Las Vegas, Nevada 89145

Attorneys for 1st Technology, LLC

A PROFESSIONAL LLC
PECCOLE PROFESSIONAL PARK
10080 ALTA DRIVE, SUITE 200
LAS VEGAS, NEVADA 89145

## MEMORANDUM OF POINTS AND AUTHORITIES

Although it has customers in Nevada who use Sportingbet's infringing technology, Sportingbet plc ("Sportingbet") has moved this Court to dismiss 1<sup>st</sup> Technology's complaint against it based on a lack of jurisdiction, and for 1<sup>st</sup> Technology to provide specificity beyond that required by notice pleading. This Court should deny both motions.

# A. JURISDICTION IN NEVADA IS PROPER

This Court can and should exert personal jurisdiction on Sportingbet. As a foreign corporation which, through its poker product, Paradise Poker, solicits customers in Nevada, provides services to customers in Nevada and uses Nevada events as incentives to use these services, Sportingbet has purposefully availed itself of the benefits of the State of Nevada to such an extent that personal jurisdiction would be proper and defendant is not entitled to dismissal under Rule 12(b)(6) for lack of personal jurisdiction. 1st Technology has not yet had the opportunity to take any discovery, even on the issue of Sportingbet's contacts with Nevada or the United States. While 1st Technology feels, even on the limited record available, that Sportingbet is clearly subject to jurisdiction in this Court, should this Court find otherwise, 1st Technology respectfully requests the opportunity to take discovery solely as to jurisdiction to establish the complete extent of Sportingbet and Paradise Poker's presence in the United States and in Nevada.

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A PROFESSIONAL LLC PECCOLE PROFESSIONAL PARY 10080 ALTA DRIVE, SUITE 200 LAS VEGAS, NEVADA 89145 1. PERSONAL JURISDICTION

Absent an evidentiary hearing, to defeat a motion for lack of personal jurisdiction under rule 12(b)(6) a plaintiff need only establish a prima facie showing of jurisdictional facts through submitted materials to avoid a defendant's motion to dismiss. *Data Disc, Inc. v. Systems*Technology Associates, Inc., 557 F.2d 1280, 1285 (9th Cir. 1977), Caruth v. International Psychoanalytical Ass'n, 59 F.3d 126, 128 (9th Cir. 1995).

Here, plaintiff can do so. To establish general *in personam* jurisdiction, the plaintiff must allege facts which, if true, would show that defendant has "such continuous and systematic contacts with the forum that the exercise of jurisdiction does not offend traditional notions of fair play and substantial justice." *Reebok Int'l Ltd. v. McLaughlin*, 49 F.3d 1387, 1391 (9th Cir. 1995) (citing *Core-Vent v. Nobel Indus. AB*, 11 F.3d 1482, 1485 (9th Cir. 1993))

Failing a finding of general *in personam* jurisdiction, the court may still be able to exercise specific jurisdiction by alleging facts which, if true, would show the following three-part test is met:

- (1) The nonresident defendant must purposefully direct his activities or consummate some transaction with the forum or resident thereof; or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws;
- (2) the claim must be one which arises out of or relates to the defendant's forum-related activities; and
- (3) the exercise of jurisdiction must comport with fair play and substantial justice, i.e. it must be reasonable.

Reebok Int'l Ltd., 49 F.3d at 1391 (citing Core-Vent, 11 F.3d 1482).

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### GENERAL IN PERSONAM JURISDICTION 2.

To establish general in personam jurisdiction, Sportingbet "must have sufficient contacts to 'constitute the kind of continuous and systematic general business contacts that approximate physical presence." Fisher v. Prof'l Compounding Ctrs. of Am., Inc., 318 F. Supp. 2d 1046, 1050 (D. Nev. 2004) (quoting Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co., 284 F.3d 1114 (9th Cir. 2002); Bancroft & Masters, Inc. v. Augusta Nat'l Inc., 223 F.3d 1082, 1086 (9th Cir. 2000)). The degree to which the defendant solicits or engages in business in the state, whether or not the defendant makes sales and if the defendant serves the state's markets are among the factors the court may consider in making this determination, although lists such as these are to be illustrative rather than limiting. Fisher, 318 F. Supp. 2d at 1050 (citing Gator. Com Corp. v. L.L. Bean, Inc., 341 F.3d 1072, 1077 (9th Cir. 2003)) (see also Gates Learjet Corp. v. Jensen, 743 F.2d 1325, 1331 (9th Cir. 1984) (we must focus upon the "economic reality" of the defendants' activities rather than a mechanical checklist)).

Sportingbet, through its Paradise Poker product, meets the first set of factors set out in these cases: it sells, solicits business and serves the state's markets. See Theo H. Davies & Co. v. Republic of the Marshall Islands, 174 F.3d 969, 975 (9th Cir 1998) (finding general jurisdiction over two foreign corporations engaged in substantial commercial activity in the United States). Sportingbet itself identifies at least one customer in the state of Nevada and its own affiliation and acquisition of the Sportingbet product (Exhibit A, Sportingbet and Paradise Poker Press Release, "You guys are the absolute NUTS." P.D., Nevada, USA and "Paradise Poker has recently joined forces with Sportingbet plc [...] to form the world's largest online betting company"). <a href="http://paradise.scobypoker.com/about\_us.phtml">http://paradise.scobypoker.com/about\_us.phtml</a>). Exhibit B shows a series of screenshots of the Paradise Poker poker tables being played on Friday, October 21, 2005. Those tables show a large number of United States customers, and, specifically, several users

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specifically in Las Vegas. Each of these users connects to Paradise Poker using the Sportingbet/Paradise Poker software, which is downloaded from Sportingbet, and each user represents an act of infringement induced and participated in by Sportingbet. Exhibit C is a more easily readable summary of the user nicknames, their location (as displayed by the Sportingbet Paradise software) and the name of the poker table on which the players were playing. Users from Las Vegas include players using the nicknames ellen29, babybaer, Michigan21, URALLFI\$H, Flop\_King, bulldod69, gambler789, savwex, GrammaJoan, bsquarepants, ninakay, Rickm89121 (See Exhibits B and C). At any given time, it is reasonable to conclude, as many as twelve and possibly many more players from Nevada are using the services of Sportingbet, and using the infringing technology. (See Exhibits B and C). These players are solicited through internet ads and promotions which include, for example, a promotion culminating with a trip to Las Vegas (Exhibit D, Paradise Poker website, http://www.paradisepoker.com/promotions/2005/wpt\_champ/ - World Poker Tour at the Bellagio). Lastly, this involvement in the gaming marketplace certainly affects and is affected by the state's markets. (Exhibit E, Liz Benston, Nevada Players Ante Up Online, LAS VEGAS SUN, April 15, 2005). Sportingbet's contacts are part of a "consistent and substantial pattern of business relations" Davies, 174 F.3d at 975 (see also Quill Corp. v. North Dakota, 504 U.S. 298, 119 L. Ed. 2d 91, 112 S. Ct. 1904 (1992)).

Moreover, the contact Sportingbet has with Nevada through its online casino is sufficient to grant general jurisdiction under the Ninth Circuit's "sliding scale" which grants jurisdiction if the party in question clearly does business over the internet and if those contacts are substantial or continuous and systematic. see *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 417-19 (9th Cir. 1997); *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997); *Revell v. Lidov*, 317 F.3d 467, 470-71 (5th Cir. 2002). "At one end of the

spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper" *Zippo Mfg. Co.*, 952 F. Supp. at 1124 (citations omitted). This is exactly that situation. In order to communicate with the Sportingbet Paradise Poker product, customers in Nevada (and throughout the United States) download a software package and connect, through the Internet, to Sportingbet's servers to play poker, either for free or to place actual wagers. (See Exhibit A). Applying the sliding-scale test, Sportingbet's contacts with Nevada are sufficient to confer general jurisdiction.

Sportingbet's entire business model is predicated on a highly interactive website and software package designed solely to transact business over the internet. "Playing multiplayer poker with our unique software is a terrific experience as we offer exceptional graphics, sounds, distinct features and action." (Exhibit B). Indeed, the virtual casinos so approximate physical presence that they are competing with brick-and-mortar casinos directly for gaming revenue (Exhibit E, Liz Benston, Nevada Players Ante Up Online, LAS VEGAS SUN, April 15, 2005). This is exactly the technology to which the 1st Technology patent is directed.

Lastly, this exercise of jurisdiction must be reasonable. The reasonableness test set out by the Ninth Circuit in Amoco is identical to the test for reasonableness of determining Specific Jurisdiction, which we address below. *Amoco Egypt Oil Co. v. Leonis Navigation Co.*, 1 F.3d 848 (9th Cir. 1993). It bears repeating, however, that the burden is on the defendant to present a compelling case that the assertion of jurisdiction is not reasonable. *Id.* at 851-52. Here, Sportingbet simply cannot do so. It has customers in the United States, and in Nevada, and Sportingbet specifically induces and participates in infringement in Nevada by transmission of and use of its Paradise Poker software packages.

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### SPECIFIC JURISDICTION 3.

Should the court not find the defendant's contacts to be sufficient to establish general jurisdiction, Sportingbet is nonetheless subject to specific jurisdiction. Each of the three prongs of the Ninth Circuit test for specific jurisdiction are fulfilled in the present case.

First, the non-resident defendant must purposefully direct activities or consummate some transaction with the forum or resident thereof; or perform some act which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protection of its laws. Schwarzenegger v. Fred Martin Motor Co., 374 F.3d 797, 802 (9th Cir. 2004). Sportingbet itself has claimed to have at least one customer in Nevada, ("You guys are the absolute NUTS." P.D., Nevada, USA http://paradise.scobypoker.com/about\_us.phtml) and a significant number of its users specifically identify that they reside in Nevada. Sportingbet also directs television and internet advertising to the United States, and may direct additional advertising for its Paradise Poker product to Nevada specifically. At a minimum, 1st Technology should be permitted to explore the extent of those contacts through targeted discovery.

Second, the claim must be one which arises out of or relates to the defendant's forumrelated activities. Schwarzenegger, 374 F.3d at 802. The claim of patent infringement arises directly from the gaming software used by Sportingbet and its clients to participate in "The Ultimate Online Poker Experience". (Exhibit A). In particular, the patent infringement arises from the downloading and use of the Sportingbet Paradise Poker software by Las Vegas-based users (among a large number of others). "To determine whether a claim arises out of forumrelated activities, courts apply a 'but for' test" Doe v. Unocal Corp., 248 F.3d 915, 924 (9th Cir. 2001). Since, were Sportingbet not infringing by providing the Paradise Poker software, there would be no infringement suit, it is clear that the claim arises from the conduct.

A PROFESSIONAL LLC PECCOLE PROFESSIONAL PARY 10080 ALTA DRIVE, SUITE 200 LAS VEGAS, NEVADA 89145 

Third, the exercise of jurisdiction must comport with fair play and substantial justice. There is a presumption that jurisdiction is reasonable so long as the first two prongs of the specific jurisdiction test have been met. See *Schwarzenegger*, 374 F.3d at 802 (stating that the plaintiff bears the burden of satisfying the first two prongs of the specific jurisdiction test and that, "[I]f the plaintiff succeeds in satisfying both of the first two prongs, the burden then shifts to the defendant to present a compelling case' that the exercise of jurisdiction would not be reasonable"). Although the defense has failed to mount an argument as to the reasonability of the state of Nevada exercising jurisdiction over Sportingbet Plc, we will outline the relevant issues in this analysis.

The court examines seven factors to determine the degree to which jurisdiction comports with "fair play and substantial justice": (1) the extent of the defendants' purposeful interjection into the forum state's affairs; (2) the burden on the defendant of defending in the forum; (3) the extent of conflict with the sovereignty of the defendants' state; (4) the forum state's interest in adjudicating the dispute; (5) the most efficient judicial resolution of the controversy; (6) the importance of the forum to the plaintiff's interest in convenient and effective relief; and (7) the existence of an alternative forum. Sinatra v. National Enquirer, Inc., 854 F.2d 1191, 1199 (9th Cir. 1988). Here, these factors almost all favor a finding of jurisdiction.

- 1. Purposefull Injection: as discussed above, Sportingbet advertises to potential clients, provides services to clients and promotes its services in the state of Nevada, all of which demonstrate purposeful injection into Nevada.
- 2. Burden on Defense: The defense has failed to delineate any burden placed on Sprotingbet by being sued in Nevada. Even should such a burden be assumed, "unless such inconvenience is so great as to constitute a deprivation of due process, it will not overcome

A PROFESSIONAL LLC ECCOLE PROFESSIONAL PARK 10080 ALTA DRIVE, SUITE 200 LAS VEGAS, NEVADA 89145 clear justification for the existence of jurisdiction." *Roth v. Garcia Marquez*, 942 F.2d 617, 623 (9th Cir. 1991). As a publicly traded, multinational corporation with pre-tax profits of around \$70 million as of October 12th of this year, Sportingbet is certainly capable of defending itself in this forum to such an extent that it will not be deprived due process.

- 3. Conflict with Foreign State's Sovereignty: As this case arises from enforcement of a U.S. patent, it only reaches as far as infringing acts taking place in the United States and in concert with United States parties. Therefore, there are no concerns regarding the sovereignty of the UK or any other foreign country.
- 4. Forum State Interest: Nevada has a strong public policy interest in regulating and managing the pursuit of gaming activity within Nevada, including internet-based activity, and including any infringement which takes place within Nevada.
- 5. The Most Efficient Judicial Resolution of the Controversy: This prong deals with "the efficiency of the forum, particularly where the witnesses and evidence are likely to be located" Caruth v. International Psychoanalytical Ass'n, 59 F.3d 126, 129 (9th Cir. 1995) (citations omitted). Two lawsuits regarding these patents have been previously resolved in Nevada, and been resolved in a highly efficient manner. In addition, "modern advances in communications and transportation have significantly reduced the burden of litigating in another country." Sinatra, 854 F.2d at 1199. Since there is no significant benefit to any other U.S. forum (and Sportingbet has not suggested a U.S. forum where it would agree to proceed), this factor is at worst neutral, and tends to favor Nevada, whose courts are familiar with the 1st Technology patents.
- 6. Importance of Forum to Plaintiff: The plaintiff has counsel in Nevada who is familiar with his matter and has chosen Nevada as the forum in which to proceed. Again, this factor is at worst neutral, and tends to favor Nevada.

7. Unavailability of Alternate Forum: If plaintiff cannot bring suit in Nevada, it is unlikely that he will be able to proceed in another U.S. forum. As a foreign corporation, defendant can be sued equally in any state with which it transacts business. Since Nevada is a prime market for online gambling, it stands to reason that if the transactions of business in Nevada are not sufficient to grant jurisdiction, it would be difficult, if not impossible, for 1st Technology to seek jurisdiction over Sportingbet in another forum.

8. Balancing the Factors: Since defendant has not made any claim as to these seven factors, the court should find that they have not overcome the presumption that jurisdiction is reasonable, and therefore are not entitled to a dismissal pursuant to rule 12(b)(6).

## 4. REQUEST FOR DISCOVERY

Given the nature of defendant's operations in the United States, specific additional information on the totality of the degree to which defendants do transact business in the state of Nevada is understandably difficult to come by. While 1st Technology believes the use by Las Vegas users of Sportingbet's infringing product and Sportingbet's direction of promotion and advertising to Nevada are sufficient to show that this Court's exercise of jurisdiction is proper, should the court feel that additional or more specific facts be outlined, the court "may permit discovery to aid in determining whether it has in personam jurisdiction" *Data Disc, Inc. v. Systems Technology Associates, Inc.*, 557 F.2d 1280 n. 1 (9th Cir. 1977) (citing *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406 at 430 n. 24 (9th Cir 1977)). 1st Technology requests, if the Court is inclined to grant Sportingbet's motion, that it be permitted a limited amount of discovery directed solely to the issue of jurisdiction. Such discovery should not need to be more than a few highly directed document requests and interrogatories, and a limited number of depositions, including specifically the deposition of Sportingbet's declarant and a 30(b)(6) deposition.

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### FIRST TECHNOLOGY'S COMPLAINT IS SUFFICIENT В.

## TO SATISFY THE REQUIREMENTS OF NOTICE PLEADING

1st Technology's complaint has adequate specificity for notice pleading. Under rule 8, plaintiffs are required to provide no more than "a short and plain statement of [a] claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). The appendix to the Federal Rules of Civil Procedure set out the following form as a guideline for pleading patent infringement:

- 1. Allegation of jurisdiction.
- 2. On May 16, 1934, United States Letters Patent No. XX were duly and legally issued to plaintiff for an invention in an electric motor; and since that date plaintiff has been and still is the owner of those Letters Patent.
- 3. Defendant has for a long time past been and still is infringing those Letters Patent by making, selling, and using electric motors embodying the patented invention, and will continue to do so unless enjoined by this court.
- 4. Plaintiff has placed the required statutory notice on all electric motors manufactured and sold by him under said Letters Patent, and has given written notice to defendant of his said infringement. Wherefore plaintiff demands a preliminary and final injunction against continued infringement, an accounting for damages, and an assessment of interest and costs against defendant.

Fed. R. Civ. P. Form 16.

1st Technology's complaint is at least as specific as Form 16, and comports entirely with the Federal Rules. There is not a laundry list of 503 claims to be applied to 100 possibly infringing products, as in one case cited by defendant. (In re Papst Licensing GmbH Patent Litig., No. Civ. A. MDL 1298, Civ. A. 99-3118, 2001 U.S. Dist. LEXIS 2255 (E.D. La Feb. 22, 2001), attached hereto as Exhibit F). Indeed, "more extensive pleading of fact is not required because the Federal Rules of Procedure provide other devices besides pleadings that will serve to define the facts and issues and to dispose of unmeritous claims." 2 James Wm. Moore, et al., Moore's Federal Practice § 8.04[1] (3d ed. 1999). Indeed, in another case cited by defense, the

court held "dismissal for failure to comply with the requirements of Rule 8 is usually reserved for those cases in which the complaint is so confused, ambiguous, vague, or otherwise unintelligible that its true substance, if any, is well disguised." *Agilent Technologies, Inc. v. Micromuse, Inc.*, No. 04 Civ. 3090 (RWS), 2004 U.S. Dist. LEXIS 20723 (October 19, 2004) (internal citations omitted), attached hereto as Exhibit G. While in *Agilent*, as the defense has identified, the court required a more detailed pleading from the plaintiff, that court distinguished itself from a decision where there "was a finite set of potentially infringing products under identified patents" <u>Id.</u> At 15 (distinguishing *Symbol Techs.. Inc. v. Hand Held Prods.*, No. 03-102-SLR, 2003 U.S. Dist LEXIS 21002 (D. Del. Nov. 14, 2003), attached hereto as Exhibit H). Here, there is a single patent. Sportingbet's Paradise Poker product, at least, is used in infringement of the patent. 1<sup>st</sup> Technology will, as part of ordinary discovery, provide Sportingbet with claim charts showing the application of specific claims of the 1<sup>st</sup> Technology patent to the Sportingbet product. There is no necessity for additional pleading.

Moreover, to qualify for a Rule 21(e) motion, the complaint "must be so vague or ambiguous that the opposing party cannot respond to it, even with a simple denial as permitted by Rule 8(b), with a pleading that can be interposed in good faith or without prejudice to himself" Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 1376 at 311 (3d ed. 2004). Plaintiff's complaint fulfills the requirements of Rule 8 and is not so vague that it can not be responded to in good faith. 1st Technology respectfully requests the court deny defendant's 12(e) motion and allow any confusion on the part of Sportingbet or its counsel to be resolved with prompt discovery and the provision by 1st Technology of claim charts during discovery.

## C. <u>CONCLUSION</u>

For the foregoing reasons, Sportingbet's motions to dismiss and for a more definite statement should be denied. In the alternative, 1<sup>st</sup> Technology requests the opportunity to take discovery from Sportingbet limited solely to the issue of jurisdiction. Should the Court deem it necessary, 1<sup>st</sup> Technology is also willing to amend its complaint as to Sportingbet to identify specific claims and products which it feels are at issue at this time.

DATED this 25 day of October, 2005.

Respectfully submitted,

Mark A. Hutchison (4639) Kristopher L. Rath (4639) Hutchison & Steffen, LLC Peccole Professional Park 10080 Alta Drive, Suite 200 Las Vegas, Nevada 89145

Phone: 702-385-2500 Fax: 702-385-2086

Attorneys for 1st Technology, LLC

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## **CERTIFICATE OF SERVICE**

1 Pursuant to F.R.C.P. 5(b), I certify that I am an employee of HUTCHISON & 2 STEFFEN, LLC and that on this day of October, 2005, I caused the above and foregoing 3 4 **OPPOSITION TO SPORTINGBET'S MOTION TO DISMISS** to be served as follows: 5 by placing same to be deposited for mailing in the United States Mail, in a sealed 6 envelope upon which first class postage was prepaid in Las Vegas, Nevada; or 7 to be hand-delivered; [ ] 8 to the attorney(s) listed below at the address and/or facsimile number indicated below: 10 Joseph S. Kistler, Esq. Joel Z. Schwarz 11 **GORDON & SILVER** A PROFESSIONAL LLC
PECCOLE PROFESSIONAL PARN
10080 ALTA DRIVE, SUITE 200
LAS VEGAS, NEVADA 89145 3960 Howard Hughes Pkwy., 9th Floor 12 Las Vegas, Nevada 89109 13 Telephone: (702) 769-5555 Attorneys for Defendant, 14 SPORTINGBET PLC 15 William R. Urga, Esq. 16 JOLLEY, URGA, WIRTH, WOODBURY & SATNDISH 17 3800 Howard Hughes Parkway, Sixteenth Floor 18 Las Vegas, Nevada 89109 Telephone: (702) 699-7500 19

Facsimile: (702) 699-7555 Attorneys for Defendants NDS Group PLC and Orbis Technology

An Employee of HUTCHISON & STEFFEN, LLC

Mark A. Hutchison (4639) 1 L. Kristoher Rath (5749) Hutchison & Steffen, LLC 2 Peccole Professional Park 10080 Alta Drive, Suite 200 3 Las Vegas, Nevada 89145 Phone: 702-385-2500 Fax: 702-385-2086 Attorneys for 1st Technology 5 UNITED STATES DISTRICT COURT 6 DISTRICT OF NEVADA 7 8 1ST TECHNOLOGY LLC, Civil Action No. CV-S-05-0788-RLH-PAL Plaintiff, 9 10 V. SPORTINGBET PLC. NDS GROUP PLC, PECCOLE PROFESSIONAL PARI 10080 ALTA DRIVE, SUITE 200 LAS VEGAS, NEVADA 89145 ONGAME E-SOLUTIONS AB, and 12 ORBIS TECHNOLOGY, 13 Defendants. 14 AFFIDAVIT OF L.KRISTOPHER RATH IN SUPPORT OF 1ST TECHNOLOGY'S 15 OPPOSITION TO SPORTINGBET'S MOTION TO DISMISS 16 I, L. Kristopher Rath, declare the following: 17 I am an attorney licensed to practice law in the State of Nevada. I am counsel 1. 18 for 1st Technology, LLC in this case, and I have personal knowledge of the following facts, to 19 20 which I can competently testify. Attached hereto as Exhibit A is a true and accurate copy of the web page 2.. 21 http://paradise.scobypoker.com/about us.phtml. 22 Attached hereto as Exhibit B is a true and accurate of 167 screen shots of 3. 23 Paradise Poker's gambling software, which were prepared at the direction of counsel. 24 Attached hereto as Exhibit C is a true and accurate copy of a summary table 25 4. listing the nicknames and locations of customers shown to be using the Paradise Poker software 26 in Exhibit B. 27 Attached hereto as Exhibit D is a true and accurate copy of the web page 5. 28

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http://www.paradisepoker.com/promotions/2005.wpt\_champ/.

- Attached hereto as Exhibit E is a true and accurate copy of Nevada Players Ante 6. Up Online by Liz Benston, LAS VEGAS SUN, April 15, 2005.
- Attached hereto as Exhibit F is a true and accurate copy of In re Papst Licensing 7. GmbH Patent Litig., No. Civ. A. MDL 1298, Civ. A. 99-3118, 2001 U.S. Dist. LEXIS 20723 (E.D. La Feb 22, 2001).
- Attached hereto as Exhibit G is a true and accurate copy of Agilent 8. Technologies, Inc. v. Micromuse, Inc., No. 04 Civ. 3090 (RWS), 2004 U.S. Dist. LEXIS 20723 (October 19, 2004).
- Attached hereto as Exhibit H is a true and accurate copy of Symbol Techs., Inc. 9. V. Hand Held Prods., No. 03-102-SLR, 2003 U.S. Dist LEXIS 21002 (D. Del. Nov. 14, 2003).

Signed and sworn this **25** Day of October, 2005.

SUBSCRIBED and sworn to before me

ary Public

JAMIE L. SCHULTZ Johnry Public State of Nevada

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Poker Game Bua, Justin Buy this Art Print for \$20.99 Framed Mounted



The River
Pykerman, Jeff
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The River
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# **Paradise Poker**



First Deposit Bonus

Sign up for Paradise Poker through this link for a 25% first deposit bonus up to \$50.

## **About the World's Premier Online Cardroom**

Paradise Poker has recently joined forces with Sportingbet plc, a publicly traded company on the London Stock Exchange (Ticker Symbol: SBT.L), to form the world's largest online betting company. With over two million customers worldwide we are proud to offer further transparency and accountability, as well as more safety and security for our customers.

We are excited to feature our sister site, Sportsbook.com, America's sports betting destination and the largest single sportsbook and casino on the planet.

Play poker in our online cardroom where our mission is to provide players with The Ultimate Online Poker Experience. Playing multiplayer poker with our unique software is a terrific experience as we offer exceptional graphics, sounds, distinct features and action. Poker players from all over the world come to play at Paradise Poker in a multiplayer poker environment 24 hours a day, 7 days a week.

Welcome to the World's Premier Online Poker Room, established in 1999! Play poker for real money or play just for fun... it's your choice. Click here for the Top 10 reasons why Paradise Poker is the best choice for online poker.

Paradise Poker is a registered legal business located in San José the capital city of Costa Rica. Paradise Poker abides by the laws and regulations of the jurisdiction within which it does business.

You play poker strictly against other real people from around the world in our online cardroom. We do not participate ir any games and act solely as the host ensuring fair and honest games.

Paradise Poker is pleased to provide our clients with the added comfort of an independent third party review of our shuffling. We engaged the services of the London office of PricewaterhouseCoopers, the world's largest professional services firm, to review our card shuffling. Click here to see the shuffling review.

We receive compensation for hosting the games by charging a small percentage of the real money winner's pot, known as the rake. There is absolutely no cost to play on our play money tables.

We have the widest selection of poker games anywhere online. You can choose your own seat at multi-player poker tables offering Texas Hold'em, Omaha High, Omaha Hi/Lo, 7 Card Stud, 7 Card Stud Hi/Lo, 1-on-1 games and multiplayer poker tournaments.

Please note financial transactions are done through Ogden Stockwell Limited (London, UK), a subsidiary of Paradise Poker. Ogden Stockwell's address is 100 Sydney Street, Chelsea, London, SW3 6NJ, England.

These transactions will appear on your credit card statement in US Dollars, with the billing descriptor Paradise Poker.

## The Paradise Poker Champions

Many of the world's top poker players choose Paradise as their online poker destination. We have hand selected a group of world class players, each having achieved some of the highest accomplishments in poker.

Come meet our Champions today!

## We have received tremendous positive feedback from our clients:

"This is the best damn site I have ever seen. No poker room I have ever been in has ever been run as well as yours. I am amazed and impressed." T.K., California, USA

"You have done more to continue the future interest in poker than you will ever know. Thank you very much." J.W., Florida, USA

"This is the coolest game on the net! Amazing. You guys are simply amazing!" R.B., Ontario, Canada

"I just wanted to let you know what a joy it is to play at your site and what a well run poker room you have. I have dealt poker for the past 15 years or so and have also run card rooms and I know good when I see it. keep it up." D.S., Nebraska, USA

"Paradise Poker is the best, and no doubt will remain the best." E.L., British Columbia, Canada

"Just wanna let you know that you guys are the BEST!!! I've played poker on other sites but none of them even come close. Keep up the good work!" R.Y., Washington, USA

"Let me tell you how much I enjoy your site, even though I am not (yet?) a winning player." S.D., Sweden

"Congratulations on being the best place on the Net (in the World?) to play Poker! Great confidence inspiring customer support, Excellent software, a variety of games make Paradise Poker the very best place to play Poker." B.H., California, USA

"You guys are the absolute NUTS." P.D., Nevada, USA

Click download to get in on the action right now!

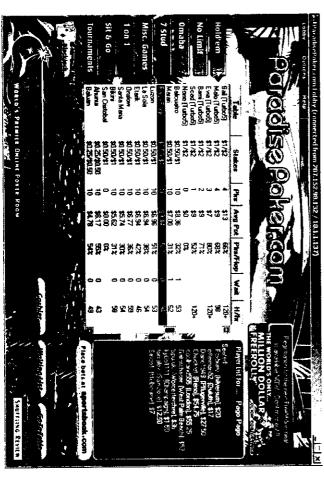


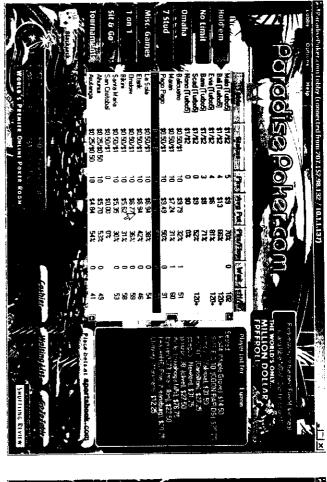


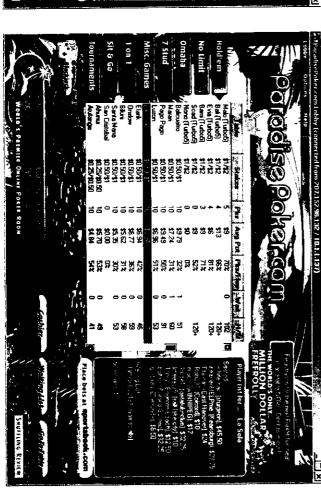


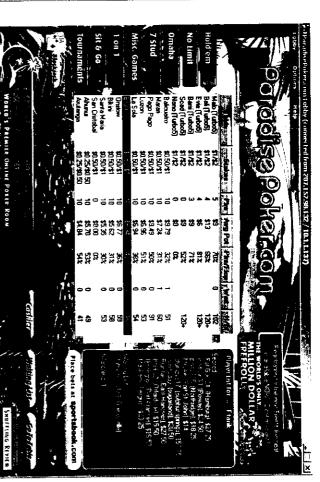
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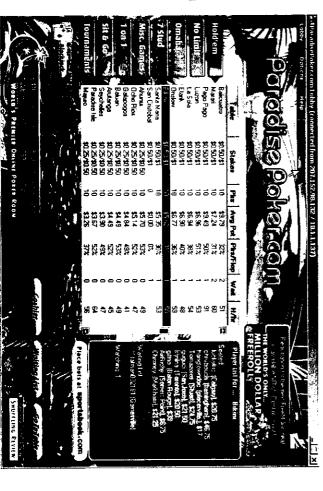
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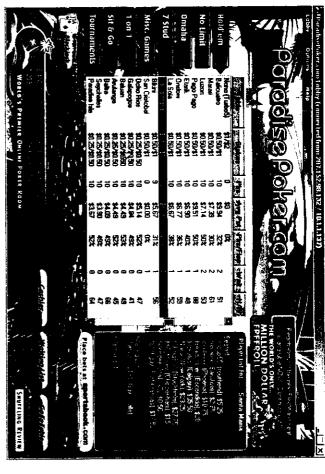


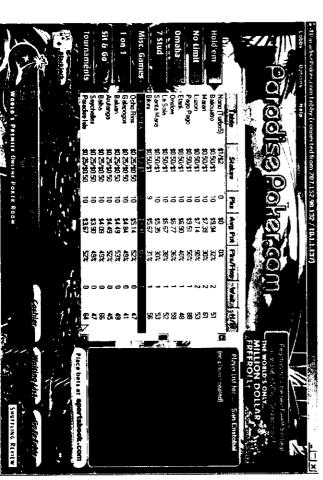


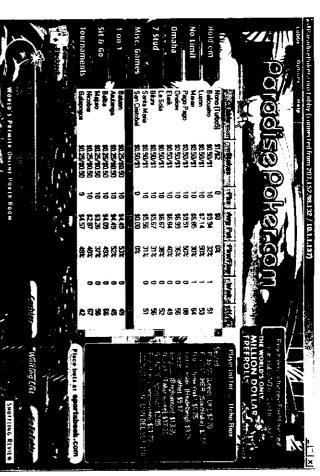


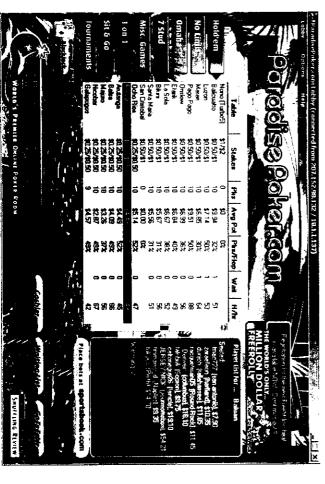


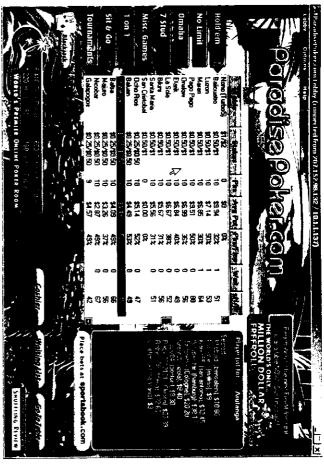


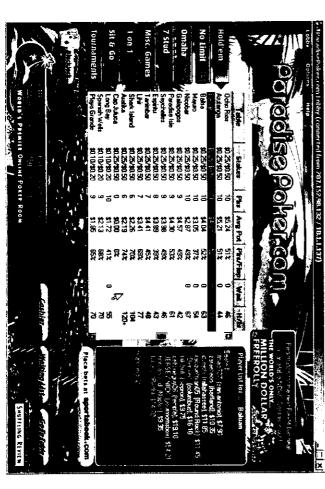


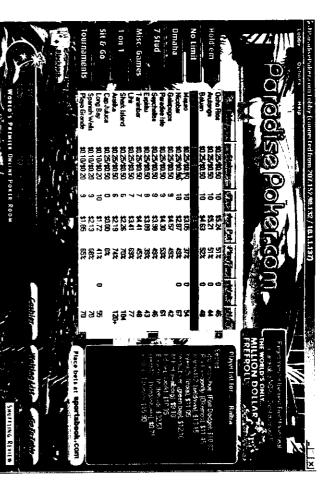


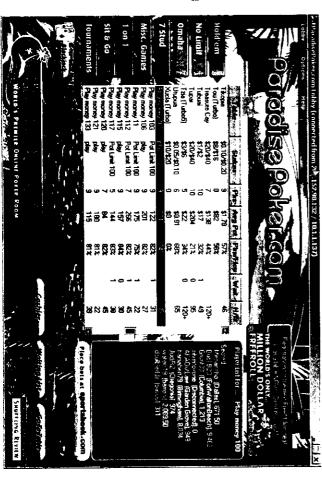


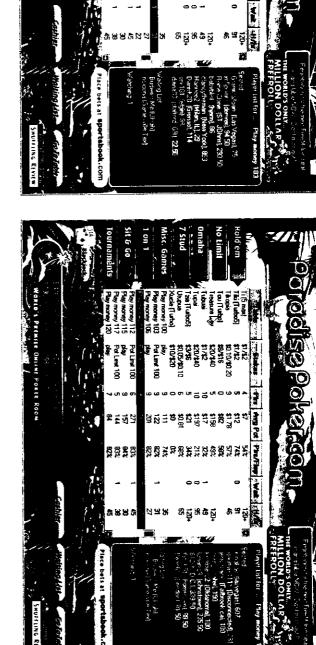












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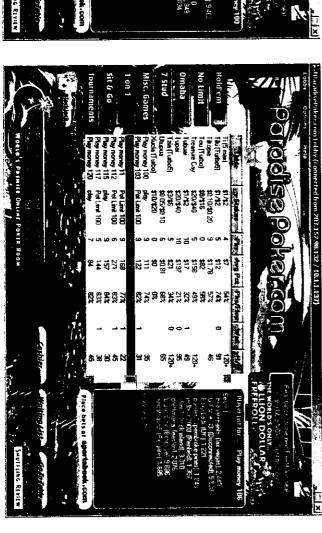
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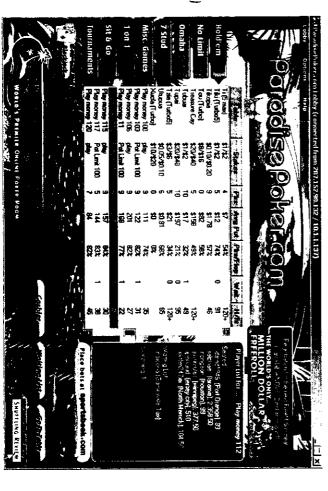
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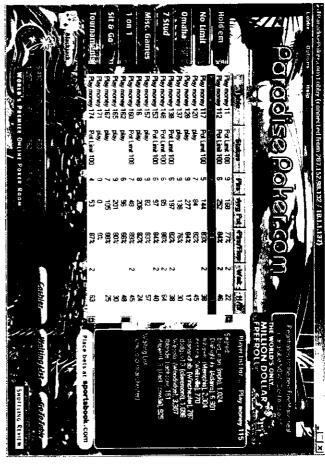
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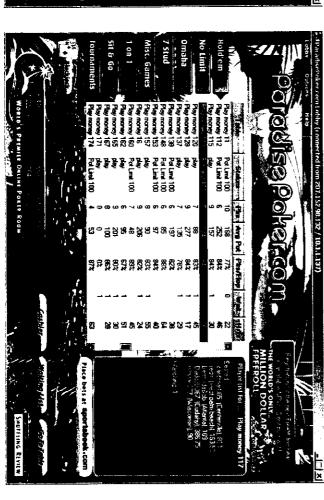
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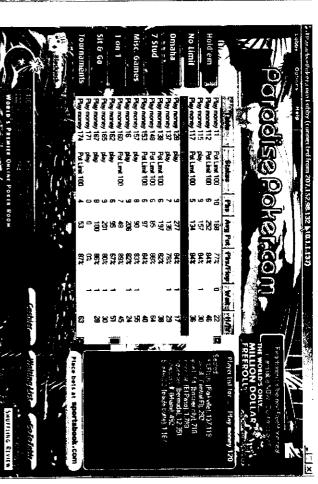
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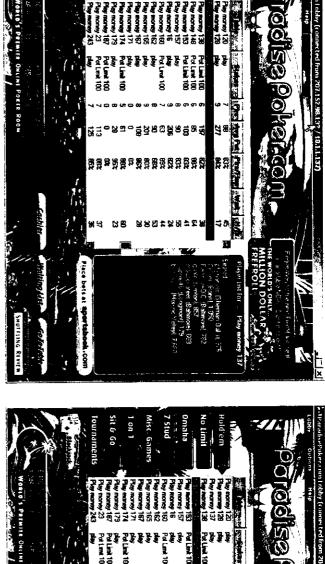


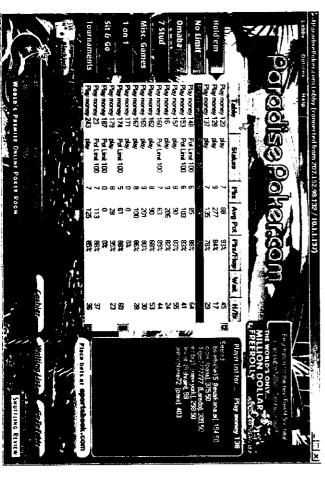


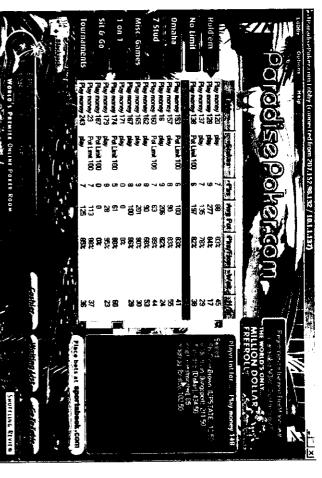


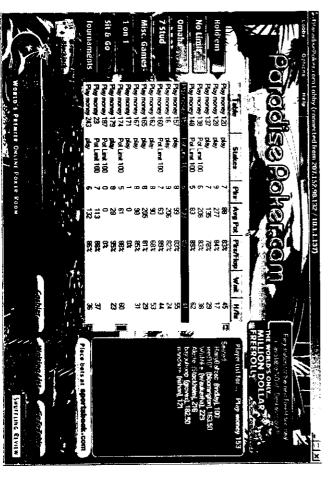


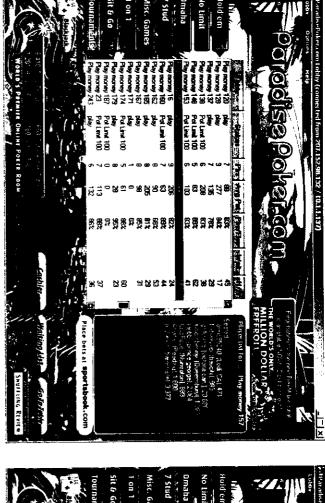


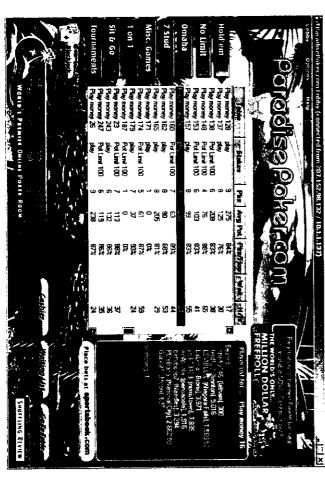


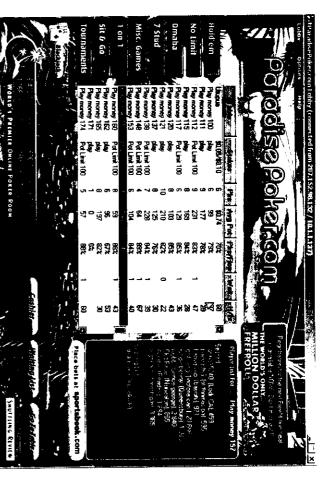


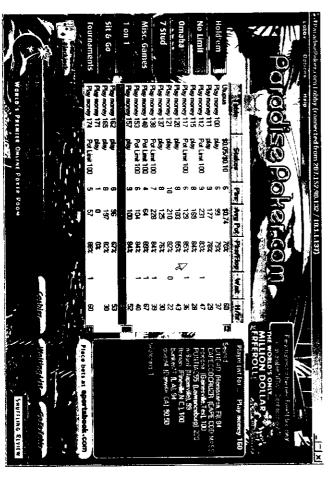


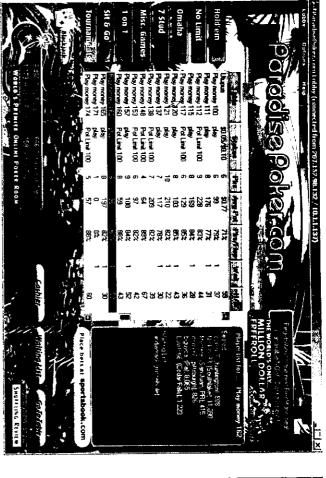


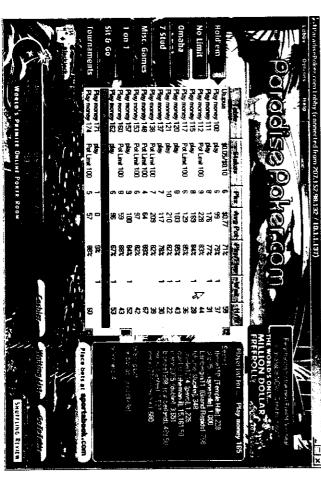


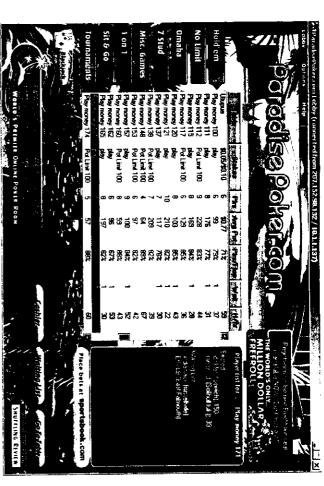


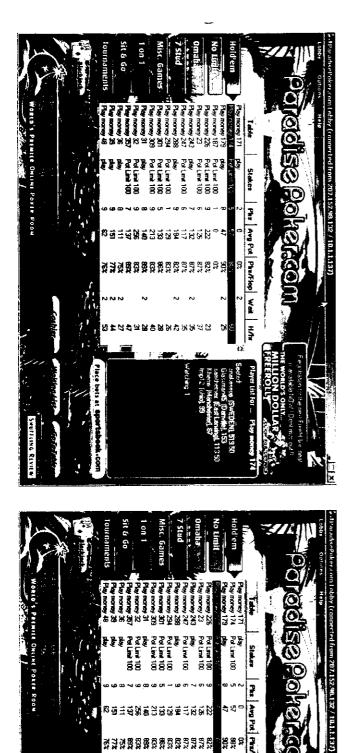












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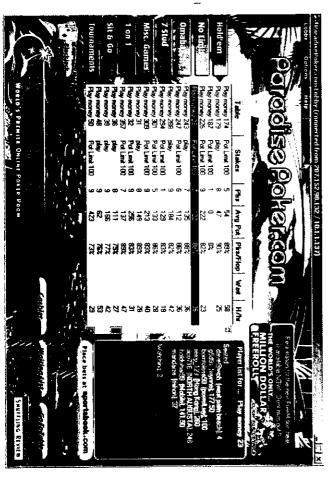
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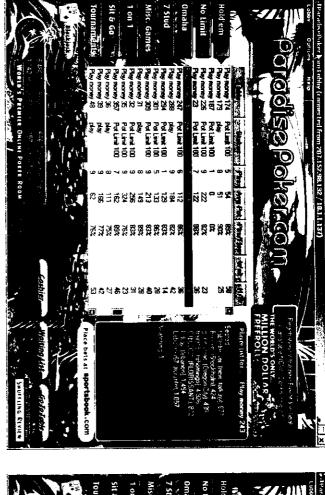
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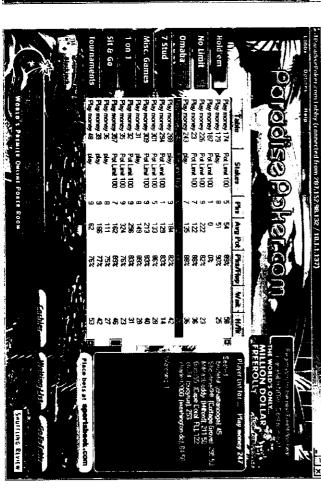


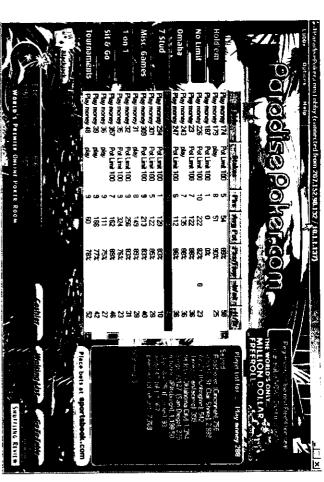
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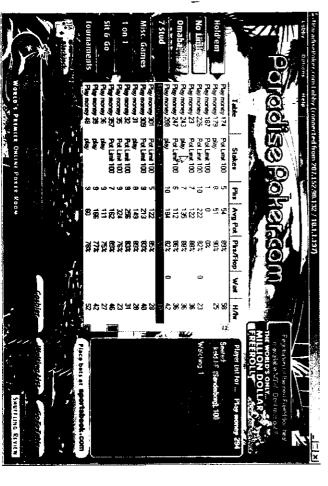
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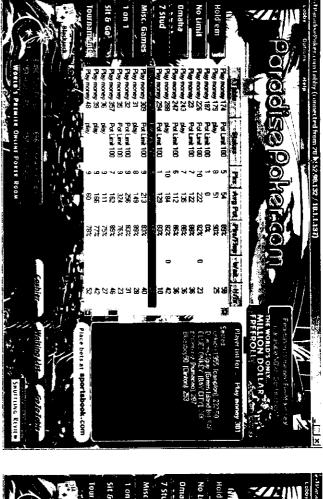


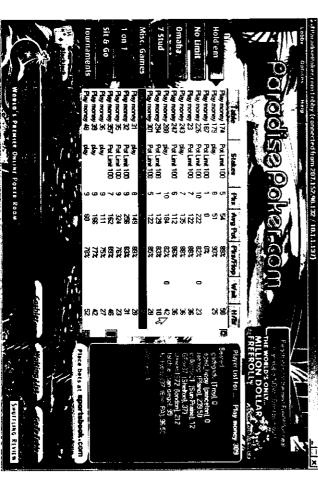


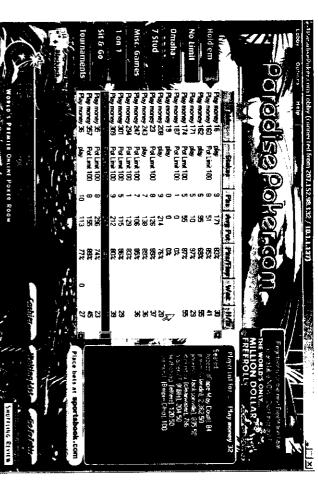


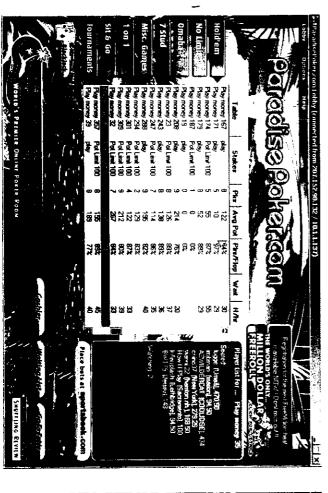


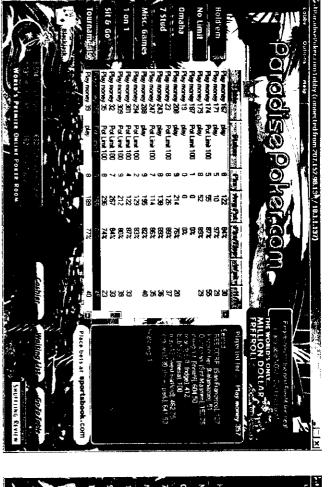


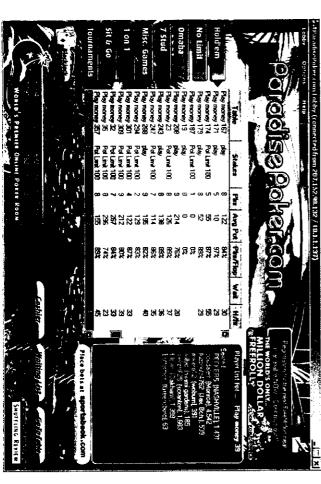


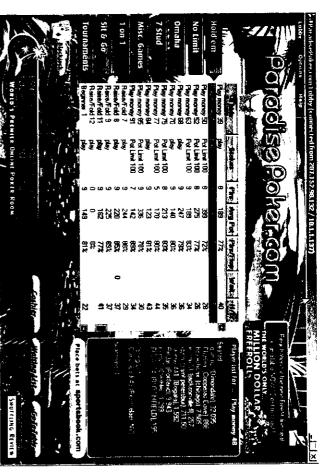


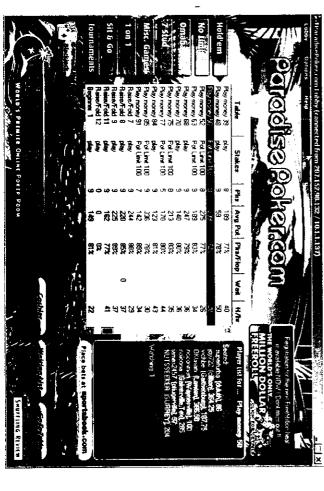


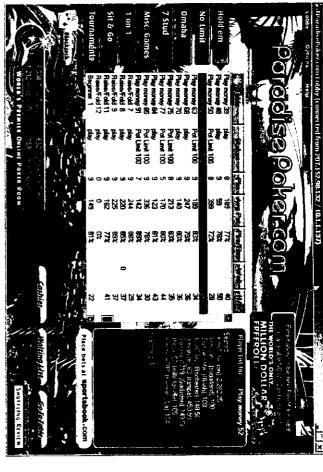


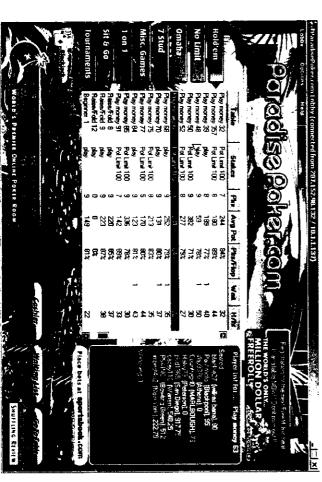


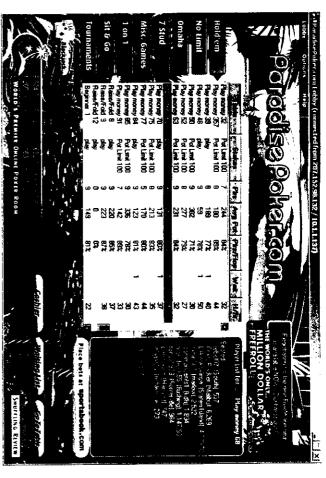


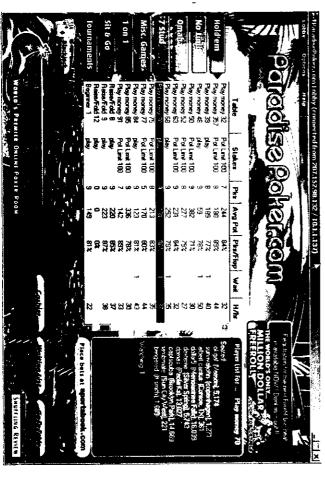


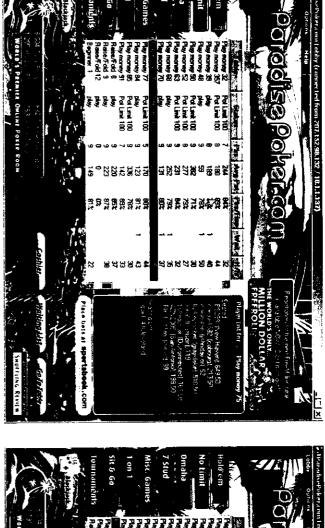


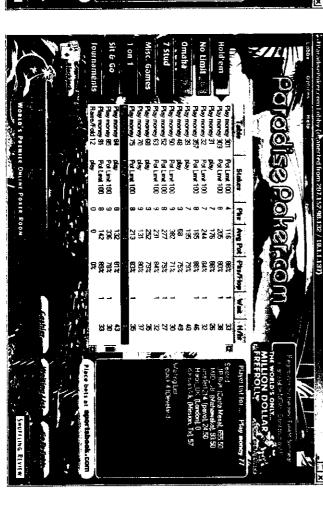


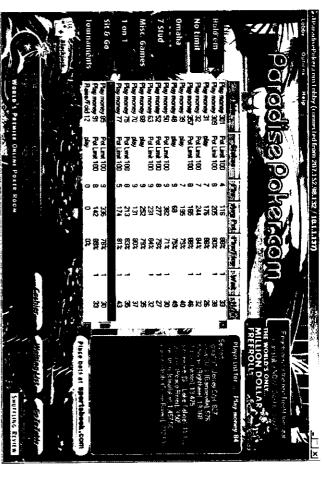




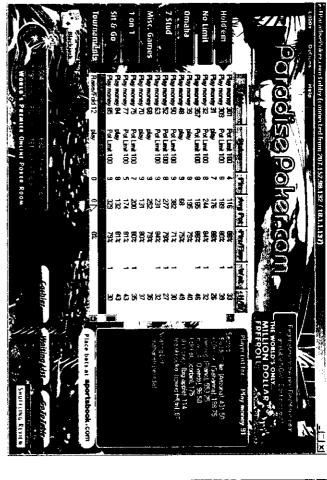


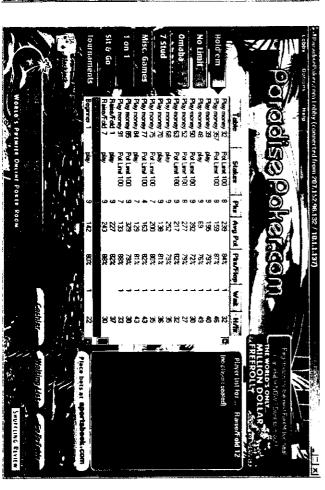


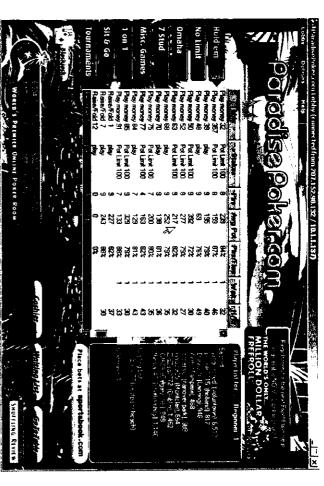


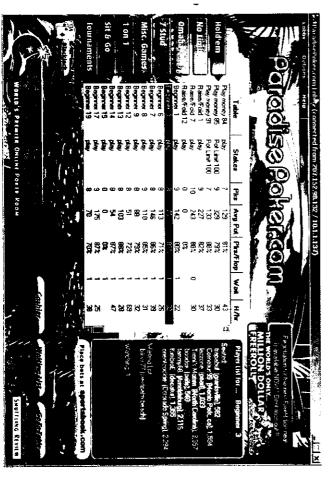


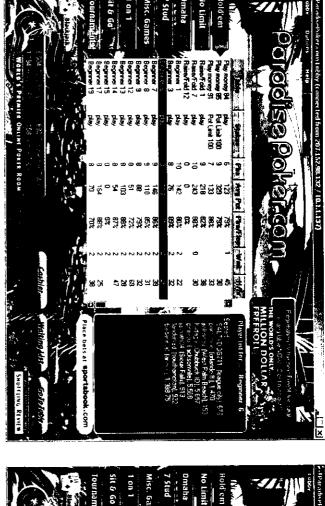


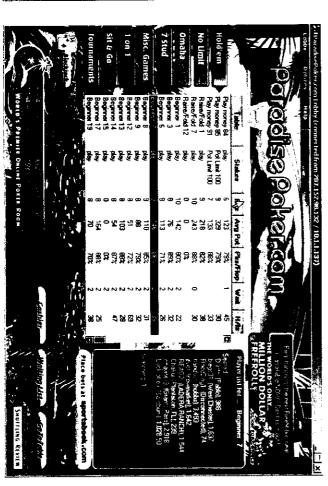


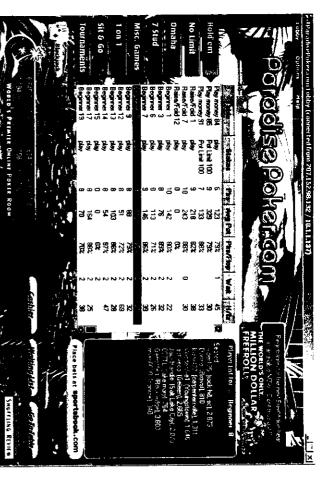


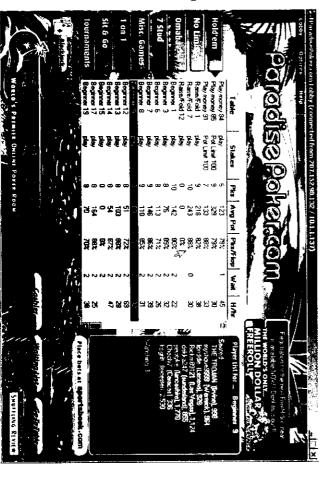


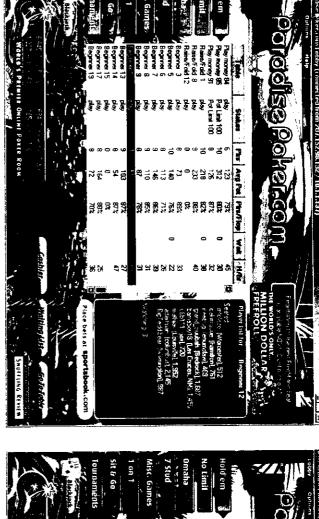


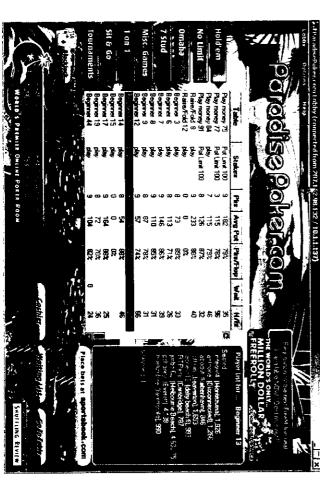


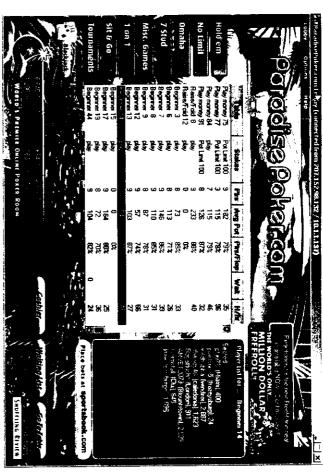


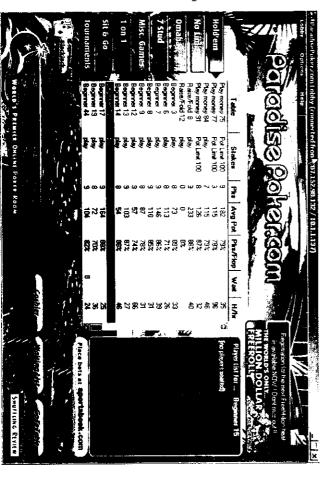


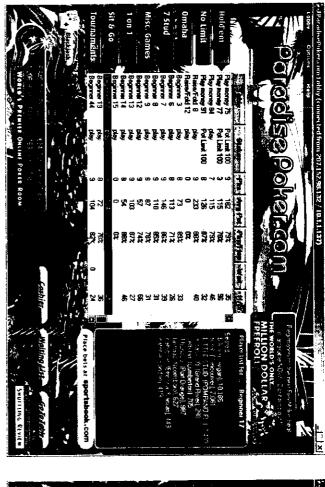


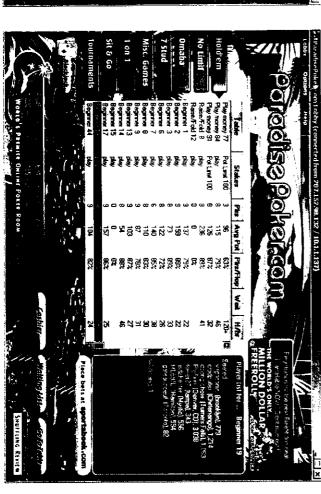


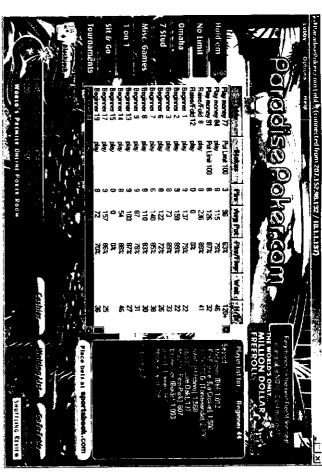


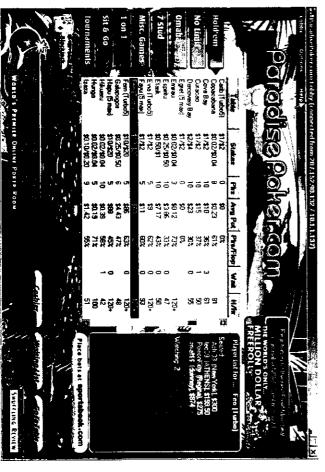


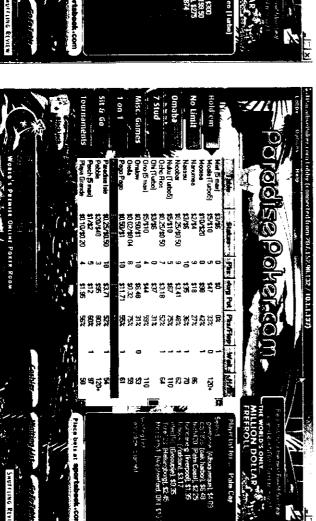


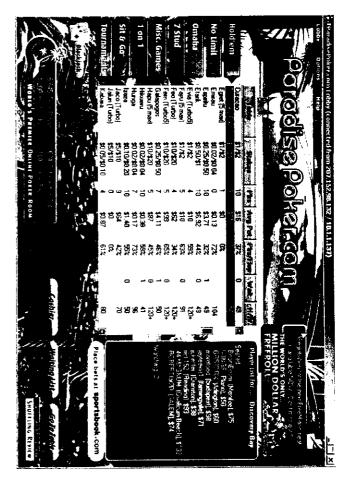


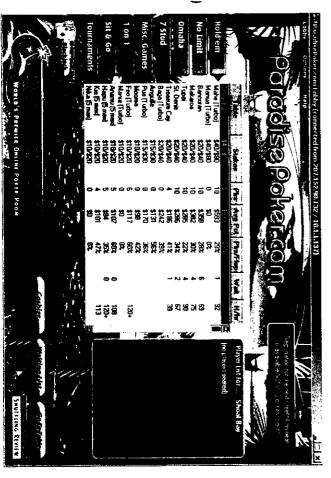


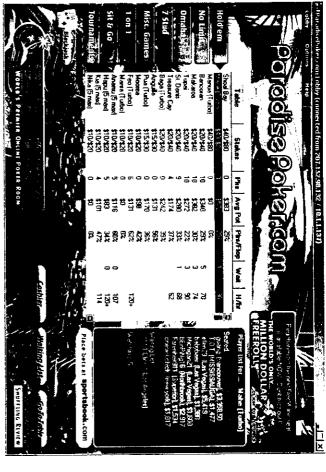


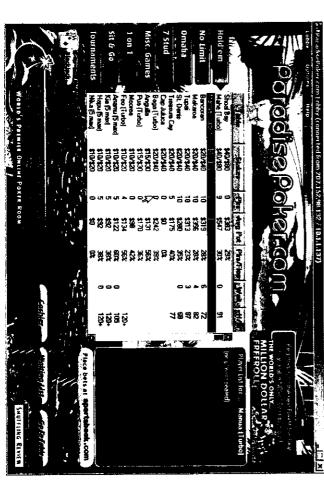


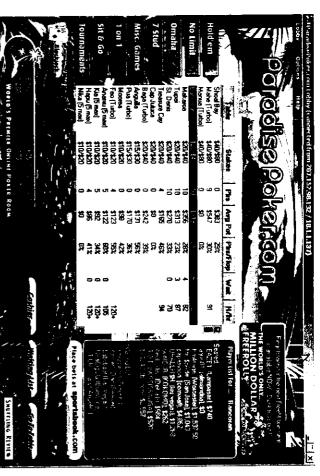


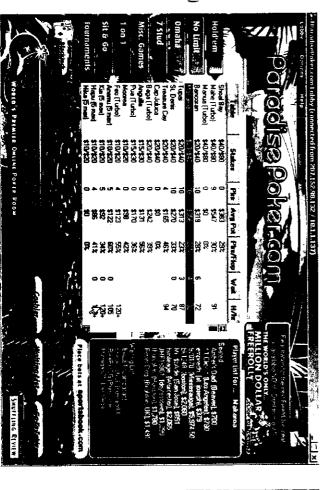


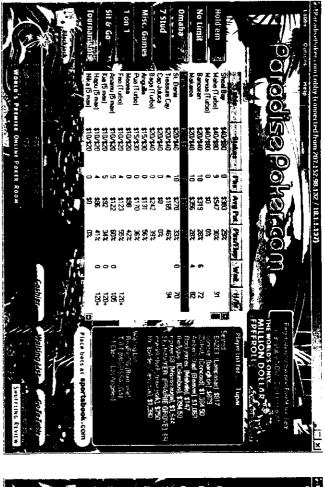


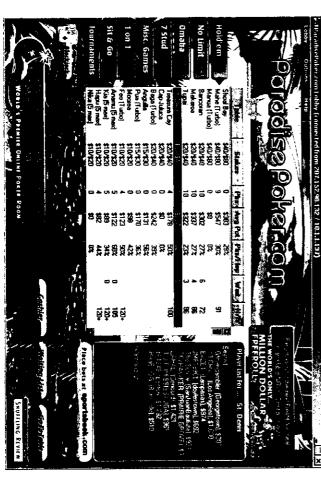


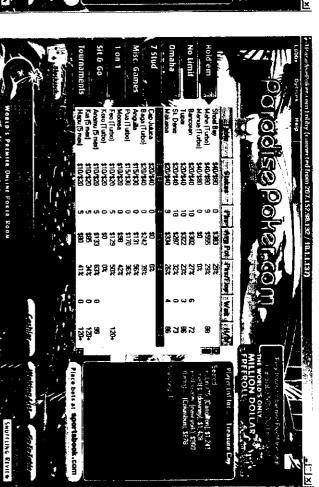


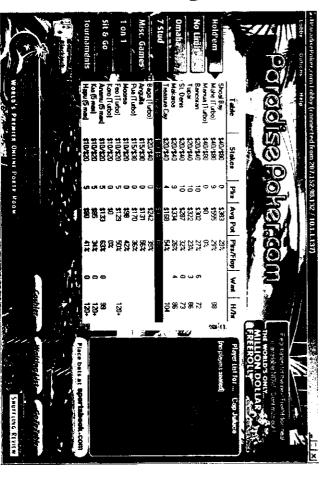


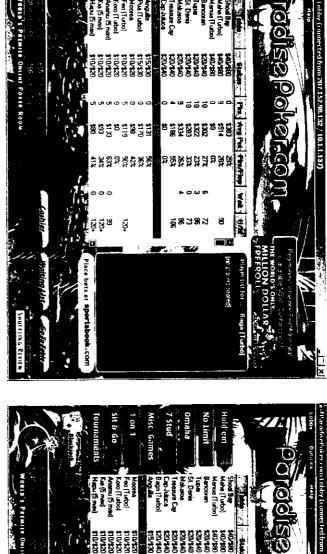




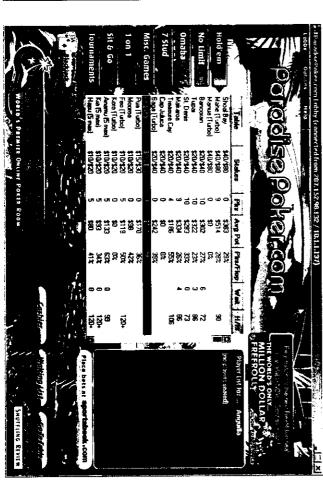


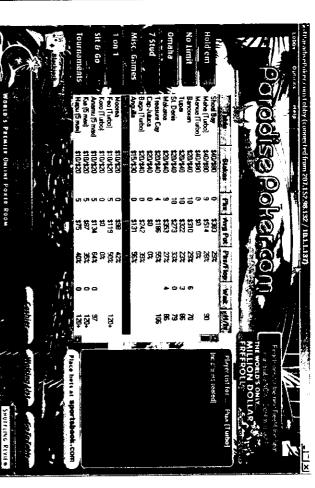


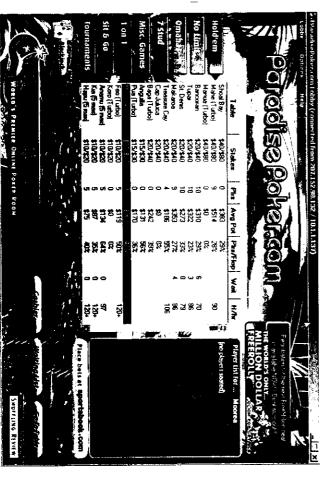


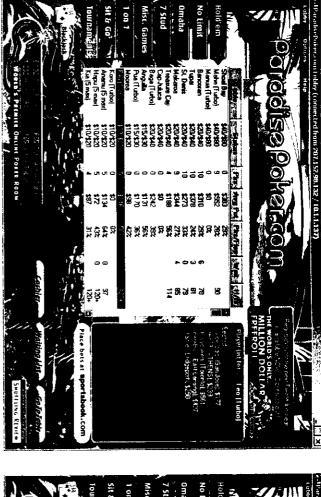


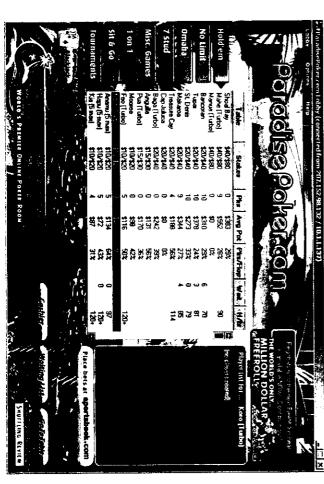
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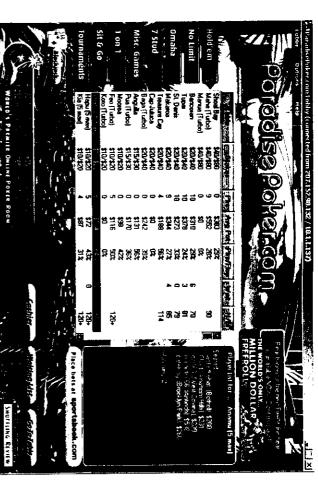




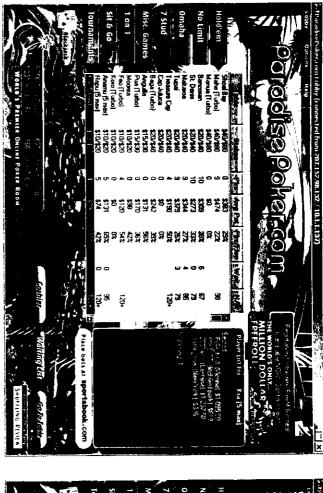


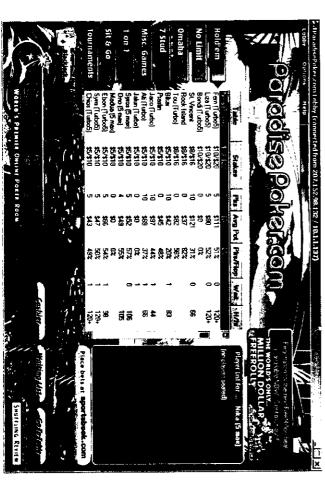


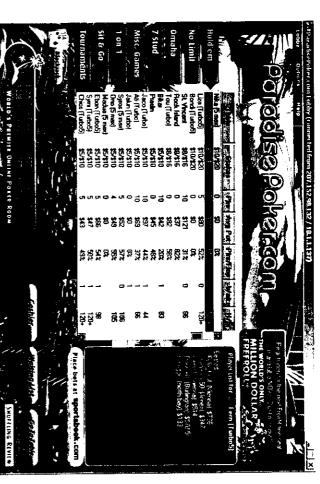


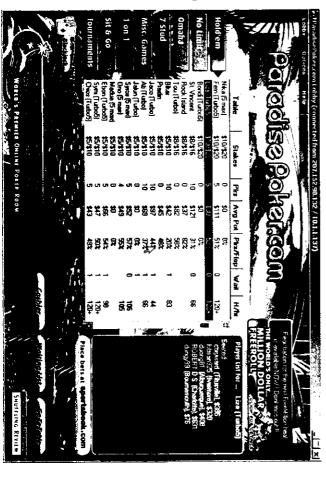


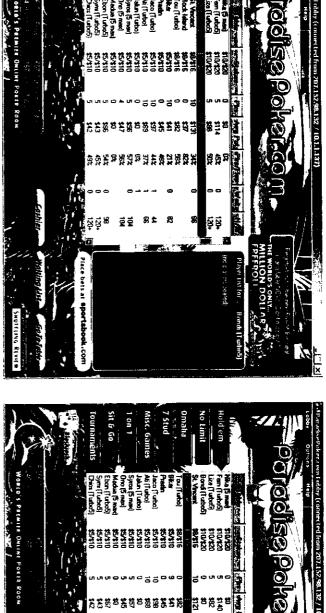




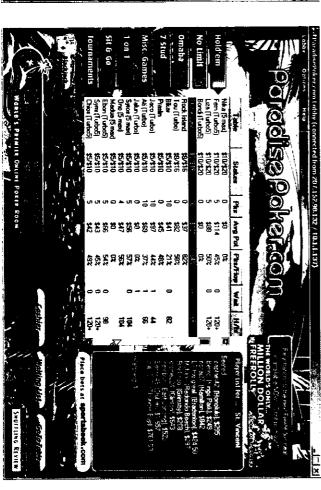






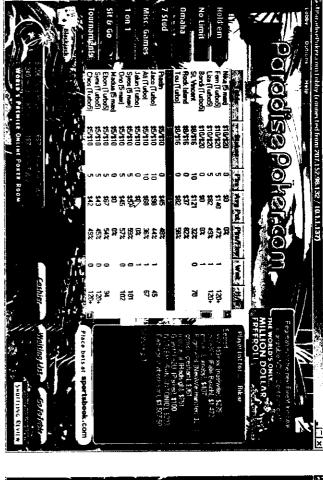


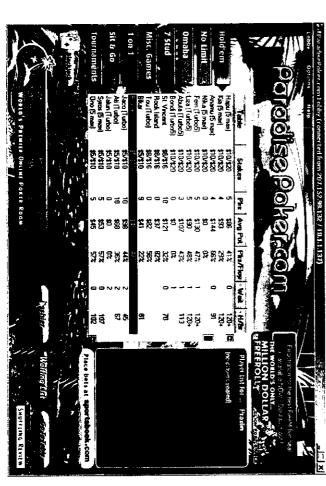
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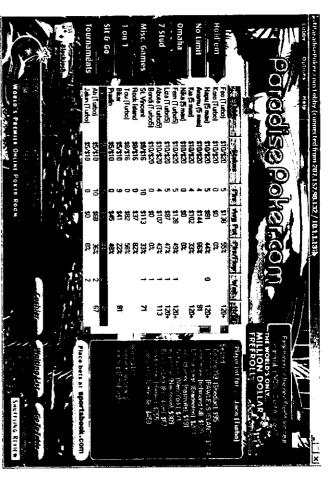


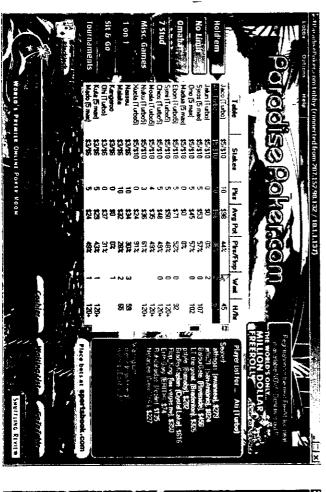
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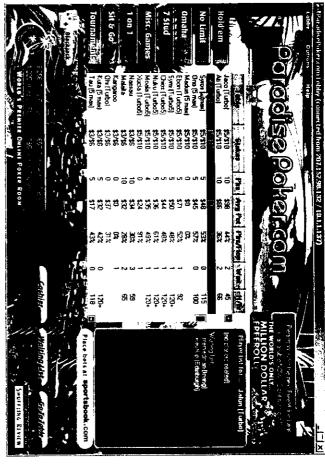


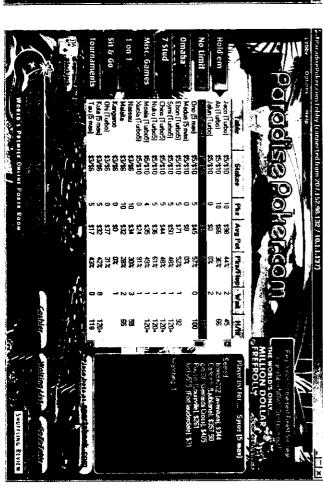


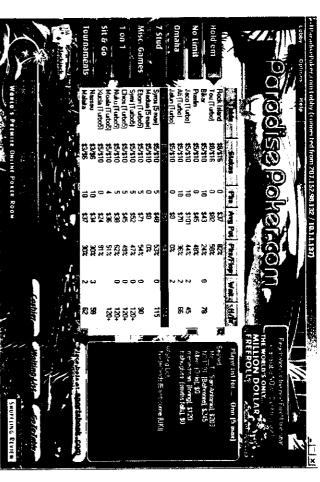


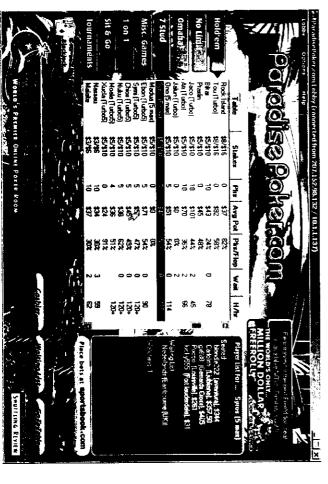


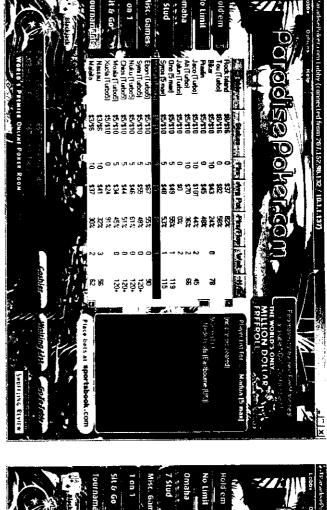


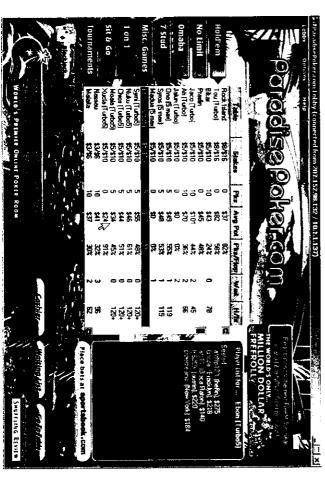


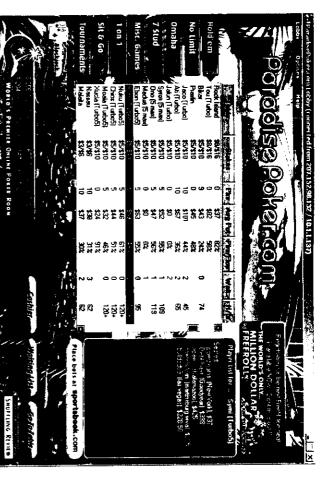


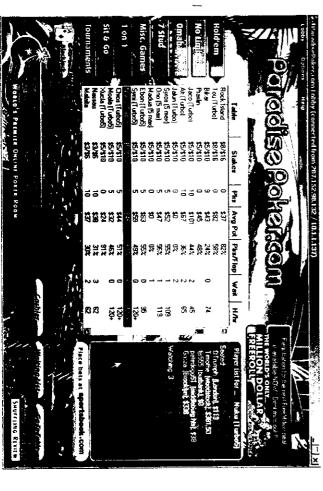


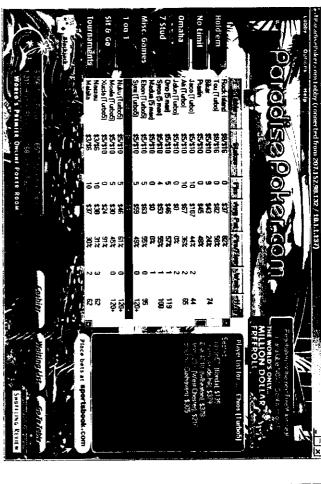


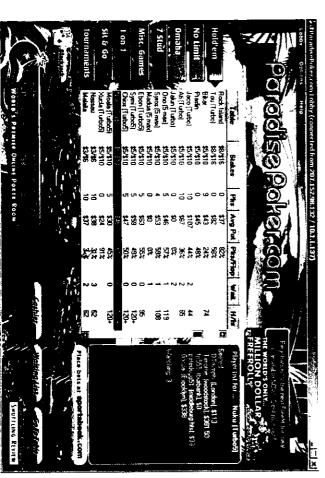


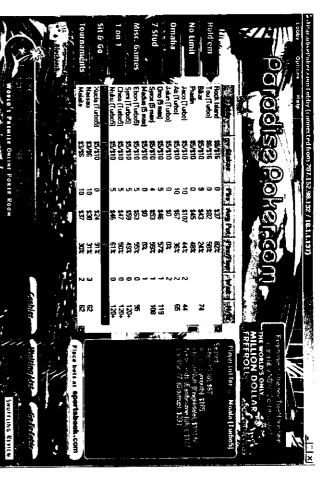




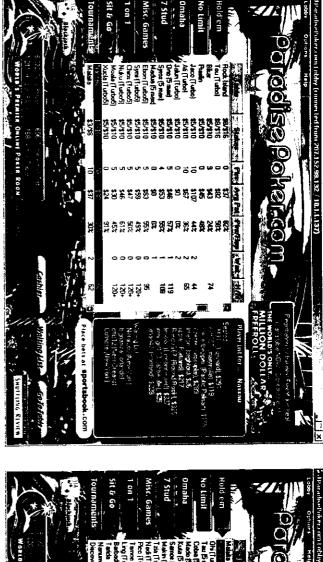


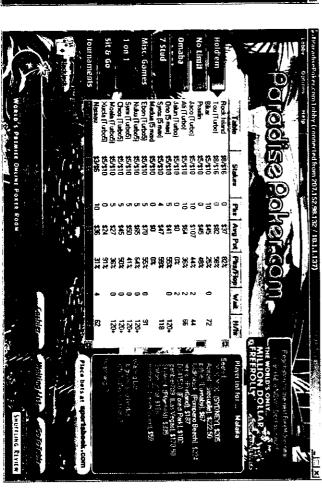


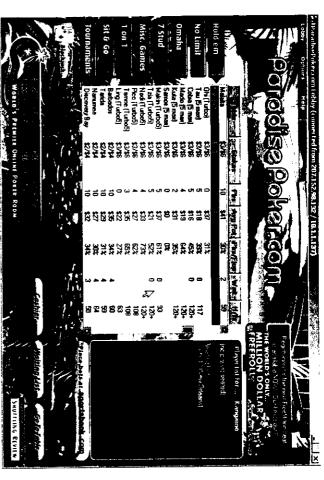


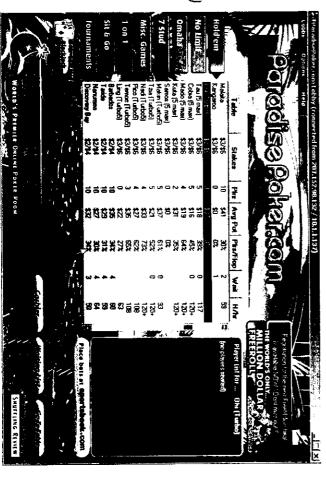


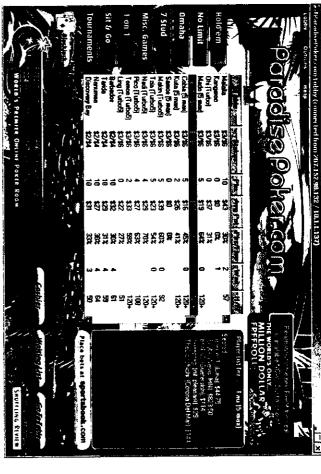


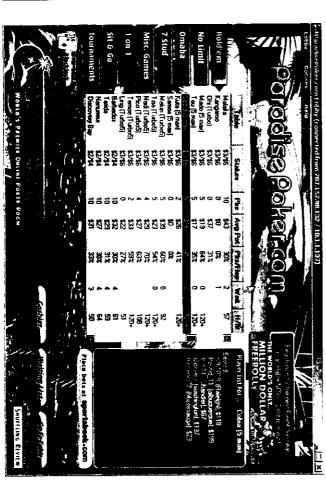


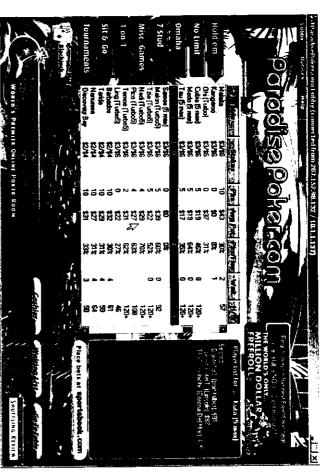


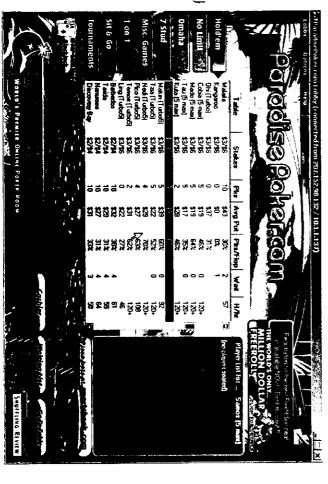


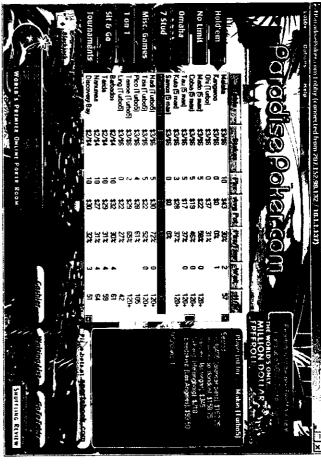


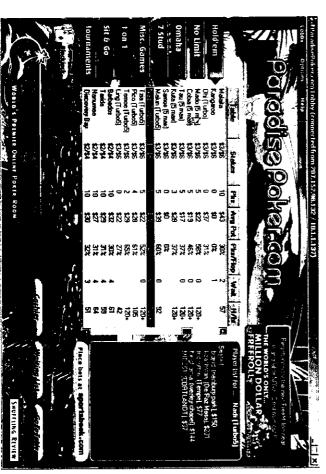


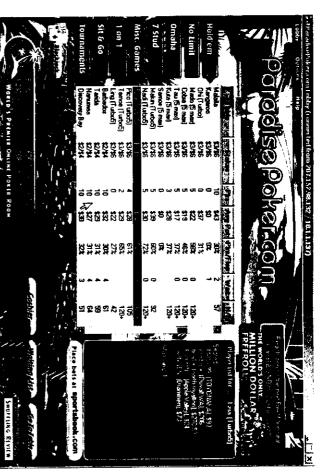


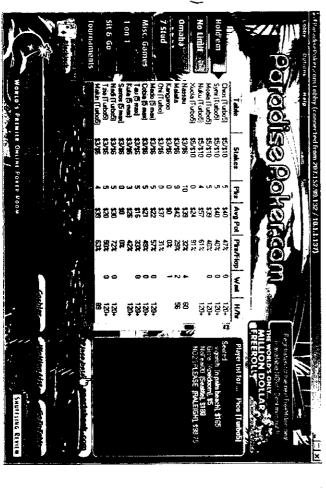


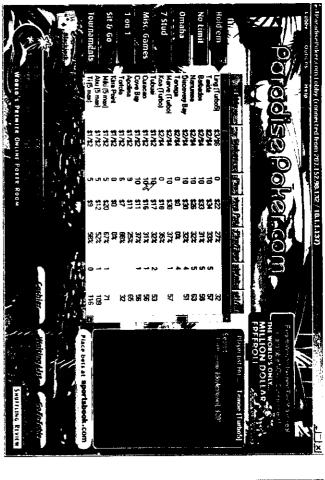


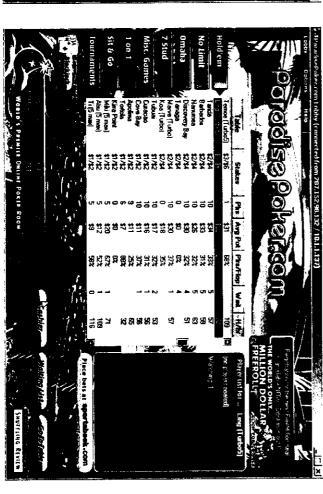


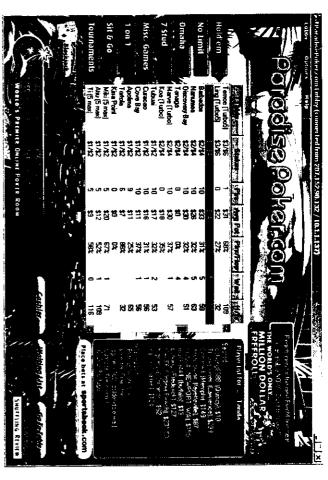


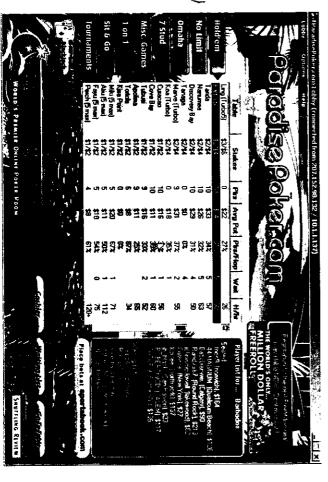


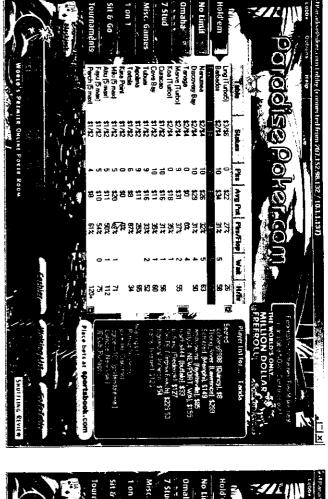


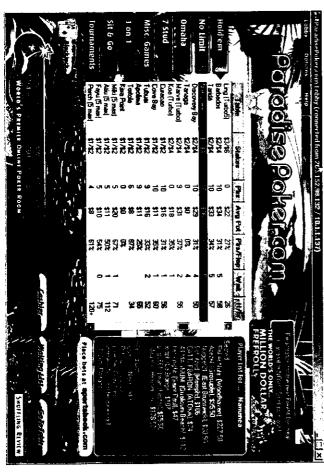


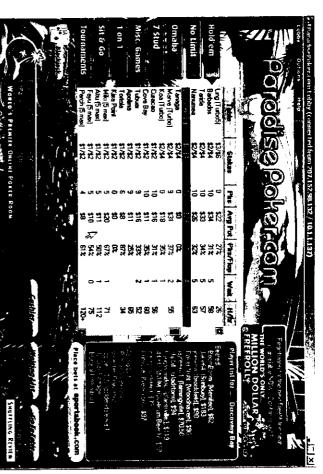


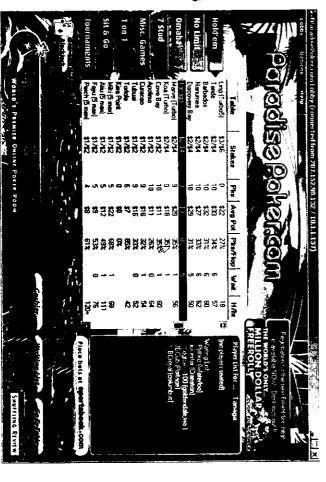




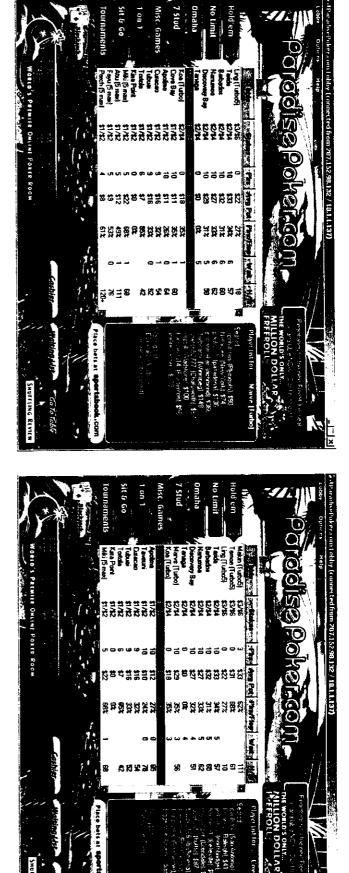


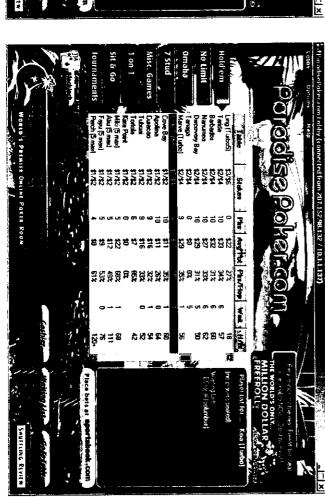


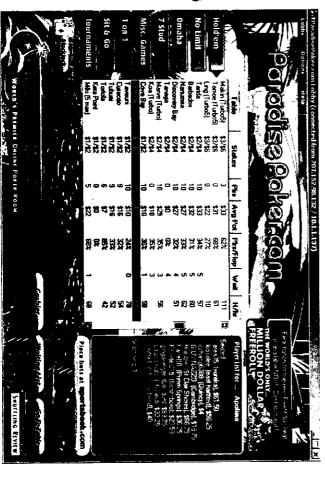


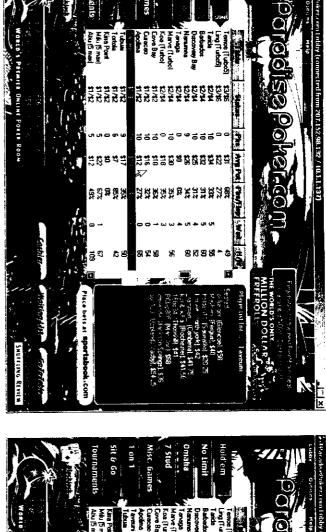


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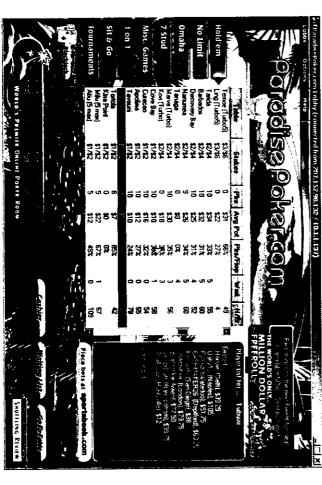




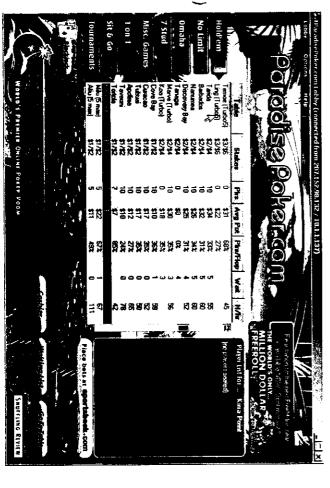


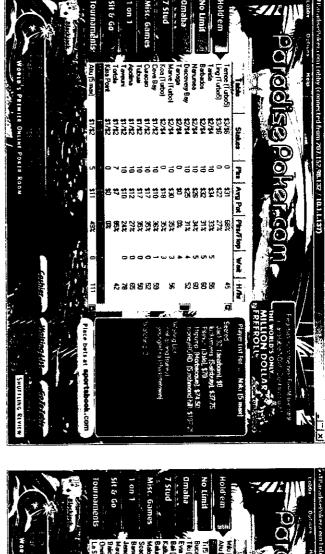


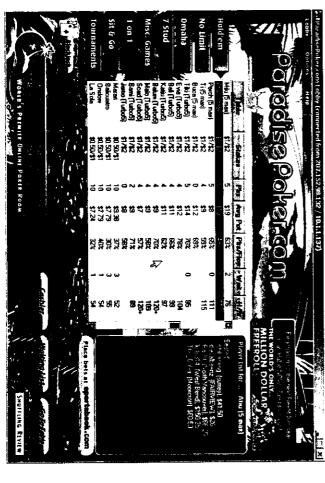
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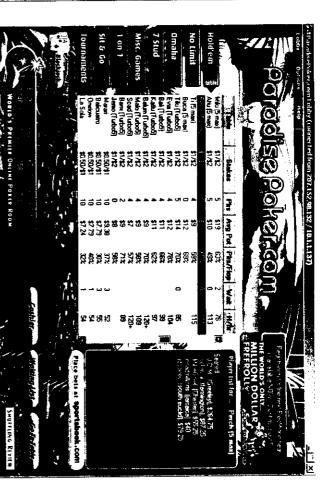


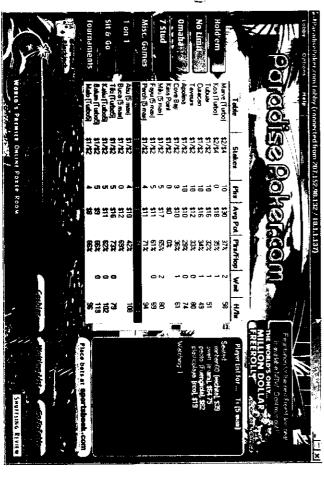
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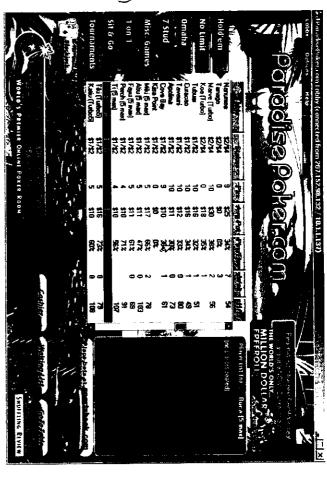


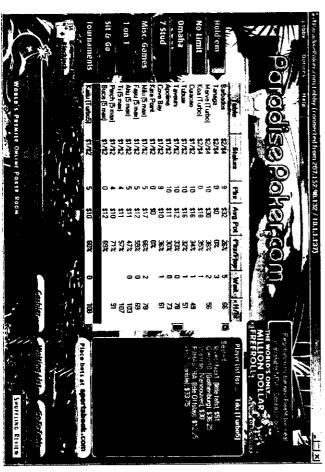


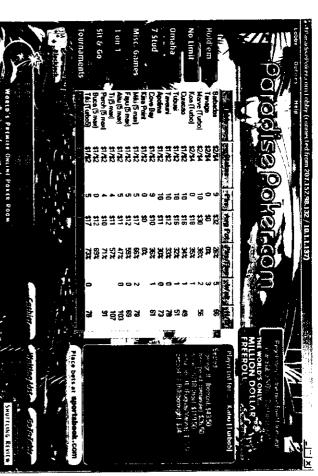


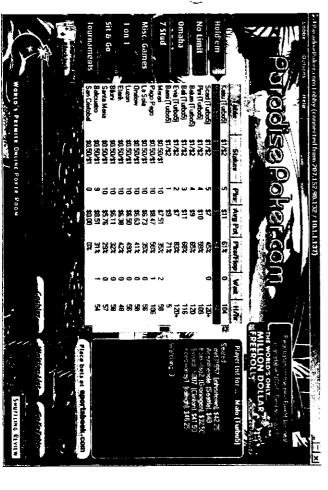


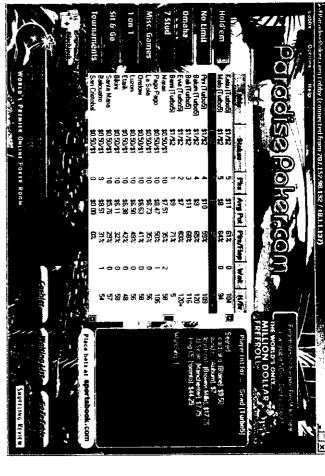


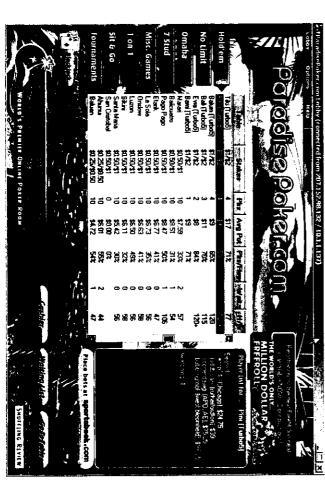


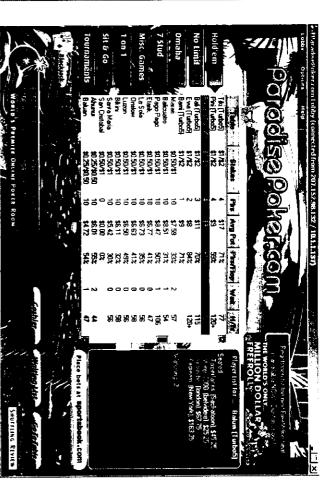


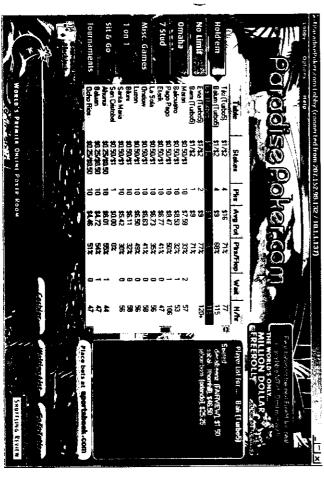


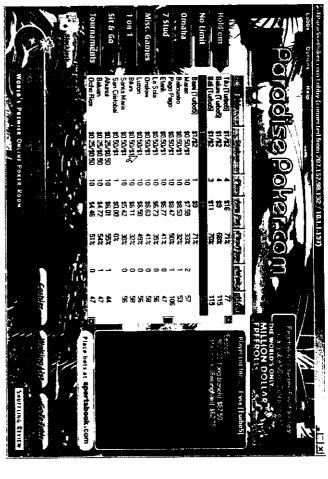


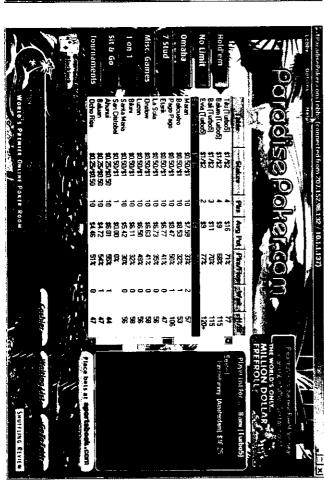


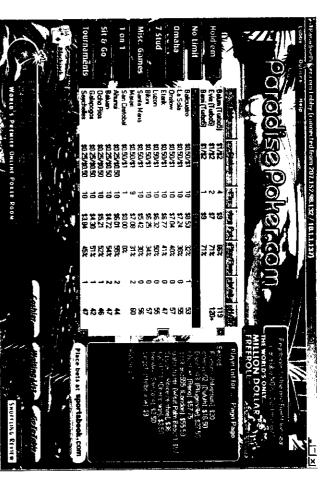


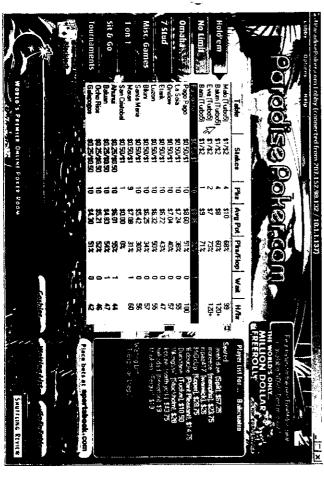


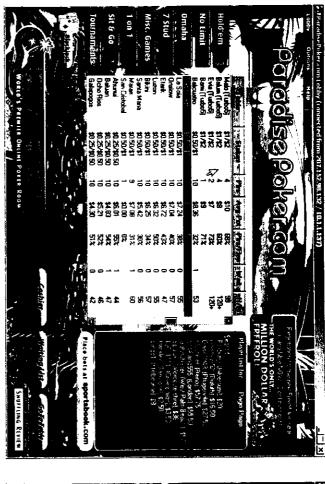


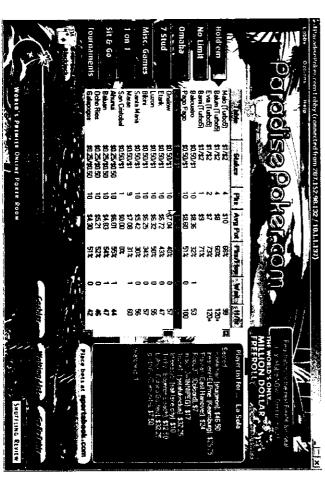


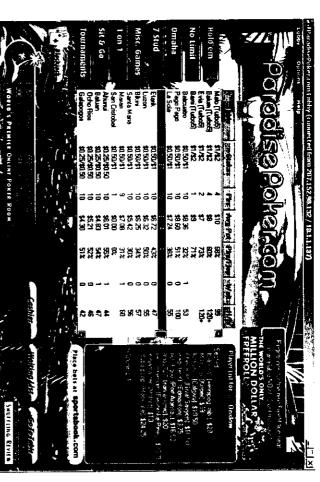


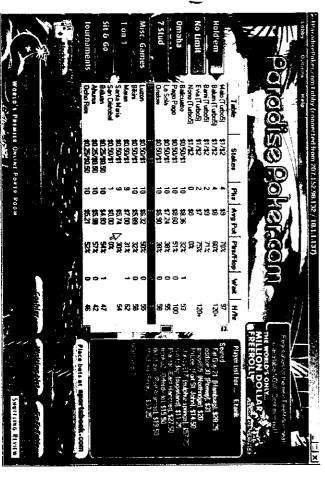


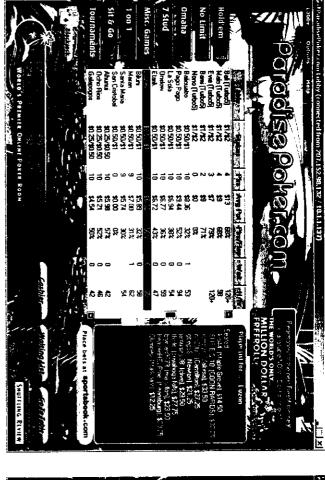


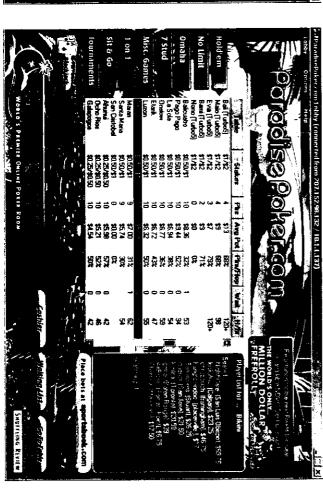


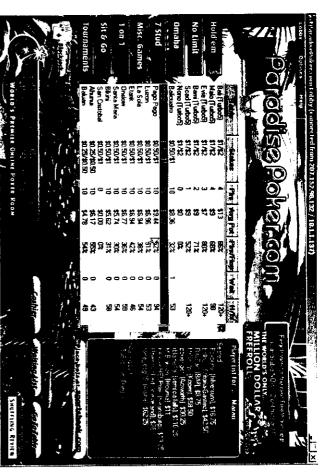












Member Name	Location	Table Name
guang	Vancouver	Mahe (Turbo)
T.O.T	Mississagua	Mahe (Turbo)
ellen29	Las Vegas	Mahe (Turbo)
babybaer	Las Vegas	Mahe (Turbo)
Michigan21	Las Vegas	Mahe (Turbo)
bEnPiNg16	Northbrook	Mahe (Turbo)
Farenheit911	Superior	Mahe (Turbo)
onesickchick	New York	Mahe (Turbo)
* 1 Click *	Los Angeles	Mahe (Turbo)
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EAZE1	Lampasas	Bancoran
arjun01	Alexandria	Bancoran
himileage	Worcester	Bancoran
Mr. \$pAde	San Jose	Bancoran
papamoon	Cornwall	Bancoran
URALLFI\$H	Las Vegas	Bancoran
WAIDJR	Kokomo	Bancoran
Anybodyy	Dekalb	Bancoran
bk1248	Boston	Bancoran
kingqueen	Toronto	Bancoran
Amber's Dad	Beaver	Bancoran
babybaer	Las Vegas	Bancoran
RealBigOG	Burnsville	Bancoran
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bk1248	Boston	Makaroa
Mr. \$pAde	San Jose	Makaroa
himileage	Worcester	Makaroa
JMF18901	Dolestown	Makaroa
1kuryakin	Houston	Makaroa
Fever Dog	Brighton, UK	Makaroa
EAZE1	Lampasas	Makaroa
onesickchick	New York	Makaroa
RealBigOG	Burnsville	Makaroa
Michigan21	Las Vegas	Makaroa
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EAZE1	Lampasas	Tupai
vongxai	Bankok	Tupai
ZAHAL	Concord	Tupai
Amber's Dad	Beaver	Tupai
Rockytimes	Melville	Tupai
theflyguy	Columbus	Tupai
nguyen68	Mississaugua	Tupai
SKYHAWKER	Praire Grove	Tupai
onesickchick	New York	Tupai
Mr. \$pAde	San Jose	Tupai
RealBigOG	Burnsville	Tupai

T.O.T	Mississagua	Tupai
* 1 Click *	Los Angeles	Tupai
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Gtowngambler	Georgetown	St. Denis
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nookanater	New York	Treasure Cay
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viewlogic	San Jose	Feo (Turbo)
teo39	Athens	Feo (Turbo)
kingqueen	Toronto	Feo (Turbo)
cerebus	East Lansing	Feo (Turbo)
Jamie	Bridgeport	Feo (Turbo)
Janne	Bridgeport	1 CO (Tarbo)
jacknthehat	Bothell	Anamu
Chad	Anaheim Hills	Anamu
gw168	West Covina	Anamu
richard6666	Anitoch	Anamu
patelog	Brooklyn Park	Anamu
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shamrock50	Jones	Fern (Turbo)
wems1	Vienna	Fern (Turbo)
DonnieB	Burlington	Fern (Turbo)
	North Bay	Fern (Turbo)
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consucrd	Titusville	Liza (Turbo5)
coryward	Livermore	Liza (Turbo5)
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KOBEKIDS	Chanotte	TEIZA (TUIDOU)

dungy99	Bournemouth	Liza (Turbo5)
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Benrc	Kings Park	St. Vincent
nosaj27	Hamilton	St. Vincent
LT the great	Bradenton	St. Vincent
MsKimii	Redondo Beach	St. Vincent
Rockrigo	Grimsby	St. Vincent
cronie224	Clinton	St. Vincent
cerebus	East Lansing	St. Vincent
Benny48	Dublin	St. Vincent
zups007	Thunder Bay	St. Vincent
xxWildGirlxx	Nashville	Bikar
zolie306	Palm Beach	Bikar
pstyle	Burnaby	Bikar
Fugitive88	New Westminster	Bikar
gtyner	Gresham	Bikar
mercuryal	Hadleigh	Bikar
GiantMike2U	Parker	Bikar
NOTLEM	San Antonio	Bikar
Barbiegir	Kobenhavn	Bikar
Collette399	Shediac	Jaco (Turbo)
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ace2three	Richmond Hill	Jaco (Turbo)
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imasnake	New Town	Jaco (Turbo)
BrooklynLeo	Brooklyn	Jaco (Turbo)
madsnobel	Herlev	Jaco (Turbo)
canuck60	Belleville	Jaco (Turbo)
memedman	Irving	Jaco (Turbo)
westkip	Edinburgh	Jaco (Turbo)
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jellis21	San Antonio	Ati (Turboo)
BaldurGate	Riverside	Ati (Turboo)
LT the great	Bradenton	Ati (Turboo)
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Flop_King	Las Vegas	Ati (Turboo)
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gx888	Gerrards Cross	Syros
Pocco	Louisville	Syros
lucky555	Fort Lauderdale	Syros
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ND1101	Baltimore	Ono
Alfen	Oslo	Ono
memedman	Irving	Ono
halhughes	Smiths Falls	Ono
Nederlands	Eastbourne, UK	Ono
afdffp123	Heflin	Ebon (Turbo5)
Grisza	Brooklyn	Ebon (Turbo5)
afs11	Boca Raton	Ebon (Turbo5)
ty6255	Austin	Ebon (Turbo5)
pipedreams	New York	Ebon (Turbo5)
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pipedreams	New York	Symi (Turbo5)
Debt Free	Goodyear	Symi (Turbo5)
apeers	Kalamazoo	Symi (Turbo5)
stretch2win	martinsburg wva	Symi (Turbo5)
bulldod69	Las Vegas	Symi (Turbo5)
DTrumph	London	Nuku (Tubo5)
Timothe	Woodstock	Nuku (Tubo5)
tjs555	Burbank	Nuku (Tubo5)
petedogg51	Middleburg Hts.	Nuku (Tubo5)
Grisza	Brooklyn	Nuku (Tubo5)
raven53	Florida	Chios (Turbo5)
smilin	Lauderhill	Chios (Turbo5)
Daly4040	Wheaton	Chios (Turbo5)
timmy203	West Chester	Chios (Turbo5)
drschm	Cuxhaven	Chios (Turbo5)
Alfen	Osio	Moala (Turbo5)
Tricias	Plymouth	Moala (Turbo5)
AbsoluteNutt	Knightdale	Moala (Turbo5)
Nederlands	Eastbourne, UK	Moala (Turbo5)
BamBam77	Glostrup	Moala (Turbo5)
-M31-	Hayward	Nassau
cliff 357	Marysville	Nassau
stevedpepper	Pacific Palisad	Nassau
Azezel	Grosuplje	Nassau
littleton	Brighton	Nassau
ripple	Portland	Nassau
RandyG67	Round Rock	Nassau
lenoxx	Disconnected	Nassau
imhisgirl123	Abbeville	Nassau

xman47	Portland	Nassau
NefarLee	New York	Nassau
	Orlando	Nassau
bignatural ottis12	New Orleans	Nassau
Cutnose	New York	Nassau
Cuthose	New TOIK	Nassau
.X.X.X.X.	Sydney	Malaita
Azezel	Grosuplje	Malaita
pstyle	Burnaby	Malaita
OldPolack	Pompano Beach	Malaita
ripple	Portland	Malaita
DS41510	Forest Park	Malaita
gambler789	Las Vegas	Malaita
Skyler34	Plainfield	Malaita
3mtae	n/a	Malaita
werner72	Leverkusen	Malaita
bignatural	Orlando	Malaita
ottis12	New Orleans	Malaita
ottis12	New Orleans	Kangaroo
mouser 1	Lima	Tau
Scylla	Nevis, MN	Tau
books2	Guetersloh	Tau
sweeptag	Mt. Pleasant	Tau
TheDonchichi	Corona Del Mar	Tau
wfh1018	Raleigh	Cobia
Pound 11	Albuquerque	Cobia
Irish11	Chandler	Cobia
drdewey	Washington	Cobia
thenewb77	Mississauga	Cobia
(Heriewori	Wilssissauga	ООВІС
Dante192	Port Talbot	Kuta
speedskater1	Lincoln	Kuta
TheDonchichi	Corona Del Mar	Kuta
W 455	A 5	Adalia
willg455	Aransas Pass	Makin
woodiewoo	London	Makin
savwex	Las Vegas	Makin
Whang	Helsingborg	Makin
bleedbluez	Los Angeles	Makin
bigind	Newbury Park	Nadi (Turbo 5)
bigjud	De Paz Mesa	Nadi (Turbo 5)
kcashman	Tempe	Nadi (Turbo 5)
micsutton		Nadi (Turbo 5)
KingKarma	Wesley Chapel	Nadi (Turbo 5)
MID251	Cortland	Madi (Tulbu 5)
NAA CAOC	Tougnalia	Tzia (Turbo 5)
MASA99	Toyonaka	Tzia (Turbo 5)
denbear	Duvall, WA	
flya1a	North Royalton	Tzia (Turbo 5)

RickMN8	Apple Valley	Tzia (Turbo 5)
WINGEN	Drammen	Tzia (Turbo 5)
vigorish	N. Palm Beach	Pico (Turbo 5)
Gijsje	Apeldoom	Pico (Turbo 5)
NoFear00	Seattle	Pico (Turbo 5)
NO2'SPLEASE	Raliegh	Pico (Turbo 5)
kantmakem	Doylestown	Temoe (Turbo 5)
cchang8888	Quincy	Tarida
Thong_lover	Lawrence	Tarida
Schlitzed	Memphi	Tarida
anytwowins	Fayetteeville	Tarida
rusty34	Newport, WA	Tarida
martha444	Buffalo	Tarida
potking	Frederick	Tarida
ValkF6	Virgina Beach	Tarida
bignatural	Orlando	Tarida
nashy	Warren	Tarida
Pythuz	Waterloo	Tarida
jokester	Cranston	Tarida
dgfce100	Goldendale, WA	Tarida
Cutnose	New York	Tarida
JDCub	Portage	Tarida
toon9	Norwich	
44-MAGNUM	Qualicum Beach	Barbados
BabyDanwei	Calgary	Barbados
RandyG67	Round Rock	Barbados
johnmcdowell	Lakewood	Barbados
Cutnose	New York	Barbados
korjlee	North York	Barbados
jb black	San Ramon	Barbados
ROBERTtat2D	Salem	Barbados
SoCalPat	Victorville	Barbados
shpbill	Gladstone	Barbados
Pythuz	Waterloo	Barbados
jokester	Cranston	Barbados
JDCub	Portage	Barbados
dgfce100	Goldendale, WA	Barbados
Poker Nuts	Woodhaven	Nanumea
Azezel	Grosuplje	Nanumea
Nugget21	East Brunswick	Nanumea
Schlitzed	Memphi	Nanumea
CATTLEBARON	Atoka	Nanumea
44-MAGNUM	Qualicum Beach	Nanumea
helsknight	Saint Paul	Nanumea
jedpt	LaGrange	Nanumea
pogo661	Manchester	Nanumea
	Henderson	Nanumea

Pythuz	Waterloo	Nanumea
jokester	Cranston	Nanumea
JDCub	Portage	Nanumea
dgfce100	Goldendale, WA	Nanumea
agioc io		
BoomBoom	Menifee	Discovery Bay
Jake 64	Sunbury	Discovery Bay
joewino	Brookfield	Discovery Bay
Poker Nuts	Woodhaven	Discovery Bay
jayteeins	Farmingville	Discovery Bay
shpbill	Gladstone	Discovery Bay
hangtowndoc	Placerville	Discovery Bay
44-MAGNUM	Qualicum Beach	Discovery Bay
nashy	Warren	Discovery Bay
Cutnose	New York	Discovery Bay
	Waterloo	Discovery Bay
Pythuz		
jokester	Cranston	Discovery Bay Discovery Bay
JDCub 100	Portage	Discovery Bay
dgfce100	Goldendale, WA	Discovery Bay
BCroyal	Columbus	Discovery Bay
spiritofstan	Plymouth	Marve
NefarLee	New York	Marve
paulus33	Pasadena	Marve
potionmaker	Richmond	Marve
Turbnator	Winnipeg	Marve
stretch52777	Chatsworth	Marve
shpbill	Gladstone	Marve
Katmandu14	Bradenton	Marve
icelite	Arden	Marve
BCroyal	Columbus	Marve
** morefood	Budapest	Marve
BCroyal	Columbus	Koa (Turbo)
paulsatx	San Antonio	Cove Bay
Lovinity	Raleigh	Cove Bay
jerkieboy	Northbridge	Cove Bay
tyrone801	Belleville	Cove Bay
jollycooper	Glendale	Cove Bay
ace0305	Huttto	Cove Bay
bazboy166	Ballymena	Cove Bay
blakezilla	Fort Carson	Cove Bay
kombucha	Rochester	Cove Bay
biggertime	Buenos Dias	Cove Bay
TuBig	San Diego	Cove Bay
area35	Eureka	Apolima
looselee	East Hartford	Apolima
cchang8888	Quincy	Apolima
GIOVINAZZO	Cambridge	Apolima
Humble	St. Clair Shores	Apolima

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KaneBB	Primm Springs	Apolima
Powder215	Scottsboro	Apolima
ginganinger	London	Apolima
pagufemale	Chaand	Apolima
raythebutch	Gila Bend	Apolima
oklunger	Glencoe	Taveuni
Mayhem	Fergus	Taveuni
holdem11	Sausalito	Taveuni
korjlee	North York	Taveuni
rainman_	Canberra	Taveuni
kombucha	Rochester	Taveuni
16bo34	Thornhill	Taveuni
BClap805	Massilon	Taveuni
drivecde	Jackson Springs	Taveuni
sus123	Upplands Vasby	Taveuni
Harryie	Delft	Tubuai
Oaky13	Naples	Tubuai
Pythuz	Waterloo	Tubuai
CASHMAKER26	Deptford	Tubuai
koskesh	San Diego	Tubuai
shazzybee	London	Tubuai
zwetschke	Wein	Tubuai
SenorBluff	Ramsbottom	Tubuai
8ball_baz	Huntsville	Tubuai
2hothands	Tulsa	Tortola
higher62380	Chandler	Tortola
Tailgater111	Cantonment	Tortola
Meta4	London	Tortola
Jayh1	London	Tortola
stikmaker	Beeville, TX	Tortola
seemoney	Vernon	Tortola
Jack32	Dearborn	Miki
luckymyers	Salisbury	Miki
Pilatius	Oslo	Miki
Mrpump	Morbecque	Miki
moneyHORD	South Richmond Hill	Miki
chikasang	Surrey	Miki
youngfellaa	Charlottetown	Miki
chikasang	Surrey	Atiu
diesalbeenz	Fairview	Atiu
Rasht	North Vancouver	Atiu
lefty314	West Bend	Atiu
The_Driller	Moorcroft	Atiu
J.D.M.	Greeley	Perch
schrmar	Farmington	Perch
MikeGowl	Chester	Perch

chadmillions	Jamaica	Perch
jdconey	South Euclid	Perch
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ronben60	Wichita	Ti
swett	Miami	Ti
pecto	Fuengirola	Ti
plasticplaya	Rico	Ti
piaoaopiaya		
lovecchios1	Little Falls	Tiki
Glenn10	Gothenburg	Tiki
stratman	Vancouver	Tiki
PJMASTRA	Isle of Islay	Tiki
iain2	Carlisle	Tiki
george III	Boston	Katiu (Turbo 5)
freespearit	Seminole	Katiu (Turbo 5)
mike225718	Troy	Katiu (Turbo 5)
adunlap001	Fuquay Varina	Katiu (Turbo 5)
zebbo413	Hillsborough	Katiu (Turbo 5)
mjd31557	Johnstown	Malo
Aceinthehole	Seattle	Malo
hoekvlag2	Gronongen	Malo
Swordfish007	Clinton	Malo
needmoney1	Raleigh	Malo
•		
cardsakq	Blaine	Scad (Turbo 5)
fishdoc	Auburn	Scad (Turbo 5)
louchico1	Browns Mills	Scad (Turbo 5)
JJ Scott	Manchester	Scad (Turbo 5)
king 65	Toronto	Scad (Turbo 5)
essp84	Chicago	Pini (Turbo 5)
kiddbryan	Rutherfordton	Pini (Turbo 5)
Soonerdawg	APO, AE	Pini (Turbo 5)
babblingfool	West Bloomfield	Pini (Turbo 5)
		<del></del>
TaipeiJacks	Saskatoon	Balum (Turbo 5)
stony_2000	Belvidere	Balum (Turbo 5)
syhumbo	London	Balum (Turbo 5)
Airdream	New York	Balum (Turbo 5)
		D II (T . L S)
diesalbeenz	Fairview	Bali (Turbo 5)
sabak	Thornhill	Bali (Turbo 5)
jabombom	Orlando	Bali (Turbo 5)
NII 12/00	Lang Breach	Evia (Turba 5)
NUX23	Long Branch	Evia (Turbo 5)
MarcKock	Birmingham	Evia (Turbo 5)
	A 4 1	Pami (Tucha 5)
Jummytummy	Amsterdam	Bami (Turbo 5)
Facility	Libraran	Page Page
Foxburry	Hilversum	Pago Pago

otterman52	Duluth	Pago Pago
Dano1948	Pflugerville	Pago Pago
Chucklet	Reno	Pago Pago
coolhand555	London	Pago Pago
Gatorchaser	West Palm Beach	Pago Pago
	Worcestershire	
Spu uk		Pago Pago
ky0 <u>o1111</u>	Champaign	Pago Pago
aomalex	San Jose	Pago Pago
Singo1	Melbourne	Pago Pago
	0.111	D-Pt
sveti duje	Split	Balicuatro
moreese	Memphis	Balicuatro
rspaz417	Warwick	Balicuatro
MrGoUp	Koper	Balicuatro
lil douche	Point Pleasure	Balicuatro
Dumdane	Tucker	Balicuatro
VikingSW	Stockholm	Balicuatro
korjlee	North York	Balicuatro
turksdad	Trevorton	Balicuatro
Mayhem	Fergus	Balicuatro
TuBig	San Diego	Balicuatro
white hair	sturgeon	La Sola
heavenHELPme	Keansburg	La Sola
Pravtar	East Hanover	La Sola
Rob207	Colcord	La Sola
imacs	Winnipeg	La Sola
1rude1	Getafuknclue	La Sola
littleeasy5	Salt Lake City	La Sola
	Boynton Beach	La Sola
Tutky boltrok	Victoria-Gasteiz	La Sola
	Zamunda	La Sola
godzulu	Zamunua	La Sola
balmoral	Winnipeg, MB	Onslow
MrGoUp	Koper	Onslow
luckyluc	Calgary	Onslow
Afarkeset	Givat Savyon	Onslow
webster99	Edmonton	Onslow
flyfishguy	Port Aransas	Onslow
	San Antonio	Onslow
tmac727	Pembroke Pines	Onslow
Rassinthemas	Milford	Onslow
ninjamaster		Onslow
duba poop	Rockville	OHSIOW
Fat Guy 21	Hamburg	Etarik
oddson30	Poway	Etarik
pinoy805	Northridge	Etarik
MrCree	Fort St. John	Etarik
	Sulphur Springs	Etarik
stumpy817	Sugarland	Etarik
win today		Etarik
Pravtar	East Hanover	Etarik
fronku2	Orfordville	Clank

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flyfishguy	Port Aransas	Etarik
Mayhem	Fergus	Etarik
kjo44	Maple Grove	Luzon
SUSIE Q 10	Coon Rapids	Luzon
wimpys	Yakima	Luzon
njs2000	Carrollton	Luzon
gbeg88	Newton	Luzon
jamurphy38	Clive	Luzon
thisle	Cuyahoga Falls	Luzon
bryman9273	Massillon	Luzon
heavenHELPme	Keansburg	Luzon
Chimney	Markham	Luzon
Orininicy	Walterdan	
NightWare	San Luis Obispo	Bikini
luckyluc	Calgary	Bikini
chrisbouch	Framingham	Bikini
hangtowndoc	Placerville	Bikini
Tomazores	Stuart	Bikini
Guguci	San Jose	Bikini
kljnina	Toronto	Bikini
gitmo	Baton Rouge	Bikini
AirRichy	Somers Point	Bikini
Chimney	Markham	Bikini
Ommoy	- Indiana	
Foxburry	Hilversum	Marari
boltrok	Vitoria-Gasteiz	Marari
RayEarl	Bali	Marari
MrGoUp	Koper	Marari
pbuenger	Acworth	Marari
rblaine19	Seneca Falls	Marari
M Blanton	Houma	Marari
heavenHELPme	Keansburg	Marari
Ubensmoked	Cleveland	Marari
tone_dog75	Aloha	Marari
TuBig	San Diego	Marari
croup55	Southend	Santa Maria
tomalex	San Jose	Santa Maria
cnotexxx	Phoenix	Santa Maria
HeadEraser	Escondido	Santa Maria
luckyluc	Calgary	Santa Maria
Nario	New York	Santa Maria
VikingSW	Stckholm	Santa Maria
Wendee	Vail, AZ	Santa Maria
flyfishingguy	Port Arnsas	Santa Maria
fatman032181	Gainesville	Santa Maria
Ridge68	Leeds, UK	Ocho Rios
FLYCATCHER	Southlake	Ocho Rios
Nario	New York	Ocho Rios
Bobomaniak	Heidelberg	Ocho Rios
Dobottiariak	1	

mezerr	Olathe	Ocho Rios
Bingo22	Binghamton	Ocho Rios
Nicky K	Tallahassee	Ocho Rios
GONZOO	Glostrup	Ocho Rios
Frutschler	Sandhausen	Ocho Rios
ZZZNUTS	San Juan Del Sun	Ocho Rios
ZZZITO TO	Todair Davidari	
tmac727	San Antonio	Baluan
zataelleon	Hartland	Baluan
dunjoh	Tallahassee	Baluan
racquetman05	Round Rock	Baluan
*Denver*	Columbus	Baluan
takibuli	Sopron	Baluan
celfoneguy26	Temple	Baluan
JERSEY NICK	Yourmomsbox	Baluan
	Naples	Baluan
timmayyy_d	Perth	Baluan
tokyos	i Giui	Jaidan
littlebyrd	Bensalem	Arutanga
krokofant	Malmo	Arutanga
juanjo55	San Antonio	Arutanga
flysuperstar	Hamburg	Arutanga
Tintoretto	Cologne	Arutanga
talent25	Izola	Arutanga
sizzle84	Boston	Arutanga
Ralph8812121	Clinton	Arutanga
Robin 138	Mena	Arutanga
chiefen	Kritiansand	Arutanga
Cilieteti	Killiansand	7 ii didinga
drewmanshoe	Fort Dodge	Baltra
Rockmegently	Okemos	Baltra
marcia412	Seldovia	Baltra
talent25	Izola	Baltra
team2biker	Green Bay	Baltra
M.K.H.	Aalborg	Baltra
hdshep	York	Baltra
Bauknecht	Telford	Baitra
i rezz420	Morgantown	Baltra
kinina	Toronto	Baltra
Killina	TOTOTAG	
Mepancho	Dallas	Play money 100
BuckB23	Fort Walton Beach	Play money 100
Grunt33	Columbia	Play money 100
silverfoxone	Disconnected	Play money 100
AKAOutLaw	Garden Grove	Play money 100
bamabert79	Birmingham	Play money 100
JudiR2	Oregonia	Play money 100
waters19	Barrow	Play money 100
doulbledds	Pasco	Play money 100
douibledus	1 4300	i lay money 100
Gramma loan	Las Venas	Play money 103
GrammaJoan im5points	Las Vegas Denver	Play money 103
im5points	DOLLAGI	1. 1dy 1110110y 100

Rome Clone	St. Johns	Play money 103
babyblink	Hjerm	Play money 103
clancytheman	New York	Play money 103
Hannee2	Milan, IL	Play money 103
Danish20	Grenaa	Play money 103
smr101	Elgin	Play money 103
diana83	Stafford, GB	Play money 103
Budweis-Me	Ukiah	Play money 103
noicona	Gainesville, TX	Play money 103
bsquarepants	Las Vegas	Play Money 106
G Force 83	Disconnected	Play Money 106
Foxy Ladi	UK	Play Money 106
painter7	Pembroke Pines	Play Money 106
jedburn2000	Penfield	Play Money 106
slurr 1	Rock Island	Play Money 106
prettynana	Easton	Play Money 106
LiQuorBox	Bellevue	Play Money 106
reigategordi	Reigate	Play Money 106
ninakay	Las Vegas	Play money 11
gauthier111*	Disconnected	Play money 11
jerry mack	Fallbrook, CA	Play money 11
swip_	sater	Play money 11
kholmes22	Oklahoma	Play money 11
lananic8	Johnstown	Play money 11
812vt	D.C.	Play money 11
flyfish51	Hometown	Play money 11
Bean61	London	Play money 11
Budweis-Me	Ukiah	Play money 11
noicona	Gainesville, TX	Play money 11
david1946	Port Orange	Play money 112
ralphael	Laramie	Play money 112
nongaon	Houston	Play money 112
justinrules	Winnipeg	Play money 112
ipersaud	Jersey City	Play money 112
xxslim247xx	North Merrick	Play money 112
noicona	Gainesville, TX	Play money 112
brad mas	Mpls	Play money 115
brad_man	Adams	Play money 115
DaBigNuts tabout	Memphis	Play money 115
tnhawk	Wellsville	Play money 115
csosna	Winchester	Play money 115
stanandtab dodgev10	Claremont	Play money 115
	Woodridge	Play money 115
Wesolo		Play money 115
tblonde	Jackson  Jacksonville	Play money 115
dapjetski9	Manchester	Play money 115
chicsoup	rvianchester	Flay money 110
cardshark05	Centerville	Play money 117

redtr	West Palm Beach	Play money 117
BermudaBob	Atlanta	Play money 117
DaddyD367	Cudahy	Play money 117
whyme277	Wisconsin	Play money 117
KCFlash	Parkville	Play money 120
six-kill	Central FL	Play money 120
jolie1954	Bossier City	Play money 120
cococat	El Paso	Play money 120
squeeser	Bermuda	Play money 120
whipper pill	Miami	Play money 120
blunted22	Eagle Butte	Play money 120
waynesfc	Falling Waters	Play money 128
bobaby2k1	Indianapolis	Play money 128
SEAN66	Miami	Play money 128
letmeout9048	Brigantine	Play money 128
niffirg	Baltimore	Play money 128
big pelon	Montebello	Play money 128
spuds47	Showlow	Play money 128
radu70mld	Vaslui	Play money 128
pocorojo	Chicago	Play money 128
p00010j0	Cinoago	
phynanzer	Sherman Oaks	Play money 137
Celver	Bonn	Play money 137
BaltimoreOIC	Baltimore	Play money 137
gualo	Winton	Play money 137
mousekateer	Baltimore	Play money 137
sophie46	Longmont	Play money 137
bossvoss	Moreno Valley	Play money 137
50337035	7.10.0710 7 4.110	
bikerbabe15	texarkana.ar	Play money 138
cicixi	Paris	Play money 138
Tiger7777777	Laredo	Play money 138
mr big1	New York	Play money 138
tmoot	Bahrain	Play money 138
atmosphere72	Paris	Play money 138
ShoDownBrown	Upstate	Play money 148
wildestman	Kingsport	Play money 148
Tuckdog	Dallas	Play money 148
chipt	Westminster	Play money 148
triggtrigg	Bristol	Play money 148
9999		<u> </u>
HarryBallzac	Findlay	Play money 153
reed101	Bloomington	Play money 153
WisMike	Waukesha	Play money 153
Aleste	Stockholm	Play money 153
bayoutroop	Groves	Play money 153
mandarze	Rishon	Play money 153
anna95240	Lodi, CA	Play money 157

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	In. Ott.	IDlay manay 157
babygump	Bay City	Play money 157
gollywog	Victoria, Canada	Play money 157
jumpinbenny	Queensbury	Play money 157
raybb	Prince George	Play money 157
ClubFace	Nuneaton	Play money 157
Arlottie	Reading	Play money 157
mgbeast	Barnstaple	Play money 157
sparky146	Latham	Play money 16
ferd123	Ironton	Play money 16
LEVIBLU	Niagara Falls	Play money 16
LaLoca	Bronx	Play money 16
jack19403	Norristown	Play money 16
ahillpcola	Pensacola	Play money 16
bettyboop7	Needles	Play money 16
PDeBaca	National City	Play money 16
Garvat1	Moon	Play money 16
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anna95240	Lodi, CA	Play money 157
partygirl68	St. Thomas, PA	Play money 157
babygump	Bay City	Play money 157
gollywog	Victoria, Canada	Play money 157
jumpinbenny	Queensbury	Play money 157
raybb	Prince George	Play money 157
ClubFace	Nuneaton	Play money 157
Arlottie	Reading	Play money 157
mgbeast	Barnstaple	Play money 157
indianjack	Russelville	Play money 157
indianjaok	r tube of vine	
LJUDAD	Homosassa, FL	Play money 160
CAPECODCRUZR	Cape Cod, MA	Play money 160
noicona	Gainesville, TX	Play money 160
PONTIAC55	Lawrenceburg	Play money 160
militanil	Naperville	Play money 160
ftnman	Pineville, NC	Play money 160
bunker77	LA	Play money 160
quest4	Daville, CA	Play money 160
quosti	2411101 011	
corkus7	Huntington	Play money 162
Nickels93	Southlake	Play money 162
Mystere	San Juan, PR	Play money 162
dhova7	Pittsburgh	Play money 162
biguyca	PA	Play money 162
bsmith06	Cedar Falls	Play money 162
indianjack	Russelville	Play money 162
initialijatik	тлазетине	1 lay money 102
tbone150	Temple Hills	Play money 165
skip05	Waynesville	Play money 165
Lambergini11	Grand Rapids	Play money 165
tok2me	Jupiter	Play money 165
smeller1214	Pavo	Play money 165
	Sherman, IL	Play money 165
quickss	Jonethian, IL	Ir lay money 100

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niamh2005	Dublin	Play money 165
blondie1958	Cumberland	Play money 165
tenyo	Santee	Play money 165
nemos777	Houston	Play money 165
indianjack	Russelville	Play money 165
indian jaron		
dicklet	Ipswich	Play money 171
tango_jd	Solihull, UK	Play money 171
indianjack	Russelville	Play money 171
EffieLB	East Falmouth	Play money 171
snakeseye	Sweden	Play money 174
Glassman45	Danville	Play money 174
samthemex	East Lansing	Play money 174
Khemri	Manchester	Play money 174
tmp12	Ohio	Play money 174
		170
siuna	fairfield	Play money 179
MGodfrey2003	Aurora	Play money 179
maspainter	Clintonville	Play money 179
chipt	Westminster	Play money 179
MotherHubbar	Fernley	Play money 179
Stardust101	Houston	Play money 179
tammy68	Arnoldsburg	Play money 179
Long79	B'ham	Play money 179
indianjack	Russelville	Play money 179
Transam01	Temecula	Play money 187
little bit 4	Forest City	Play money 226
Mrhealthnut	S.F.	Play money 226
joe21811	Berlin md.	Play money 226
Connie01	Union City	Play money 226
fast_eddie12	Berwyn	Play money 226
Ice Queen	Medicine Hat	Play money 226
full of chip	Saltville	Play money 226
snuffy1952	Harker Heights	Play money 226
ivory	Gardner, ND	Play money 226
doug@wab	West Palm Beach	Play money 23
dave@wpb	Wynne	Play money 23
g5d9s borntolose50	Powell, WY	Play money 23
remy 123	Hong Kong	Play money 23
rico716	North Augusta	Play money 23
holdwhat99	Mobile	Play money 23
madarze	Rishon	Play money 23
Madaize	1 1011011	1.127
tabledresser	New York, NY	Play money 243
Borisen	Stockholm	Play money 243
gljimmymac	Oregon City	Play money 243
trail915	Tishomingo	Play money 243
CJb63031	Florissant	Play money 243

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kitkay	Lebanon	Play money 243
Lebowski67	Toronto	Play money 243
brudeful	Chattanooga	Play money 247
Showtime**	Cottage Grove	Play money 247
MiMacDaddy	Milford	Play money 247
Gusis55	Cape Coral, FL	Play money 247
otis34	Bucyrus	Play money 247
Charlest2000	Washington DC	Play money 247
Ondricotzooo	Trabinington DC	, , , , , , , , , , , , , , , , , , , ,
Roadhoser	Cincinatti	Play money 288
gilhart1	St. Clair Shore	Play money 288
AcuDr	Huntington	Play money 288
Tifney	San Jacinto	Play money 288
fredcox	Okalahoma City	Play money 288
Sergey92127	San Diego	Play money 288
mrfusion	Pittsburgh	Play money 288
skywalker35	Durham	Play money 288
andy147	UK	Play money 288
peechez	Olivehurst	Play money 288
peechez	Oliveriurst	T lay money 200
keld J-F	Condorbora	Play money 294
Keiu J-r	Sonderborg	r lay money 20 T
uplusky1055	Campton	Play money 301
unlucky1955	Green Island Br	Play money 301
DiamondXguy BLUEDONKEY	Bay City	Play money 301
	Humacao	Play money 301
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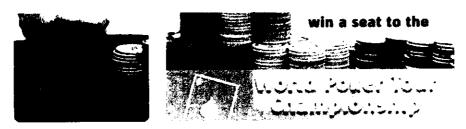
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## Wanna be a World Poker Champion? Paradise can make it happen!



The World Poker Tour Championship is the last stop on the WPT circuit and it's quickly becoming one of the world's most elite poker events. Win a WPT Champseat in Paradise and you'll be sitting among the world's best in the luxurious Bellagio Hotel this spring! This is what poker dreams are made of – pros, Vegasand a prize pool expected to be well in to the millions.

## Our \$27,000 WPT Championship Prize Package includes:

- \$25,000 (plus \$500 entry fee) World Poker Tour Championship seat in the Bellagio main event, Las Vegas, April 18th— 24th 2006
- \$1500 cash to your Paradise Poker account to cover airfare, hotel and travel expenses

#### How to win your seat

On the last Saturday of every month you can join 'WPT Champ' online in Paradise. Tournaments kick off at 5 PM EST (New York), 2 pm PST (Los Angeles), 10 pm BST (London), 9 pm GMT. We Guarantee at least one prize package will be awarded per fournament.

You can jump directly into the WPT Champ main event for \$500 or you can win your way there via a satellite. Multi table tournaments will start as low as \$7 andoffer R&A and straight buy—in options. Check under the Satellite tab for the next 'Champ Seats!' tournament

### Check back to see who's on Team Paradise for the WPT Championship!

#### **Terms and Conditions**

- Winning players must play in the WPT Championship event and can not exchange the prize for cash. If you do not play in the WPT
  Championship event you will forfeit your prize. In the event a player wins more than one online WPT Championship package, he/she may
  transfer the additional prize(s) to another Paradise player.
- 2. The player's \$25,500 (USD) entry fee will be paid directly by Paradise Poker. Paradise will also credit winning player's accounts \$1,500 (USD) in order to cover airfare, hotel and misc, expenses Players are responsible for their own travel and hotel arrangements.
- 3. All tournaments will be played according to the Paradise Poker multi-table tournament rules.
- Paradise reserves the right to cancel or postpone any WPT Championship online tournament in the event that a server problem or internet
  routing problem prevents many players from accessing the site. Promotion will run until March 25, 2006 unless otherwise determined by
  management.
- Players participating in the WPT Championship event as part of their Paradise prize package agree to promote Paradise at the event. Players are not permitted to wear competitive card room shirts or other sponsor's gear at the gaming tables.
- 6. Paradise Poker is not affiliated with or related to the WPT.
- 7. Paradise Poker has no affiliation with the Bellagio and is not a sponsor or promoter of this site's event.
- 8. Paradise Poker charges a 9% fee on the WPT Championship tournament which is taken out of the total buy-in pool. The next 3 highest finishing players, after the WPT prize(s), are respectively paid 50%, 30% and 20% of the remaining prize pool.
- 9. Offer only open to players aged 21 and over. Employees and immediate family members of employees of ParadisePoker.com, its associated companies, affiliates, advertising and promotional agencies are not eligible to take part in the Promotion. Entry to the Promotion is limited to those people who are resident in countries where their registration and use of the Cardroom is permitted by the law of their country.
- 10. Management's decision is final-

Good luck to all Players!

## Las Vegas SUN

April 15, 2005

## Nevada players ante up online

## By Liz Benston <br/> <br/>benston@lasvegassun.com>

LAS VEGAS SUN

Every day hundreds of Las Vegas residents break the law for a shot at fame and fortune or just a bit of fun.

They work in casinos and in offices. They pay their taxes and hold steady jobs.

And many don't even know they are lawbreakers.

Among them is Jeff Larsen, a casino worker at the Bellagio who has turned a hobby into a part-time job.

From home, Larsen now plays up to eight games of online poker at a time on two computers. Gambling in Internet poker rooms up to 40 hours a week nets Larson about the same kind of money he makes at his casino job.

"It's convenient, the games are really good and you've got people on the Internet just giving their money away," he said. "Playing in a casino is just getting old for a lot of people."

David Matthews, a webmaster for the LasVegasAdvisor.com consumer Web site, said he makes about \$150 per hour for the 20 or so hours per week he plays online poker.

"I can't afford not to play," Matthews said. "If I decided to play full time I could probably make \$30,000 a month. "I know people who've given up their day jobs."

Online poker is faster, doesn't require tipping a dealer and often features cash bonuses for players, he said. It also draws players who are "fast and loose," translating into good games at all hours, he said.

"On a Wednesday in the morning you're not going to find a good game in Vegas," Matthews said. Players in Las Vegas cardrooms at that time are "better than average and protective with their money."

A casino manager in Las Vegas, who declined to be named, said he plays poker only online these days.

"People can see where I'm from online. I always get asked, 'Why do you play online when you can play in the casinos?'
"the manager said. "I laugh and say, 'Because they look at you funny when you sit down in your underwear.'

"At home I can multitask," the manager said. "I cleaned out my entire fish tank one day and never missed a hand."

It's a little-known fact that Nevada is only one of a handful of states that specifically prohibits both players and Internet operators from engaging in online betting.

A state law passed in 1997 barred the placing of wagers on the Internet. Persons who break the law are guilty of a misdemeanor.

The law doesn't exclude Internet poker.

Online poker players in Nevada and online poker rooms that take bets from state residents are breaking the law if they

are dealing in real money, according to Nevada's top gaming regulator.

Nevada Gaming Control Board Chairman Dennis Neilander said his agency is considering whether to take its first steps to prosecute Internet poker players.

"We haven't taken any action yet and we're still ferreting through Internet wagering, not just for poker but all types of Internet gambling," Neilander said this week. "If there's not a change in the federal law it's something we have to consider."

Keith Copher, chief of the Gaming Control Board's enforcement division, said his agency doesn't have the manpower to go after players who make wagers online.

"We would request help from the federal government," Copher said. "The best way to pursue (prosecution) is to go after the providers, (but) they're out of our jurisdiction."

The state faces a "prohibition problem," Senior Deputy Attorney General Toni Cowan added. "Are you going to burst into people's homes, their living rooms or their cars?" she said.

That would take a virtual army.

EmpirePoker.com, one of the larger sites on the Internet, estimates that as many as 11,000 Nevadans gamble during peak hours online.

"We get a wide variety of players, from professional poker players to complete novice players who watch TV and like what they see and try to play," Empire Poker General Manager Ron Burke said.

Nevada is one of the top 10 states in terms of online players, behind bigger states such as California, New York and Texas, he said.

But Nevada players don't seem to worry about being lawbreakers.

The fear of prosecution has been a "nonissue" for online poker players, said Barry Shulman, co-publisher of the poker magazine Card Player in Las Vegas.

"Everybody I know plays online," Shulman said.

"States just aren't going to get excited about someone placing \$100 in an account in Aruba where it's legal," he said.
"It's not only extremely difficult to track but it's such a minor thing on their radar screen. They'd be far more interested if I'm running a poker game out of my house in Las Vegas and a lot more interested if I'm running a poker game out of a bar and taking a rake."

An estimated 1 million to 2 million Americans are now playing online poker -- a trend fueled by televised poker tournaments and a flood of online games, books and other teaching aids. The U.S. Justice Department considers Internet poker games and other online gambling illegal but players and operators alike have largely thumbed their noses at the federal government, saying the law surrounding online gambling is unclear.

It's been nearly impossible for federal regulators to enforce the prohibition because the major Internet gambling sites operate from locations outside the United States in small countries where Internet bets are legal or unregulated.

Nevada is no different.

The Gaming Control Board cut short discussions about legalizing Internet gambling in 2002 after receiving official word of the Justice Department's opposition. Regulators at the time expressed concern that Internet operators could run afoul of federal law barring gambling across state lines.

The Internet transfers information over the path of least resistance, which could mean crossing state lines and using methods difficult to track, regulators said.

Keeping Internet operators out of Nevada "would be difficult to do because the Web sites move around so frequently," Neilander said.

"If we did an investigation, we would have to turn it over to the District Attorney or Attorney General's office. We would have to have some discussions with them to see if they have an appetite to consider those violations."

With a casino in close proximity to every home in the Las Vegas Valley, regulators and casino operators have long said that Internet gambling wouldn't be much of a threat to the state's casino industry and that Nevadans wouldn't gravitate to the Internet in droves.

The poker craze has created a different dynamic. Players say the presence of casinos has fueled interest in online poker and vice versa, creating a symbiotic relationship between casino poker rooms and their online counterparts that has become all too obvious in the nation's gambling capital.

The world's largest poker site, PartyPoker.com, now runs radio and television ads in Las Vegas. Local billboards advertise Internet poker sites, including a billboard near the airport that exclaims, "Your credit card will work here."

Internet poker worldwide generated some \$1 billion in revenue last year and is expected to top \$2.4 billion this year -- which is about what all of the table games on the Las Vegas Strip generated in gambling revenue last year, according to recent statistics compiled by gambling analysts Christiansen Capital Advisors. Last year online poker was 12 percent of worldwide Internet gambling revenue. This year poker's share is expected to climb to 20 percent.

By 2010, online poker revenue is expected to top \$6.7 billion, or 27 percent of total Internet gambling and overtaking sports betting as the chief gambling activity online.

The Las Vegas Strip, by contrast, generated \$5.3 billion in gambling revenue last year.

"When we first started looking at this I didn't believe it but I verified that with operators," Christiansen Capital President Sebastian Sinclair said. "It blew me away."

About 70 to 85 percent of online poker players are believed to be Americans.

The Orleans poker room -- Las Vegas' largest with about 40 tables -- has lost a few regular poker players to the Internet.

"For every one of those the Internet has brought us 10 players," Tournament Director Bryan Gurden said. "It's brought us more business than it has cost us."

A couple of years ago the Orleans poker room was about 80 percent local. With more players gambling on the Internet and watching poker on television, about half of the Gurden's customers these days are out-of-towners seeking liveaction games.

Internet gamblers make up a "ton" of new players in the Bellagio's poker room -- home to some of the world's richest cash games, the casino's tournament director, Jack McClelland, said.

"Intimidation was one of the things that kept people out of the poker rooms," said McClelland, who is also a consultant for UltimateBet.com. "Poker players in general tend to be a little bit more aggressive than other individuals. They have a hard time turning it off in real life. They are the ones barking at the maitre d' or arguing with the front desk clerk."

McClelland said he is not paid by UltimateBet but receives a free, one-week vacation for promoting the site.

A majority of the 2,500 players who competed in the final championship event at last year's World Series of Poker --

the world's largest poker tournament -- gambled online and many won their \$10,000 buy-in to the tournament from online satellite games, operators say.

The 2003 champion, the aptly named Chris Moneymaker, won his entry in the tournament from a site called PokerStars.com. Greg Raymer is another unknown who won his seat in the tournament from PokerStars.com and parlayed it into a championship.

The site recently awarded Miami Heat basketball star Shaquille O'Neal -- a Vegas regular -- with a complimentary seat in this year's tournament as a 33rd birthday present in addition to a year of poker coaching from Raymer.

Players are generally aware that the federal government doesn't like Internet gambling. Yet with all the major poker sites allowing Americans to gamble and the government doing little to stop them, players say they have no way of knowing that the sites are illegal.

Las Vegas resident Jeffrey Weisbroth, who plays at the Orleans poker room, is also a regular online.

"I work nights so it's convenient," Weisbroth said .

Weisbroth said he is not married to Internet poker and would give it up if the state publicized a position that the practice was illegal.

"I've heard conflicting information" on whether Internet poker is legal, he said. "If (Nevada) said it was illegal I'd cash out my bets. Just let me know."

Some attorneys argue that Internet poker falls into a legal gray zone.

The Wire Communications Act of 1961 outlaws sports betting over interstate lines and was intended to fight organized crime. Yet it is the primary federal law used to fight Internet gambling, a relatively modern invention. In a letter to Nevada regulators in 2002, the Justice Department applied the Wire Act to online bets. Some attorneys dispute that interpretation and often cite a 2001 federal court decision in Louisiana as a defense.

The court dismissed a lawsuit brought by gamblers who lost money on Internet sites and sued credit card companies for facilitating illegal bets. A judge tossed the suit and ruled the Wire Act didn't prohibit games of chance played online.

That hasn't stopped the federal government from going after offshore sites through their business partners.

The U.S. Attorney's Office in Missouri last year gathered evidence of Internet gambling advertising from media companies and has threatened to prosecute such companies for "aiding and abetting" online betting -- a move that resulted in some Internet, radio and television companies pulling ads for Internet casinos.

In the company's annual report issued this month, WPT Enterprises said the Travel Channel has removed names and logos of Internet poker sites from its telecasts because the law surrounding online gambling is "unclear."

Las Vegas casino companies including MGM Mirage and Harrah's have already tested the waters with Internet gambling sites that blocked U.S. bets. But those sites -- which featured complicated software that could detect where gamblers were located -- folded for lack of business.

The top few poker sites, with little overhead costs and unlimited table capacity, are making spectacular profit that has already outpaced the world's most profitable casinos.

Experts estimate that the largest poker site, PartyPoker.com, will likely generate some \$500 million in operating cash flow this year. That compares with about \$352 million for Bellagio last year and about \$300 million for the Venetian -- the Strip's most profitable casinos.

Based on market share estimates for the largest poker sites, PokerStars.com generates about \$125 million in operating

cash flow compared with \$75 million for PokerRoom.com and \$50 million each for ParadisePoker.com, UltimateBet.com and PacificPoker.com.

By comparison, MGM Grand -- the Strip's largest property -- generated some \$290 million in operating cash flow last year. Caesars Palace generated about \$149 million last year and Bally's generated about \$81 million.

PartyPoker.com's parent company is rumored to be considering an IPO that could value the company from \$5 billion to \$6 billion. That would put the site in league with Las Vegas casino giants with a market capitalization less than Strip giants MGM Mirage and Caesars Entertainment Inc. but larger than Station Casinos Inc. and Boyd Gaming Corp.

"It's a shocking amount of money," said John O'Malia, chief executive of BetBug Ltd., a Toronto-based company that offers sports bets and other proposition bets on a network similar to that offered by peer-to-peer music file-sharing services. "I have to wonder if the whole reason for going public is to do something in the land-based (casino) space."

Buying competitors doesn't make much sense because the site already is so much bigger than the competition, O'Malia said. An IPO would give the company enough cash to build land-based casinos using a powerful brand, however, he said.

Bettors using BetBug believe its more likely that the PartyPoker IPO could fetch more than \$5.6 billion.

"It's a gravy business compared to online casinos and sports books, which can lose money sometimes," bettor Matthews said. "A poker room never loses. They keep raking it in."

Some of those figures were recently made public when a London-based Internet gambling empire bought ParadisePoker.com in November.

For the six months ended January 31, Sportingbet Plc's pre-tax profit shot up 118 percent to \$18.3 million in part because of the poker site. Paradise Poker contributed about \$15 million in operating profit over a three-month period and about \$24 million in income.

The site now has more than 830,000 customers and received an average daily poker rake of \$261,668 -- more than double last year. It offers 858,324 games per day, a 61 percent increase.

The World Poker Tour recently launched an online poker Web site — the first owned by a U.S. company. The site has a mechanism that aims to block U.S. bets so as not to run afoul of federal law.

Harrah's Entertainment Inc. isn't far behind. The company is working on creating a real-money poker site using the World Series of Poker brand that also would block U.S. bets. The company also is developing a play-for-fun Web site for American gamblers, according to sources familiar with those plans.

ESPN, which has the broadcast rights to the World Series of Poker and has begun airing a television drama about poker players, recently introduced a play-for-fun site called ESPN Poker Club.

North Dakota generated buzz last month for introducing a bill that would have legalized online poker to raise tax revenue. The bill was easily defeated in the state Senate over concerns about a potential challenge from the Justice Department.

A similar move would be unlikely in Nevada, which has a casino industry to protect and "has decided it's not willing to challenge the federal government's interpretation," said Tony Cabot, a Las Vegas attorney and Internet gambling expert.

Burke, of Empire Poker, said the legal question will likely "fade away" with time.

A game that was played in smoky bars and casino back rooms five years ago is now aired on major TV networks, he said.

"It's a completely mainstream activity," Burke said. "It is part of the American (experience)."

Meanwhile, the federal government is continuing its war of words against Internet gambling.

The World Trade Organization last week issued a complex ruling that calls into question the United States' ban on Internet gambling with respect to a little-known federal law permitting Internet betting on horse races. The ruling isn't expected to slow Internet bets though the extent to which it could help online gambling is unclear.

In one respect, the WTO agreed with the United States' argument that the country can use the Wire Act to maintain "protect public morals or maintain public order." The federal government maintains that Internet gambling has connections with organized crime and has been used to launder drug money and fund terrorism. Internet gambling backers say such claims are a shot in the dark, unproven and even laughable.

Like many in the gaming business, Sexton believes the government is better off regulating and taxing Internet bets rather than trying to prohibit it.

"Online poker and the online (gambling) world is far bigger than the U.S. and you're never going to be able to stop it," he said. "It's just amazing to me that you have have lotteries and yet tell somebody who works for a living that he can't take \$20 and buy into a tournament in his own home. It seems un-American."10"States just aren't going to get excited about someone placing \$100 in an account in Aruba where it's legal. It's not only extremely difficult to track but it's such a minor thing on their radar screen."

Return to the referring page.

Photo: Las Vegan Jeffrey Weisbroth studies the table

Las Vegas SUN main page

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### LEXSEE 2001 U.S. DIST. LEXIS 2255

### IN RE PAPST LICENSING GmbH PATENT LITIGATION

## CIVIL ACTION NO: MDL 1298; Ref. C.A. 99-3118 SECTION: "G"(2)

## UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

2001 U.S. Dist. LEXIS 2255

February 22, 2001, Decided February 22, 2001, Filed

**DISPOSITION:** [\*1] IBM's FRCP 12(e) motion for a more definite statement GRANTED.

#### CASE SUMMARY:

PROCEDURAL POSTURE: Complainant filed a complaint for patent infringement, alleging that respondent made, used, sold, or offered to sell to customers in the United States or imported into the United States products that embodied the elements of at least one claim of the 20 identified patents. Complainant did not identify the products which allegedly infringed the patents. Respondent filed a Fed. R. Civ. P. 12(e) motion requesting a more definite statement.

OVERVIEW: There were a total of 503 patent claims in the 20 patents at issue in this lawsuit. Respondent objected to having to compare the claims to all of its products containing hard disk drives. Complainant argued that its complaint complied with the sample patent infringement complaint. It was apparent, however, that the number of patents and products in the case before the court were far greater than those contemplated in the sample complaint, which would have justified a request for greater specificity. Respondent was willing to interpret each of the 503 claims of the 20 patents, but it sought to limit the number of comparisons it would have had to make to products by obtaining a more specific description of the alleged infringing products. Complainant was ordered to amend its complaint to specifically identify the products which it alleged infringe upon one or more claims of each of the 20 patents.

**OUTCOME:** The motion for a more definite statement was granted and the court ordered complainant to amend its complaint in order to specifically identify on a patent-by-patent basis the products which it alleged infringe upon one or more of the claims of each of the 20 patents.

#### LexisNexis(R) Headnotes

### Civil Procedure > Pleading & Practice > Defenses, Objections & Demurrers > Defects of Form

[HN1] Fed. R. Civ. P. 12(e) provides that if a pleading is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading.

## Patent Law > Infringement Actions > Infringing Acts > General Overview

[HN2] Whether a particular product infringes a particular patent claim first requires the interpretation of the claim, and then a comparison of the interpreted claim to the allegedly infringing product.

COUNSEL: For MINEBEA CO LTD, PRECISION MOTORS DEUTSCHE MINEBEA, GMBH, NIPPON MINIATURE BEARING CORPORATION, plaintiffs: Gene W. Lafitte, Sr., Marie Breaux, John C. Anjier, Liskow & Lewis, New Orleans, LA.

FOR MINEBEA CO LTD, PRECISION MOTORS DEUTSCHE MINEBEA, GMBH, NIPPON MINIATURE BEARING CORPORATION, plaintiffs: Joel E. Lutzker, chulte, Roth & Zabel, New York, NY.

For MINEBEA CO LTD, PRECISION MOTORS DEUTSCHE MINEBEA, GMBH, NIPPON MINIATURE BEARING CORPORATION, plaintiffs: Tom Schaumberg, Adduci, Mastriani & Schaumberg, Washington, DC.

For GEORG PAPST, PAPST LICENSING GMBH, defendants: A. Sidney Katz, Richard Lee Wood, Welsh & Katz, Ltd., Chicago, IL.

For GEORG PAPST, PAPST LICENSING GMBH, defendants: William Karl Wilburn, Seyfarth, Shaw,

Fairweather & Geraldson, Washington, DC.

For PAPST LICENSING VERWALTUNGSGESELLACHAFT MITBESCHRANKTER HAFTUNG, defendant: Steven W. Usdin, Christopher A. Colvin, Stone, Pigman, Walther, Wittmann & Hutchinson, LLP, New Orleans, LA.

JUDGES: MOREY L. SEAR, UNITED STATES DISTRICT JUDGE.

**OPINIONBY: MOREY L. SEAR** 

#### **OPINION:**

MEMORANDUM AND ORDER

### Background

On December 26, 2000, Papst [\*2] Licensing GmbH & Co. KG ("Papst") filed its complaint for patent infringement against International Business Machines Corporation ("IBM"). Papst alleges that IBM "has made, used, sold, or offered to sell to customers in the United States or imported into the United States products that embody the elements of at least one claim" n1 of the twenty patents specifically identified in the complaint by patent number and issue date. Papst does not identify the IBM products which allegedly infringe the patents.

n1 See Paragraphs 26 and 27 of Papst's Complaint for Patent Infringement, filed Dec. 26, 2000.

In response to the complaint, IBM has filed under FRCP 12(e) a motion requesting a more definite statement of which IBM products are alleged to infringe the patent claims asserted against it.

#### Discussion

[HN1] FRCP 12(e) provides that if a pleading "...is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing [\*3] a responsive pleading."

IBM asserts and Papst does not contest that there are a total of 503 patent claims in the twenty patents at issue in this lawsuit. [HN2] Whether a particular product infringes a particular patent claim first requires the interpretation of the claim, and then a comparison of the interpreted claim to the allegedly infringing product. Markman v. Westview Instruments, Inc., 52 F.3d 967, 976, aff'd, 517 U.S. 370,

116 S. Ct. 1384, 134 L. Ed. 2d 577 (1996). Under Papst's complaint, IBM will be required to interpret 503 claims, and then compare them to any IBM product that contains a hard disk drive. IBM does not object to interpreting 503 claims. However, it does object to having to compare those claims to all of its products containing hard disk drives.

IBM filed its Rule 12(e) motion on January 31, 2001. On February 1, 2001, counsel for Papst wrote a letter to counsel for IBM, forwarding a document that lists on a patent-by-patent basis the IBM hard disk drives that Papst alleges are infringed. Several hundred IBM hard disk drives are described by model and part numbers. There are as many as one hundred allegedly infringing products [\*4] listed for some patents, and only one listed for another patent. Papst prefaces its list by informing IBM that it does not consider the list to be exclusive:

Papst Licensing's charges of infringement are not limited to the IBM hard disk drives that are specifically identified herein. Rather, Papst Licensing's charges of infringement are intended to include all IBM hard disk drives that have a construction that is similar from an infringement standpoint to that of the IBM hard disk drives that are specifically identified herein.

Upon receipt of this list, IBM offered to withdraw its 12(e) motion if Papst would stipulate that its infringement allegations would be limited to the products specifically identified in the list. IBM and Papst have apparently been unable to reach a stipulation.

Papst argues that its complaint complies with the sample patent infringement complaint provided in Federal Form 16. It is apparent, however, that the number of patents and products in the case before me are far greater than those contemplated in the sample complaint, which would justify a request for greater specificity.

Papst further contends that it filed a similar 12(e) motion against [\*5] Minebea in related action no. 99-3118, which was denied. However, in that motion, Papst sought to have Minebea identify the particular claims of each patent which Minebea claims were invalid. IBM is not making such a request. IBM is willing to interpret each of the 503 claims of the twenty patents, but it seeks to limit the number of comparisons it will have to make to IBM products by obtaining a more specific description of the alleged infringing products.

I find that Papst's complaint must be amended to specifically identify the IBM products which it alleges infringe upon one or more claims of each of the twenty patents.

Accordingly,

IT IS ORDERED, that IBM's FRCP 12(e) motion for a more definite statement is GRANTED;

IT IS FURTHER ORDERED, that Papst amend its complaint on or before March 20, 2001, in order to specifically identify on a patent-by-patent basis the IBM prod-

ucts which it alleges infringe upon one or more of the claims of each of the twenty patents.

New Orleans, Louisiana, this 22 day of February, 2001.

MOREY L. SEAR

UNITED STATES DISTRICT JUDGE

#### LEXSEE 2004 U.S. DIST. LEXIS 20723

## AGILENT TECHNOLOGIES, INC., Plaintiff, v. MICROMUSE, INC., Defendant.

04 Civ. 3090 (RWS)

## UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

2004 U.S. Dist. LEXIS 20723

October 19, 2004, Decided October 19, 2004, Filed

**DISPOSITION:** Micromuse's motion to dismiss the complaint was denied and its motion for a more definite statement was granted.

#### **CASE SUMMARY:**

**PROCEDURAL POSTURE:** Plaintiff, a communications technology provider, brought a patent infringement action against defendant, an alleged infringer, regarding its patents for a particular internet service and a network service. The alleged infringer moved to dismiss under *Fed. R. Civ. P. 12(h)(6)*, moved for a more definite statement, moved to add a necessary party, and moved to disqualify the provider's counsel. The provider cross-moved for a supplemental declaration.

OVERVIEW: The alleged infringer claimed that the provider's complaint failed to specify or identify any allegedly infringing product. The court held that dismissal under Fed. R. Civ. P. 12(b)(6) for failure to state a claim was not appropriate because the provider's complaint complied with Fed. R. Civ. P. 8(a)(2) by establishing jurisdiction, by setting forth the ownership of the patents, and by alleging patent infringement by the alleged infringer. The court then held that the alleged infringer was entitled to a more definite statement under Fed. R. Civ. P. 12(e) setting forth which of its products or services were alleged to have infringed the provider's patents due to the general allegations in the provider's complaint. The court further held that the co-owner of the provider's patents was not required to be joined as a necessary party under Fed. R. Civ. P. 19(a) because, pursuant to an agreement between the provider and the co-owner, the co-owner had no independent capacity to file a patent infringement action against the alleged infringer regarding the patents at issue. The court finally held that the alleged infringer was not entitled to disqualification of the provider's counsel.

OUTCOME: The alleged infringer's motion to dismiss

was denied, and its motions to add a necessary party and to disqualify the provider's counsel were denied with leave to renew. The alleged infringer's motion for a more definite statement was granted. The provider's motion to file a supplemental declaration was granted.

#### LexisNexis(R) Headnotes

## Civil Procedure > Pleading & Practice > Defenses, Objections & Demurrers > Failure to State a Cause of Action

[HN1] In considering a motion to dismiss pursuant to Fed. R. Civ. P. 12(h)(6), the court should construe the complaint liberally, accepting all factual allegations in the complaint as true, and drawing all reasonable inferences in the plaintiff's favor, although mere conclusions of law or unwarranted deductions need not be accepted. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. In other words, the office of a motion to dismiss is merely to assess the legal feasibility of the complaint, not to assay the weight of the evidence which might be offered in support thereof. Dismissal is only appropriate when it appears beyond doubt that the plaintiff can prove no set of facts which would entitle him or her to relief.

## Civil Procedure > Pleading & Practice > Pleadings > Interpretation

[HN2] The indulgent standard for a filing a complaint is codified in Fed. R. Civ. P. 8, which requires no more than a short and plain statement of a claim showing that the pleader is entitled to relief. Fed. R. Civ. P. 8(a)(2). The United States Supreme Court has interpreted Fed. R. Civ. P. 8 not to require a claimant to set out in detail the facts upon which he bases his claim. Indeed, the Federal Rules of Civil Procedure require (with irrelevant exceptions) only that the complaint state a claim, not that it plead the facts that if true would establish (subject to any defenses) that the claim was valid. All that need be specified is the

bare minimum facts necessary to put the defendant on notice of the claim so that he can file an answer.

### Civil Procedure > Pleading & Practice > Defenses, Objections & Demurrers > Failure to State a Cause of Action

## Civil Procedure > Pleading & Practice > Pleadings > Interpretation

[HN3] Whether a complaint satisfies Fed. R. Civ. P. 8(a)(2) is determined by whether the pleading provides fair notice to the opposing party. Accordingly, dismissal for failure to comply with the requirements of Fed. R. Civ. P. 8 is usually reserved for those cases in which the complaint is so confused, ambiguous, vague, or otherwise unintelligible that its true substance, if any, is well disguised.

## Civil Procedure > Pleading & Practice > Defenses, Objections & Demurrers > Defects of Form

[HN4] Where a pleading is sufficient to provide notice of the claim but does not contain sufficient information to allow a responsive pleading to be framed without risk of prejudice, the proper remedy is a motion for a more definite statement under Fed. R. Civ. P. 12(c).

### Civil Procedure > Pleading & Practice > Defenses, Objections & Demurrers > Defects of Form [HN5] See Fed. R. Civ. P. 12(e).

## Civil Procedure > Pleading & Practice > Defenses, Objections & Demurrers > Defects of Form Civil Procedure > Pleading & Practice > Defenses, Objections & Demurrers > Denials

[HN6] Fed. R. Civ. P. 12(e) applies only in limited circumstances: the pleading must be sufficiently intelligible for the district court to be able to make out one or more potentially viable legal theories on which the claimant might proceed; in other words the pleading must be sufficient to survive a Fed. R. Civ. P. 12(b)(6) motion to dismiss. At the same time, the pleading also must be so vague or ambiguous that the opposing party cannot respond to it, even with a simple denial as permitted by Fed. R. Civ. P. 8(b), with a pleading that can be interposed in good faith or without prejudice to himself.

## Patent Law > Infringement Actions > Burdens of Proof Patent Law > Inequitable Conduct > General Overview Civil Procedure > Pleading & Practice > Defenses, Objections & Demurrers > Defects of Form

[HN7] Although motions pursuant to Fed. R. Civ. P. 12(e) are generally disfavored where prompt resort to discovery may provide an adequate means for ascertaining relevant facts, courts have considered Fed. R. Civ. P. 12(e) relief appropriate in patent infringement cases where a plaintiff has failed to identify any allegedly infringing product or products. A pleading need not identify every infringing

product where some other limiting parameter has been set forth or at least one purportedly infringing product has been identified.

## Civil Procedure > Pleading & Practice > Defenses, Objections & Demurrers > Defects of Form

[HN8] Where a motion made under Fed. R. Civ. P. 12(e) has been granted, the order of the court to provide a more definite statement must be obeyed within ten days after notice of the order or within such other time as the court may fix. Fed. R. Civ. P. 12(e).

## Civil Procedure > Pleading & Practice > Defenses, Objections & Demurrers > Motions to Dismiss Civil Procedure > Joinder of Claims & Parties > Joinder of Necessary Parties

[HN9] Fed. R. Civ. P. 19 sets forth a two-step test for determining whether the court must dismiss an action for failure to join an indispensable party. First, the court must determine whether an absent party belongs in the suit, i.e., whether the party qualifies as a necessary party under Fed. R. Civ. P. 19(a).

## Civil Procedure > Joinder of Claims & Parties > Joinder of Necessary Parties

[HN10] See Fed. R. Civ. P. 19(a).

## Civil Procedure > Joinder of Claims & Parties > Joinder of Necessary Parties

[HN11] If a party is deemed necessary, it then must be determined whether the party's absence warrants dismissal pursuant to Fed. R. Civ. P. 19(b). If a party does not qualify as necessary under Fed. R. Civ. P. 19(a), then the court need not decide whether its absence warrants dismissal under Fed. R. Civ. P. 19(b).

## Copyright Law > Civil Infringement Actions > Standing > Copyright Act of 1976

Civil Procedure > Joinder of Claims & Parties > Joinder of Necessary Parties

## Patent Law > Ownership > Conveyances > Equitable Assignments & Joint Ownership

[HN12] As a general matter, United States patent law requires that all co-owners normally must join as plaintiffs in an infringement suit. Since all co-owners have standing to sue for infringement, if all the co-owners are not joined in an infringement suit, there may be a risk that the defendant will be subject to multiple suits. Since the introduction of Fed. R. Civ. P. 19 and its 1966 amendments, however, courts are less concerned with abstract characterizations of the parties and more concerned with whether the rights of the parties can be fairly adjudicated absent joinder of the patent co-owner. Thus, where the co-owner of a patent or other entity or individual whose interest in a patent might be directly affected by litigation has specifically disclaimed all interest in pursuing litiga-

tion related to the patent in favor of the party who has brought the suit, courts have held that joinder of the coowner or other entity or individual is not necessary.

## Patent Law > Ownership > Conveyances > Licenses Civil Procedure > Joinder of Claims & Parties > Joinder of Necessary Parties

## Patent Law > Ownership > Conveyances > Equitable Assignments & Joint Ownership

[HN13] A licensor is a necessary party to a patent infringement action despite the existence of an agreement with a plaintiff licensee granting the licensee sole and exclusive rights to sue for infringement where the agreement is of fixed term and where the licensor retains a reversionary interest in the patent.

## Civil Procedure > Pleading & Practice > Pleadings > Supplemental Pleadings

[HN14] Although submission of supplemental papers is often more of a hindrance than a help, where the issues addressed in the supplemental papers presented are carefully cabined and respond to arguably new contentions contained in reply papers on the underlying motion, and where the opposing party has disclaimed any prejudice resulting from the submission of the supplemental papers, there is no evidence of bad faith by the party seeking to submit the supplemental papers, and the parties will be best served by the court's deciding the issue presented to it on the most complete factual basis possible, leave to submit supplemental papers is appropriately granted.

## Civil Procedure > Counsel

## Legal Ethics > Client Relations > Appearance of Impropriety

[HN15] Motions to disqualify counsel have long been disfavored in the United States Court of Appeals for the Second Circuit. Disqualification motions are often made for tactical reasons, and thereby unduly interfere with a party's right to employ counsel of his choice. Moreover, disqualification motions, even when made in the best of faith inevitably cause delay. A high standard of proof is therefore required from one who moves to disqualify counsel. The appearance of impropriety alone does not warrant disqualification.

#### Civil Procedure > Counsel

## Legal Ethics > Client Relations > Appearance of Impropriety

[HN16] In determining whether an attorney can oppose his former client, courts evaluate whether the new matter is substantially related to the subject matter of the prior representation. An attorney may be disqualified from representing a client in a particular case if: (1) the moving party is a former client of the adverse party's counsel; (2) there is a substantial relationship between the subject matter of the counsel's prior representation of the moving

party and the issues in the present lawsuit; and (3) the attorney whose disqualification is sought had access to, or was likely to have had access to, relevant privileged information in the course of his prior representation of the client. Under this standard, proof of substantial similarity must be patently clear to warrant disqualification. A substantial relationship exists where facts pertinent to the problems underlying the prior representation are relevant to the subsequent representation.

#### Civil Procedure > Counsel

[HN17] A party is entitled to seek an opposing party's counsel's disqualification based on the counsel's prior representation of the party's wholly owned subsidiary. A plaintiff's law firm will be deemed to have previously represented a defendant where the plaintiff's law firm has previously represented the defendant corporation's subsidiary and the defendant corporation has taken in active role with regard to the law firm's representation of its subsidiary.

#### Civil Procedure > Counsel

Legal Ethics > Client Relations > Conflicts of Interest Patent Law > Infringement Actions > General Overview [HN18] For purposes of the disqualification of counsel, prior general business representation by a plaintiff's law firm of an entity related to a defendant on matters unrelated to the lawsuit at issue does not meet the high burden of establishing a conflict.

COUNSEL: [\*1] Attorneys for Plaintiff: CHRISTIAN & BARTON, Richmond, VA. By: MICHAEL W. SMITH, ESQ. CRAIG T. MERRITT, ESQ. R. BRAXTON HILL, ESQ. Of Counsel. GRAY CARY WARE & FREIDENRICH, San Diego, CA. By: EDWARD H. SIKORSKI, ESQ. JOHN ALLCOCK, ESQ. SEAN C. CUNNINGHAM, ESQ. MEGAN WHYMAN OLESEK, ESQ.

Attorneys for Defendant: BROWN RAYSMAN MILLSTEIN FELDER & STEINER, New York, NY. By: SETH OSTROW, ESQ. JEFFREY P. WEINGART, ESQ. ERIC C. OSTERBERG, ESQ. Of Counsel. WILLCOX & SAVAGE, Norfolk, VA. By: MICHAEL R. KATCHMARK, ESQ. GARY A. BRYANT, ESQ. Of Counsel.

JUDGES: ROBERT W. SWEET, U.S.D.J.

**OPINIONBY: ROBERT W. SWEET** 

OPINION: Sweet, D.J.,

Defendant Micromuse, Inc. ("Micromuse") has moved pursuant to Federal Rule of Civil Procedure

12(b)(6), to dismiss the complaint of plaintiff Agilent Technologies, Inc. ("Agilent") alleging patent infringement, and, in the alternative, for a more definite statement pursuant to Rule 12(e), and to add Hewlett Packard Company ("H-P") as a necessary party under Rules 12(b)(7) and 19(a) of those same Rules. Micromuse has also moved to disqualify Gray Cary Ware & Freidenrich, LLP ("Gray Cary") from representing Agilent in this action, [\*2] Gray Cary having previously represented NetWork Harmoni, Inc. ("Network Harmoni"), an entity acquired by Micromuse prior to the filing of this action. Agilent has cross-moved for leave to file a supplemental declaration in opposition to Micromuse's motion to disqualify Gray Cary. For the reasons set forth below, Micromuse's motion to dismiss is denied, the motion for a more definite statement is granted, the motion to add H-P as a party is denied at this time with leave granted to renew, and the motion to disqualify is denied at this time with leave granted to renew. Agilent's cross-motion for leave to file a supplemental declaration is granted.

#### **Prior Proceedings**

The complaint in this patent infringement action was filed in the United States District Court for the Eastern District of Virginia, Norfolk Division, on November 10, 2003.

On December 17, 2003, Micromuse filed the instant motions in the Eastern District of Virginia as well as a motion to transfer the action to this district, which latter motion was granted by order of the Honorable Raymond A. Jackson filed on April 16, 2004. The action was transferred to this district on April 22, 2004.

The remaining motions [\*3] were argued and marked fully submitted on May 19, 2004.

#### The Complaint

The following facts are drawn from Agilent's complaint and do not constitute findings of fact by the Court.

According to the complaint, Agilent is a Delaware corporation having its headquarters in Palo Alto, California, and significant operations in Fort Collins, Colorado. It is alleged that Micromuse is a Delaware Corporation with headquarters in San Francisco, California, and significant operations in Northern Virginia, Georgia, Illinois, Texas, New York, London, and other overseas destinations. Subject matter jurisdiction is alleged under 28 U.S.C. §§ 1331 and 1338.

With regard to the factual background of the complaint, it is alleged that:

6. Agilent is a leading provider of compo-

nents, test, measurement, monitoring and management solutions for the communications industry. Agilent's broad set of solutions and services includes, among other technologies, optical, wireless, Internet and broadband technologies that span the entire communications life cycle. Having invested substantial resources in the development of these technologies, Agilent maintains a portfolio [\*4] of patents covering its inventions, including the patents at issue.

7. On October 24, 2000, *United States Patent No. 6,138,122* ("the '122 Patent"), entitled "Modeling of Internet Services," was duly and legally issued to Mark D. Smith, Deborah L. Caswell and Srinivas Ramanathan. All rights, title and interest in the '122 Patent were assigned to Agilent, which remains the sole owner of the '122 Patent...

8. On January 1, 2002, *United States Patent No. 6,336,138* ("the '138 Patent"), entitled "Template-Driven Approach For Generating Models On Network Services," was duly and legally issued to Deborah L. Caswell, Srinivas Ramanathan, James D. Hunter, Scott S. Neal, Frederick A. Sicker and Mark D. Smith. All rights, title and interest in the '138 Patent were assigned to Hewlett-Packard Company. Agilent and Hewlett-Packard Company now jointly own the '138 Patent, and Agilent has the exclusive right to enforce the '138 Patent against Micromuse...

(Compl. at PP 6-8.) It is further alleged that Micromuse "makes, sells, or offers products for sale in this district that infringe Agilent's patents." (Compl. at P 4.)

The complaint contains two counts and Micromuse's liability [\*5] is alleged as follows:

#### COUNT ONE

Infringement of U.S. Patent No. 6,138,122

- 9. Agilent realleges the foregoing paragraphs.
- 10. Agilent is informed and believes that Micromuse has directly infringed and continues to infringe, has induced and continues to induce, and/or has committed and continues to commit acts of contributory infringement of, one or more claims of the '122 Patent.
- 11. Agilent is informed and believes that Micromuse's acts of patent infringement are and continue to be willful and deliberate.

- 12. As a result of Micromuse's patent infringement, Agilent has suffered damages in an amount not yet determined, and will continue to suffer damages in the future.
- 13. Unless an injunction is issued enjoining Micromuse and its agents, servants, employees, attorneys, representatives, and all others acting on their behalf from infringing the '122 Patent, Agilent will be greatly and irreparably harmed.

#### **COUNT TWO**

Infringement of U.S. Patent No. 6,336,138

- 14. Agilent realleges the foregoing paragraphs.
- 15. Agilent is informed and believes that Micromuse has directly infringed and continues to infringe, has induced and continues to induce, and/or has committed and continues [\*6] to commit acts of contributory infringement of, one or more claims of the '138 Patent.
- 16. Agilent is informed and believes that Micromuse's acts of patent infringement are and continue to be willful and deliberate.
- 17. As a result of Micromuse's patent infringement, Agilent has suffered damages in an amount not yet determined, and will continue to suffer damages in the future.
- 18. Unless an injunction is issued enjoining Micromuse and its agents, servants, employees, attorneys, representatives, and all others acting on its behalf from infringing the '138 Patent, Agilent will be greatly and irreparably harmed.

(Compl. at PP 9-18.)

### Discussion

## I. Micromuse's Motion To Dismiss Is Denied

Micromuse has moved to dismiss Agilent's Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure on the grounds that the complaint fails to meet the notice requirements of Rule 8(a) of those same Rules.

[HN1] In considering a motion to dismiss pursuant to Rule 12(b)(6), the court should construe the complaint liberally, "accepting all factual allegations in the complaint as true, and drawing all reasonable [\*7] inferences in the plaintiffs favor," *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152 (2d Cir. 2002) (citing Gregory v. Daly, 243 F.3d 687, 691 (2d Cir. 2001)), although "mere conclusions of law or unwarranted deductions" need not be accepted. First Nationwide Bank v. Gelt Funding Corp., 27 F.3d 763, 771 (2d Cir. 1994), "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." Villager

Pond. Inc. v. Town of Darien, 56 F.3d 375, 378 (2d Cir. 1995) (quoting Scheuer v. Rhodes, 416 U.S. 232, 236, 40 L. Ed. 2d 90, 94 S. Ct. 1683 (1974)). In other words, "the office of a motion to dismiss is merely to assess the legal feasibility of the complaint, not to assay the weight of the evidence which might be offered in support thereof." Eternity Global Master Fund Ltd. v. Morgan Guar. Trust Co. of New York, 375 F.3d 168, 176 (2d Cir. 2004) (quoting Geisler v. Petrocelli, 616 F.2d 636, 639 (2d Cir. 1980)). Dismissal is only appropriate when "it appears beyond doubt that the plaintiff can prove no set of facts [\*8] which would entitle him or her to relief." Sweet v. Sheahan, 235 F.3d 80, 83 (2d Cir. 2000); accord Eternity Global Master Fund, 375 F.3d at 176–77.

[HN2] "The indulgent standard evident in these precedents is codified in Rule 8, which requires no more than 'a short and plain statement of [a] claim showing that the pleader is entitled to relief." *Id. at 177* (quoting Fed. R. Civ. P. 8(a)(2)) (alteration in original); see also *Wynder v. McMahon, 360 F.3d 73, 76–77 & n.5* (2d Cir. 2004) (referring to the "bare-bones standards of Rule 8" and noting that "Rule 8 pleading is extremely permissive"). The Supreme Court has interpreted Rule 8 "not to require a claimant to set out in detail the facts upon which he bases his claim." *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168, 122 L. Ed. 2d 517, 113 S. Ct. 1160 (1993)* (quoting *Conley v. Gibson, 355 U.S. 41, 47, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957)).* Indeed,

The federal rules require (with irrelevant exceptions) only that the complaint state a claim, not that it plead the facts that if [\*9] true would establish (subject to any defenses) that the claim was valid ... All that need be specified is the bare minimum facts necessary to put the defendant on notice of the claim so that he can file an answer.

Higgs v. Carver. 286 F.3d 437, 439 (7th Cir. 2002); see also Scutti Enters., LLC v. Park Place Entm't Corp., 322 F.3d 211, 215 (2d Cir. 2003) ("More extensive pleading of fact is not required because the Federal Rules of Procedure provide other devices besides pleadings that will serve to define the facts and issues and to dispose of unmeritorious claims.") (quoting 2 James Wm. Moore, et al., Moore's Federal Practice § 8.04[1] (3d ed. 1999) (citation omitted)). [HN3] Whether a complaint satisfies Rule 8(a)(2) is determined by whether the pleading provides fair notice to the opposing party. See Conley, 355 U.S. at 47; see also Wynder, 360 F.3d at 79 ("The key to Rule 8(a)'s requirements is whether adequate notice is given.").

Accordingly, dismissal for failure to comply with the requirements of Rule 8 "is usually reserved for those cases in which the complaint is [\*10] so confused, ambiguous, vague, or otherwise unintelligible that its true substance, if any, is well disguised." Simmons v. Abruzzo, 49 F.3d 83, 86 (2d Cir. 1995) (quoting Salahuddin v. Cuomo, 861 F.2d 40, 42 (2d Cir. 1988)).

Here, Agilent's complaint establishes the jurisdiction of this Court, sets forth the ownership of the patents in suit and alleges that Micromuse makes, sells, or offers products for sale that infringe Agilent's patents. The complaint further alleges that Micromuse is liable for direct infringement, contributory infringement and infringement by inducement. Agilent has provided a "short and plain statement" of its claims against Micromuse and the nature of those claims is discernible. Fed. R. Civ. P. 8(a)(2). Indeed, it would be difficult to frame a more skeletal pleading.

Micromuse nonetheless argues that dismissal of Agilent's complaint is appropriate because the complaint fails to specify any allegedly infringing product, fails to identify any allegedly infringing conduct, and fails to set forth any of the other actors implicated by the allegations that Micromuse has contributed to and [\*11] induced patent infringement. The absence of allegations such as those described does not demonstrate that the harsh sanction of dismissal is appropriate here, as this absence does not make it "appear[] beyond doubt that the plaintiff can prove no set of facts which would entitle him or her to relief," Sweet, 235 F.3d at 83, nor that the complaint is "so confused, ambiguous, vague, or otherwise unintelligible that its true substance, if any, is well disguised." Simmons, 49 F.3d at 86 (quoting Salahuddin, 861 F.2d at 42); see generally Glus v. Brooklyn E. Dist. Terminal, 359 U.S. 231, 235, 3 L. Ed. 2d 770, 79 S. Ct. 760 (1959) ("It may well be that petitioner's complaint as now drawn is too vague, but that is no ground for dismissing his action.").

[HN4] Where, as here, a pleading is sufficient to provide notice of the claim but does not contain sufficient information to allow a responsive pleading to be framed without risk of prejudice, the proper remedy is a motion for a more definite statement under Rule 12(e), Fed. R. Civ. P. See, e.g., Scott v. City of Chicago, 195 F.3d 950, 952 (7th Cir. 1999); [\*12] Sisk v. Texas Parks & Wildlife Dep't, 644 F.2d 1056, 1059 (5th Cir. 1981); Harman v. Nat'l Bank of Arizona, 339 F.2d 564, 567 (9th Cir. 1964); but compare Ondeo Nalco Co. v. Eka Chems., Inc., 2002 U.S. Dist. LEXIS 26195, No. 01 Civ. 537 (SLR), 2002 WL 1458853, at \*1-2 (D. Del. August 10, 2002) (dismissing defendant's counterclaims where it was unclear which products were being accused, concluding that the plead-

ing was "too vague to provide plaintiff with fair notice," and granting leave to amend).

## II. Micromuse's Motion For A More Definite Statement is Granted

Rule 12(e) of the Federal Rules of Civil Procedure provides in pertinent part that [HN5] "if a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading." Fed. R. Civ. P. 12(e). [HN6] Rule 12(e) applies only in limited circumstances:

The pleading must be sufficiently intelligible for the district court to be able to make out one or more [\*13] potentially viable legal theories on which the claimant might proceed; in other words the pleading must be sufficient to survive a Rule 12(b)(6) motion to dismiss. At the same time, the pleading also must be so vague or ambiguous that the opposing party cannot respond to it, even with a simple denial as permitted by Rule 8(b), with a pleading that can be interposed in good faith or without prejudice to himself.

5C Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 1376 at 311 (3d ed. 2004) (footnote omitted); see *Humpherys v. Nager, 962 F. Supp. 347, 352–53 (E.D.N.Y. 1997)* ("A 12(b)(6) motion is one made for a failure to state a claim, while a 12(e) motion is proper when a complaint pleads a viable legal theory, but is so unclear that the opposing party cannot respond to the complaint."); but compare *Home & Nature Inc. v. Sherman Specialty Co., 322 F. Supp. 2d 260, 265 (E.D.N.Y. 2004)* ("Rule 12(e) motion should be denied if a complaint comports with the liberal pleading requirements of Rule 8(a).") (collecting cases).

[HN7] Although motions pursuant to Rule 12(e) are generally disfavored where prompt resort to discovery [\*14] may provide an adequate means for ascertaining relevant facts, see id., courts have considered Rule 12(e) relief appropriate in patent infringement cases where a plaintiff has failed to identify any allegedly infringing product or products. See, e.g., In re Papst Licensing, GmbH, Patent Litig., 2001 U.S. Dist. LEXIS 2255, Nos. MDL 1298 & C.A. 99-3118, 2001 WL 179926, at \*2 (E.D. La. Feb. 22, 2001) (concluding that the plaintiff's complaint must be amended to specifically identify which of the defendant's products are alleged to have infringed the plaintiff's patents); cf. Creative Copier Servs. v. Xerox

Corp. (In re Indep. Serv. Orgs. Antitrust Litig.), 85 F. Supp. 2d 1130, 1169 (D. Kan. 2000) (denying the plaintiff's motion for summary judgment on a defendant's counterclaim where the plaintiff argued that it did not have adequate notice of which of its devices allegedly infringed the defendant's patents, observing that the plaintiff had already answered the counterclaim and that, if the plaintiff "did not truly know which parts were covered by the patents identified, it could have filed a motion for a more definite statement under Rule 12(e)"). The cases cited by Agilent in opposition to Micromuse's motion [\*15] do not suggest that a contrary result is required here, as they stand for the propositions that a pleading need not identify every infringing product where some other limiting parameter has been set forth or at least one purportedly infringing product has been identified. See Symbol Techs., Inc. v. Hand Held Prods., 2003 U.S. Dist. LEXIS 21002, No. 03-102-SLR, 2003 WL 22750145, at \*3 (D. Del. Nov. 14, 2003) (denying a Rule 12(e) motion where there was a "finite" set of potentially infringing products under identified patents held by the defendant); Oki Elec. Indus. Co., Ltd. v. Lg Semicon Co., Ltd., 1998 U.S. Dist. LEXIS 22507, No. 97 Civ. 20310 (SW), 1998 WL 101737, at \*3 (N.D. Cal. Feb. 25, 1998) (denying a motion to dismiss where the plaintiff identified infringing products by specifying that the products concerned were "devices that embody the patented methods, including 4 megabit and higher density DRAMs") (internal quotation marks omitted), aff'd, 243 F.3d 559 (Fed. Cir. 2000).

Agilent's complaint does not specify which products infringed plaintiff's patents; it merely states that the alleged infringements occurred as a result of the fact that Micromuse "makes, sells, or offers products [\*16] for sale . . . that infringe Agilent's patents." (Compl. at P 4.) Although Agilent's papers submitted in opposition to Micromuse's various motions suggest that Micromuse possesses at least four infringing products, those products have not been formally accused. Under these circumstances, Micromuse is entitled to know which of its products or services are alleged to have infringed Agilent's patents and a more definite statement setting forth that information is appropriate.

Micromuse has also argued that Agilent's complaint fails to identify the primary infringer with respect to the contributory and inducement claims. Micromuse has cited to a single unpublished authority in support of its argument that such identification is required to render a pleading answerable, and this authority, Net Moneyin, Inc. v. Mellon Fin. Corp., No. O1 Civ. 441 (TUC) (RCC), slip op. (D. Ariz. July 30, 2003), itself cites no other case law directly on point. Micromuse has accordingly failed to establish that relief under Rule 12(e) with respect to the identity of any primary infringers is appropriate.

[HN8] Where a motion made under Rule 12(e) has been granted, the order of the court to provide a more definite [\*17] statement must be obeyed within ten days after notice of the order "or within such other time as the court may fix." Fed. R. Civ. P. 12(e). Agilent is directed to comply with the grant of Micromuse's motion for a more definite statement by filing and serving an amended complaint within thirty (30) days of entry of this order and opinion.

## III. II-P Will Not Be Deemed A Necessary Party At This Time

Micromuse argues that, if Agilent's complaint is not dismissed, H-P, as co-owner of the '138 Patent, should be joined as a necessary party to this lawsuit, pursuant to Rule 19(a) of the Federal Rules of Civil Procedure. In addition, Micromuse asserts that if H-P is not so joined, the case should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(7).

[HN9] "Fed. R. Civ. P. 19 sets forth a two-step test for determining whether the court must dismiss an action for failure to join an indispensable party. First, the court must determine whether an absent party belongs in the suit, i.e., whether the party qualifies as [\*18] a 'necessary' party under Rule 19(a)." *Viacom Int'l, Inc. v. Kearney, 212 F.3d 721, 724 (2d. Cir. 2000).* Rule 19(a) provides in relevant part that,

[HN10] A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party.

Fed. R. Civ. P. 19(a). Second, [HN11] if a party is deemed necessary, it then must be determined whether the party's absence warrants dismissal pursuant to Rule 19(b), Fed. R. Civ. P. [\*19] See *Viacom Int'l*, 212 F.3d at 725. "If a party does not qualify as necessary under Rule 19(a), then

the court need not decide whether its absence warrants dismissal under Rule 19(b)." *Id. at 724* (citing *Associated Dry Goods Corp. v. Towers Fin. Corp., 920 F.2d 1121, 1123 (2d Cir. 1990)).* 

[HN12] As a general matter, "United States patent law . . . requires that all co-owners normally must join as plaintiffs in an infringement suit." Int'l Nutrition Co. v. Horphag Research Ltd., 257 F.3d 1324, 1331 (Fed. Cir. 2001); see also Ethicon, Inc. v. United States Surgical Corp., 135 F.3d 1456, 1468 (Fed. Cir. 1998) (stating that, "as a matter of substantive patent law, all coowners must ordinarily consent to join as plaintiff in an infringement suit") (footnote omitted); see generally Waterman v. MacKenzie, 138 U.S. 252, 255-56, 34 L. Ed. 923, 11 S. Ct. 334, 1891 Dec. Comm'r Pat. 320 (1891). As one court has explained, since "all co-owners have standing to sue for infringement, if all the co-owners are not joined in an infringement suit, there may be a risk that the defendant will be subject to multiple suits." E-Z Bowz, L.L.C. v. Profil Prod. Research Co., 2003 U.S. Dist. LEXIS 15364, No. 00 Civ. 8670 (LTS) (GWG), 2003 WL 22064257, [\*20] at \*3 (S.D.N.Y. Sept. 5, 2003) (quoting IBM Corp. v. Conner Peripherals, 1994 U.S. Dist. LEXIS 2884, No. 93 Civ. 20591 (RMW), 1994 WL 409493, at \*3 (N.D. Cal. Jan. 28, 1994)); see also Union Trust Nat'l Bank v. Audio Devices, Inc., 295 F. Supp. 25, 27 (S.D.N.Y. 1969) ("That all co-owners be parties to a suit is a necessary requirement if conflicting decisions about the same patent (for example, its validity) are to be avoided."); cf. Vaupel Textilmaschinen KG v. Meccanica Euro Italia S.P.A., 944 F.2d 870, 875 (Fed. Cir. 1991) ("The policy underlying the requirement to join the owner when an exclusive licensee brings suit is to prevent the possibility of two suits on the same patent against a single infringer.").

"Since the introduction of Fed. R. Civ. P. 19 and the 1966 amendments to the rule, however, 'courts are less concerned with abstract characterizations of the parties and more concerned with whether the rights of the parties can be fairly adjudicated absent joinder of the patent co-owner." E.Z. Bowz, 2003 U.S. Dist. LEXIS 15364, 2003 WL 22064257, at \*3 (quoting Michaels of Oregon Co. v. Mil-Tech, Inc., 1995 U.S. Dist. LEXIS 20875, No. 95 Civ. 908 (MA), 1995 WL 852122, [\*21] at \*1 (D. Or. Oct. 17, 1995)); cf. Howes v. Med. Components, Inc., 698 F. Supp. 574, 576 (E.D. Pa. 1988) ("The adoption of the 1966 amendments to Rule 19 'makes inappropriate any contention that patent co-owners are per se indispensable in infringement suits.") (quoting Catanzaro v. Int'l Tel. & Tel. Corp., 378 F. Supp. 203, 205 (D. Del. 1974)).

Thus, where the co-owner of a patent or other entity or individual whose interest in a patent might be directly affected by litigation has specifically disclaimed all interest in pursuing litigation related to the patent in favor of the party who has brought the suit, courts have held that joinder of the co-owner or other entity or individual is not necessary. See Vaupel Textilmaschinen, 944 F.2d at 875-76 (concluding that the policy to join an owner when an exclusive licensee bring suit in order to preclude the possibility of duplicative lawsuits was not undercut where, pursuant to express agreements, the right to suc rested solely with the licensee and denying the defendant's Rule 19 motion); E-Z Bowz, 2003 U.S. Dist. LEXIS 15364, 2003 WL 22064257, at \*4-5 (holding that the defendant would not [\*22] be subject to a substantial risk of incurring inconsistent obligations where the former co-owner of certain patents had relinquished her interest in the patents as well as any rights of action relating to the patents and concluding that the rights of the parties could be fairly adjudicated without joinder of the absent former co-owner); Michaels of Oregon, 1995 U.S. Dist. LEXIS 20875, 1995 WL 852122, at \*2-3 (determining that an absent co-owner of certain patents was not a necessary party where that absent co-owner had entered into an agreement with the plaintiff providing that only the plaintiff might file actions for patent infringement); compare Parkson Corp. v. Andritz Sprout-Bauer, Inc., 866 F. Supp. 773, 775 (S.D.N.Y. 1995) (concluding that it was not possible to determine whether an owner was a necessary party to an action brought by an exclusive licensee where the licensing agreement did not unambiguously give the licensee control over whether infringement claims should be brought); Howes, 698 F. Supp. at 577 (concluding that an absent patent co-owner was a necessary party where the defendants might face the risk of relitigation by that co-owner).

Although [\*23] the complaint alleges that Agilent and H-P jointly own the '138 Patent, it further alleges that Agilent enjoys the exclusive right to enforce the '138 Patent against Micromuse. In opposition to Micromuse's motion, Agilent has submitted a redacted version of an August 22, 2003 agreement between Agilent and H-P (the "August Agreement") regarding their respective rights concerning the enforcement of the '138 Patent. According to the August Agreement, H-P grants to Agilent "the exclusive right to license the ['138] Patent to Micromuse." (Declaration of Megan Whyman Olesek, dated Jan. 15, 2004 ("Olesek Decl."), Exh. X at P L) H-P further grants to Agilent "the exclusive right to enforce the [738] Patent to and against Micromuse" including by "filing and prosecuting the Agilent Patent Suit to final judgment, including appeals," n1 (Id.) H-P has also agreed that

> As between the parties, Agilent shall have the full power and authority to control the Agilent Patent Suit and any settlement

thereof and shall retain one hundred percent (100%) of any damages or compensation received in connection with the Agilent Patent Suit or settlement thereof.

(Id. at P 3.)

N1 The "Agilent Patent Suit" is defined as "a patent infringement lawsuit against Micromuse." (Olesek Dccl., Exh. X, preamble.)

[\*24]

Based on the terms of the August Agreement, it does not appear that H-P's absence from this lawsuit will subject Micromuse to any "substantial risk of incurring double, multiple, or otherwise inconsistent obligations," Fed. R. Civ. P. 19(a), because H-P has no independent capacity to file a patent infringement action against Micromuse based on the '138 Patent, having expressly disclaimed any interest in pursuing a claim against Micromuse with respect to the '138 Patent. In light of the broad contractual language by which H-P has granted Agilent the exclusive right to enforce the '138 Patent against Micromuse, the absence of any provision in the August Agreement stating that H-P agrees to be bound by the outcome of this litigation is not determinative here. Likewise, the absence of an affirmative representation that H-P has relinquished its right to sue Micromuse for any purported past infringement does not, contrary to the argument advanced by Micromuse, require joinder of H-P. On the facts now available, it thus appears that complete relief can be accorded among those already parties.

Micromuse has noted, however, that the August Agreement [\*25] makes explicit reference to the existence of a Master Patent Ownership and License Agreement and that the August Agreement is an agreement among Agilent and H-P "together with Hewlett Packard Development Company, L.P." (Olesek Decl., Exh. X, preamble), an entity that, according to Micromuse, may also have an interest in the '138 Patent. Micromuse has further observed that the redacted form of the August Agreement does not set forth its effective term or termination provisions and suggests that the absence of such provisions raises questions of whether H-P enjoys a reversion, termination, or expiration interest in the '138 Patent, questions which may, in turn, affect any determination as to whether H-P is a necessary party here. See, e.g., Moore U.S.A. Inc. v. Standard Register Co., 60 F. Supp. 2d 104, 109-110 (W.D.N.Y. 1999) (concluding that [HN13] a licensor was a necessary party to a patent infringement action despite the existence of an agreement with the plaintiff licensee granting the licensee sole and exclusive rights to sue for infringement where

the agreement was of fixed term and where the licensor retained a reversionary interest in the patent).

Although the [\*26] facts presently available do not establish that H-P is a necessary party, Micromuse's observations suggest that developments resulting from discovery may cause the issue of H-P's joinder to be revisited. Accordingly, Micromuse's motion to join H-P is denied at this time and leave is hereby granted to renew the motion after further discovery.

# IV. Gray Cary Will Not Be Disqualified At This Time

Micromuse has moved to disqualify Gray Cary from representing Agilent in this matter on the grounds that, for many years, Gray Cary provided extensive legal representation to Network Harmoni, a company acquired by Micromuse in August 2003. Micromuse argues that Network Harmoni's suite of proprietary intelligent software agents is now part of Micromuse's product offerings and, under the current complaint, potentially the target of Agilent's patent infringement claims. Micromuse asserts that Gray Cary thus formerly represented Network Harmoni in matters substantially related to the subject matter of this action and must be disqualified from representing Agilent as a result. Agilent opposes Micromuse's motion, arguing that in its representation of Network Harmoni Gray Cary was at all [\*27] times in an adverse relationship to Micromuse and that Gray Cary's prior representation of Network Harmoni involved no confidential information about the product or products at issue in the present action, n2

> n2 Following briefing on Micromuse's motion, Agilent moved for leave to submit a supplemental declaration, claiming the need to respond to certain contentions in Micromuse's reply papers, and Micromuse opposed the motion. Agilent's motion for leave to submit the supplemental declaration is granted. [HN14] Although submission of supplemental papers is often more of a hindrance than a help, the issues addressed in the supplemental papers presented here are carefully cabined and respond to arguably new contentions contained in reply papers on the underlying motion. Where this is true, and where, as here, the opposing party has disclaimed any prejudice resulting from the submission of the supplemental papers, there is no evidence of bad faith by the party seeking to submit the supplemental papers, and "the parties will be best served by the Court's deciding the . . . issue presented to it on the most complete factual basis possible," Nat'l Union Fire Ins. Co. v. BP Amoco P.L.C., 2003 U.S. Dist. LEXIS 4810, No. 03 Civ. 200

(GEL), 2003 WL 1618534, at \*1 (S.D.N.Y. Mar. 27, 2003), leave to submit supplemental papers is appropriately granted.

[\*28]

[HN15] Motions to disqualify counsel have long been disfavored in this Circuit. See, e.g., Evans v. Artek Sys. Corp., 715 F.2d 788, 791-92 (2d Cir. 1983) (enumerating the reasons for which disqualification motions are disfavored); Bennett Silvershein Assoc. v. Furman, 776 F. Supp. 800, 802 (S.D.N.Y. 1991) ("The Second Circuit has indeed been loathe to separate a client from his chosen attorney . . . . ") (collecting cases). "Disqualification motions are often made for tactical reasons, and thereby unduly interfere with a party's right to employ counsel of his choice." Skidmore v. Warburg Dillon Read L.L.C., 2001 U.S. Dist. LEXIS 6101, No. 99 Civ. 10525 (NRB), 2001 WL 504876, at \*2 (S.D.N.Y. May 11, 2001) (citing Board of Educ. v. Nyquist, 590 F.2d 1241, 1246 (2d Cir. 1979)). Moreover, disqualification motions, "even when made in the best of faith . . . inevitably cause delay." Evans, 715 F.2d at 792 (quoting Nyquist, 590 F.2d at 1246). A "high standard of proof" is therefore required from one who moves to disqualify counsel. Id. at 791 (quoting Government of India v. Cook Industries, Inc., 569 F.2d 737, 739 (2d Cir. 1978)). [\*29] The appearance of impropriety alone does not warrant disqualification. See Nyquist, 590 F.2d at 1246-47.

[HN16] In determining whether an attorney can oppose his former client, courts evaluate whether the new matter is substantially related to the subject matter of the prior representation. An attorney may be disqualified from representing a client in a particular case if:

- (1) the moving party is a former client of the adverse party's counsel;
- (2) there is a substantial relationship between the subject matter of the counsel's prior representation of the moving party and the issues in the present lawsuit; and
- (3) the attorney whose disqualification is sought had access to, or was likely to have had access to, relevant privileged information in the course of his prior representation of the client.

Id. at 791. "Under this standard, proof of substantial similarity must be 'patently clear' to warrant disqualification." Decora Inc. v. DW Wallcovering, Inc., 899 F. Supp. 132, 136 (S.D.N.Y. 1995) (quoting Government of India, 569) F.2d at 739-40) (additional citations omitted). A "substantial relationship" exists where [\*30] facts pertinent to the problems underlying the prior representation are relevant to the subsequent representation. See U.S. Football League v. Nat'l Football League, 605 F. Supp. 1448, 1459-60 & n.25 (S.D.N.Y. 1985) ("It is the congruence of factual matters, rather than areas of law, that establishes a substantial relationship between representations for disqualification purposes.") (emphasis in original).

According to Micromuse, Network Harmoni evolved from a research project in network visualization software conducted at Curtin University in Perth, Australia. In 1996, the founders of the project formed NDG Software, Inc., and in November 1998 the company received its first venture funding and moved its headquarters from Australia to San Diego, California. It is alleged that Gray Cary initially provided advice, counsel and representation in establishing and structuring this U.S.-based company and its operations, and served as outside counsel. Subsequently, NDG Software, Inc., changed its name to Network Harmoni, Inc.

During the time of Gray Cary's representation, Network Harmoni developed and licensed to its customers, including Agilent and Micromuse, proprietary [\*31] intelligent software agents designed to provide users with information on the status and security of computer networks, systems and applications. Micromuse contends that Gray Cary, during its five-year relationship with Network Harmoni, represented Network Harmoni in its corporate affairs, employment issues, in prosecuting its patents and trademarks and handling other patent and trademark-related matters, in evaluating third-party patents, and in drafting and negotiating licensing agreements, financing instruments and other corporate-related documents.

Over the course of its representation of Network Harmoni, Gray Cary is alleged to have drafted and filed several patent applications with the United States Patent and Trademark Office relating to certain aspects of Network Harmoni's software products and was informed of virtually all attributes and potential uses of Network Harmoni's suite of proprietary intelligent software agents, as well as the company's plans for future software applications and services.

According to Micromuse, Gray Cary represented Network Harmoni in its negotiations to be purchased by Micromuse, and Network Harmoni and Micromuse executed a non-disclosure agreement [\*32] to assure that the parties could have full and complete discussions without the use of such information for non-acquisition purposes.

It is further alleged that in three rounds of financing,

Gray Cary was allowed to participate on the same basis as the initial preferred investors and became a sharcholder of Network Harmoni, and until September 1999, one of its lawyers served as a member of its board of directors. Gray Cary sold its stock in connection with Network Harmoni's acquisition by Micromuse.

In opposition to Micromuse's motion it is alleged that Gray Cary first became aware of a potential claim against Micromuse by Agilent on September 19, 2003, when Agilent approached Gray Cary about the possibility of Gray Cary handling the matter for Agilent. It is also alleged that on December 8, 2003, an ethical wall was established to isolate all attorneys working on Agilent matters from any and all information related to any matter in which Network Harmoni had been a client for the firm.

Agilent asserts that Gray Cary never had an attorneyclient relationship with Micromuse and that such a relationship may not be inferred from Micromuse's disclosure of confidential business information [\*33] to Network Harmoni and its then-counsel Gray Cary during negotiations for the acquisition of Network Harmoni. At present, however, there appears to be no dispute that [HN17] Micromuse is entitled to seek Gray Cary's disqualification based on Gray Cary's prior representation of Micromuse's wholly owned subsidiary, Network Harmoni. See generally Hartford Accident & Indem. Co. v. RJR Nahisco, Inc., 721 F. Supp. 534, 539-40 (S.D.N.Y. 1989) (concluding that the plaintiff's law firm would be deemed to have previously represented the defendant where the plaintiff's law firm had previously represented the defendant corporation's subsidiary and the defendant corporation had taken in active role with regard to the law firm's representation of its subsidiary); cf. Decora, 899 F. Supp. at 137 (concluding that the plaintiff could properly seek disqualification of the defendant's attorney in a patent infringement action where the attorney had previously represented the plaintiff's parent corporation, thereby learning certain of the plaintiff's trade secrets).

Assuming without deciding that the first prong of the test set forth in Evans has therefore been satisfied, [\*34] Micromuse's motion for disqualification is denied nonetheless, since, to date, Micromuse has not met its burden of proof with respect to establishing a "substan-

tial relationship" between Gray Cary's former representation of Network Harmoni and its current representation of Agilent. It has not been shown that Gray Cary gave Network Harmoni advice on the validity of the patents in suit, including whether there was infringement by Network Harmoni of the patents in suit. All that has been established is that Gray Cary advised Network Harmoni on corporate governance issues, employment matters, original equipment manufacturer ("OEM") agreements, patent and trademark filings, and financing instruments. [HN18] Prior general business representation by the plaintiff's law firm of an entity related to the defendant on matters unrelated to the lawsuit at issue does not meet the high burden of establishing a conflict. See, e.g., In re Maritima Aragua, S.A., 847 F. Supp. 1177, 1182-83 (S.D.N.Y. 1994).

The Micromuse products and services alleged to be violative of the Agilent patent will be identified as a consequence of the granting of Micromuse's motion for a more definite statement. [\*35] Thereafter, discovery may be sought with respect to the knowledge and participation of Gray Cary in the development of any such accused products or services. Should this discovery yield additional facts establishing that the prior representation of Network Harmoni by Gray Cary dealt with issues presented in this action, leave is granted to Micromuse to renew its disqualification motion, which motion is denied at this time.

#### Conclusion

For the reasons set forth above, Micromuse's motion to dismiss the complaint is denied and its motion for a more definite statement is granted. Agilent is directed to comply with the grant of Micromuse's motion for a more definite statement by filing and serving an amended complaint within thirty (30) days of entry of this order and opinion. In addition, Micromuse's motions to add H P as a party and to disqualify Gray Cary are denied at this time with leave to renew. Agilent's motion to file a supplemental declaration is granted.

It is so ordered.

ROBERT W. SWEET U.S.D.J.

#### LEXSEE 2003 U.S. DIST. LEXIS 21002

## SYMBOL TECHNOLOGIES, INC., Plaintiff, v. HAND HELD PRODUCTS, INC. and HHP-NC, INC., Defendants.

Civil Action No. 03-102-SLR

#### UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

2003 U.S. Dist. LEXIS 21002

November 14, 2003, Decided

**DISPOSITION:** [\*1] Motions decided. Claims dismissed. Allegations stricken.

#### CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff patent holder alleged that defendant competitor infringed, induced others to infringe, and/or committed acts of contributory infringement of, one or more claims of each of the patent holder's numerous patents. The patent holder sought a declaratory judgment that the patents were noninfringed, invalid, and unenforceable. The competitor brought numerous motions to dismiss.

OVERVIEW: The competitor was acquired by its parent company, which was a direct competitor of the patent holder. Shortly thereafter, the parent company's in-house counsel corresponded with the patent holder's in-house patent counsel indicating that certain parent company patents might "present problems" to one of the patent holder's product lines. Having concluded that the totality of circumstances sufficiently demonstrated a reasonable apprehension of suit, nonetheless, the court held that the patent holder did not establish a reasonable apprehension of suit with respect to each of the named competitor patents. At most, the affidavit and accompanying documents filed to support the complaint suggest that only those patents referenced in the correspondence from the parent company were proper subjects of a declaratory judgment suit. Consequently, the court dismissed those competitor patents which were not the subject of the correspondence. With respect to the remaining patents, the court found that the parent holder engaged in the manufacture and production of products sufficiently similar to competitor's patents.

**OUTCOME:** The competitor's motions were granted in part and dismissed in part.

#### LexisNexis(R) Headnotes

### Patent Law > Ownership > Conveyances > Licenses

[HN1] It is established law that a licensee that exceeds the scope of its license may be held liable for patent infringement.

## Civil Procedure > Pleading & Practice > Pleadings > Interpretation

[HN2] It is established law that liberal pleading requirements are designed to put the parties on notice generally as to the nature of the cause of action. Particularly in complex litigation, it is through the discovery process that the parties refine and focus their claims.

## Civil Procedure > Pleading & Practice > Defenses, Objections & Demurrers > Defects of Form

[HN3] A motion under Fed. R. Civ. P. 12(e) is to correct a pleading that is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading.

## Civil Procedure > Remedies > Declaratory Relief Patent Law > Remedies > Declaratory Relief

[HN4] Declaratory judgment pursuant to 28 U.S.C.S. § 2201 requires that there be (1) an explicit threat or other action by the patentee, which creates a reasonable apprehension on the part of the declaratory plaintiff that it will face an infringement suit, and (2) present activity which could constitute infringement or concrete steps taken with the intent to conduct such activity. In reaching its conclusion, the court must apply a totality of the circumstances standard.

## Civil Procedure > Justiciability > Case or Controversy

[HN5] Test for finding a "controversy" for jurisdictional purposes is a pragmatic one and cannot turn on whether the parties use polite terms in dealing with one another or engage in more bellicose saber rattling. The question is whether the relationship between the parties can be considered a "controversy," and that inquiry does not turn on whether the parties have used particular "magic words" in communicating with one another. Therefore, the absence of an explicit threat of suit, while a factor, is not dispositive.

Civil Procedure > Pleading & Practice > Pleadings > Heightened Pleading Requirements

Patent Law > U.S. Patent & Trademark Office Proceedings > Reissues > General Overview

Patent Law > Claims & Specifications > Description Requirement > General Overview

[HN6] Fraud is a clear exception to the otherwise broad notice-pleading standards under Fed. R. Civ. P. 9. A claim of patent unenforceability is premised upon inequitable conduct before the Patent & Trademark Office (PTO), which is a claim sounding in fraud. A plaintiff alleging unenforceability, therefore, must plead with particularity those facts which support the claim the patent holder acted fraudulently before the PTO.

**COUNSEL:** For Symbol Technologies, Inc, PLAINTIFF: Arthur G Connolly, III, Connolly, Bove, Lodge & Hutz, Wilmington, DE USA.

For Hand Held Products Inc, HHP-NC Inc, DEFENDANTS: Donald F Parsons, Jr, Mary B Graham, Morris, Nichols, Arsht & Tunnell, Wilmington, DE USA.

JUDGES: [\*2] Sue L. Robinson, United States District Judge.

**OPINIONBY:** Sue L. Robinson

#### **OPINION:**

## MEMORANDUM ORDER

#### I. INTRODUCTION

Currently before the court are the following motions by the defendants Hand Held Products, Inc. and HHP-NC, Inc. (collectively "HHP"): 1) motion to dismiss U.S. Patent No. 5,591,956 of Count II for lack of subject matter jurisdiction; 2) motion to dismiss U.S. Patent No. 5,130,520 of Count I from the action because HHP holds a valid license; 3) motion to dismiss plaintiff's infringement and [\*3] noninfringement claims from Counts I and If pursuant to Fed, R. Civ. P. 8 and 12(b)(6) for failure to state a claim; 4) motion to dismiss Count II of the complaint pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6) for lack of subject matter jurisdiction for failure to satisfy the jurisdictional requirements of 28 U.S.C. § 2201; 5) motion to dismiss plaintiff's invalidity and unenforceability claims from Count II pursuant to Fed. R. Civ. P. 8 and 12(h)(6) for failure to give notice of the bases for claims of invalidity and unenforceability; 6) motion to strike plaintiff's unenforceability allegations pursuant to Fed. R. Civ. P. 12(b)(6) for failure to plead fraud with particularity; and 7) motion for a more definite statement as to Counts I and II. (D.I. 10) For the reasons and to the extent stated below, the court grants in part and denies in part HHP's motions.

#### H. BACKGROUND [\*4]

Plaintiff Symbol Technologies, Inc. ("Symbol") and HHP are competitors in the hand-held optical scanner industry, each holding patents and manufacturing a variety of products. Symbol is the owner of U.S. Patent 5,479,441; Nos. 5,029,183; 5,130,520; 5,157,687; 5,702,059; 5,783,811; 5,521,366; 5,646,390; 5,818,028; 6,00,612; 6,019,286; and 6,105,871 (collectively, the "Symbol Patents"). HHP is the owner of U.S. Patent Nos. 5,286,960; 5,291,008; *5,391,182*; 5,420,409: 5,569,902; 5,591,956; 5,463,214; 5,723,853; 5,723,868; 5,773,806; 5,773,810; 5,793,967; 5,780,834; 5,784,102; 5,786,586; 5,837,985; 5,831,254; 5,801,918; 5,825,006; 5,914,476; 5,929,418; 5,900,613; 5,838,495; 5,949,052; 5,949,054; 5,942,741; 5,932,862; 6,161,760; 6,015,088; 6,060,722; 5,965,863; 6,491,223; D392,282; D400,199, and 6,298,176; D400,872 (collectively the "HHP Patents").

In September 1999, HHP was acquired by Welch Allyn, Inc. ("Welch Allyn"), a direct competitor of Symbol. Later that fall, Welch Allyn announced that it intended to acquire another competitor of Symbol's, PSC, Inc., with whom Symbol was engaged in patent litigation.

On March 13, 2000, Welch Allyn's in-house counsel sent an email to Symbol's [\*5] in-house patent counsel indicating that certain Welch Allyn patents might "present problems" to Symbol's Golden Eye product line. (D.I. 19)

On June 6, 2000, Welch Allyn began negotiating with Symbol on behalf of Welch Allyn's newly acquired subsidiary, PSC, Inc. (Id.) Later that month, a meeting was held between Symbol and Welch Allyn to discuss the licensing of certain patents held by HHP relating to the Golden Eye product line. At that meeting, a list of twenty-three (23) patents was presented to Symbol which Welch Allyn viewed as relevant. (Id.)

On June 28, 2000, a second list was provided to Symbol by HHP in response to a request made at the earlier meeting. This second list contained only ten (10) patents, eight of which were previously listed on the first list, and two of which were new additions. The June 28 letter indicated that these patents should be the topic of further licensing discussions between the parties. (Id.)

On November 30, 2000, Symbol acquired Telxon, a Texas company that was at the time engaged in patent-related disputes with Welch Allyn. Previously that year, Welch Allyn had sent a list of patents to Telxon, identical to the first list sent to [\*6] Symbol, and sug-

gested that Telxon's products might be infringing. Welch Allyn had also previously raised infringement issues with Metanetics, a Telxon subsidiary. (Id.)

Relations between Symbol and Welch Allyn deteriorated completely when Welch Allyn filed a lawsuit against Symbol in North Carolina regarding a certain contract that they shared to provide products to the United States Postal Service. (Id.)

On January 21, 2003, Symbol filed a two-count complaint alleging that HHP has infringed the Symbol Patents and seeking declaratory judgment that the HHP Patents are not infringed, invalid and/or unenforceable. (D.I. 1)

In Count I of the complaint, Symbol alleges that "HHP infringed and continues to infringe, has induced and continues to induce others to infringe, and/or has committed and continues to commit acts of contributory infringement of, one or more claims of each of the Symbol Patents." (D.I. 1 at 6) In Count II of the complaint, Symbol seeks a declaratory judgment that the HHP Patents are noninfringed, invalid, and unenforceable. (Id.)

#### III. DISCUSSION

## A. HHP's Motion to Dismiss U.S. Patent No. 5,591,956

HHP contends that the court is without subject-matter [\*7] jurisdiction as to *U.S. Patent No. 5,591,956* ("956 patent"). (D.I. 11) At oral arguments before the court on October 28, 2003, HHP's counsel affirmatively stated that the '956 patent is dedicated to the public; therefore, this patent will be dismissed from the complaint.

## B. HHP's Motion to Dismiss U.S. Patent No. 5,130,520

HHP contends that U.S. Patent No. 5,130,520 ("520 patent") should be dismissed because it is the subject of a valid license from Symbol. Symbol contends that there is a license for the '520 patent, but that it pertains to a narrow field of use. [HN1] It is established law that a licensee that exceeds the scope of its license may be held liable for infringement. See General Talking Pictures Co., 304 U.S. 175, 82 L. Ed. 1273, 58 S. Ct. 849, 1938 Dec. Comm'r Pat. 831 (1938); Eli Lilly & Co. v. Genetech, Inc., 1990 U.S. Dist. LEXIS 18619, 17 U.S.P.Q.2d 1531, 1534 (S.D. Ind. 1990). Consequently, HHP's motion to dismiss the '520 patent will be denied.

C. HHP's Motion to Dismiss Infringement and Noninfringement Claims from Count I and II for Failure to State a Claim, Motion to Dismiss Symbol's Claims of Invalidity and Unenforceability, and Motion for a More [\*8] Definite Statement

HHP contends that Symbol's complaint is facially defective under Fed. R. Civ. P. 8(a), as it fails to provide sufficient notice of which of HHP's products infringe claims under the Symbol Patents and which of Symbol's products may infringe HHP Patents. (D.I. 11 at 16) HHP, however, has failed to cite any precedent binding upon this court that requires a complaint to identify the basis of an infringement claim with such particularity. n1 [HN2] It is established law that liberal pleading requirements are designed to put the parties on notice generally as to the nature of the cause of action. Conley v. Gibson, 355 U.S. 41, 47, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957); Weston v. Pennsylvania. 251 F.3d 420, 429 (3d Cir. 2001). Particularly in complex litigation, it is through the discovery process that the parties refine and focus their claims. At this stage in the litigation, the court declines to dismiss Symbol's claims until adequate discovery has been completed.

n1 The court notes that HHP attempts to bootstrap Fed. R. Civ. P. 11 requirements into Rule 8, without actually alleging that Symbol's complaint is frivolous. (D.I. 11 at 9–10) In the absence of an actual motion by HHP to the contrary, the court will assume that Symbol's counsel has complied with their ethical obligations under Fed. R. Civ. P. 11.

[\*9]

In the alternative, HHP moves the court to require Symbol to provide a more definite statement pursuant to Fed. R. Civ. P. 12(e). [HN3] A motion under Rule 12(e) is to correct a pleading that is "so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading." The purpose, however, of Rule 12(e) is not to make it easier for the moving party to prepare its case. Fed. R. Civ. P. 12 advisory committee's note. In this case, the crux of HHP's motion is that Symbol's complaint is simply too large. There are, however, a finite number of claims and a finite number of infringing products. Consequently, the court finds that traditional mechanisms of discovery are the proper tools to refine the scope of this litigation. HHP's motions in this regard will be denied.

# D. HHP's Motions to Dismiss Count II for Lack of Subject Matter Jurisdiction

HHP contends that the court is without subject matter jurisdiction as to the HHP Patents, as there is not an actual controversy within the meaning of § 2201. (Id.) See Vectra Fitness, Inc. v. TNWK Corp., 162 F.3d 1379, 1383 (Fed. Cir. 1998). [\*10]

[HN4] Declaratory judgment pursuant to 28 U.S.C. § 2201 requires that there be "(1) an explicit threat or other action by the patentee, which creates a reasonable appre-

hension on the part of the declaratory plaintiff that it will face an infringement suit, and (2) present activity which could constitute infringement or concrete steps taken with the intent to conduct such activity." BP Chemicals Ltd. v. Union Carbide Corp., 4 F.3d 975, 978 (Fed. Cir. 1993). In reaching its conclusion, the court must apply a totality of the circumstances standard. See C.R.Bard, Inc. v. Schwartz, 716 F.2d 874, 880 (Fed. Cir. 1983).

The recent contentious and litigious history between the parties weighs in favor of a finding that Symbol has a reasonable apprehension of suit. In EMC Corp. v. Norand Corp., 89 F.3d 807 (Fed. Cir. 1996), the Federal Circuit stated that the [HN5] "test for finding a 'controversy' for jurisdictional purposes is a pragmatic one and cannot turn on whether the parties use polite terms in dealing with one another or engage in more bellicose saber rattling." Id. at 811. The Court of Appeals continued [\*11] and emphasized that "the question is whether the relationship between the parties can be considered a 'controversy,' and that inquiry does not turn on whether the parties have used particular 'magic words' in communicating with one another." Id. at 812. Therefore, the absence of an explicit threat of suit, while a factor, is not dispositive. See BP Chemicals Ltd. v. Union Carbide Corp., 4 F.3d 975, 979 (Fed. Cir. 1993) ("Declaratory judgment jurisdiction does not require direct threats.").

Further, it is relevant under Federal Circuit precedent that at oral argument HHP did not affirmatively state that it would not bring suit. In C.R. Bard Inc., the Court of Appeals held that a plaintiff had a reasonable apprehension of suit when the defendant in a declaratory judgment declined to affirmatively state at oral arguments that he would not bring a suit for infringement against the plaintiff, n2 716 F.2d at 881.

n2 The court is not entirely comfortable with the notion that a plaintiff might bring a declaratory judgment against a defendant for the purpose of forcing an admission of the defendant's intent to enforce its patent rights. The court is also uncomfortable with the notion that a defendant might plead that the plaintiff has no reasonable apprehension of suit, and then file in another forum once the declaratory judgment has been dismissed for want of subject matter jurisdiction. Nonetheless, the Federal Circuit in C.R. Bard made it clear that the failure to deny an intent to sue for infringement is a factor to be considered.

### [\*12]

Having concluded that the totality of circumstances sufficiently demonstrates a reasonable apprehension of suit, nonetheless, Symbol has not established a reasonable apprehension of suit with respect to each of the named HHP Patents. At most, the affidavit and accompanying documents filed to support the complaint suggest that only those patents referenced in the June 28, 2000 correspondence from Welch Allyn are proper subjects of a declaratory judgment suit. n3 Consequently, the court will dismiss without prejudice those HHP Patents which were not the subject of the June 28, 2000 correspondence.

n3 Those patents are: U.S. Patent Nos. 5,286,960; 5,900,613; 5,723,868; 5,780,834; 5,784,102; 5,825,006; 5,831,254; 6,060,722; 5,929,418; and 5,965,863.

With respect to the remaining HHP Patents, the court finds that Symbol satisfies the "present activity" requirement of § 2201. It is sufficient that Symbol engages in the manufacture and production of products sufficiently similar to HHP's patents. See Millipore Corp. v. University Patents, Inc., 682 F. Supp. 227, 232 (D. Del. 1987). [\*13] Moreover, the fact that HHP's own correspondence to Symbol suggests that licensing of its patents may be needed is sufficient for the court to conclude that there is "present activity" as required under § 2201.

## E. HHP's Motion to Strike Symbol's Allegations of Unenforceability for Failure to Plead with Particularity

The court will dismiss Symbol's claims for unenforceability without prejudice. [HN6] Fraud is a clear exception to the otherwise broad notice-pleading standards under Fed. R. Civ. P. 9. A claim of patent unenforceability is premised upon inequitable conduct before the Patent & Trademark Office ("PTO"), which is a claim sounding in fraud. A plaintiff alleging unenforceability, therefore, must plead with particularity those facts which support the claim the patent holder acted fraudulently before the PTO. As Symbol has failed to adequately plead its bases for unenforceability of the remaining HHP Patents, that portion of Count II will be dismissed without prejudice.

#### IV. CONCLUSION

At Wilmington this 14th day of November, 2003, having held oral argument and reviewed HHP's motion to dismiss pursuant to Fed. R. Civ. P. 8(a), 9 [\*14], 12(b)(1), 12(b)(6) and 12(f), or in the alternative for a more definite statement pursuant to Rule 12(e) (D.I. 10), and Symbol's response thereto;

### IT IS ORDERED that:

1. HHP's motion to dismiss Count II of Symbol's complaint with respect to U.S. Patent No. 5,591,956 is

#### granted. (D.I. 10-1)

- 2. HHP's motion to dismiss *U.S. Patent No. 5,130,520* of Count I is **denied.** (D.I. 10-2)
- 3. HHP's motion to dismiss infringement and noninfringement claims from Counts I and II of the complaint pursuant to *Fed. R. Civ. P. 8 and 12(b)(6)* is **denied.** (D.I. 10-3)
- 4. HHP's motion to dismiss Count II of the complaint pursuant to Fed. R. Civ P. 12(b)(1) and 12(b)(6) for lack of subject matter jurisdiction is granted with respect to U.S. Patent Nos. 5,291,008; 5,391,182; 5,420,409; 5,463,214; 5,697,902; 5,723,853; 5,773,806; 5,773,810; 5,786,586; 5,793,967; 5,801,918; [\*15] 5,837,985; 5,838,495; 5,914,476; 5,932,862; 5,942,741; 5,949,052; 5,949,054; 6,015,088; 6,161,760; 6,298,176; 6,491,223; D392,282; D400,199;
- and D400,872, and is **denied** with respect to U.S. Patent Nos. 5,286,960; 5,900,613; 5,723,868; 5,780,834; 5,784,102; 5,825,006; 5,831,254; 6,060,722; 5,929,418; and 5,965,863. (D.I. 10-4)
- 5. HHP's motion pursuant to Fed. R. Civ. P. 8 and 12(b)(6) to dismiss Symbol's invalidity and unenforceability claims from Count II is **denied**. (D.I. 10-5)
- 6. HHP's motion to strike Symbol's allegations of unenforceability pursuant to *Fed. R. Civ. P. 12(b)(6) or 12(f)* is **granted.** (D.I. 10-6)
- 7. HHP's motion for a more definite statement is **denied.** (D.I. 10-7)

Sue L. Robinson

United States [\*16] District Judge