

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

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

**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

MDY INDUSTRIES, LLC,
Plaintiff and Counterdefendant,

vs.

**BLIZZARD ENTERTAINMENT, INC.,
and VIVENDI GAMES, INC.,**

Defendants and Counterclaimants,

Case No.: CV06-02555-PHX-DGC

**STATEMENT OF DISPUTED FACTS
BY PLAINTIFF MDY INDUSTRIES,
LLC, AND THIRD PARTY
DEFENDANT MICHAEL DONNELLY
IN RESPONSE TO BLIZZARD'S
MOTION FOR SUMMARY
JUDGMENT**

The Honorable David G. Campbell

**BLIZZARD ENTERTAINMENT, INC.,
and VIVENDI GAMES, INC.,**

Third-Party Plaintiffs,

vs.

MICHAEL DONNELLY, an individual

Third-Party Defendant.

1 *The Parties*

2 1. MDY Enterprises, LLC (“MDY”) and Michael Donnelly (“Donnelly”)
3 (collectively, “the MDY Parties”) do not dispute paragraphs 1-3.

4
5 *Michael Donnelly and MDY Industries, LLC*

6 2. The MDY Parties do not dispute paragraphs 4-8.

7
8 *World of Warcraft*

9 3. The MDY Parties do not dispute paragraphs 9-17.

10 4. In paragraph 18, the MDY Parties state that the “universe” must refer to the
11 experience when a user actually plays WoW. A person does not need to be “connected to
12 a WoW server using an authorized subscription” in order to load the WoW software code
13 into RAM memory. (Deposition of Greg Ashe (“Ashe Dep.”), 43:17 - 44:8 relevant
14 excerpts of which are attached hereto as **Exhibit A**).

15 5. The MDY Parties do not dispute paragraphs 19-49.

16 6. The MDY Parties dispute paragraph 50. When users launch a copy of
17 WoW from their hard drive in order to access the game servers and play the game, the
18 user is not making a “copy” in the copyright sense, but rather is simply moving software
19 code from the hard drive to RAM so that the computer can execute the coded instructions
20 more efficiently. In fact, a computer could execute the coded instructions directly from
21 the hard drive. (Deposition of Joseph Calandrino (“Calandrino Dep.”) at 49, 54, 68,
22 attached hereto as **Exhibit B**.); (Expert Report of Joseph Calandrino (“Calandrino
23 Rep.”), attached hereto as **Exhibit C**) at 2-5).

24 7. The MDY Parties do not dispute paragraphs 51-52.

25
26
27
28 *Threats to WoW Gaming Experience - Bots*

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Real-World Resource Drain Due to Botting

16. The MDY Parties dispute paragraph 64. Glider cannot cause more than 3.6% server loading. Given 9.3 million active WoW customers (Strumpf Rep. at 6) and 27,300 active Glider customers (*Id*), active Glider customers comprise a mere 0.03% of active WoW customers. Even assuming that every Glider customer is somehow running 24 hours per day, (Castronova Rep. at 21, which is attached hereto as **Exhibit F**) which is very unlikely (Strumpf Rep. at 16), instead of the intended 2 hours per day (Castronova Rep. at 20), then each Glider customer is causing 12 times the loading. This translates to 3.6% loading at 0.03% penetration. No evidence has been presented that Glider customers choose servers differently from other WoW players.

17. The MDY Parties dispute paragraph 65. See response to paragraph 64 above.

Social Impact of Botting

18. The MDY Parties do not dispute paragraphs 66-67.

19. The MDY Parties dispute paragraph 68. Players do not mind if they play a game in which the other players are not actually present. (Donnelly Aff. ¶ 4; Strumpf Rep. at 15).

Decrease of Demand Due to Botting

20. The MDY Parties dispute paragraph 69. (Strumpf Dep. and Rep.). A copy of the Strumpf Dep. is attached hereto as **Exhibit G**

21. The MDY Parties dispute paragraph 70. (Strumpf Dep. and Rep.).

The Problems of RMT and Gold Farming

22. The MDY Parties do not dispute paragraphs 71-72.

1 23. The MDY Parties assert that paragraph 73 is a legal conclusion, not a fact.

2 24. The MDY Parties do not dispute paragraphs 74-75.

3 25. The MDY Parties dispute paragraph 76. (Strumpf Report., at 18-21).

4 26. The MDY Parties do not dispute paragraphs 77-79.

5
6
7 ***Blizzard's Need to Have and Enforce Rules***

8 27. The MDY Parties do not dispute paragraph 80.

9 28. The MDY Parties dispute paragraph 81. The use of Glider with WoW has
10 little, or no negative impact on the game-play experience of others. (Donnelly Aff. ¶ 5;
11 Strumpf Report at 6).

12 29. The MDY Parties do not dispute paragraphs 82.

13 30. The MDY Parties dispute paragraph 83. The MDY Parties do not dispute
14 that Blizzard may have received 465,000 in-game petitions from users complaining about
15 bots. The petitions, however, are extremely unreliable as to their accuracy and constitute
16 inadmissible hearsay. Most significant is the fact that Blizzard never presented any
17 evidence to confirm that all of the petitioners actually encountered a bot during play.
18 Additionally, some of the petitions were flat out false. For example, two of the
19 complaints Blizzard provided specifically mention Glider (Blizzard's SOF ¶ 164-65).
20 Those two complaints were filed by the same user when Glider was physically off-line
21 due to Blizzard's November, 2006 ban wave (Donnelly Dep. at 139:4-23, a copy of
22 which is attached hereto as **Exhibit H**). Because MDY prohibited Glider use by its
23 customers during the dates specified, it was impossible for the complaints to refer to
24 Glider. Another example pertained to a third complaint in Blizzard's SOF ¶ 162 that
25 claims to identify Glider based on the character spinning repeatedly on October 12, 2006.
26 This complaint likely identifies InnerSpace instead, a competitor to Glider (Deposition of
27 Joseph Thaler ("Thaler Dep.") at 18:3-7, a copy of which is attached hereto as **Exhibit I**),
28

1 based on this thread: <http://ismods.com/forums/viewtopic.php?t=2586> (a copy of which is
2 attached hereto as **Exhibit U**) from InnerSpace's support board on October 11, 2006.
3 Glider had no similar reported bug at the time. Furthermore, Blizzard has presented no
4 evidence that any of the 465,000 bot complaints pertained to Glider users. In fact,
5 because MDY had not sold Glider until June, 2005 (Donnelly Dep. at 60:5), Blizzard's
6 alleged complaints between December 22, 2004 and June, 2005 could not have pertained
7 to Glider.

8 *The World of Warcraft EULA and TOU*

9
10 31. The MDY Parties do not dispute paragraphs 84-89.

11 *Blizzard's EULA and TOU Provisions at Issue*

12 32. The MDY Parties do not dispute paragraphs 90-104.

13 *Blizzard's Technical Measures to Enforce Rules*

14
15 33. The MDY Parties do not dispute paragraphs 105-07.

16 *Warden – Scan.dll*

17 34. The MDY Parties do not dispute paragraphs 108-10.

18 35. The MDY Parties dispute paragraph 111. Scan.dll stops the *game* from
19 copying elements into RAM. The user can still copy the elements at any time by simply
20 dragging the WoW folder somewhere else, such as a hard disk, flash drive, CD-ROM, or
21 other storage. The contents will also pass through RAM during this copy. (Donnelly
22 Aff. ¶ 7).

23 36. The MDY Parties dispute Paragraph 112. The *entire* executable code for
24 wow.exe is loaded into memory at the authentication portion, including game logic for
25 spells, combat, LUA scripting, and everything else. The only content that is not yet
26 loaded into memory is game resource, namely graphics, sound, text. (Donnelly Aff. ¶ 8).

27
28 37. The MDY Parties dispute Paragraph 113. Specifically, the user cannot

1 *attempt* to authenticate if scan.dll detects a program. Scan.dll is not part of the
2 authentication process, but it happens *before* authentication. (Donnelly Aff. ¶ 9).

3 38. The MDY Parties dispute Paragraph 114. InnerSpace, by Joseph Thaler, is
4 also completely undetectable and has only been picked up by Warden on a few occasions
5 in June of 2007. (Thaler Dep. at 20:24-25, 21:1-4). WOWmimic, cited as as the possible
6 bot complaint in Blizzard SOF 169, has also been on the open market since September of
7 2007 and has not been detected. (WOWmimic launch announcement:
8 <http://www.gamemimic.com/static/ff80808114fc01fe01150f788e64000a.jsp>)

9 ***Warden – The Resident Component***

10 39. The MDY Parties do not dispute paragraph 115, 117-119. The MDY
11 Parties dispute paragraph 116. Warden has the ability to stop the *game* from copying
12 further elements into RAM. The user can still copy the elements at any time by simply
13 dragging the WoW folder somewhere else, such as a hard disk, flash drive, CD-ROM, or
14 other storage. The contents will also pass through RAM during this copy. (Donnelly
15 Aff. ¶ 7).

16 **The MDY Business**

17 ***Glider***

18 40. The MDY Parties dispute paragraph 120. MDY did not make its first sale
19 of Glider until June, 2005. (Donnelly Dep. at 60:5).

20 41. The MDY Parties do not dispute paragraphs 121-22.

21 42. The MDY Parties dispute paragraph 123. Glider currently can be used to
22 automate Windows Solitaire. (<http://www.youtube.com/watch?v=f7Oy9fOwyr4>).
23 Additionally, MDY is currently developing the Glider platform for use with other games
24 similar to WoW. Glider can also be used as a tool to assist people with physical
25 disabilities in playing WoW. In particular, any person who has difficulties using a
26
27
28

1 standard keyboard can program Glider to mimic the keystrokes they would use to play
2 WoW. (Donnelly Aff. ¶ 10); (See **Exhibit Z – Handicap letters**).

3 43. The MDY Parties do not dispute paragraphs 124-25.

4 44. The MDY Parties dispute paragraph 126. Glider is not designed to
5 circumvent Warden. Glider is designed, and is solely marketed as, a tool to assist WoW
6 players in leveling their characters to level 70 at a faster than normal rate. Glider's
7 ability to circumvent Warden is a feature of Glider. Furthermore, MDY did not even
8 implement Glider's ability to circumvent Warden until over six months after MDY first
9 began developing Glider. MDY added the anti-detection feature in September, 2005 only
10 after MDY realized that Blizzard objected to Glider's use with WoW. (Donnelly Dep. ¶
11 83:12-15, Donnelly Aff. ¶ 11).

12 *MDY Affiliates*

13 45. The MDY Parties do not dispute paragraphs 127-28.

14 46. The MDY Parties dispute paragraph 129. MarkeeDragon.com resells
15 Glider. (Eikenberry Dep. at 25:19-21, a copy of which is attached hereto at **Exhibit J**).
16 MDY does not sell or resell Glider through MarkeeDragon.com. (Donnelly Aff. ¶ 12).

17 47. The MDY Parties do not dispute paragraphs 130-31.

18 *Operation of Glider*

19 48. The MDY Parties do not dispute paragraphs 132-34.

20 49. The MDY Parties dispute paragraph 135. Launchpad was a feature of
21 Glider from October, 2005 through January, 2008 and was not necessary for use
22 (Calandrino Dep. at 80:22). It is no longer necessary or even possible for a Glider user to
23 start the WoW software client using Glider as of version 1.5.7, released in January, 2008.
24 (Donnelly Aff. ¶ 13).

25 50. The MDY Parties dispute paragraph 136. See paragraph 49 above.

1 was in fact being used by a WoW player.

2 60. The MDY Parties dispute paragraphs 164-65. *See* paragraph 30 above.

3
4 61. The MDY Parties do not dispute paragraph 166. Blizzard, however, has
5 presented no evidence that the cited complaint referred to an actual incident where Glider
6 was in fact being used by a WoW player. Furthermore, Blizzard has presented no
7 evidence that the petitioner canceled his/her account as a result of the alleged incident.

8 62. The MDY Parties do not dispute paragraph 167. Blizzard, however, has
9 presented no evidence that the cited complaint referred to an actual incident where Glider
10 was in fact being used by a WoW player. Furthermore, Blizzard has presented no
11 evidence that the petitioner canceled his/her account as a result of the alleged incident.

12 63. The MDY Parties dispute paragraph 168. The reference to "AFK'ing
13 [botting]" is for the battlegrounds feature of WoW and is not used to gain experience in
14 the game (<http://www.worldofwarcraft.com/pvp/battlegrounds>). Although Glider can
15 function in battlegrounds, it requires a third-party add-on program. MDY explicitly
16 discourages using Glider in battlegrounds and does not sell or promote any add-on
17 programs that would enable Glider to work in battlegrounds. (Donnelly Aff. ¶ 15);
18 (<http://vforums.mmoglider.com/showpost.php?p=221025&postcount=10>);
19 (<http://vforums.mmoglider.com/showpost.php?p=197587&postcount=34>); (Donnelly
20 Dep. at 287-88).

21 64. The MDY Parties do not dispute paragraph 169. Blizzard, however, has
22 presented no evidence that the cited complaint referred to an actual incident where Glider
23 was in fact being used by a WoW player.

24 65. The MDY Parties dispute paragraph 170. *See* paragraph 63 above.

25
26 **Glider Use Violates the WoW EULA and TOU**

27 ***Bots and Other Automated Programs are Prohibited***

28 66. The MDY Parties do not dispute paragraphs 171-73.

1 67. The MDY Parties dispute paragraph 174. The statement in paragraph 174
2 is a conclusion of law. To the extent that the TOU prohibits bots, the TOU only began
3 prohibiting bots in December, 2006 when Blizzard added the term “bots” as one of the
4 explicit types of programs Blizzard apparently did not allow to be used with WoW.
5 (Ashe Dep. 133:10-41:15, specifically 138:21-41:15).

6 *Compare* Section 2C of TOU as of September 2005 (**Exhibit O**);

7 **C. You agree that you will not (i) modify or cause to be modified any files that are a part of a World of
8 Warcraft installation; (ii) create or use cheats, "mods", and/or hacks, or any other third-party software
9 designed to modify the World of Warcraft experience; (iii) use any third-party software that intercepts,
10 "mines", or otherwise collects information from or through World of Warcraft; or (iv) allows players
11 who are playing characters aligned with the "Alliance" faction to chat or otherwise communicate
12 directly with players who are playing characters aligned with the "Horde" faction, or vice versa.
Notwithstanding the foregoing, you may update World of Warcraft with authorized patches and updates
distributed by Blizzard, and use authorized Third Party User Interfaces as set forth in Section 13(f),
below.**

13 *with* Section 4C of TOU as of December 11, 2006 (**Exhibit T**).

14 **C. You agree that you will not (i) modify or cause to be modified any files that are a part of the Program
15 or the Service; (ii) create or use cheats, bots, "mods", and/or hacks, or any other third-party software
16 designed to modify the World of Warcraft experience; or (iii) use any third-party software that
17 intercepts, "mines", or otherwise collects information from or through the Program or the Service.
18 Notwithstanding the foregoing, you may update the Program with authorized patches and updates
19 distributed by Blizzard, and Blizzard may, at its sole and absolute discretion, allow the use of certain
third party user interfaces.**

20 ***Programs that Collect Information from WoW are Prohibited***

21 68. The MDY Parties do not dispute paragraph 175.

22 69. The MDY Parties dispute paragraph 176. The statement in paragraph 176
23 is a conclusion of law.
24

25 ***Unauthorized Third Party Programs are Prohibited***

26 70. The MDY Parties do not dispute paragraph 177. The MDY Parties,
27 however, wish to clarify the statement that MDY did not know that Blizzard disapproved
28 of Glider use until after four months of selling the program when Blizzard first banned

1 one of MDY's customers. (Donnelly Aff. ¶ 16).

2 71. The MDY Parties dispute paragraph 178. The statement in paragraph 178
3 is a conclusion of law. In addition, the EULA expressly states how Blizzard's license
4 terminates:

5
6 **6. Termination. This License Agreement is effective until terminated. You may terminate the License Agreement at
7 any time by (i) permanently destroying all copies of the Game in your possession or control; (ii) removing the
8 Game Client from your hard drive; and (iii) notifying Blizzard of your intention to terminate this License Agreement.
9 Blizzard may terminate this Agreement at any time for any reason or no reason. In such event, you must
10 immediately and permanently destroy all copies of the Game in your possession and control and remove the
11 Game Client from your hard drive. Upon termination of this Agreement for any reason, all licenses granted herein
12 shall immediately terminate.**

13 (Exhibit S, attached hereto.)

14 MDY is not aware of a single case in which Blizzard's license has ever been
15 terminated under any of the provisions set forth in Section 6 of EULA. (Donnelly Aff. ¶
16 35.) And, Blizzard has not provided any evidence that any of its licenses have ever been
17 terminated in the manner specified in the EULA.

18 Moreover, Blizzard has modified the EULA and TOU by its own conduct. In its
19 termination letters, Blizzard never suggests that the copyright license is terminated.
20 Blizzard simply states:

21 If a player is found to have used such a program, he/she may:

- 22 * Be temporarily suspended from the game
- 23 * Have further action taken, up to and including account closure, based on the intent of the program

24 *See, Exhibit Y.*

25 Thus, even assuming Blizzard's legal argument is correct, an issue of fact exists
26 whether any paying user has ever loaded WoW into RAM in a manner that exceeds the
27 scope of the license.

28 ***Donnelly Agreed to and Understood the EULA and TOU***

72. The MDY Parties do not dispute paragraphs 179-80.

1 ***MDY Knew that Glider Violates the EULA and TOU***

2 73. The MDY Parties do not dispute paragraph 181.

3 74. The MDY Parties dispute paragraph 182. MDY did not add the language in
4 its FAQ section until after September of 2005 – shortly after Blizzard banned the first
5 Glider customers. The MDY Parties did not believe Glider would be a violation of the
6 terms before then. (Donnelly Aff. ¶ 17, Donnelly Dep. 83:12-15) Also, Blizzard’s quote
7 of MDY’s FAQ in paragraph 182 omits the rest of MDY’s statement that refers to the
8 sweeping nature of the contract and shows that the MDY Parties did not believe Glider
9 was specifically prohibited by Blizzard’s TOU. MDY’s statement referred to MDY’s
10 suspicion that Blizzard might have believed that it could ban any third party program.
11 Specifically, the following language currently appears in the MDY Parties’ FAQ section.

12 “While Glider does not violate any of the terms listed under
13 Blizzard's ‘Client/Server Manipulation Policy,’ it is still a third-party
14 program and their Terms of Service are very open in what falls
15 under that definition, meaning they can find you in violation for
16 pretty much anything they want.” (Donnelly Aff. ¶ 17).

17 75. The MDY Parties dispute paragraph 183. Blizzard’s citation to the record
18 in paragraph 183 refers to what Donnelly’s understanding of Blizzard’s EULA was as of
19 June, 2007. The MDY Parties did not know that Blizzard objected to Glider use until
20 several months after MDY began selling Glider. (Donnelly Dep. at 83:12-15, 293:13-
21 297:22).

22 76. The MDY Parties do not dispute paragraphs 184-187.

23 ***MDY Knows its Customers Use Glider for Commercial Purposes***

24 77. The MDY Parties dispute paragraph 188. Marcus Eikenberry managed the
25 forum that Blizzard refers to in paragraph 188. The MDY Parties removed the forum on
26 September 17, 2006 even before the litigation commenced due to its content. (Donnelly
27 Aff. ¶ 19). What MDY specifically stated about the post is located on MDY’s forum at
28 <http://vforums.mmoglider.com/showthread.php?t=31623>.

1 78. The MDY Parties dispute paragraph 189. While it is true that MDY
2 markets Glider on MarkeeDragon.com, MDY markets Glider on that website because the
3 site has a reputation for being a place where many WoW players go to discuss the WoW
4 game. The MarkeeDragon.com website is a site devoted to the discussion of several
5 computer games of a similar genre to WoW (See **Exhibit Q**). MDY does not market on
6 the site because the site features forums about buying, trading or selling WoW accounts
7 in violation of Blizzard’s TOU. MDY has no control over what MarkeeDragon.com
8 discusses or promotes (Donnelly Aff. ¶ 20).

9 79. The MDY Parties do not dispute paragraphs 190-91.

10 80. The MDY Parties dispute paragraph 192. See the MDY Parties’ response
11 to paragraph 188.

12 81. The MDY Parties dispute paragraph 193. Although Blizzard is correct that
13 MDY posted information about referring to MarkeeDragon.com with regard to selling
14 Glider efforts on November 22, 2005. (Donnelly Aff. ¶ 21). MDY does not earn a
15 commission or have any business interest in MarkeeDragon.com website other than to
16 sell Glider (Donnelly Dep. at 219:9-12). Selling or buying accounts is not allowed on the
17 Glider forums (<http://vforums.mmoglider.com/announcement.php?f=30>) Note:
18 WTT/WTS/WTB are short-hand for “want to trade”, “want to sell”, and “want to buy”
19 respectively.
20

21 82. The MDY Parties do not dispute paragraphs 194-95. The MDY Parties,
22 however, for the purpose of clarification do not market Glider for the purpose of gold
23 farming in WoW. In fact, the MDY Parties actively discourage such a practice.
24 (Donnelly Aff. ¶ 22, forum post by Jason Beatty, MDY employee:
25 <http://vforums.mmoglider.com/showpost.php?p=659355&postcount=17>, forum post by
26 Michael Donnelly:
27 <http://vforums.mmoglider.com/showpost.php?p=448270&postcount=128>.
28

1 banned upon detection. Blizzard asked him whether he thought it was *proper for*
2 *Blizzard to ban an account* it suspected of using Glider. He stated that if *Blizzard*
3 believed it was against its terms, in his opinion, Blizzard could ban the account.
4 (Donnelly Dep., at 197:17-23).

5 91. The MDY Parties dispute paragraph 210. Blizzard's expert, Edward
6 Castronova, has no basis to offer what is nothing more than an opinion. Repeatedly,
7 when asked at his deposition if he had ever interviewed WoW players or conducted any
8 scientific study on any issue related to customer complaints or damages to Blizzard, he
9 indicated he had never done so. (Castronova Dep. at 40:8-11, 110:14-21, 174:10-18,
10 204:11-21, 239:14-21). Furthermore, Castronova offered no evidence tying damages
11 from a user complaint to Glider. (Strumpf Rep. at 7).

12 92. The MDY Parties dispute paragraph 211. Blizzard's expert, Edward
13 Castronova, has no basis to offer what is nothing more than an opinion. Repeatedly,
14 when asked at his deposition if he had ever interviewed WoW players or conducted any
15 scientific study to support such an assertion, he indicated he had never done so.
16 (Castronova Dep. at 40:8-11, 110:14-21, 174:10-18, 204:11-21, 239:14-21).
17 Furthermore, at least as to Glider customers, Blizzard actually has an increase in
18 subscription revenues. (Strumpf Supp. Rep. at 4).

19 93. The MDY Parties dispute paragraph 212 in part. While it may be true that
20 botters move through WoW game content more quickly than they otherwise would,
21 Blizzard provided no evidence that Blizzard loses revenue as a result of Glider. *See*
22 answer to paragraph 211 above.

23 94. The MDY Parties do not dispute paragraph 213.

24 95. The MDY Parties dispute paragraph 214. Blizzard's expert, Edward
25 Castronova, has no basis to offer what is nothing more than an opinion. Repeatedly,
26 when asked at his deposition if he had ever interviewed WoW players or conducted any
27
28

1 scientific study to support his claim that Blizzard suffered reputation harm, or evidence of
2 any person who quit WoW, or who never signed up to play WoW because of WoW's
3 reputation for having bots in its game, he indicated he had never done so. (Castronova
4 Dep. at 40:8-11, 110:14-21, 174:10-18, 204:11-21, 239:14-21). Furthermore, MDY's
5 damages expert refuted Castronova's claims. (Strumpf Rep. at 31-32).

6 96. The MDY Parties dispute paragraph 215. *See* answer to paragraph 214
7 above.

8 97. The MDY Parties do not dispute paragraph 216.

9 98. The MDY Parties dispute paragraph 217. *See* answer to paragraph 214
10 above.

11 99. The MDY Parties do not dispute paragraph 218.

12 100. The MDY Parties dispute paragraph 219 in part. The MDY Parties have no
13 way to refute that a large number of complaints on its European website forums regarding
14 bots. Blizzard's citation, however, to Exhibit 45 shows no evidence that Glider bots were
15 identified as the source of the complaints or that contributors to the thread cancelled their
16 subscriptions.

17 101. The MDY Parties do not dispute paragraph 220.

18 102. The MDY Parties dispute paragraphs 221-22 in part. The MDY Parties
19 have do not dispute Blizzard's contentions regarding Glider and Blizzard's resources.
20 Glider, however, is not a cheat program. Glider is a bot program.

21 103. The MDY Parties do not dispute paragraphs 223-26.

22 104. The MDY Parties dispute paragraph 227. Blizzard decides on its own
23 initiative to ban Glider user's accounts. They are under no obligation to do so. Even if
24 Blizzard bans a Glider user's account, Glider users can and often choose to immediately
25 open up another account (Strumpf Supp. Rep page 3, Ashe Dep. 254, Donnelly Aff. ¶
26
27
28

1 23).

2 105. The MDY Parties dispute paragraph 228. Ashe's statement is a speculative
3 opinion, not a fact.

4 106. The MDY Parties dispute paragraph 229. See paragraphs 147 through 153
5 below.

6
7 107. The MDY Parties dispute paragraph 230 in part. Blizzard's statement that
8 a Glider user has a special advantage because he can play multiple accounts
9 simultaneously. This is not a special advantage because any player who does not use
10 Glider can play multiple accounts simultaneously. This practice is known as "multi-
11 boxing" and is explicitly *permitted* by Blizzard. (Donnelly Aff. ¶ 24, WoW forums:
12 [http://forums.worldofwarcraft.com/thread.html?topicId=5103947753&postId=523547236](http://forums.worldofwarcraft.com/thread.html?topicId=5103947753&postId=52354723699&sid=1#2)
13 [99&sid=1#2](http://forums.worldofwarcraft.com/thread.html?topicId=5103947753&postId=52354723699&sid=1#2)).

14 *Glider Gross Revenues*

15 108. The MDY Parties do not dispute paragraphs 231-33.

16 *MDY's Improper Motive*

17
18 109. The MDY Parties dispute paragraph 234. MDY has never actively
19 developed Glider to be used in breach of WoW's EULA and TOU. First, Ashe cannot
20 speak on behalf of Donnelly or MDY, which means that his statement is pure speculation
21 as to Donnelly's motive. Second, whether Glider is a violation of the EULA or TOU is a
22 question of law, not fact. Third, Donnelly designed the Glider program initially for his
23 personal use, and then for other WoW users to level their characters at a faster rate than
24 normal. Donnelly did not even know that Blizzard objected to Glider use until Blizzard
25 first banned a Glider user's account in late September, 2005 – nearly four months after
26 Donnelly first sold a Glider key. Donnelly's intent in designing and selling Glider was
27 not to harm Blizzard or the World of Warcraft experience, but rather his intent was to
28 capitalize on a market demand for a program like Glider and make a profit. (Donnelly

1 Aff. ¶ 25).

2 110. The MDY Parties dispute paragraph 235 in part. While Donnelly did
3 reverse engineer Warden, the reverse engineering was solely for the purpose of allowing
4 Glider to work with WoW. (Donnelly Aff. ¶ 26).

5 111. The MDY Parties do not dispute paragraph 236.

6
7 112. The MDY Parties dispute paragraph 237. At one time, MDY did suggest to
8 its Glider customers to use Launchpad as a way to avoid detection of Warden. MDY,
9 however, eliminated the Launchpad feature of Glider in January, 2008. See paragraph 49
10 above.

11 113. The MDY Parties do not dispute paragraph 238.

12 114. The MDY Parties dispute paragraph 239. Donnelly did not design Glider
13 to encrypt output to make it difficult for Blizzard to analyze it. Donnelly designed Glider
14 with encrypted output to prevent a competitor from analyzing Glider. (Mike D Dep.
15 187:18 – 188:9).

16
17 115. The MDY Parties dispute paragraph 240. See the MDY Parties' response
18 to paragraph 209.

19 116. The MDY Parties dispute paragraph 241 in part. It is still Donnelly's
20 opinion that if the botting population becomes too big, other players become more aware
21 of botters and will think badly about the game. Donnelly, however, currently believes
22 that the botting population has not become too big and is not in danger of becoming too
23 big, given the microscopically small penetration of Glider. Donnelly does not believe
24 that botting hurts the game in any measurable way at present, and does not believe MDY
25 will ever sell enough Gliders to hurt the game due to the microscopically small
26 penetration of Glider. (Donnelly Aff. ¶ 28).

27 117. The MDY Parties do not dispute paragraphs 242-43.
28

1 118. The MDY Parties dispute paragraph 244. See the MDY Parties' response
2 to paragraph 193.

3 119. The MDY Parties dispute paragraph 245 in part. While Donnelly did share
4 his account credentials, Donnelly did so only with other employees of WoW to assist in
5 the reverse engineering process of WoW's Warden feature. As stated above for
6 paragraph 235, reverse engineering for the purpose of interoperability with a computer
7 program is a legitimate act under federal copyright law. See 17 U.S.C. § 1201(f). See
8 also, Testimony of Professor Ginsburg, attached hereto as **Exhibit L**.

9 ***MDY Targets Advertising to Players Looking for Cheats and Exploits***

10 120. The MDY Parties do not dispute paragraphs 246-47.

11 ***Quantifying Financial Damages***

12 121. The MDY Parties dispute paragraph 248. Blizzard has provided no
13 evidence that Glider use causes Blizzard real, concrete reputational and financial harm.
14 (Strumpf Rep. at 31-32).

15 122. The MDY Parties dispute paragraphs 249-52. Blizzard does not have to
16 devote any time to bot enforcement. Blizzard chooses to do so.

17 123. The MDY Parties dispute paragraph 253. Blizzard has suffered no harm to
18 its reputation as evidenced by the fact that despite MDY has increased its sales of Glider
19 keys from zero to over 100,000 from June, 2005 to the present, Blizzard has increased its
20 subscription from 3.5 million active subscribers to well over 10 million in the same time
21 period. Furthermore, Blizzard has presented no evidence that WoW subscribers have
22 actually terminated their accounts *because of Glider*. (Strumpf Dep. at 62:25 to 73:16).

23 124. The MDY Parties do not dispute paragraphs 254-57.

24 125. The MDY Parties dispute paragraph 258. Castronova offered no empirical
25 evidence to support his claim that a "casual WoW player can be expected to average 2
26
27
28

1 hours of play per day.” In fact, when asked how he arrived at this figure, he stated
2 “That’s how often I play, about two hours a day, when I play those games.” (Castronova
3 Dep. at 240:19 to 241:9).

4 126. The MDY Parties dispute paragraph 259. While theoretically if a person
5 uses Glider 24 hours a day, a person could complete 480 hours of play in just 20 days, no
6 person actually does use Glider 24 hours a day because it requires human interaction to
7 continue leveling. In fact, the number of hours that people use Glider varies in the same
8 way that the number of hours that people who play WoW without Glider varies. When
9 asked if he had any evidence to support his assertion, Castronova stated that he did not.
10 (Donnelly Aff. ¶ 2); (Castronova Dep. at 243:11 to 244:15).

11 127. The MDY Parties dispute paragraph 260. See the MDY Parties’ responses
12 to paragraphs 258-59.

13 128. The MDY Parties dispute paragraph 261. Castronova’s model is flawed in
14 its entirety. The MDY Parties’ damages expert, Koleman Strumpf, refuted every aspect
15 of Castronova’s model in Strumpf’s report. (*See generally*, Strumpf Rep.).

16 129. The MDY Parties dispute paragraph 262. If anything, Blizzard’s statement
17 in paragraph 262 acknowledging that WoW “remains very popular, and indeed has
18 generally increased in popularity,” is evidence that Glider use has had no impact on
19 Blizzard’s bottom line. This is further established by what the MDY Parties’ expert has
20 stated. (Strumpf Report at 6).

21 130. The MDY Parties dispute paragraph 263. Despite Castronova’s conclusion
22 that a 1.0% increase in cheating behavior such as botting results in a .05% decrease in
23 demand for WoW, Castronova could not attribute any decrease in the demand for WoW
24 to Glider. Furthermore, Castronova’s conclusion is directly contrary to the fact that the
25 public demand for WoW has never decreased since Glider first became available in June,
26 2005. Additionally, the MDY Parties’ expert rebutted the validity of Castronova’s
27
28

1 model. (Castronova Dep. at 261:21 to 266:11); (Strumpf Report at 6).

2 131. The MDY Parties dispute paragraph 264. See the MDY Parties' response
3 to paragraph 263 above.

4 ***Blizzard's Warden Program***

5
6 132. Warden is a mechanism Blizzard uses to detect the presence of third-party
7 software that Blizzard deems is unauthorized under its EULA or TOS. See **Exhibit V**
8 (Bates No. BLIZZM00335490, BLIZZM00335507).

9 133. When a licensee is running the WoW game client, Warden detects changes
10 to the licensee's computer memory (RAM) and reports any changes back to Blizzard.
11 Blizzard then compares the changes in the licensee's RAM for known patterns of code
12 that indicate that an unauthorized third-party software program is running. Once Blizzard
13 confirms the licensee's use of an "unauthorized" third-party program, such as a bot
14 program, Blizzard decides whether it will ban the licensee's account. See **Exhibit W**
15 (Deposition of Matthew Versluys), at 18-22.

16 134. Blizzard does not ban, nor has it ever banned the licensee itself. If Blizzard
17 bans a licensee's account, the licensee may immediately sign up for a new account using
18 the licensee's name and same credit card number that it previously used for the banned
19 account. See **Exhibit A** (Deposition of Greg Ashe), at 254.

20 135. Warden is not a copy protection program in that it cannot:

- 21
- 22 a. Prevent a person from accessing the WoW game client software
23 code;
 - 24 b. Prevent a person from copying the WoW game client software from
25 a compact disc or DVD to another form of storage medium;
 - 26 c. Prevent a person from copying a downloaded version of the WoW
27 game client obtained from Blizzard's server to another form of
28 storage medium;

- 1 d. Prevent a person from distributing copies of the WoW game client
2 software;
3 e. Prevent a person from making derivative works of the WoW game
4 client software. *See Exhibit A*, at 43-44.
5
6

7 ***Blizzard's Scan.dll Program***

8 136. Scan.dll is the second element of Warden's cheat detection system.
9 Scan.dll is a dynamic link library file that is part of the WoW game client. After the
10 WoW game client is loaded into a licensee's RAM, the computer executes the Scan.dll
11 file. The file scans the inside of the licensee's RAM and WoW game data files and
12 checks for changes or modifications to the WoW game client code and game files to
13 determine whether the licensee has loaded any "unauthorized" third-party programs. If
14 Scan.dll detects an unauthorized program, the WoW game client will present an error
15 message and will not allow the licensee to log onto WoW server to play WoW. *See*
16 **Exhibit A**, at 53-56, 63.
17

18 Blizzard's entire argument pertaining to Scan.dll is moot. Since January of 2008,
19 MDY's Glider software no longer needs to launch the WoW software client program to
20 work with WoW. (Donnelly Aff. ¶ 40.) Glider users are now able to load the WoW
21 software first, and then load Glider. *Id.* Because Scan.dll can only detect third-party
22 software when a user first loads WoW, when a user loads Glider, Scan.dll is not even
23 active. Thus, Glider does not circumvent Scan.dll at all. If anything, this demonstrates
24 how ineffective Scan.dll is as an access control means, as well as proving that MDY
25 could not be liable under the DMCA as it pertains to Scan.dll since Glider does not
26 circumvent Scan.dll.
27

28 137. If any of the three tests fail, then the WoW game client will present an error

1 message and will not allow the licensee to log into the WoW game client to play WoW.
2 *See id.*

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

- 4 a. Prevent a person from accessing the WoW game client software
5 code;
- 6 b. Prevent a person from copying the WoW game client software from
7 a compact disc or DVD to another form of storage medium;
- 8 c. Prevent a person from copying a downloaded version of the WoW
9 game client obtained from Blizzard's server to another form of
10 storage medium;
- 11 d. Prevent a person from distributing copies of the WoW game client
12 software;
- 13 e. Prevent a person from making derivative works of the WoW game
14 client software. *See Exhibit A*, at 43-44.

15 139. Scan.dll's only function is to detect third-party software when WoW is *first*
16 loaded into RAM. (Donnelly Aff. ¶ 37.) After a user loads the WoW game code into
17 RAM, Scan.dll stops functioning. *Id.* Although Scan.dll can control whether a licensee
18 can access the WoW game client software to *play* the WoW game during the initial
19 loading of the WoW game client, Scan.dll cannot control whether a licensee can *access*
20 the WoW game client software code for the purpose of examining, copying, making
21 derivative works or distributing copies of WoW. *Id.* In fact, Scan.dll cannot prevent the
22 licensee *from manually loading the game client into RAM. Id.* Even if Scan.dll detects
23 prohibited software code – it can only stop the licensee from *playing*, not copying, the
24 WoW software code. *Id.* Any person can manually copy the game client into RAM by
25 using any file viewer, such as Notepad, to open individual WoW software files from a
26 person's hard drive. When this is done, the files are loaded into RAM. All Scan.dll can
27 do is prevent a person from playing the game.
28

1 *Glider's Detection Avoidance Features*

2 140. MDY continuously updates Glider's ability to avoid detection from Warden
3 only because MDY must maintain Glider's interoperability with WoW. (Donnelly Aff. ¶
4 38).

5 141. When MDY started selling Glider, Glider did not originally avoid
6 detection. MDY did not originally include detection avoidance as a feature of Glider
7 because Donnelly never believed that Blizzard would object to the use of Glider with
8 WoW. MDY added this feature to Glider solely as a countermeasure to Blizzard's
9 unilateral attempt to take away what Donnelly believed was a rightful software business.
10 (Donnelly Aff. ¶ 39).

11 142. MDY's expert witness, Mr. Joseph Calandrino, has offered his opinion that
12 that computer experts distinguish between copying software code from an external source
13 such as a compact disc to an internal hard drive, and moving software code from a hard
14 drive to RAM in terms of copyright infringement. See **Exhibit C**. Mr. Calandrino
15 proffers the opinion that because the hard drive and RAM are technically connected to
16 each other as part of one system, once a copy of machine readable code is fixed to a
17 computer's hard drive, simply moving the code to RAM is not copying, but rather it
18 serves to enable the CPU to execute the code faster than if it remained on the hard drive
19 (Calandrino Dep at 49:6). In other words, he notes that a computer's CPU can execute
20 WoW's software code directly from either a user's hard drive or RAM. The program,
21 however, would execute much slower from a hard drive than if it was able to execute the
22 instructions from RAM memory (*Id* at 68). Mr. Calandrino's opinion demonstrates that
23 *MAI* is distinguishable to the present case because the "copying" in *MAI* pertained to the
24 loading of code from an *external* source into RAM, whereas here the computer merely
25 moves the data from a hard drive to a more convenient location to be executed by the
26 CPU (*Id* at 54:17).

27 *Blizzard Has Misused Its Copyrights Before*

1 143. In November, 2005, Blizzard tried shutdown a business where the owner
2 did nothing more than sell a book that provided extensive details in how to level a WoW
3 character to level 70 in as little as eight days. The owner of the business, Brian Kopp,
4 sold his books through eBay.

5 144. Over a period of two months, Blizzard filed several requests with eBay
6 demanding that eBay remove Kopp's auctions selling his book. Blizzard asserted the
7 identical bases for terminating Mr. Kopp's auctions as Blizzard asserts against MDY –
8 that Kopp's book sales violated Blizzard's EULA/TOU by (1) infringing Blizzard's
9 copyrights, (2) using WoW software for commercial purposes, and (3) trading off of
10 Blizzard's good will by selling an unauthorized leveling guide to WoW. Because of
11 Blizzard's demands to eBay, eBay removed Kopp's auctions and ultimately terminated
12 his eBay user account. Blizzard threatened Kopp that if he continued to sell his
13 unauthorized book, Blizzard would sue him.

14 145. Reacting to Blizzard's threats, Kopp filed suit against Blizzard in early
15 2006 alleging various causes of action including tortious interference with contracts and
16 copyright misuse (*See Exhibit X*). Shortly thereafter, Blizzard settled with Kopp.
17 Blizzard, however, did allow Kopp to continue selling his book, and Kopp continues to
18 sell his book even today. Blizzard's acts raise two important issues. First, Blizzard
19 asserted the same liability theories against Kopp as it does with MDY. Blizzard used its
20 breach of its EULA as a basis for alleging copyright infringement to stop the sale of an
21 independently created literary work that effected WoW. Second, MDY should have as
22 much right to sell its literary work (a software program) as Kopp should have to sell his
23 literary work (a book). Clearly, Blizzard's acts demonstrate a pattern and practice of
24 misusing its EULA and its copyright in WoW in ways that the copyright laws do not
25 apply.

26
27 146. Kopp's book and Glider have nearly identical purposes. The only
28 difference is that the book describes how a WoW player can save time by getting to level

1 70 faster than a normal user, while Glider uses software to accomplish the leveling task.
2 More importantly, the book advertises a person can get to level 70 in eight days, while
3 under normal circumstances, Glider requires a minimum of one to two months.

4 *Strumpf Report*

5 147. MDY's damages expert witness, Dr. Koleman Strumpf ("Strumpf")
6 categorically rejects all of Blizzard's damage calculations cited by Blizzard's expert,
7 Edward Castronova (Strumpf Rep. at 31-32, **Exhibit E**). Strumpf, in his expert report,
8 supplemental report, and his deposition, provided concrete evidence that exposed
9 Castronova's calculations as entirely speculative (*Id.* at 7-8,) and wholly unsupported by
10 any controlled economic study.

11 148. Strumpf demonstrated that Castronova's opinions that Glider adversely
12 affected WoW's in-game economy were not only offered without Castronova conducting
13 a single economic study (Strumpf Dep. 94:5-95:21, 310:1-13, **Exhibit G**), but
14 Castronova never interviewed one WoW player or Glider user (Castronova at Dep. 66:4-
15 5, 111:1-23) in arriving at his conclusions.

16 149. Furthermore, Strumpf provided concrete evidence that Glider likely helped
17 Blizzard increase its revenues (Strumpf Rep. at 10-11, Strumpf Supp. at 4, **Exhibit K**).
18 Most importantly, Strumpf demonstrated that whatever revenues Blizzard may have lost
19 as a result of bots, Castronova provided no evidence to determine whether Blizzard's
20 alleged lost revenues originated from the literally thousands of various bots and human
21 gold farmers that play WoW and exploit WoW's resources, and WoW users who use
22 Glider (Strumpf Rep. at 12-14; Strumpf Dep. 140:1-10).

23 150. Strumpf also presented the most obvious evidence that Blizzard has
24 suffered no harm - that being the fact that since MDY introduced Glider in June, 2005,
25 MDY has sold over 100,000 Glider keys, yet Blizzard's active WoW subscription total
26 increased from 3.3 Million to well over 10 Million in the same time period (Strumpf Rep.
27
28

1 at 3-5). During that time, Blizzard has steadily experienced an increase in WoW
2 subscribers at a rate of approximately one million every 3.5 to 4 months – a rate that has
3 never been seen before by a computer game by a factor of twenty.

4 151. Additionally, Strumpf presented evidence in his Supplemental Report that a
5 survey of over 6,200 Glider users that MDY conducted indicated that the majority of
6 Glider users purchased multiple WoW accounts, several even purchase three or more
7 accounts (Strumpf Supp. Rep. at 1-3). The survey demonstrated that Glider users, on
8 average, purchase one additional WoW account (Strumpf Supp. at 3). The survey also
9 demonstrated that a substantial majority of Glider users indicated they played WoW
10 much longer with Glider once they reached level 70 than if they had spent a substantial
11 period of time grinding through the repetitive tasks in levels 1-70 without Glider. *Id.*

12 152. Strumpf's evidence proves that Glider users provide, on average, twice as
13 much subscription revenue as non-Glider users and the evidence also rebuts Castronova's
14 meritless opinion that Glider users deprive Blizzard of revenues from levels 1-70 because
15 they play faster than normal. Strumpf's evidence demonstrates that whatever revenue
16 Blizzard might lose by Glider user leveling faster than normal prior to level 70, Blizzard
17 is more likely to make up that revenue after a Glider user reaches level 70 because the
18 Glider user will likely play WoW longer once he reaches level 70 *Id.*

19 153. Furthermore, MDY regularly receives unsolicited comments in its Glider
20 Forum from Glider users who state that were it not for Glider, the user would have either
21 quit playing WoW or would have never begun playing WoW at all. (*See Exhibit M*).

22 154. MDY's Glider does not modify or change any WoW software or coding.
23 MDY independently created Glider as an aftermarket software application that permits its
24 users to play WoW on auto-pilot. (Donnelly Dep. at 286:4-8).

25 Dated this April 24, 2008
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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

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

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

1 **CERTIFICATE OF SERVICE**

2
3
4 I hereby certify that on March 21, 2008, I electronically transmitted the attached
5 document to the Clerk's Office using the CM/ECF System for filing and
6 transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

7

Name	Email Address
8 Christian Genetski, Esq.	cgenetski@sonnenschein.com
9 Scott Jeremy Stein, Esq.	sstein@sonnenschein.com wanderson@sonnenschein.com
10 Shane McGee, Esq.	smcgee@sonnenschein.com
11	12

13

14
15 I hereby certify that on _____, I served the attached document by
16 FIRST CLASS MAIL on the following, who are not registered participants of the
17 CM/ECF System:

18

Name	Physical or Email Address
19	20

21

22
23
24 s/ Lance C. Venable