, as well as the
27 appropriateness of permanent injunctive relief, without recourse to a jury trial.¹

28 Accordingly, the parties submit in connection with this PreTrial Order their respective

¹ Upon entry of the stipulated judgment, Blizzard will dismiss its claims for trademark infringement and unjust enrichment.

1 Proposed Findings of Fact and Conclusions of Law on the issues of MDY's DMCA
2 liability and the personal liability of Michael Donnelly for resolution at a bench trial
3 before this Court.

4
5 **D. CONTESTED ISSUES OF FACT AND LAW**

6 Because the parties intend to try all issues to the Court and not a jury, their
7 respective Proposed Findings of Fact and Conclusions of Law on all remaining claims are
8 filed concurrently herewith.

9 **E. LIST OF WITNESSES**

10 Witnesses for Defendant/Cross-Plaintiff Blizzard:

11 (a) Witnesses who shall be called at trial:

12 Fact Witnesses:

13 Greg Ashe, Manager of Technical Research, Blizzard Entertainment, Inc.

14 (b) Witnesses who may be called at trial:

15 Matthew Versluys, Lead Software Engineer, Blizzard Entertainment, Inc.

16 Michael Donnelly

17 (c) Witnesses who are unlikely to be called at trial:

18 Expert Witness:

19 None

20
21 Witnesses for Plaintiff/Counterclaim Defendant MDY and Third-Party Defendant:

22 Fact Witnesses:

23 (a) Witnesses who shall be called at trial:

24 Michael Donnelly, MDY Industries, LLC.

25 Gregory Ashe, Blizzard Entertainment

26 Matthew Versluys, Blizzard Entertainment
27
28

1 (b) Witnesses who may be called at trial: None

2 (c) Witnesses who are unlikely to be called at trial: None

3 Expert Witnesses:

4 Joseph Calandrino

5
6
7 **F. LIST OF EXHIBITS**

8 **1.** The following exhibits are admissible in evidence and may be marked in
9 evidence by the clerk:

10 MDY's Exhibits: See Attached List as Attachment A hereto

11 Blizzard's Exhibits: See Attached List as Attachment B hereto

12
13 **2.** As to the following exhibits, the parties have reached the following
14 stipulations:

15 MDY's Exhibits: Authenticity stipulated.

16 Blizzard's Exhibits: Authenticity stipulated.

17 **3.** As to the following exhibits, the party against whom the exhibit is to be
18 offered objects to the admission of the exhibit and offers the objection stated below:

19 MDY's Exhibits: None.

20 Blizzard's Exhibits: None.

21
22 **4.** Each party hereby acknowledges by signing this joint Proposed Final
23 Pretrial Order that any objections not specifically raised herein are waived:

24 **G. DEPOSITIONS TO BE OFFERED**

25 MDY's Depositions: Gregory Ashe and Matthew Versluys

26 Blizzard's Depositions: Joseph Calandrino, Michael Donnelly, Robert Hale,
27 and Marcus Eikenberry
28

1 Each party hereby acknowledges by signing this joint Proposed Final Pretrial
2 order that any deposition not listed as provided herein will not be allowed, absent good
3 cause.

4
5 **H. MOTIONS IN LIMINE**

6 The following Motions in Limine have been filed pursuant to the instructions
7 contained in this Court's order Setting Final Pretrial Conference:

8 None.

9 **I.**

10 In addition to the Motions in Limine listed in section H, the following motions are
11 pending:

12 Blizzard Entertainment, Inc. and Vivendi Games, Inc.'s Motion for a Permanent
13 Injunction or in the Alternative to Amend this Court's Judgment Entered July 14, 2008.

14
15 **J. PROCEDURES FOR EXPEDITING TRIAL**

16 As noted above, the parties have submitted a proposed Order and Stipulated
17 Judgment to resolve all damages issues in connection with the Court's entry of summary
18 judgment in favor of Blizzard on Counts I, II and III of its Counterclaims. The only
19 remaining issues involve only narrow disputes of fact, and the parties have presented in
20 their Proposed Findings of Fact a number of stipulated facts to facilitate the Court's
21 resolution of these issues at a bench trial. Finally, Blizzard intends to dismiss its
22 trademark and unjust enrichment claims.

23
24 **K. ESTIMATED LENGTH OF TRIAL**

25 1 hour for opening statements and closing arguments

26 3 hours for Blizzard's Case

27 2 hours for MDY's case

28 1 hour for rebuttal

1 **L. JURY DEMAND**

2 The parties have agreed to try all remaining claims to the Court.

3 **M. PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF**
4 **LAW FOR BENCH TRIALS.**

5 The separately lodged Proposed Findings of Fact and Conclusions of Law on
6 liability for Blizzard’s claims against MDY for violations of the DMCA, and addressing
7 the individual liability of Michael Donnelly on Blizzard’s copyright, tortious interference
8 and DMCA claims, are incorporated by reference into this Joint Proposed Pre-Trial
9 Order.

10 **N. JOINT PROPOSED JURY INSTRUCTIONS, JOINT PROPOSED**
11 **VOIRE DIRE QUESTIONS, AND PROPOSED FORMS OF**
12 **VERDICT FOR JURY TRIALS.**

13 The parties have elected to proceed with their remaining claims by trying them to
14 the Court. Consequently, the parties have not filed jury instructions, voire dire, or forms
15 of verdict.

16 **O. CERTIFICATIONS**

17 **1.** All discovery has been completed.

18 **2.** The identity of each witness has been disclosed to opposing counsel.

19 **3.** Each exhibit listed herein: (1) is in existence; (2) is numbered; and (3) has been
20 disclosed and shown to opposing counsel.

21 **4.** The parties have complied in all respects with the mandates of the Court’s Rule
22 16 Scheduling Order and Order Setting Final Pretrial Conference.

23 **5.** The parties have made all of the disclosures required by the Federal Rules of
24 Civil Procedure (unless otherwise previously ordered to the contrary).

25 **6.** The parties acknowledge that once this Proposed Final Pretrial Order has been
26 signed and lodged by the parties, no amendments to this Order can be made without leave
27 of Court.
28

1 Dated: September 10, 2008

Respectfully submitted,

2
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