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8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10 SAN FRANCISCO DIVISION JUDICIAL DISTRICT
11

12 GEOFFREY PECOVER and JEFFREY
LAWRENCE, on Behalf of Themselves and
13 All Others Similarly Situated,

14 Plaintiffs,

15 v.

16 ELECTRONIC ARTS INC., a Delaware
Corporation
17

18 Defendant.

CASE NO. C 08-02820 VRW

**DECLARATION OF TIMOTHY L. O'MARA
IN OPPOSITION TO PLAINTIFFS'
MOTION TO COMPEL DISCOVERY**

[PUBLIC REDACTED VERSION]

19
20 I, Timothy L. O'Mara, declare as follows:

21 1. I am an attorney at law duly licensed to practice in the State of California
22 and before this Court. I am a partner with the law firm of Latham & Watkins LLP ("Latham"),
23 and counsel for Defendant Electronic Arts Inc. ("EA") in this action. Unless otherwise noted, I
24 have personal knowledge of the facts stated in this declaration, and, if called upon to do so, could
25 and would competently testify thereto.

26 2. At issue in the current discovery dispute is plaintiffs' claim that they are
27 entitled to documents from 2000 to 2003—four complete product cycles before the allegedly
28 "monopolized" football video games were first sold, and before any alleged damages occurred.

1 3. The license agreements at issue in this case were entered into in December
2 2004 (Madden), January 2005 (AFL), and April 2005 (NCAA). Further, the games covered by
3 these license agreements were not sold until late summer 2005 (NCAA, Madden), and February
4 2006 (AFL). EA has already agreed to produce: (a) documents related to competition and
5 market definition, based on key word searches, from January 2004 to the date of plaintiffs'
6 requests for custodians relevant to EA's football games; (b) documents related to licenses and
7 license negotiations, from January 2004 to the date of plaintiffs' requests, including all such
8 documents in the files of Joel Linzner—the EA executive who negotiated the league licenses at
9 issue—dating back to January 2003; and (c) pricing data, including the release date, unit sales,
10 sales revenue, and average price for each game, on a monthly basis, from 2004 to the present.
11 EA has provided the latter—pricing data—for all of EA's football games, EA's top selling non-
12 football games, and the top selling games of EA's competitors.

13 4. In accord with the Court's June 25, 2009 Order, plaintiffs have submitted
14 a declaration by Dr. Mackie-Mason. EA respectfully submits that Dr. Mackie-Mason's analysis
15 is fundamentally flawed on multiple levels. Indeed, Dr. Mackie-Mason's estimated magnitude
16 of damages is nothing more than pure fiction—it has no basis in fact or law, and would not
17 withstand a *Daubert* challenge. That said, EA is mindful of the Court's admonition that this
18 discovery motion is not the time to address the merits—or the lack thereof—of this litigation.
19 Instead, EA limits its response to the discovery dispute actually before the Court—i.e., the need
20 for pricing and market definition documents for the period August 1, 2001 to January 1, 2004.

- 21 5. Dr. Mackie-Mason states that an “ideal list” of documents would include:
- 22 a. Retail pricing data (from NPD Group or a similar market research
23 firm) dating back at least to August 1, 2001;
 - 24 b. An extension of Appendix C to EA's Responses to Plaintiffs'
25 Second Set of Interrogatories dating back to August 1, 2001, and
26 including actual transaction wholesale prices; and
 - 27 c. The following business reports or their equivalent dating back to
28 August 1, 2001: (i) Customer Satisfaction Report, (ii) EA Sports

1 Brand Reports/Update, (iii) EA Sports Brand Tracking, (iv) EA
2 Sport Label Report, (v) EA Sports Landscape Brand Assessment,
3 (vi) Product Marketing Review, (vii) Sports Deck, (viii) Sports
4 Demand Review, (ix) Industry Update, and (x) Rejecter Report.

5 6. In an effort to resolve the current discovery dispute, EA has conducted a
6 diligent search for pricing and corporate level market definition documents from the August 1,
7 2001 to January 1, 2004 time period. EA's legal department has spent more than thirty hours
8 over the course of the last two weeks interviewing numerous custodians from EA's business
9 planning, strategic planning, finance, marketing, and publishing departments, and searching
10 EA's corporate files for such documents. Notably, this process has included interviewing
11 (a) Todd Sitrin, General Vice President of Marketing for the EA Sport Label, (b) Laura Miele,
12 Vice President of Business Planning, and (c) Tom Cipolla, General Manager of North American
13 Publishing.

14 7. Having conducted a diligent search for the documents that Dr. Mackie-
15 Mason claims to need, and in an effort to resolve the current dispute, EA will produce the exact
16 pricing data the Dr. Mackie-Mason has requested—i.e., retail pricing data from NPD (this
17 includes total revenue figures for each game per month, as well as the total unit sales to end users
18 per month), and an extension of Appendix C to EA's Responses to Plaintiffs' Second Set of
19 Interrogatories (this includes gross units sold by EA to its top customers and the wholesale prices
20 charged by EA). These are items (a) and (b) on Dr. Mackie-Mason's "ideal list" of documents.
21 *See infra* ¶ 12, Chart Identifying Discovery EA Will Produce.

22 8. Further, EA will produce additional pricing and sales data beyond what
23 Dr. Mackie-Mason claims to need. Specifically, EA will produce the profit and loss statements
24 ("P&Ls") that EA has for its football games for the requested time period. I am informed and
25 understand that EA has P&Ls for (a) *Madden NFL* for the fiscal years 2001 to 2004, (b) *NCAA*
26 *Football* for the fiscal years 2002 to 2004, and (c) *NFL Street* for the fiscal year 2004. P&Ls for
27 *NCAA Football* do not exist prior to the 2002 fiscal year. However, the 2002 fiscal year covers
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1 the period from April 1, 2001 until March 31, 2002. *NFL Street* was first released in 2004, and
2 no AFL-branded video game was produced during this time period.

3 9. Dr. Mackie-Mason’s declaration provides no support—zero—for needing
4 any other data to conduct his purported damages analysis. The EA business reports identified in
5 item (c) of Dr. Mackie-Mason’s “ideal list” concern, at best, general market dynamics. In this
6 respect, Dr. Mackie-Mason represents in his declaration that, in addition to documents already
7 produced by EA, there is in fact a wealth of market dynamics information publicly available that
8 he has already reviewed, including:

- 9 a. “video game reviews and industry news ... from such information
10 services such as Gamespot.com, Cheatcc.com, ING.com and
11 Operationsport.com,” Mackie-Mason Declaration ¶ 6;
- 12 b. “annual output in units, annual revenue, average retail prices and
13 product reviews of video games produced by the top 20 video
14 game publishers (as of 2008), including Nintendo, EA, Activision,
15 Take Two and Sega. Among other data sources, [Dr. Mackie-
16 Mason has] so far examined annual 10-Ks as well as data from
17 third-party sources such as NPD, Jupiter Research, Jon Peddie
18 Research, DFC Intelligence, IBIS World, Isuppli, World Video
19 Game Market Report and VGChartz.com,” Mackie-Mason
20 Declaration ¶ 7;
- 21 c. data on video game distribution channels, including “publicly
22 available lists of Nintendo Domestic Distributors as well as annual
23 reports for retailers such as Game Stop,” Mackie-Mason
24 Declaration ¶ 8; and
- 25 d. various “academic studies” that “provide background and analysis
26 of the structure and competition of the U.S. home video game
27 industry, product cycles, price points and price rigidity, product
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strategies and competitive dynamics of the video game industry, among other topics,” Mackie-Mason Declaration ¶ 9.¹

10. Despite the wealth of industry data that Dr. Mackie-Mason purports to have available to him, EA will also produce the internal, corporate-level business reports regarding competition that it has located for the August 1, 2001 to January 1, 2004 time period. Specifically, EA will produce the following documents:

- a. Dr. Mackie-Mason has requested EA’s Sports Brand Tracking report. EA Sports Brand Tracking is a report generated by an outside research company. EA has only located this document back to 2003; EA will produce this report back to 2003. Attached as Exhibit A is a true and correct copy of an EA Sports Brand Tracking report.
- b. Dr. Mackie-Mason has requested EA’s Sports Landscape Brand Assessment reports. EA’s Sports Landscape Brand Assessment report was a one-time research report from an outside research company. However, EA has been able to locate EA Sports Overview and EA Sports Summary Presentation, both of which are equivalent, one-time reports conducted by the same outside research company in 2003. EA will produce these reports. Attached as Exhibit B is a true and correct copy of the EA Sports Overview. Attached as Exhibit C is a true and correct copy of the EA Sports Summary Presentation.
- c. Dr. Mackie-Mason has requested EA’s Industry Update report. EA does not have this report or anything similar to it prior to 2006.

¹ The wealth of industry data that Dr. Mackie-Mason purports to have studied is largely unidentified and no such documents were attached to his declaration. Accordingly, EA does not concede that any of this information is accurate, relevant, or admissible.

Plaintiffs' "Ideal" List of Documents	EA's Response
(i) Customer Satisfaction Report;	(i) No Customer Satisfaction Reports have been located; EA believes that no formal Customer Satisfaction Reports were created prior to 2004;
(ii) EA Sports Brand Reports/Update;	(ii) No EA Sports Brand Reports/Updates have been located;
(iii) EA Sports Brand Tracking;	(iii) EA has been able to locate its Sports Brand Tracking back to 2003; EA will produce these reports from 2003;
(iv) EA Sport Label Report;	(iv) EA Sports Label Reports were first created in 2006; no equivalent reports have been located;
(v) EA Sports Landscape Brand Assessment;	(v) EA Sports Landscape Brand Assessment was a one time study generated by an outside research company; EA will produce the EA Sports Overview and EA Sports Summary Presentation, both of which are equivalent, one-time studies from 2003 that were generated by the same outside research company;
(vi) Product Marketing Review;	(vi) No Product Marketing Review reports have been located; EA believes no formal Product Marketing Review reports were created prior to 2004;
(vii) Sports Deck;	(vii) No Sports Deck reports have been located;
(viii) Sports Demand Review	(viii) No Sports Demand Review reports have been located;
(ix) Industry Update	(ix) The Industry Update report was first created in 2006. However, this report is derived from NPD pricing data, which EA is producing;
(x) Rejecter Report	(x) No Rejected Reports have been located.

13. It is worth noting that, nine years ago, EA was a much smaller company than it is now, and it did not produce all of the business reports that it does today; obviously, EA cannot produce documents that do not exist.

1 14. In light of EA's agreement to produce the foregoing documents, EA
2 respectfully submits that the parties have resolved the discovery dispute, and that the Court's
3 involvement need go no further than signing the accompanying Proposed Order. Plaintiffs'
4 expert declaration concedes that a full, custodian-by-custodian review for August 1, 2001 to
5 January 1, 2004 is unnecessary. Indeed, nothing in plaintiffs' expert declaration justifies more
6 discovery for this time period than EA is now—in a good faith effort to resolve this dispute—
7 offering to produce. Nor could it. As detailed in Paragraphs 15 through 23 below, the expense
8 of any further discovery is tremendous, and clearly outweighs any marginal relevance that any
9 additional documents from up to nine years ago might have.

10 15. Short of actually collecting, reviewing, and producing all of the documents
11 from August 1, 2001 to January 1, 2004, it is impossible to state the precise amount that a
12 custodian-by-custodian document production for this period would cost EA. However, EA
13 recently completed a similarly-sized document collection, review, and production for an FTC
14 Second Request. Based on the costs of this collection, review, and production, it is possible to
15 accurately estimate how much plaintiffs' requests for additional discovery would cost EA.

16 16. In the spring and summer of 2008, the FTC conducted a full Second
17 Request merger review of the proposed merger of EA and Take-Two Interactive—the very rival
18 that plaintiffs' claim EA has illegally excluded from the “interactive football videogame
19 market.” The FTC's Second Request focused upon whether relevant antitrust markets existed for
20 video games that simulate a specific sport, such as basketball, hockey, or football. The
21 documents collected, reviewed, and produced to the FTC dealt with market definition, market
22 power, competition, pricing, license agreements, and league negotiations—the exact issues
23 central to this case.

24 17. Guidance Software, First Advantage, and Covington & Burling LLP all
25 worked on the document collection, review, and production for the FTC's Second Request. The
26 costs to EA for the document pull and production are itemized in Paragraphs 18 through 23,
27 below.

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24. Federal Rule of Civil Procedure 26(b)(2) requires courts to limit discovery where the burden or expense of the proposed discovery outweighs its likely benefit. Fed. R. Civ. P. 26(b)(2). Unlike many cases where the cost of discovery is difficult to quantify, here EA has recently completed a highly analogous document collection and production for the FTC involving almost all of the custodians at issue in this litigation. Accordingly, the projected cost to EA of nearly \$3 million dollars is an accurate estimate based on prior invoices actually paid by EA. The burden is anything but speculative. By contrast, plaintiffs' own expert concedes

1 that a custodian-by-custodian document collection and production is unnecessary. Plaintiffs
2 have not made any showing that would justify the high cost of collecting, reviewing, and
3 producing documents from 2000 to 2003 at the individual custodian level. Plaintiffs showing—
4 at best—justifies pricing data and corporate level documents concerning competition. EA has
5 agreed to produce—and will produce—exactly that, as detailed in Paragraphs 7-8, 10, and 12
6 above.

7 25. EA respectfully requests that the Court's June 25, 2009 Order denying
8 Plaintiffs' Motion To Compel be affirmed. To the extent that plaintiffs' expert declaration
9 justifies the production of data and documents from 2000 to 2003, EA has agreed to produce data
10 and documents sufficient to moot plaintiffs' demand; plaintiffs' expert declaration acknowledges
11 that a custodian-by-custodian review is not necessary and, as set forth herein, the burden of such
12 a review to EA would be nearly \$3 million dollars.

13 26. For these reasons, EA respectfully requests the Proposed Order filed
14 herewith be entered.

15 I declare under penalty of perjury under the laws of the United States that the
16 foregoing is true and correct. Executed this 13th day of July 2009, San Francisco, California.

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18 Dated: July 13, 2009

19 LATHAM & WATKINS LLP

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21 By /s/ Timothy L. O'Mara
Timothy L. O'Mara

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