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Party: Spark Entertainment, Inc.  
Products: Multi-Products for PlayStation 2, Xbox and GameCube  
Deal Type: Publishing and Development

## SOFTWARE PUBLISHING AND DEVELOPMENT AGREEMENT

This Software Publishing and Development Agreement (this "Agreement") is entered into as of September 10, 2002 by and between Spark Entertainment, Inc. ("Developer"), a California corporation with offices at 11130 Morrison Street, North Hollywood, California 91601, and Activision Publishing, Inc. ("Activision"), a Delaware corporation with offices at 3100 Ocean Park Boulevard, Santa Monica, California 90405.

### RECITALS

- A. Activision is in the business of developing, manufacturing, publishing, licensing, distributing and selling entertainment software and video game products.
- B. Developer is in the business of developing and producing entertainment software products.
- C. Activision desires to engage the services of Developer to develop and produce for Activision a total of three (3) distinct Products (as set forth and defined in Section 1) to be published and distributed by Activision, and Developer is willing to develop and produce the Products for Activision.
- D. Activision and Developer entered into a letter agreement dated as of July 22, 2002 (the "Letter Agreement"), which set forth the principal terms and understanding between the parties regarding the development by Developer of the Products and other rights and obligations of the parties with respect thereto.
- E. The parties now desire to enter into this more formal Agreement, the terms of which are derived from and based on the provisions of the Letter Agreement and which shall supersede the Letter Agreement.

NOW, THEREFORE, in consideration of the mutual representations, warranties and covenants set forth in this Agreement and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties to this Agreement agree as follows:

### 1 Products and Exclusivity

The works that are the subject matter of this Agreement shall include three (3) distinct interactive entertainment software products to be developed by Developer for each of the Platforms (as defined in Section 2) and which shall be comprised of the following:

- 1.1 A "AAA" quality, reality-based World War 2 entertainment software product, with a title to be determined, in the first person shooter genre (the "First Product").
- 1.2 A second entertainment software product (the "Second Product"), which will either be (a) a Sequel (as defined in Section 1.6 and as Developer may create pursuant to Section 8.1) or (b) a new entertainment software product based on an original concept or a licensed property as mutually agreed upon by the parties.

- 1.3 A third entertainment software product (the "Third Product"), which will either be (a) a Sequel (as Developer may develop pursuant to Section 8.1) or (b) a new entertainment software product based on an original concept or a licensed property as mutually agreed upon by the parties.
- 1.4 The First Product, the Second Product, and the Third Product are collectively referred to, from time to time in this Agreement, as the "Products," and each, individually is sometimes referred to as a "Product."
- 1.5 For purposes of this Agreement, the parties agree that the term "Products" shall specifically include and encompass any and all enhancements to a particular Product as determined by Activision in its reasonable discretion, including, but not limited to, bug fixes and error corrections, code patches, technical improvements and upgrades, and add-ons and expansion or mission packs (collectively, "Enhancements"), and Enhancements shall not be considered separate Products for purposes of calculating the total number of Products to be developed by Developer pursuant to this Agreement.
- 1.6 The term "Sequel" shall mean any sequel to its predecessor Product (the "Predecessor"), if requested to be developed by Activision. The parties acknowledge and agree that for purposes of this Agreement, the term "sequel" shall mean an entertainment software product produced by Developer which is (a) based entirely or in substantial part on one or more major characters in the Predecessor; or (b) based on the primary or one or more major secondary storylines in the Predecessor; or (c) based on the same or substantially similar "universe" (as such term is commonly understood in the computer game software industry, including without limitation, characters, stories, settings, rules, weapons and vehicle designs) as the Predecessor. Sequels shall include prequels and spin-offs.
- 1.7 Until the completion of by Developer of the Second Product in accordance with the terms of this Agreement, Developer agrees to perform services solely and exclusively for Activision and Developer shall not enter into any publishing, development, consulting or service agreements with or otherwise provide services to or for any third party. During the development of the Third Product, Developer will ensure that Developer's Key Employees (as defined in Section 5.1) for the Third Product are performing services on behalf of Activision with respect to the Third Product on an exclusive basis as provided in Section 5.1 and during such development of the Third Product and for a period of twelve (12) months following the completion of the Third Product, Developer shall not be engaged in the development of or provide any other services in connection with any entertainment software product that is directly competitive with (i.e., substantially similar characters, themes and gameplay) any of the Products; provided, however, that this limitation shall not prevent Developer from developing or providing services in connection with other entertainment software products not so specifically excluded.
- 1.8 The parties acknowledge and agree that (a) the First Product shall be part of a larger World War 2 based entertainment software product brand being created by Activision tentatively entitled "Tour of Duty", (b) the First Product will not be the only entertainment software product created under the "Tour of Duty" brand, (c) one or more other developers will be developing entertainment software products under the "Tour of Duty" brand contemporaneously with the First Product on platforms or systems other than the Platforms, including Infinity Ward, Inc., which will be developing a PC-based "Tour of Duty" brand entertainment software product, and (d) such other "Tour of Duty" brand entertainment software products being developed contemporaneously with the First Product shall not be deemed to be the same entertainment software product as, or Converted Versions (as defined in Section 7.2) of, the First Product.

## 2 Platforms and Formats

- 2.1 The parties agree that Developer shall develop the Products to operate on the following platforms configured for both the NTSC and PAL television/video system standards: Sony PlayStation 2 computer entertainment system, Microsoft Xbox and Nintendo GameCube, or any successors or updates to such platforms (the "Platforms").

3 Ownership

- 3.1 For purposes of this Agreement, the term "Intellectual Property" means inventions, know-how, patents, patent rights, and registrations and applications, renewals and extensions thereof, copyrights, copyrightable works or art and works or authorship (including, but not limited to, titles, computer code, themes, objects, characters, character names, stories, dialog, catch phrases, locations, concepts, game play elements, artwork, animation, sounds, musical compositions, audio-visual effects and methods of operation and any related documentation and packaging), copyright registrations and applications, renewals and extensions thereof, trademarks, service marks, trade names, trademark registrations and applications, renewals and extensions thereof, rights in trade dress, rights of paternity, attribution, integrity and other similarly afforded "moral" rights, trade secrets and other intellectual property and proprietary rights recognized by United States law and applicable foreign and international laws, treaties and conventions.
- 3.2 Subject to Section 3.4, Activision or, as applicable, any other party who may license rights to Activision in connection with the development of the Products, shall retain and own all rights, title and interest in and to the Products, including, without limitation, design documents, materials, graphics, animation, music, the Activision Game Engine (as defined in Section 4.2.1), and all technology created or incorporated into the Products by Developer (e.g., computer code and engines, software, software development tools, utilities, data formats or compression methods, algorithms, interfaces, and general computer design practices used by Developer) (collectively, the "Product Technology"), game play elements, audio and visual assets and displays, and other Intellectual Property created by Developer under this Agreement, and the underlying properties upon which the Products are based (i.e., all aspects of a Product's game universe, including, without limitation, all characters, settings, stories, story lines, titles, themes, objects, dialog, catch phrases, weapons, vehicles, locations, concepts, artistic representations, rules and methods of play, names, likenesses, designs and other elements, and all trademarks, trade names, trade dress and copyrights and other Intellectual Property rights relating to such universe and elements (collectively, the "Underlying Properties")). Without limiting the foregoing, Activision (or as applicable, its licensor in connection with a particular Product) shall also own all trade dress rights throughout the world in the packaging and materials developed by Activision for the Products, as well as all trademark rights throughout the world in the name that is actually used by Activision to market and sell the Products.
- 3.3 Subject to Section 3.4, the Products, the Product Technology, the Underlying Properties and all other Intellectual Property Developer creates and/or develops in connection with the services provided by Developer to Activision in regard to the Products under this Agreement shall be considered "work(s) made for hire" (as that term is commonly used under all applicable copyright laws), and shall therefore be the sole and exclusive property of Activision from the time of creation. In the event for any reason whatsoever anything Developer creates and/or develops in connection with the services performed pursuant to this Agreement or any rights to the Products, the Product Technology, the Underlying Properties and related Intellectual Property are deemed not to be work(s) made for hire, or in the event that Developer should, by operation of law, be deemed to retain any rights in the Products, the Product Technology, the Underlying Properties or to any other such Intellectual Property, Developer hereby agrees to irrevocably assign and does hereby irrevocably assign to Activision, without any further consideration and regardless of any use by Activision of the Products, all of Developer's rights, title, and interest, if any, in and to the Products, the Product Technology, the Underlying Properties or any other Intellectual Property created by Developer in connection with this Agreement. Developer also hereby grants Activision a perpetual, worldwide, non-exclusive, paid-up and royalty-free license to exercise any moral rights to any and all aspects of all materials created in connection with the development of the Products. Developer further agrees to execute one or more copyright assignments at Activision's request, the form of which is set forth on Exhibit C attached hereto, or any other subsequent document as further evidence of this assignment, and to cooperate with Activision in perfecting the assignment of any rights to the Products and all Intellectual Property related thereto.
- 3.4 Notwithstanding the foregoing, Publisher and Developer shall jointly own all right, title and interest, including all Intellectual Property rights in and to the software development tools, utilities, subroutines, scripting languages, generic art and generic sound assets (provided that any such art and sound assets cannot be readily identified by the average reasonable consumer as being part of, derived from or associated with any of the Products), and methodologies that may be independently developed by Developer during the course of development of the Products (such

tools, utilities, subroutines, scripting languages, generic art and generic sound assets, and methodologies being generally and collectively referred to herein as "Background Materials") and incorporated into or utilized in the creation of the Products, and Developer shall have the right to utilize the Background Materials in connection with its development of other entertainment software products, provided that: (a) any such Background Materials do not (i) include, embody, incorporate or constitute "derivative works" (as such term is defined under United States copyright law) of any Product Technology provided by Activision to Developer for use in the Products (e.g., Product Technology contained in any software engine provided by Activision), or (ii) require any Product Technology provided by Activision to Developer to function; and (b) Developer shall not have the right to use any such Background Materials in the development of any entertainment software product for third party if such entertainment software product is directly competitive with any of the Products.

#### 4 Responsibilities

##### 4.1 Developer's Responsibilities:

4.1.1 Except as specifically provided below to the contrary, Developer shall be responsible for (a) the complete development and production of the Products, including the creation of all software, programs, computer code, visual assets and related materials required to release the Products commercially, and the design, creation and integration of all audio and sound assets, in conformance with the specifications in the Game Design Document ("GDD") and Technical Design Document ("TDD") to be created by Developer pursuant to the applicable Milestone Schedule for each of the respective Products set forth in Exhibit A attached hereto (the parties agree that the Milestone Schedule for the First Product is attached hereto as Exhibit A-1, and then this Agreement and Exhibit A shall be amended accordingly to include each successive Product's applicable Milestone Schedule, including Exhibit A-2 for the Second Product, and Exhibit A-3 for the Third Product), Activision's specifications for the Products as mutually agreed upon with Developer and as set forth in the GDD and TDD, whether orally or in writing, and commonly accepted standards for premium entertainment software design, development and programming (the "Specifications"); and (b) the payment of any and all development costs. Without circumscribing the generality of the foregoing, such development shall include, without limitation: (i) designing the creative and technical Specifications for the Products; (ii) creating all computer code for the Products; (iii) creating all visual and audio assets for the Products, including, as applicable, all game design aspects, art direction and creation, character development, screen graphics, animation, cut scene and introduction movies, motion capture, and video production, sound recording and effects, music composition, music production, music recording, and voice over recordings; (iv) as necessary, hiring talent for motion capture, acting, and script writing; (v) integrating all visual and audio assets into the Products; (vi) testing the Products in an amount which is sufficient for the Products to be delivered to Activision in "Alpha" and then "Beta" versions (as such terms are defined in the Notes to the Milestone Schedule set forth in Exhibit A) for further quality assurance testing by Activision; (vii) assisting Activision in assuring that the Products receive approval from any first party proprietary system licensor, such as Sony, Nintendo and Microsoft (collectively, "First Parties"), as necessary for the commercial release of the Products (in this regard, Developer agrees to make any and all changes that may be required by such First Parties so as to allow Activision to release and distribute the Products); (viii) assisting in the preparation of the user game manual, hint books or strategy guides and other reference materials; (ix) using its commercially reasonable efforts to correct Defects (as defined in Section 4.1.3) found after release of the Products; and (x) creating foreign language versions of the Products as provided for in Section 9 of this Agreement.

4.1.2 At Activision's request, Developer also will provide to Activision a self-running and/or interactive software program for each of the Platforms that demonstrates the principal features of the Products for use in sales and marketing promotions (the "Demo Program"). The Demo Program must be a practical demonstration of the Products on the applicable platform, where the animated 3D characters are integrated with the 3D world and controlled by the player with a functional user interface. Activision and Developer will mutually agree on the content of the Demo Program and the interim

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delivery milestones for the Demo Program, provided that such Demo Program shall contain at least one fully playable game level and further provided that the quality of such Demo Program shall be competitive with that of the demonstration programs of other "AAA", high quality entertainment software products of similar genres. The parties agree that such Demo Program, if requested to be developed by Activision, shall be delivered to Activision as provided for in the applicable Milestone Schedule for each respective Product set forth in Exhibit A attached hereto.

4.1.3 After the acceptance of a final version of any of the Products by Activision, Developer agrees to diligently and in good faith remedy all Defects discovered in such Products at no additional charge to Activision for a reasonable period of time. For purposes of this Agreement, the term "Defects" shall mean deficiencies in content or technical defects in regard to the program code, graphics, animation, or other Product assets and attributes developed and/or provided by Developer (excluding any Defects that arise from or are caused by any Product assets that are created or delivered to Developer by Activision or any other party under the direction of Activision), such as, by way of example only, cases where (a) the Product is rendered partially or completely non-functional, (b) the Product produces incorrect or misleading information, (c) there is a material detriment to the visual representation, sound or game play of the Product, (d) the Product erroneously interrupts information given to it, (e) the Product causes the destruction, disruption or corruption of a data system, storage device or mechanism, or (e) there are material errors in any textual information, including serious grammatical errors. Such Defects may arise either as deviations from the Specifications or as deviations from commonly accepted standards for normal and correct operation of computer programs, even if not explicitly mentioned in the Specifications. Developer will provide periodic reports to Activision, as Activision may reasonably request, during the course of performing the services required pursuant to this Section. Whenever appropriate, Activision may require that any modifications/corrections are to be provided in the form of a new and complete set of archival materials (as described in greater detail in Section 6.6) with appropriate version number, and/or in a form suitable to be distributed as an electronically downloadable computer patch. Time is of the essence in performing these tasks. If Developer fails to repair or otherwise remedy or mitigate any such Defect within a time period that is reasonable in light of the circumstances surrounding the discovery of such Defect (such time not to exceed in any event thirty (30) days after Developer's receipt of a notice from Activision regarding the discovery of such Defect), Activision shall have the right, in addition to any other remedy it may have under this Agreement, to attempt to correct such Defect or to contract with one or more third parties to have such Defect corrected and may recoup all sums expended for said purpose from Developer's royalty payments hereunder.

4.1.4 If, pursuant to Section 4.3, Activision provides any item of software, tools or other equipment to Developer in connection with the performance by Developer of its obligations under this Agreement, Developer agrees to return such software, tools or equipment to Activision upon Activision's request, but in any event no later than ten (10) days after (a) cancellation of the Products with respect to which such software, tools or equipment was being used, or (b) termination of this Agreement. Any software, tools or equipment provided to Developer by Activision may be used by Developer exclusively for work Developer is doing for Activision under this Agreement and may not be used for work Developer is doing for any other individuals or companies.

4.1.5 At Activision's request and as applicable to each Product's operating platform, Developer shall include the installer program provided by Activision in each Product along with any electronic registration programs, previews, demonstration programs and other promotional materials provided by Activision for inclusion, subject only to the data storage limitations created by the size of the actual Product. Developer may modify the installer and electronic registration programs to suit the particular requirements of the applicable Product, subject to Activision's prior approval.

4.2 Activision's Responsibilities:

- 4.2.1 In connection with the development and production of the Products, Activision shall provide Developer with the following: (a) periodic editorial feedback and substantial creative and technical input on all aspects of Product design and development; (b) a reasonable amount of production management support relating to Developer's production of the Products; (c) source code for Activision's installer and electronic registration program, if applicable; (d) quality assurance testing of the Products; and (e) solely with respect to the First Product, a game engine developed by Activision (the "Activision Game Engine"), which will be provided to Developer free of charge.
- 4.2.2 Activision will be responsible for providing customer telephone and online electronic Internet support, in English only, for end user application of the Products directly to end users located in such parts of the world where such telephone and online service is made available by Activision during Activision's standard business hours. In connection with Activision's obligations to provide customer support undertaken pursuant to this Agreement, Developer agrees to consult with Activision and provide such technical information to Activision as shall be reasonably necessary for Activision to provide such customer support for the Products as Activision provides for its other comparable products in the ordinary course of business.
- 4.2.3 Subject to the provisions of Section 13, Activision will design the packaging for the Products and develop all related advertising, marketing and promotional materials to be used in connection with the distribution of the Products. Developer will cooperate with Activision in connection with its development of such advertising, marketing and promotional materials.
- 4.2.4 Activision will be responsible for all aspects of distribution and sale of the Products in all channels, now existing or hereafter created, and in any manner Activision deems appropriate. Activision may, in its sole discretion, decide to publish any of the Products throughout the world (a) in any variety of forms, including, without limitation, as applicable, in source or object code form recorded on CD-ROM, diskette, cassette tape, read-only memory or any other media, (b) by any method or variety of methods, including, without limitation, distribution under an affiliated label, by licensing or sublicensing, by bundling, and/or, as applicable, by offering the Products electronically, online, on time sharing or for cyber café services, or any other form of delivery, and (c) for use with any electronic devices it deems appropriate.

4.3 Development Aids and other Assistance:

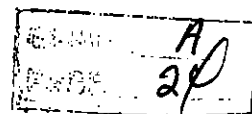
- 4.3.1 From time to time, Activision may provide Developer with certain Activision Development Aids (as defined below), when and in the form Activision and Developer mutually deem appropriate to assist Developer in its development of the Products. Activision Development Aids anticipated to be provided to Developer, and the estimated costs (including lease or depreciation costs) thereof, will initially be described in Exhibit D attached to this Agreement and such Exhibit D shall be amended by the parties from time to time as necessary to (a) include any additional Activision Development Aids provided by Activision to Developer, or (b) account for any other changes in Activision Development Aids provided (or to be provided) to Developer, or the costs thereof, during the course of development of the Products. The costs (including lease or depreciation costs) of the Activision Development Aids shall constitute Additional Advances as set forth and defined in Section 10.2. Subject to Section 10.2, Activision hereby grants a nonexclusive license to Developer to use any delivered Activision Development Aid solely for the purpose of developing the Products. Developer agrees that it shall return to Activision all Activision Development Aids (to the extent such Activision Development Aids are in tangible or electronic form) provided hereunder, including any copies thereof, in accordance with Section 4.1.4.
- 4.3.2 "Activision Development Aids" means equipment, assistance, development tools, utilities or other software, hardware, assets, content, materials or services, that are provided by Activision (or any third party at Activision's direction) to Developer for Developer's use in the development of the Products. Activision Development Aids shall

include, but are not limited to, software programming assistance, installer programs, game engines (but specifically excluding the Activision Game Engine, which shall be provided by Activision to Developer free of charge for use in connection with the development of the First Product) or files, sound system or MP3 decoding software, animation, artwork or other computer generated renderings, cut-scenes, movies (including CG and live action), videos, motion capture, script or dialogue writings, music, sound effects, and voice-overs, and also include First Party Aids. "First Party Aids" means any machine or device, including, without limitation, development kits, debuggers, decompilers, or hand-held machines, manufactured or marketed by or on behalf of First Parties that is provided by Activision (or any third party at the direction of Activision) to Developer to assist Developer in its development of the Products.

4.3.3 Without limiting the foregoing provisions of this Section, Developer agrees and understands that it shall obtain no rights whatsoever to any First Party Aids supplied hereunder, except for the limited right to use the same as described in this Section. DEVELOPER SHALL HAVE NO RIGHT IN ANY EVENT TO PUBLISH OR DISTRIBUTE ANY PRODUCT DEVELOPED IN WHOLE OR IN PART WITH ANY FIRST PARTY AIDS, OR TO USE FIRST PARTY AIDS FOR ANY PURPOSE OTHER THAN FOR THE DEVELOPMENT OF THE PRODUCTS HEREUNDER DURING THE TERM OF THIS AGREEMENT FOR PUBLICATION BY ACTIVISION. DEVELOPER ACKNOWLEDGES AND AGREES THAT FIRST PARTIES ARE THIRD PARTY BENEFICIARIES OF THIS AGREEMENT WITH RESPECT TO THE TERMS RELATING TO FIRST PARTY AIDS, AND THUS HAVE FULL RIGHT TO BRING ANY ACTION AGAINST DEVELOPER, INCLUDING INJUNCTIVE ACTION, TO ENFORCE SUCH TERMS.

## 5 Development Team and Updates

- 5.1 The lead employees for the First Product and Second Product shall include, without limitation, the employees of Developer as identified in Exhibit B attached hereto (the "Key Employees"). Until final acceptance of the First Product and the Second Product, the Key Employees shall devote their full time and effort solely and exclusively to the completion of the First Product and the Second Product. In connection with the Third Product, (a) the parties will mutually determine the list of Key Employees for the Third Product in good faith, (b) Exhibit B shall be amended accordingly to identify the Key Employees for the Third Product, (c) such Key Employees will devote their full time and effort solely and exclusively to the completion of the Third Product, and (d) the parties acknowledge and agree that such Key Employees for the Third Product will include Developer's then lead development and design employees, but shall not include employees working solely in a management capacity. Developer shall be solely responsible for ensuring the continuing availability of all Key Employees, and in order to insure such availability and as a material inducement to Activision entering into this Agreement, Developer agrees to cause each of the Key Employees to enter into long-term employment contracts with Developer commensurate with scope of the development obligations undertaken by Developer hereunder, but in no event less than four (4) years in duration. All such employment contracts will be in a form and substance acceptable to Activision and contain provisions that are customary for agreements of this nature, including, without limitation, confidentiality and proprietary information covenants. Until final acceptance of the Products, the exclusive assignment of the Key Employees shall be the completion of the Products and Developer shall not assign any another project to such Key Employees that would prevent them from fulfilling their respective responsibilities for the Products.
- 5.2 In addition to the Key Employees, the remainder of the development team for the First Product and Second Product shall include, without limitation, the employees of Developer as listed on Exhibit B attached hereto (the "Development Team"), and Exhibit B shall be amended upon mutual agreement of the parties to reflect the then current Development Team dedicated to the Third Product. Until final acceptance of each of the Products, each member of the applicable Development Team shall devote his or her full time and effort solely and exclusively to the completion of the applicable Products. Developer shall be solely responsible for ensuring the continuing availability of all members of the Development Team. A Development Team member terminating his or her employment with Developer shall not be considered a material breach of this Agreement, provided that Developer agrees to use its commercially reasonable efforts to immediately replace such team member with a substantially similarly qualified new team member acceptable to Activision as needed to complete the Products. Until final acceptance of the



Products, the exclusive assignment of such persons (excluding any such person working solely in a management capacity) shall be the completion of the Products and Developer shall not assign another project to such employees that would prevent them from fulfilling their respective responsibilities for the Products.

- 5.3 Developer shall provide Activision with brief written status reports relating to the development of the Products on a schedule and in a manner to be reasonably established by the parties, but in no event less often than weekly. Developer also shall provide Activision with reasonable access to the Key Employees and Development Team in order to allow Activision to adequately monitor the progress of the Products' development. In the event that at any time during the term of this Agreement, Activision deems it appropriate, at Activision's expense, to have one or more of its employees present at Developer's offices in order to monitor the development of any of the Products and facilitate the provision of Activision's creative and technical input, Developer will make all reasonable accommodations to allow such Activision's employees to fulfill their respective tasks.
- 5.4 In order to facilitate Activision's monitoring of the Products' development process and timely receipt of Activision's approvals and technical and creative input, Developer will provide Activision with "Builds" of the Products (pursuant to each Product's applicable Milestone Schedule), defined as a version of the Products that represents the then current state of the development and integration of the Products' computer code and audio / visual assets as set forth in more detail in Exhibit A to this Agreement.

## 6 Delivery

- 6.1 Developer shall deliver each deliverable item described in the applicable Milestone Schedule for each respective Product set forth in Exhibit A to this Agreement in the manner applicable to delivery of Builds and in accordance with the delivery schedule also set forth in Exhibit A for approval to Activision. Developer will give Activision written notice of each milestone delivery, and no delivery shall be considered complete until Activision has received written notice and verified receipt of the deliverable item. If Developer fails to deliver any deliverable item on or before the specified delivery date, Activision shall provide written notice to Developer of such failure to deliver. Thereafter, if Developer fails to provide the deliverable item within seven (7) business days of receipt of such notice (or such longer period as Activision may, in its sole discretion, agree), Activision shall have the right to terminate this Agreement upon written notice due to a material default by Developer, subject to the provisions of Section 17 of this Agreement. Notwithstanding the foregoing, any of the applicable Milestone Schedules for each respective Product set forth in Exhibit A may be adjusted or amended from time to time upon mutual written agreement of Activision and Developer.
- 6.2 Within ten (10) business days from the date of delivery of the items required by such milestone, Activision will give Developer written notice of any aspects of the deliverables which (a) do not conform to the Specifications and/or milestone descriptions contained in the Milestone Schedule, (b) contain Defects, or (c) are unacceptable for some other reason, including, but not limited to, in Activision's reasonable judgment, the deliverable item, if meant to be the Code Release version of the Products, is not marketable as delivered. Activision's approvals will not be unreasonably withheld. To the extent that Activision fails to provide Developer with a written acceptance (or written notice that a certain deliverable item does not conform to the Specifications) within the period of time described above, the parties agree that Activision and Developer will negotiate in good faith to extend the delivery dates for all remaining milestones if the delivery of such milestones is reasonably affected by Activision's delay; provided, however, that if Activision fails to respond within fifteen (15) business days from the date of delivery of the deliverable item, the due dates for the remaining milestones will be automatically extended by one (1) day for each day that Activision fails to respond beyond such fifteen (15) business day period. Following its receipt of a written notice containing description of any milestone delivery deficiencies, Developer agrees to make all such modifications and changes as will be required to correct the specified deficiencies within a reasonable amount of time, which shall in no event exceed ten (10) business days of receipt of such written notice without Activision's written consent.
- 6.3 This procedure will be repeated with each submission until Activision determines that the milestone has been met or, in Activision's discretion reasonably exercised, that further submissions will be to no avail and Developer cannot remedy the deficiencies. In the event that



Activision determines that further submissions will be to no avail, but in no event prior to at least two (2) submissions and reviews pursuant to Section 6.2, and Developer cannot cure the deficiency, it may, at its sole option, (a) terminate this Agreement upon written notice due to a material default by Developer subject to the provisions of Section 17; (b) procure the services of others to complete the milestone and/or the entire Product development process and deduct the costs (including, but not limited to, development fees and royalties paid to third parties) from any royalties or other payments due to Developer; (c) complete the milestone and/or the entire Product development process and deduct Activision's costs from any royalties or other payments due to Developer; or (d) a combination of (a), (b) and/or (c). Without limiting the generality of the foregoing, Activision has the right to terminate this Agreement for material breach by providing written notice to Developer upon Developer's failure to complete any of the milestones set forth in Exhibit A within thirty (30) days of the date due in accordance with the Milestone Schedule or in a manner that remains reasonably unacceptable to Activision after such thirty (30) day period.

- 6.4 The parties acknowledge and agree that Activision retains final editorial control in all areas of Product development; provided, however, that Activision agrees to consult with Developer and seek Developer's reasonable creative input throughout the development of the Products, and shall use commercially reasonable efforts to take into consideration Developer's creative input regarding the Products. Activision's editorial control will not be unreasonably exercised and will be mainly exerted in instances where the schedule, budget, product quality, key aspects of product development or market viability are in question. Accordingly, once the Products are in development, Activision reserves the right, from time to time, to request amendment of the Specifications in light of commercial and creative considerations or to accommodate the requests of a third party licensor with respect to any of the Products. To the extent any such changes constitute a Significant Design Change (as defined below), as shall be mutually determined by the parties, Activision and Developer shall mutually agree in writing upon (a) appropriate adjustments, if any, to be made to the applicable Milestone Schedule, and (b) the amount of additional compensation, if any, to be paid to Developer for additional work required to implement such Significant Design Change. "Significant Design Change" shall mean a modification to the Specifications that causes the Specifications to materially differ from the Specifications as accepted by Activision in connection with the applicable Milestone Schedule, and requires either (i) significant reprogramming of the Product code or (b) significant amounts of new artwork and animation.
- 6.5 Developer shall deliver to Activision a final, Code Release (as defined in Exhibit A) master of the First Product in a form that is ready to be commercially released by Activision no later than June 1, 2004. Delivery of other Products shall occur on dates to be mutually agreed to by the parties through good faith negotiations. Time is of the essence with respect to making each of the deliveries referred to in this Agreement, including, without limitation, the delivery of each of the Products and completion of each interim milestone.
- 6.6 Developer will provide documented source code, along with all associated game assets as described in further detail below, created pursuant to this Agreement to Activision: (a) within ten (10) business days after Activision's request that Developer do so; (b) within ten (10) business days after Activision's final acceptance of any Product, and (c) within ten (10) business days after Activision's acceptance of any Enhancements to any Product. Following the final acceptance of each of the Products, Developer will deliver to Activision a complete package (on disk) of all assets contained in the Products, along with any related archival materials and other documentation consisting of one hard copy of: (i) the thoroughly documented and commented source listing of the graphics, animation, sounds and music which represent such Products, including one copy on magnetic or optical media as required to create a working executable version of the Products; (ii) any other written documentation, including development notes, which Developer may have created which may assist Developer, Activision or third parties in the maintenance, support and/or conversion of such Products; (iii) a list of any utilities, tools or editors which Developer created during the development of such Products and which would be necessary in any modification, reconstruction or recompilation of the Products, along with similarly documented source listings and magnetic or optical media copy of all such programs; (iv) a complete listing of the development environment utilized by Developer in the creation of the Products; (v) brand name and version information for all used commercial software libraries and tools used in the development of the Products; and (vi) all original source data created during development, including application, system and utility code. If Activision is unable to successfully compile the data and run the program and any associated utilities because of the assets

Developer has provided pursuant to this Section, the requirements of this Section shall not have been met.

- 6.7 Notwithstanding anything to the contrary set forth in this Agreement, the following conditions shall apply to the delivery of milestones and Activision's payment therefor: (a) Activision is under no obligation to make any milestone payment until such milestone is submitted by Developer, actually received by Activision and approved in writing by Activision; (b) Activision is under no obligation to approve and/or make payments for milestones in accordance with the dates set forth on the Milestone Schedule, which Developer agrees are for purposes of establishing delivery dates only; (c) payments for each milestone, when due in accordance with subsection (a) above, shall be made within ten (10) days of Activision's written approval of such milestone; (d) payment by Activision for any milestone does not constitute acceptance or approval of such milestone unless Activision has otherwise approved the milestone in writing; provided, however, such payments shall be non-refundable in accordance with Section 17.6; and (e) payment by Activision for any milestone delivered by Developer to Activision after the due date set forth in the Milestone Schedule shall not (i) constitute a waiver by Activision of the late delivery by Developer, (ii) constitute or establish a course of dealing between the parties, (iii) alter or extend any milestone delivery due dates (including the due date for the milestone for which Activision has made payment) or (iv) otherwise be deemed a modification or waiver of any of the terms of this Agreement.

## 7 Enhancements and Conversions

- 7.1 Developer agrees to create Enhancements in order to supply new materials for the Products and to maintain and enhance each Product's competitiveness against other third party entertainment software products, at Activision's discretion and as may be reasonably requested by Activision from time to time. Developer and Activision shall negotiate in good faith the terms pursuant to which any Enhancements are to be developed by Developer, including, if applicable, payment of additional fees to Developer, prior to Activision offering such project to any third party.
- 7.2 In connection with its ownership of the Products, the Product Technology, the Background Materials, and the Underlying Properties, Activision shall have the right to convert or "port" (as such term is commonly understood in the entertainment software industry) any of the Products developed by Developer hereunder for use and play on any videogame, computer or other systems or platforms other than the Platforms, whether now known or hereafter developed, including without limitation, PC or Macintosh, Nintendo Game Boy Advance, hand held electronic devices, wireless telephones, personal digital assistants, and other convergent devices, set-top boxes, online gaming networks, Internet browser based software and other online applications (collectively, "Converted Versions").

## 8 Sequels

- 8.1 In connection with its ownership of the Products, the Product Technology and the Underlying Properties, Activision shall also have the right, but not the obligation, to develop, produce and publish Sequels. The development of any such Sequel by Developer shall be subject to the mutual agreement of the parties (subject to the limitation on the number of Products Developer is obligated to develop for Activision pursuant to this Agreement), provided that Developer shall have a first right of negotiation, for a period of ten (10) days from notice from Activision of Activision's intention to publish a Sequel, to develop a Sequel as either the Second Product or Third Product. Activision and Developer agree to negotiate in good faith with respect to the terms of such Sequel, including the amount of the development fees or advance payments to Developer for the applicable Sequel, and delivery schedules. If the parties fail to reach an agreement within such ten (10) business day period or Developer elects to initially reject an offer with respect to such Sequel, Activision may offer the right to develop the Sequel to another developer. If Activision's offer to such other developer contains any terms that are materially more favorable than those submitted to Developer, then Activision will give Developer an opportunity to match the offer by giving Developer written notice of such revised terms and Developer may accept such offer within ten (10) business days of receiving notice thereof. If Developer does not actually produce a particular Sequel for Activision, then Developer agrees to provide reasonable assistance and cooperation to Activision in connection with the exercise by Activision of its right to develop and produce such Sequel, including assistance with any source code, development tools and assets developed by Developer in connection with the Predecessor, provided that Activision will reasonably

compensate Developer for its assistance, if such assistance reaches a material level, as reasonably determined in good faith by the parties. Royalty rates payable to Developer for any Sequel developed by Developer for Activision hereunder shall be the same as those applicable to any of the Products pursuant to Section 11.1.

## 9 Foreign Language Translations

- 9.1 Developer shall provide the Products to Activision in the English language. Developer shall incorporate into the Products, at no additional cost, up to eight (8) foreign language translations requested by Activision, including, but not limited to, French, German, Spanish, Portuguese, Italian, and one or more Asian languages. In connection with the foregoing, because some translations may involve non-English-style alphabet characters (such as Chinese or Japanese), Developer shall develop the English language versions of the Products in double-byte enabled computer code and otherwise prepared for use with Asian operating systems. Whenever practical, Developer will use its good faith efforts to complete all foreign language translations simultaneously with the completion of the English language version of the Products. In Activision's discretion, foreign language translations may be fully localized (all text is translated and all audio is dubbed, re-recorded or subtitled, with localized packaging) or partially localized (some but not all elements are translated or otherwise localized). Activision shall be responsible for providing all translated voice and translated text files in the format specified by Developer and Developer shall be responsible for the integration of all such files, at no additional cost, into the final translated Products, subject to Activision's quality assurance review and approval.
- 9.2 In the event Activision requests Developer incorporate into the Products more than eight (8) foreign language translations, any such additional foreign language translations will require Activision to pay Developer Additional Advances (as defined in Section 10.2.2), to be negotiated by the parties in good faith, but not to exceed Ten Thousand Dollars (\$10,000) per localization. Such cost may be adjusted in regard to the Second Product and the Third Product subject to good faith negotiations between the parties based on the then current market cost of performing such work.

## 10 Advance Payments

- 10.1 In connection with the development of the First Product for all of the Platforms, Activision will pay to Developer an advance (the "Advance") against Royalties (as defined in Section 11.1) equal to Eight Million Five Hundred Thousand U.S. Dollars (US\$8,500,000). The Advance shall be payable in installments as provided in the Milestone Schedule for the First Product attached hereto as Exhibit A-1. All Advance payments shall be non-refundable in accordance with Section 17.6. The parties acknowledge and agree that Activision has already paid Developer Six Hundred Thousand U.S. Dollars (US\$600,000) of the Advance. Development advances or fees for the Products other than the First Product shall be determined by the good faith negotiations of the parties prior to the commencement of development of each such Product, provided that such advances or development fees for the other Products shall not, in any event, exceed the Advance payable for the First Product.
- 10.2 Additional Advances
- 10.2.1 Developer shall be responsible for all design, development and production costs associated with the creation of the Products in accordance with the Specifications set forth in this Agreement. In the event a Product or any of its aspects (including the foreign languages versions) do not conform, in Activision's reasonable discretion, to such Specifications, Activision shall have the right, in addition to any other rights it has under this Agreement, to correct all such deficiencies and complete the Product or any of its aspects or have the Product or any of its aspects completed on its behalf by a third party.
- 10.2.2 Accordingly, except for Royalties payable under this Agreement, the following shall collectively constitute "Additional Advances" recoupable from all sums payable to Developer under this Agreement: (a) solely in the event that a Product needs to be brought into accordance with the Specifications, all payments made by Activision to Developer, or on behalf of Developer to other developers and/or designers (whether Activision's employees or independent contractors) who add art, animation, video,

graphics, narration, format, or other features to the Products; (b) all costs listed in Exhibit D with respect to Activision Development Aids; (c) all costs expended by Activision with respect to the completion of the Products, whether to correct deficiencies in the Products, to add necessary features and Enhancements needed to complete the Products in accordance with the Specifications or to provide Developer with requested support; (d) all travel, lodging, and other expenses incurred by Developer and paid by Activision on Developer's behalf, at Activision's discretion, directly related to the completion of the Products; (e) payments made and expenses incurred pursuant to the terms of Section 4.1.3 to correct Defects that Developer is unable to correct; (f) rental fees for any computer or other equipment owned or leased by Activision and used by Developer for development of the Products; (g) licensing fees paid by Activision on behalf of Developer in connection with any third party software requested by Developer for use in connection with the development of the Products; (h) payments for additional foreign language translations as specified in Section 9.2; (i) any additional advance payments or development fees paid to Developer for Converted Versions of or Enhancements to a particular Product that are created by Developer; and (j) any payments made pursuant to Section 10.3 (subject to Section 10.4).

- 10.3 The a parties shall commence discussions in regards to each successive Product and the development fees or advances payable in regards to such Product eight (8) weeks prior to the scheduled completion of the Product under development by Developer at that time. If the parties are unable to complete their discussion in regards to the successive Product within ten (10) business days following the completion of the preceding Product, Activision agrees to pay Developer such periodic amounts as the parties shall determine in good faith is needed to allow Developer to retain Key Employees and continue its business operations, consistent with Developer's actual monthly costs (expressly excluding any built in profit) for the preceding Product, until such time as Developer commences work on the successive Product. All such payments shall be deemed to be Additional Advances paid in respect to such successive Product. In the event the parties are unable to agree on the successive Product and/or Activision elects in its discretion not to proceed with Developer's providing services as to any additional Products, this Agreement shall be deemed terminated and the parties shall have no further obligations to each other, provided that the amounts paid to Developer pursuant to this Section shall not be refundable.
- 10.4 All advances or development fees paid to Developer under this Agreement, including Additional Advances, for each Product shall be recoupable by Activision from any and all Royalties due to Developer for each such Product, including Converted Versions and/or Enhancements, across all Platforms on a fully cross-collateralized basis. Notwithstanding the foregoing, advances or development fees attributable to one of the Products shall not be recoupable against Royalties attributable to a different Product.

#### 11 Royalty Rate(s) Paid by Activision

- 11.1 Developer shall be entitled to receive royalties ("Royalty" or "Royalties") equal to the following respective percentages of Adjusted Gross Invoices (as defined in Section 11.2) with respect units of each of the respective Products developed, produced and completed by Developer pursuant to this Agreement, that are sold by Activision, or licensed by Activision for sale, and not returned: (a) twenty percent (20%) for the first 1,000,000 units of each Product across all Platforms; (b) twenty five percent (25%) for 1,000,001 units up to 2,000,000 units of each Product across all Platforms; (c) thirty percent (30%) for 2,000,001 units up to 3,000,000 units of each Product across all Platforms; and (d) thirty five percent (35%) for units in excess of 3,000,000 units of each Product across all Platforms.
- 11.2 "Adjusted Gross Invoices" shall be defined as the gross invoices from all sales and licenses of the Products, less the following amounts: (a) taxes on sales or licenses (such as sales, use, excise, value-added and other taxes); (b) amounts reimbursed by customers, such as for insurance, packing, custom duties, shipping and similar charges; (c) promotional amounts, such as credits, cash discounts, freight discounts, rebates or promotional allowances to customers (commonly known as "DFI" or "Deductions from Invoices"), and cooperating advertising expenditures (commonly known as "Coop"); (d) Cost of Goods (as defined below); (e) royalty and/or license fees payable to First Parties and third party licensors in connection with licenses related to the development of the Products; and (f) amounts for returns, credits, refunds, price

protection or markdown allowances, and a return reserve (calculated in accordance with Section 11.3). "Cost of Goods" means the following amounts: all costs of materials, packaging, manufacture, replication, assembly and delivery of final packaged Products, including freight costs and fulfillment charges.

- 11.3 Returns Reserve: Activision may retain a reasonable percentage of Royalties otherwise payable to Developer as a reserve against returns, such as credits, refunds, price protection or allowances. Such returns reserve shall be calculated as follows: For each quarterly Royalty payment to be made by Activision to Developer, if any, Activision shall withhold twenty percent (20%) of each payment as a reserve for returns of the Products, which Activision may receive from its reselling customers. Activision shall retain such returns reserve for the previous twelve (12) month's sales as a reasonable reserve against charges, credits, or returns. Activision shall pay to Developer the withheld monies on a quarterly basis the reserve that was withheld four (4) quarters earlier. The amount to be paid shall be the full amount less any amounts actually reimbursed, refunded or given as a credit to Activision's customers. Activision may, under reasonable business judgment, discontinue the repayment of the reserve if it appears that the maintenance of the reserve is reasonably necessary to account for future charges, credits and returns. The full amount retained, less any amounts actually refunded or credited by Activision, shall be paid to Developer not later than twelve (12) months after the last day of sale of the Products by Activision.
- 11.4 In the event Activision contracts with a party other than Developer to develop and produce any Converted Version or Enhancement, Developer shall be entitled to receive passive Royalties equal to ten percent (10%) of Adjusted Gross Invoices with respect to all units of such Converted Version or Enhancement that are sold by Activision, or licensed by Activision for sale, in the retail channel, provided that (a) any such Converted Version is developed by such other party in substantial part by simply "porting" the assets and computer code from one of the Products developed by Developer hereunder and is not developed by such other party by creating substantially new and different assets and computer code (e.g., Developer would not be entitled to passive Royalties under this Section for a Converted Version developed for the Nintendo Game Boy Advance handheld device or a wireless telephone, given the technology that currently exists for such handheld devices as of the date of this Agreement), and (b) all advances paid by Activision to Developer hereunder, including the Advance and any Additional Advances, have been fully recouped by Activision from Royalties due to Developer for units of the Products developed, produced and completed by Developer.
- 11.5 Developer shall be entitled to receive passive Royalties equal to ten percent (10%) of Adjusted Gross Invoices from the sale or license by Activision of any Ancillary Products (as defined below), provided that (a) no Royalties shall be payable under this Section until such time as Activision has actually received payment for sales or licenses of such Ancillary Products, and (b) Developer shall be entitled to Royalties under this Section only in the event that the Ancillary Products are based upon or derived from Products that are based on an original concept and/or original Intellectual Property created by Developer in conjunction with Activision, and are not based on Intellectual Property licensed by Activision or Developer from a third party. For purposes of this Section, the term "Ancillary Products" shall mean non-software products that are based upon or derived from the Products or any materials contained in or presented by the Products (such as characters contained in the Products) developed by Developer hereunder, including, without limitation, various forms of merchandise, such as posters, articles of clothing, books, magazines, comics, toys, and various linear media products, such as motion pictures, videos, cable and television programs, but expressly excluding hint books and strategy guides used to assist end users in playing and learning all of the various features and functionalities of the Products.
- 11.6 Developer shall be entitled to receive passive Royalties equal to ten percent (10%) of Adjusted Gross Invoices from the sale or license by Activision of any hint books and strategy guides for the Products that are used to assist end users in playing and learning all of the various features and functionalities of the Products, provided that (a) no Royalties shall be payable under this Section until such time as Activision has actually received payment for sales or licenses of such hint books and strategy guides, and (b) Developer provides a reasonable level of assistance and cooperation to Activision (or, as applicable, any third party to whom Activision licenses the rights to make such hint books or strategy guides) in connection with the creation of any such hint books or strategy guides, including providing art assets from and consultation and instructions on the gameplay, features and functions of the Products on which such hint books or strategy guides are based.

- 11.7 Royalties in connection with retail sales of the Products will be deemed to have occurred in the quarterly accounting period in which Activision has invoiced its retail accounts. Such Royalties, if any, shall be paid in accordance with Section 12.
- 11.8 Royalties in connection with licensing of the Products will be deemed to have occurred in the quarterly accounting period in which licensees render to Activision accounting statements for sales and Activision has received payment. No Royalties shall be payable to Developer on licenses until Activision has received payment from licensees.
- 11.9 Royalties for sales of the Products outside of the United States shall be computed in the national currency in which they are paid and shall be credited to Developer's Royalty account at the same rate of exchange as they are paid, if paid directly to Activision in the United States. If Royalties are paid to a foreign subsidiary of Activision in the national currency, Royalties shall be credited to Developer's Royalty account at the exchange rate in effect at the time the funds are received by the foreign subsidiary. In either instance Royalties shall be proportionately subject to any transfer or comparable taxes that may be imposed upon the revenue.
- 11.10 Developer is solely responsible for any taxes that may be imposed on Developer by any taxing jurisdictions as a result of Developer's services in connection with the development and design of the Products.
- 11.11 If a Product is marketed with other works in a package for a single price, the Adjusted Gross Invoices attributable to such Product shall be determined by prorating the invoices attributable to the package according to the suggested retail prices or values established by Activision for the separate works contained in the package, whether or not such works are marketed separately.
- 11.12 No Royalties shall be payable for units of the Products (a) distributed at no charge or at cost that are made in connection with advertising and promotion of the Products, or (b) sold in distress sales, which are defined as any volume sale of a Product for the primary purpose of reducing inventory which is made at a price less than or equal to forty percent (40%) of Activision's originally announced wholesale price for the Product.

## 12 Payments and Reports

- 12.1 Statements as to Royalties payable under this Agreement, detailed to the extent customary in the entertainment software industry, shall be sent by Activision to Developer within sixty (60) days following the end of each quarterly calendar period for that preceding quarterly period (commencing with the first quarterly calendar period in which a Product shall have been commercially released), together with payment of accrued Royalties, if any, earned by Developer under this Agreement during such quarterly period, less any advance payments or developments fees unrecovered by Activision.
- 12.2 Activision shall maintain books of account relating to the Royalty payments to be made by Activision pursuant to this Agreement. Such books of account shall be in sufficient detail so as to allow for verification of the Royalties actually paid. Developer may, at its expense, have a reputable certified public accountant reasonably acceptable to Activision audit these books at Activision's corporate headquarters solely for the purpose of verifying the accuracy of Royalty payments and Royalty statements during normal business hours upon fifteen (15) business days prior written notice to Activision, but no more frequently than once a year and not later than one (1) year after the date the statement was rendered. Any costs associated with any audit shall be borne by Developer unless there is a discrepancy of more than five percent (5%) between Royalties actually paid and Royalties actually owed, in which case Activision shall bear the actual and documented costs of such audit.
- 12.3 Each Royalty statement and payment rendered by Activision pursuant to this Agreement will be conclusively binding on Developer and not subject to any objection unless Developer gives Activision specific notice of Developer's objection to the statement or the payment and its reasons for such objection within twelve (12) months after the date the statement was rendered.
- 12.4 Any certified public accountant engaged by Developer to conduct an audit pursuant to this Section shall (a) not be paid on a contingent fee or value added basis or according to the results or

findings of the audit; (b) not perform services for any of Activision's competitors, (c) keep secret and confidential all information received by it from Activision; and (d) deliver to Activision a copy of its audit report and related work papers simultaneously with its delivery of such report and papers to Developer.

- 12.5 In the event that Developer audits the books and records of Activision, Developer shall require the certified public accountant when engaged for the audit to execute and deliver to the audited party a certificate in substantially the following form: *I hereby certify that I have been engaged by Spark Entertainment, Inc. ("Spark") to audit the books and records of Activision Publishing, Inc. Spark will not pay me on a contingent fee basis. The fees to be received by me for conducting the audit shall be in no manner variable according to the findings or results of the audit. Simultaneously with my rendering reports to Infinity, I agree to render copies thereof to Activision Publishing, Inc., together with copies of all my work sheets.*

### 13 Marketing and Distribution

- 13.1 Except as specified to the contrary in this Agreement, Activision shall be responsible, solely and exclusively, for all marketing and promotional aspects related to the distribution of the Products. Activision shall have final approval on all marketing activities relating to the Products, including but not limited to advertising, packaging, logo design, Web site design and selection of screen shots, art, images, demos and Builds of the Products to be sent to the media.
- 13.2 Activision agrees to commit no less than Two Millions United States Dollars (US\$2,000,000) in marketing and promotional costs related to the First Product.
- 13.3 Developer agrees to cooperate with Activision in connection with the marketing of the Products, including, without limitation, and subject to Developer's availability and consent, which will not be unreasonably withheld: (a) conferring and consulting with Activision concerning the promotion of the Products; (b) cooperating with interviews and press tours for the Products and allowing Activision to use the identity of Developer in promoting sales of the Products; (c) appearing for photography and/or artwork under the direction of Activision; and (d) promoting the Products on the Internet through online interviews, designer diaries and other activities. Developer agrees not to unreasonably withhold its consent in making key members of its development team available for media interviews and press tours. Developer agrees that all media relations related to the Products shall be coordinated through Activision, and that any media inquiries to Developer regarding the Products shall be referred to Activision before Developer makes any comment or commitments.
- 13.4 In connection with its distribution and sale of the Products, Activision shall be entitled to determine, in its sole and absolute discretion, all prices for the Products through all channels of distribution, including, without limitation, all related marketing and promotional allowances and discounts.
- 13.5 Developer acknowledges and agrees that Activision requires certain material created by Developer for each of the Products to effectively market and promote the Products, and that any delay in receiving these items will have a detrimental impact on Activision's marketing and promotional efforts. Therefore, Developer agrees to provide the following material to Activision for each of the Products upon a reasonable advance written notice by Activision in the quantities reasonably requested by Activision and by the milestones mutually agreed to by the parties: (a) at least thirty (30) screen shots; (b) at least ten (10) rendered computer graphics images; (c) character sketches and art; (d) sketches and illustrations of weapons, vehicles, buildings and environments; (e) at least three (3) pieces of hi-resolution magazine cover art (8 1/2" x 11" at 300 dpi); and (e) other production material related to the Products. Developer acknowledges and agrees that Activision's acceptance of any milestone that includes delivery of specified material from the above list will be subject to Activision's receipt and acceptance of such material.
- 13.6 Activision makes no warranty that the Products will be successfully marketed or that any minimum level of Adjusted Gross Invoices will be achieved. Activision does not guarantee to Developer that Activision's marketing efforts will be necessarily commensurate with those efforts expended on any other product published by Activision.

## Credits and Notices

- 14.1 Activision desires to promote Developer as a creative talent in the field of entertainment software products. Subject to any limitations that may be imposed on Activision by First Parties or any third party licensors with respect to the Products, Activision agrees to prominently attribute Developer's contribution to the development and production of the Products on the Products' packaging, in the on-screen credits and in the user manual. Developer's logo shall appear on the back of the box in which each of the Products is shipped, as well as on all advertising and promotional materials (except for television) for the Products, the size and placement of the logo to be solely determined by Activision, but shall be no less prominent than all other third party logos appearing on the packaging, except for Activision's logo, the logos of First Parties and any third party licensors with respect to the Products, and rating icons. Unintentional failure to give any of the foregoing credits will not be considered a material breach. In the event of such omission, Activision will take commercially reasonable steps to remedy it. Developer's screen credit shall consist of a single "card" or "splash screen" (as such terms are customarily defined in the interactive entertainment industry). Developer hereby grants Activision the right to utilize Developer's relevant trademarks and logos in the Products, packaging, user documentation, and promotional and other related materials. The parties agree that the display of Developer's logos and trademarks are for purposes of creative recognition only and shall not confer upon Developer any trademark, copyright or other proprietary right or interest in the Products.
- 14.2 Activision shall provide Developer at Developer's option with either (a) one hundred (100) total copies of each Product (on such Platforms as Developer shall choose in its discretion), or (b) one (1) copy of each Product per Platform per each employed and credited member of the Development Team for each Product, at no charge and Royalty free. Developer shall have the right to purchase a limited number of additional copies of the Products at Activision's costs (including manufacturing and shipping costs). Developer represents and warrants that it will not sell any copies it receives under this Section and that all such copies shall be used solely for Developer's internal and promotional use. Activision shall also provide Developer with reasonable quantities of promotional materials prepared by Activision for the Products.
- 14.3 Notwithstanding Section 3.2, subject to Activision's prior approval, which shall not be unreasonably withheld, Developer shall have the right, provided that Developer has not materially breached this Agreement, to utilize the title, trademarks and any artwork relating to the Products created by Developer solely for portfolio and promotional purposes, including the right to display such materials on Developer's website.

## 15 Representations and Warranties

- 15.1 Developer represents and warrants to Activision that:
- 15.1.1 Developer has full and exclusive power and authority to enter into and perform this Agreement and that such ability is not limited or restricted by any agreements or understandings between Developer and other persons or companies;
- 15.1.2 The execution, delivery and performance by Developer of this Agreement have been duly authorized by any and all necessary corporate action by Developer, and this Agreement constitutes the legal, valid and binding obligation of Developer enforceable in accordance with its terms;
- 15.1.3 Except as otherwise stated in this Agreement, no other person or company has or will have any right, title or interest in or to all or any portion of the Products which would in any way curtail, impair, diminish or derogate from any of the rights granted to Activision under this Agreement, and Developer has not done or permitted to be done and will not do or authorize or permit to be done any act or thing which is or may be in any way inconsistent with or may in any way curtail, impair, diminish or derogate from any right granted to Activision under this Agreement;
- 15.1.4 All ideas, creations, materials and Intellectual Property furnished by Developer in connection with the Products are Developer's own and original creation (except for matters in the public domain or material which Developer is fully licensed to use);



- 15.1.5 All works and materials developed or otherwise provided by Developer in connection with the development of the Products (including, without limitation, the Products, the Product Technology, the Underlying Properties, and any other audio or visual aspects created by computer code) will not infringe upon or misappropriate the copyright, trademark, trade secret, patent, publicity or privacy rights or any other rights to Intellectual Property of any third party, and should any aspect of any version of a Product become, or, in Activision's opinion, is likely to become, the object of any infringement or misappropriation claim or suit as a result of any such works or materials, Developer will procure for Activision, at Developer's expense, the right to use such version of the Product in all respects, or will replace or modify such version of the Product accordingly to make it non-infringing. This representation and warranty does not extend to any works or materials included in the Products that are created or otherwise provided by Activision or any other third party licensor of Activision under this Agreement, including, without limitation, the Activision Game Engine;
- 15.1.6 Any information or materials developed by Developer for Activision in connection with the development of the Products shall not rely, or in any way be based upon, proprietary information obtained or derived by Developer from sources other than Activision (or any author engaged by Activision to provide services in connection with the Products) unless Developer has received specific authorization in writing from any such source to use such information and to grant the rights granted herein to Activision, and has provided a copy of such written authorization to Activision; and
- 15.1.7 Developer has the experience and is fully capable of performing its obligations under this Agreement and shall not, during the term of this Agreement, take actions that will interfere with such performance.
- 15.1.8 Developer is and at all times during the development of the Products shall remain a party to, and is and at all such times shall remain in full compliance with the provisions of, the applicable publishing and/or development tool agreements with all First Parties, which authorize or license to Developer the right to create entertainment software products for the Platforms.
- 15.2 Activision represents and warrants to Developer that (a) it has full power and authority to enter into and perform this Agreement and that such ability is not limited or restricted by any agreements or understanding between Activision and any other person or company; (b) the execution, delivery and performance by Activision of this Agreement have been duly authorized by any and all necessary corporate action by Activision, and this Agreement constitutes the legal, valid and binding obligation of Activision enforceable in accordance with its terms; and (c) all ideas, creations, materials and Intellectual Property furnished by Activision in connection with the Products are Activision's own and original creation (except for matters in the public domain or material which Activision is fully licensed to use and/or Activision has the full power and authority grant Developer the right to use).

## 16 Indemnification

- 16.1 Developer hereby agrees to indemnify, defend and hold harmless Activision, and its assignees, licensees and purchasers, and the officers, directors, shareholders, employees, agents and affiliates of all of them, against any and all suits, losses, liabilities, damages, awards, claims, settlements, costs and expenses, including reasonable attorneys' fees, arising out of or otherwise relating to: (a) any breach by Developer of this Agreement; or (b) any breach by Developer of the warranties, representations and covenants contained in Section 15.1.
- 16.2 Activision hereby agrees to indemnify, defend and hold harmless Developer, and its assignees, licensees and purchasers, and the officers, directors, shareholders, employees, agents and affiliates of all of them, against any and all suits, losses, liabilities, damages, awards, claims, settlements, costs and expenses, including reasonable attorneys' fees, arising out of or otherwise relating to: (a) any breach by Activision of this Agreement; or (b) any breach by Activision of the warranties, representations and covenants contained in Section 15.2.
- 16.3 Promptly after receipt by an indemnified party under this Section 16 of notice of the commencement of any action, such indemnified party will, if a claim in respect thereof is to be

made against any indemnifying party under this Section, notify the indemnifying party in writing of the commencement thereof. Upon receipt of such notice the indemnifying party shall have the right to assume and control the defense of such action with counsel of its choice, subject to the approval of the indemnified party, which approval shall not be unreasonably withheld. Subject to such control by the indemnifying party, the indemnified party shall have the right to participate in the defense of any action and to be represented by counsel of its own selection in connection therewith and to be fully and completely informed by the indemnifying party and its counsel as to the status thereof at all stages of the proceedings therein, all at the indemnified party's cost and expense. Following the indemnifying party's assumption of the defense of any action the indemnifying party shall have no further liability to the indemnified party for any legal or other expense in connection with such defense for so long as it maintains such defense. If the indemnifying party, after receipt of a written notice of an action, fails to notify the indemnified party in writing that it will assume the defense of such indemnified party against such action or if it assumes such defense and later abandons it, the indemnified party shall have the right to undertake the defense of the action on behalf of and for the account of the indemnifying party. The indemnified party shall cooperate with the indemnifying party in any defense that the indemnifying party assumes. The indemnifying party will not settle any claim without the consent of the indemnified party, which consent will not be unreasonably withheld. Subject to its receipt of such consent, the indemnifying party shall be entitled to settle any action for monetary damages if the indemnifying party will be fully responsible for all losses in respect thereof. The settlement of any other action shall be subject to the joint control of, and approval by, both the indemnifying party and the indemnified party (each of which shall exercise its respective right of joint control and approval with respect to such settlement reasonably and in good faith). The failure to notify an indemnifying party promptly of the commencement of any such action, if prejudicial to its ability to defend such action, shall relieve such indemnifying party of any liability to the indemnified party under this section, but the omission so to notify the indemnifying party will not relieve him of any liability that he may have to any indemnified party otherwise than under this Section.

- 16.4 Activision shall have the right to extend to third parties Developer's representations and warranties set forth above in connection with Activision's marketing, distributing and selling the Products and Developer's duty to indemnify under this Section 16, and Developer shall be liable to such third parties to the same extent as if such representations and warranties were originally made by Developer to such third parties.
- 16.5 The parties also agree that from the date of notice to Developer of any claim described in this Section 16, Activision shall have the right to withhold all payments due Developer under this Agreement, if any, as security for Developer's obligations to indemnify Activision under this section until either (a) Activision is indemnified for the cost of defending or settling any such claim or for the payment of any judgment arising from such claim, or (b) Developer otherwise provides reasonable assurances that it will be able to satisfy any such obligation.

## 17 Term and Termination

- 17.1 The parties agree that the term of this Agreement shall continue until such time that the parties have fully completed their obligations under this Agreement or until such time that it is terminated by either or both parties strictly in the manner and under the conditions defined below and elsewhere in this Agreement.
- 17.2 The parties acknowledge and agree that Activision cannot guarantee that in the volatile software marketplace any potential Product as developed by Developer will remain marketable during the entire development period. Accordingly, subject to Section 17.3, Activision has the right, in its sole and absolute discretion, to cancel (for so-called "convenience purposes" as opposed to "for cause" or due to a material breach) the development by Developer of any of the Products contemplated by this Agreement by giving a written notice to Developer. Activision shall be entitled to exercise the foregoing right of cancellation on a product-by-product basis, without affecting the rights and obligations of Developer or Activision or any other provisions under this Agreement with respect to any of the other Products as to which such right of cancellation shall not have been exercised, which rights and obligations shall then remain in full force and effect with respect to such Products; provided, however, that Developer shall be deemed to have completed any Product cancelled by pursuant to this Section, and therefore fulfilled its obligations with respect to one (1) of the three (3) Products required hereunder, if Activision cancels such Product at any time after the "first playable" (as such phrase is commonly understood in the entertainment software industry

and as such phrase may be described in the applicable Milestone Schedule for such Product) stage of development. Notwithstanding the foregoing, if Activision cancels two (2) such Products prior to the first playable development stage, Developer shall have deemed to have fulfilled its obligations with respect to one (1) of the three (3) Products required hereunder.

- 17.3 In the event of cancellation by Activision pursuant to Section 17.2 of the development by Developer of a Product, Activision's sole obligation to Developer with respect to such Product will be to pay Developer for the installments of milestone payments with respect to all milestones completed by Developer as of that date (provided that such milestones are completed strictly in accordance with the requirements and Specifications for the applicable Product), whether or not accepted and approved by Activision, as well as a cancellation fee of Five Hundred Thousand United States Dollars (US\$500,000), and Activision will have no further obligations or liabilities under this Agreement with respect to such cancelled Product.
- 17.4 Upon the occurrence of any material breach of this Agreement that remains uncured for a period of thirty (30) days following written notice, the injured party has the right to terminate this Agreement by providing additional written notice of such termination.
- 17.5 In the event of termination by Developer due to Activision's uncured breach of this Agreement pursuant to Section 17.4, Activision's sole obligation to Developer shall be to pay all milestone payments with respect to all milestones completed by Developer and accepted and approved by Activision as of the date of termination if such termination occurs prior to commercial release of a Product or Products, as well as a reasonably prorated portion of the milestone in progress at the time of such termination, and, in addition, if such termination occurs after commercial release of a Product or Products, to pay all accrued Royalties to Developer related to the Products then commercially released by Activision as due in accordance with this Agreement. The parties agree that following the commercial release of a Product developed and produced by Developer pursuant to this Agreement, Developer shall not be permitted to terminate this Agreement with respect to such Product except for non-payment by Activision of any Royalties related to such Product.
- 17.6 In the event of termination by Activision due to Developer's uncured breach of this Agreement pursuant to Section 17.4, all payments made to Developer shall be non-refundable, provided that Developer fully complies with the provisions of Section 17.7.
- 17.7 Activision will have the right, upon termination pursuant to the terms set forth herein, in addition to all of its other rights, to require Developer to deliver to Activision copies of the applicable Products, all of Developer's work in progress with respect to the Products, including, without limitation, any computer source code created by Developer in connection with the development of the Products, and all other materials and items created under or received as a result of this Agreement. Developer acknowledges and agrees that prompt delivery of such work in progress and other materials described in this Section (to the extent that such work in progress and other materials have not already been provided to Activision as part of Developer's milestone deliverables or otherwise) shall be deemed condition precedent to any payment by Activision due to Developer with respect to the milestones completed by Developer and accepted by Activision at the time of such termination and/or any accrued Royalty payments due hereunder. Developer hereby agrees to allow a representative of Activision to enter Developer's premises to supervise and verify the complete transfer of such materials to Activision and Developer further consents to a mandatory injunction to require it, if necessary, to turn over to Activision all of Developer's work in progress and such other materials then in its possession. No termination or cancellation of this Agreement shall in any way affect or impair Activision's rights to utilize any and all materials created by Developer pursuant to this Agreement and to complete, develop, publish, manufacture, license, distribute and sell the Products or any derivative works of such Products or other versions of the Products.
- 17.7 Survivability. The following sections shall survive the expiration or termination of this Agreement 3, 4.1.4, 15, 16, 17.3, 17.5, 17.6, 17.7, 18 and 19.

## 18 Confidentiality

- 18.1 During the course of this Agreement, Developer and Activision may become aware of information relating to each other's products, software research and development, inventions, processes,

techniques, designs or other technical and business information, as well as the Product and proprietary information developed by both parties in the course of developing and producing the Product. All such information and all physical forms thereof, whether disclosed to the other party before or after this Agreement is signed, including the terms of this Agreement, is considered by both parties to be proprietary and confidential ("Proprietary Information"). Notwithstanding anything to the contrary contained herein, a disclosure by Activision of the GDD to a third party shall not be considered a breach of this Section 18.1.

- 18.2 Both during and after this Agreement, each party agrees that, except as authorized in writing by the other party, it will: (a) preserve and protect the confidentiality of all Proprietary Information; (b) not disclose or otherwise disseminate to anyone, including each other's employees, except as necessary to carry out the terms of this Agreement, the existence, source, content or substance of the Proprietary Information; (c) not use Proprietary Information in any way other than in furtherance of this Agreement; and (d) not disclose, use or copy any information or materials received in confidence by each party during the course of this Agreement from a third party or about a third party.
- 18.3 Each party shall have no liability to the other for disclosure of any Proprietary Information which either party can establish to have: (a) become publicly known without breach of this Agreement; (b) been previously publicly released for disclosure by either party; (c) been given to either party by someone other than Activision or Developer without a duty to maintain confidentiality; or (d) been independently developed prior to the date this Agreement is signed as evidenced by related documentation.
- 18.4 Not later than three (3) days after the termination of this Agreement for any reason, both parties will return to each other all originals and copies of Proprietary Information.
- 18.5 Developer shall require each of its employees working on the Products to sign a confidentiality agreement containing the terms that are no less protective of Proprietary Information than the terms set forth in this Section 18.

## 19 General

- 19.1 Amendment. No amendment or modification of this Agreement will be made except by an instrument in writing signed by both parties.
- 19.2 Governing Law. This Agreement shall be deemed entered into in Los Angeles County, California and will be governed by and interpreted in accordance with the substantive laws of the State of California, USA and applicable federal laws of the United States. The parties agree that any dispute arising under this Agreement shall be resolved exclusively in the state or federal courts within Los Angeles County in the State of California, USA. Notwithstanding the foregoing, the parties agree that, before any legal action is initiated hereunder, they will attempt in good faith to resolve their disputes through a formal mediation procedure by submitting their dispute to a mediation service, such as JAMS.
- 19.3 Severability. If any provision of this Agreement is or becomes or is deemed invalid, illegal or unenforceable under the applicable laws or regulations of any jurisdiction, either such provision will be deemed amended to conform to such laws or regulations without materially altering the intentions of the parties and enforced accordingly or it shall be stricken and the remainder of this Agreement shall remain in full force and effect.
- 19.4 Headings. The headings of the sections of this Agreement are for convenience only and shall not be of any effect in construing the meanings of the Sections.
- 19.5 Notices. All notices, statements and payments to Developer shall be delivered to it at the address set forth on page 1 of this Agreement, Attention: Chief Operating Officer, or at such other address as it shall designate in writing by notice given in accordance with this section from time to time. All notices, statements and payments to be given to Activision shall be delivered to 3100 Ocean Park Boulevard, Santa Monica, California 90405 USA, to the attention of the Royalty Manager/ Contract Administrator, with a copy to the General Counsel, or at such other address as it shall designate in writing, by notice given in accordance with this section from time to time. All notices shall be in

writing and shall either be served by personal delivery, fax, mail, or internationally recognized overnight courier service, all charges prepaid. Except as otherwise provided herein, such notices shall be deemed given when personally delivered, within three (3) days following the delivery to the office of the overnight courier service, one (1) day following the date of the fax, or on the date five (5) days following the date of mailing, except that notices of change of address shall be effective only after the actual receipt thereof.

- 19.6 Integration. This Agreement, including Exhibits A, B, C and D, which are incorporated into this Agreement by this reference, constitutes the entire agreement and understanding between the parties with respect to the subject matter hereof, thereby superseding all prior negotiations, preliminary agreements, correspondence or understandings, written or oral, between the parties, including the Letter Agreement.
- 19.7 Waiver. No waiver of any obligation by any party hereto under this Agreement shall be effective unless in writing, specifying such waiver, executed by the party making such waiver. A waiver by a party hereto of any of its rights or remedies under this Agreement on any occasion shall not be a bar to the exercise of the same right of remedy on any subsequent occasion or of any other right of remedy at any time.
- 19.8 Presumptions. Because the parties hereto have participated in drafting this Agreement, there shall be no presumption against any party on the ground that such party was responsible for preparing this Agreement or any part of it.
- 19.9 Remedies. Unless expressly set forth to the contrary, either party's election of any remedies provided for in this Agreement shall not be exclusive of any other remedies available hereunder or otherwise at law or in equity, and all such remedies shall be deemed to be cumulative.
- 19.10 Assignment. Because of the special and unique qualities of Developer, this Agreement may not be assigned in whole or in part by Developer without prior written consent of Activision. Notwithstanding the foregoing, this Agreement shall be binding upon the personal representatives, successors and assigns of Developer, and the successors and assigns of Activision.
- 19.11 Counterparts. This Agreement may be executed in counterparts, each of which shall be deemed an original Agreement for all purposes, including the judicial proof of any of the terms hereof, provided, however that all such counterparts shall constitute one and the same Agreement.
- 19.12 Injunctive Relief. Developer recognizes and agrees that in the event of a material breach or threatened breach of its obligations under this Agreement, irreparable injury to Activision could result and money damages alone would not adequately compensate Activision, and therefore agrees that, in addition to all other remedies available to Activision at law, in equity, by agreement or otherwise, Activision shall be entitled to specific performance or other injunctive or equitable relief for the enforcement of any such obligation without the necessity of posting a bond.
- 19.13 Attorneys' Fees. Should any litigation be commenced among the parties in relation to this Agreement, the party prevailing in such litigation shall be entitled, in addition to such other relief as may be granted, to a reasonable sum for attorneys' fees in connection with such litigation or in a separate action brought for that purpose.
- 19.14 Independent Contractor Status. Neither party shall have, nor shall represent that it has, any power, right or authority to bind the other party, or to assume or create any obligation or responsibility, express or implied, on behalf of the other party or in the other party's name, except as herein expressly provided. Nothing stated in this Agreement shall be construed as constituting the parties hereto as partners or as creating the relationships of employer / employee, franchisor / franchisee, or principal / agent between the parties. Developer is performing services for Activision as an independent contractor. Nothing contained in this Agreement constitutes appointment of either party as an agent, representative, partner, joint venturer or employee of the other party for any purpose. Neither party can bind the other to any agreement with any third party.


IN WITNESS WHEREOF, the undersigned hereby acknowledge that they have read and understand the terms of this Agreement, including all Exhibits to this Agreement, and that by signing this Agreement they agree to be bound by all terms, conditions and obligations contained herein. The parties hereto have executed this Agreement as of the date first set forth above.

ACTIVISION:

DEVELOPER:

ACTIVISION PUBLISHING, INC.

SPARK ENTERTAINMENT, INC.

By:   
Ronald Doornink  
President and Chief Executive Officer

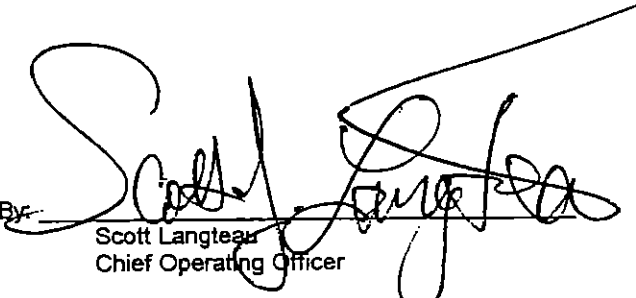
By:   
Scott Langteau  
Chief Operating Officer

EXHIBIT A-1

Milestone Schedule for First Product

MS#	Date Due	Description	Amount
	LOI	Paid LOI Payments	\$ 600,000
M0	09/03/02	Contract Signing, prelim production schedule	\$ 423,000
M1	10/04/02	Game Engine Selection	\$ 368,637
M2	11/05/02	Assessment Demo	\$ 380,000
M3	12/05/02	TDD first pass and Cube/Xbox assessment demos	\$ 335,000
M4	01/15/03	Prototype Final Design and Preproduction TBD	\$ 574,329
M5	02/14/03	PS2 Prototype	\$ 335,000
M6	03/14/03	Xbox/Cube Prototypes / Full Production Schedule	\$ 360,000
M7	04/11/03	Level production 1	\$ 345,000
M8	05/12/03	Level production 2	\$ 335,000
M9	06/10/03	Level production 3	\$ 341,000
M10	07/10/03	Level production 4	\$ 345,000
M11	08/11/03	Level production 5	\$ 343,000
M12	09/10/03	Level production 6	\$ 360,000
M13	10/10/03	Level production 7	\$ 341,000
M14	11/10/03	Level production 8	\$ 495,000
M15	12/15/03	Level production 9	\$ 385,000
M16	01/15/03	Level production 10	\$ 341,000
M17	02/16/03	Level production 11	\$ 335,000
M18	03/01/04	Alpha	\$ 195,000
M19	04/05/02	Beta	\$ 335,000
M20	05/03/04	1st Party Submissions (all versions & languages)	\$ 335,000
M21	06/01/04	Code Release	\$ 133,034
M-Move	TBD	Payments required for moving to new space. Date to be based on lease signing and furniture purchases.	\$ 160,000
		<b>TOTAL</b>	<b>\$ 8,500,000</b>

15 4/25  
A  
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Notes to Milestone Schedule:

- i. The above milestone dates are for purposes of establishing delivery dates only; such dates are approximate for making milestone payments. No milestone will be deemed completed until all applicable deliverables are delivered to Activision. Milestone payments will be made when the deliverables constituting each applicable milestone are actually submitted by Developer and are accepted and approved by Activision in accordance with the terms of this Agreement.
- ii. The milestones in this schedule may be reasonably amended or supplemented upon mutual written agreement of the parties. Payments for all milestones shall be ten (10) days of acceptance of each milestone.
- iii. Notwithstanding the foregoing Milestone Schedule, the parties agree that in order to expedite Activision's review and approval of the Milestones, Developer will deliver a full Build (or other appropriate deliverable requested by Activision, e.g. design document) at least once per month, prior to the delivery for approval of the Alpha Version, and every week thereafter. All Builds should be delivered via one of two methods: (a) by internationally recognized overnight courier for first normal delivery of the business day or (b) digitally via File Transfer Protocol ("FTP"); if Builds or files are sent digitally, they should be sent via FTP to Activision's FTP server, with all FTP transfers to be completed by 9:00 A.M, PST. The parties agree that in order to facilitate digital transfer of assets contained in each Build, the transmitting party shall have a connection to the Internet no slower than ISDN (128kbps sustained at any time of day through a reliable Internet Service Provider) with T1-rated speed or better connection being recommended. This connectivity, if it is not already in place, should be installed and fully functional no later than two (2) months prior to scheduled Code Release. The parties agree that the frequency of the deliveries of the Builds may have to be increased by mutual consent in accordance with needs of quality assurance testing as the Beta Version enters the stage prior to the Code Release.
- iv. The Final Milestone Schedule ("FMS") (if one has not already been completed by the time the parties execute this Agreement) shall be defined in a written amendment that clearly specifies the milestone descriptions and will be determined following completion and acceptance of the final TDD, final GDD and Prototype before any subsequent milestones are approved for payment. All "TBD's" shall be replaced with deliverables or such FMS will not be acceptable. The FMS will include detailed definitions of each milestone; these definitions will serve as Activision's basis for tracking the progress of the Products. Milestone definitions shall conform, unless otherwise directed in writing by Activision, to the following specifications:

The FMS will consist of three "phases": (1) the Pre-Production Phase, (2) the Production Phase ("Work-In-Progress"), and (3) the Testing Phase (Alpha, Beta, and Code Release). Expected details for each phase are described below:

- 1 Pre-Production. Pre-production milestones must include the following:
  - 1.1 Execution of Agreement
  - 1.2 Descriptions of exact deliverables to Activision
  - 1.3 Descriptions of what these deliverables represent vis-à-vis the contemplated final Product (i.e., to what extent do the pre-production deliverables suggest the final look, interface, performance, etc., of the contemplated final Product)
  - 1.4 By the final milestone of the pre-production phase, delivery of the following will have been included in the pre-production milestone definitions: (a) a final GDD, as further defined below; (b) a final TDD, as further defined below; (c) a final budget; and (d) a prototype (if and when applicable)
- 2 Production ("Work-In-Progress"). Production milestones must include the following:
  - 2.1 A detailed description of all physical assets to be delivered at the milestone (i.e., software, documents, sketches, designs, etc.)
  - 2.2 The FMS
  - 2.3 A final production schedule
  - 2.4 A description of the major achievements that these assets represent
  - 2.5 The percentage of completeness on the final Product that the deliverable represents;
  - 2.6 Deliverables are expected to indicate the progress of sections and sub-sections of the Product. For instance, if the Product is "level-based," work-in-progress milestone definitions will show per-level progress (i.e., "in this milestone, complete designs for level 7 are delivered, 50% of the implementation of level 6 is delivered," etc.).
  - 2.7 During the course of the production milestones, the following additional deliverables must be defined:

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- 2.7.1 Tradeshow demos (when applicable);
- 2.7.2 Press tour demo (when applicable).

3 **Testing (Alpha, Beta, Code Release).** Definitions of Alpha, Beta, and Code Release to be included in the Final Milestone Schedule are provided below. In addition, the Testing Phase will include the following milestones:

- 3.1 Downloadable demo (when applicable);
- 3.2 Third Party Submission (when applicable);
- 3.3 Third Party Approval (when applicable).

4 **ALPHA**

- 4.1 Developer is expected to deliver a working Alpha version of the Product. "Alpha" is defined as follows:
- 4.2 Suitable for submission into Activision's Quality Assurance Department for bug testing. Although the Product is not yet complete, Developer has moved from "development" mode into "tuning" mode.
- 4.3 All features and playability are in and working.
- 4.4 Substantially all, and all gameplay-critical, artwork and animation have been completed (and where incomplete, there is limited place holder art in the game), with the understanding that additional changes may need to be made (as a response to gameplay tuning, bug reports, etc.).
- 4.5 Substantially all, and all gameplay critical, music and sound effects are implemented.
- 4.6 Bugs remain, and the game play may need adjusting. The Product might not include copy protection, title screen, credits.
- 4.7 All cinematic sequences are implemented, including opening, mid-game, and end-game sequences.
- 4.8 Installer is 100% functional.
- 4.9 At this stage, anyone looking at the Product will have a very good understanding of exactly what the final Product will be, with very little, if any, additional explanation.
- 4.10 At Alpha, Developer is expected to deliver all game assets to be translated for the localized versions of the Product.
- 4.11 The contents of the milestone shall be in accordance with the current approved Game and Technical Design Documents, as well as with Activision's comments on the previous milestone.
- 4.12 Server code is implemented and running and anti-cheat mechanisms are implemented and running.

5 **BETA**

- 5.1 Developer is expected to deliver a working Beta version of the Product. "Beta" is defined as follows: The Product is complete, to the best of the Developer's knowledge, and all that remains is final approval from Activision's Quality Assurance department. Developer has moved from "tuning" mode into "bug response" mode.
- 5.2 Activision's stated requests for improvements or enhancements have all been implemented and accepted by Activision.
- 5.3 Developer has finalized all features that were to be put into the Product (including copy protection, title screen, credits screen, installer, etc.) and has thoroughly tested and adjusted the Product to Activision's satisfaction.
- 5.4 As far as the Developer is concerned, the product is basically free of substantial bugs.
- 5.5 Gameplay tuning is complete.
- 5.6 The Product is up to Developer's quality standards and, to best of Developer's knowledge, to Activision's quality standards as well.
- 5.7 Product is ready to enter final quality assurance testing and hardware compatibility. Activision can, once Activision has tested the Product to Activision's satisfaction, release the Product, as is, for manufacture and distribution.
- 5.8 At Beta, Developer is expected to deliver final version of all game assets to be translated for the localized versions of the Product, along with at least one localized version of the product using translated assets provided to developer.
- 5.9 The contents of the milestone shall be in accordance with the current approved GDD and TDD, as well as with Activision's comments on the previous milestone.

6 **CODE RELEASE**

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- 6.1 Developer is expected to deliver a final version of the Product, suitable for release in the United States, and other territories using the U.S. version of the Product. "Code Release" is defined as follows:
- 6.2 The Product is 100% complete, all items on Activision's bug report are marked as "closed," and the Product is ready for manufacture and commercial distribution by Activision. Developer will have fixed any and all bugs that Activision determines must be fixed.
- 6.3 Along with the final version of the Product, Developer is expected to deliver the following:
  - 6.3.1 Final, documented source code.
  - 6.3.2 Final assets, including text files, sound files, art assets (including bitmaps, models, textures, etc.), video assets, etc., in a form suitable to recreate all in-game assets.
  - 6.3.3 Updated GDD and TDD.

**TECHNICAL DESIGN DOCUMENT**

A TDD is a document that must set up the parameters, identify the potential hurdles, and establish the strategies, choices and options for the development and production of the Product. The TDD shall include, but not be limited to, the following information:

- 1 Product overview from a technical standpoint
  - 1.1 a description of the finished product;
  - 1.2 minimum and ideal requirements of the target system and the manner in which the Product will perform in each instance under each such requirements;
  - 1.3 general technical design strategy;
  - 1.4 potentially difficult technical issues or techniques anticipated in the production of the Product;
  - 1.5 asset conversion processes;
  - 1.6 art, interface and marketing concerns; and
  - 1.7 description of all tests performed during the development process that determines the technical viability of the Product.
- 2 Code design
  - 2.1 List and description of major/critical software routines and algorithms used in the development and production of the Product. (This includes any tools/utilities used in or developed specifically for the Product).
  - 2.2 Description of significant data structures to be employed in the Product (modules organization, etc.).
  - 2.3 Indication of what parts of computer code created for the Product will be changed in order to accommodate a new platform.
  - 2.4 Memory map of both the hard drive usage and the RAM memory usage.
  - 2.5 Description of memory management codes.
  - 2.6 Delivery of a medium map.
- 3 List of all proposed participants on the Product
  - 3.1 This section should include a brief biography of each person engaged by Developer in the production of the Product together with a list of the specific responsibilities/tasks attached to each of them.
- 4 Description of the hardware/software environment in which the Product will be developed
  - 4.1 This section should describe in detail the development system hardware configuration (which should include the language/compiler to be used). It also should provide a list of all software tools and the stages (i.e., alpha, beta, final) that these tools are to be used by the programmers, artists, and sound and music professionals involved in the production of the Product. This section also should include an assessment of the hardware versus manpower.
- 5 Backup plans
  - 5.1 This section should include a description of potential alternative production scenarios if the assessed risks associated with the proposed production plan make such plan unfeasible.

Developer shall submit a first draft of the TDD that conforms to the specifications set forth above in order to provide Activision with the opportunity to review and comment on such draft. If Activision accepts such first draft as being in conformance with the specifications set forth above, then Activision shall provide detailed written comments to Developer on the first draft within ten (10) business days. Developer then shall revise the first draft and deliver a final TDD that addresses each of Activision's comments and conforms to the specifications set forth above.

## GAME DESIGN DOCUMENT

A GDD is a document that serves as the preliminary basis upon which a Product will be produced. The GDD will include, at a minimum, responses to the following questions:

- 1 Concept
  - 1.1 What is the basic concept?
  - 1.2 What is the "high concept" of the game?
- 2 Design
  - 2.1 What is the basic interactive design?
  - 2.2 What is the planned interface? Provide a detailed description of the game's interface and controls.
  - 2.3 What is the planned perspective (1st person vs. 3rd person)?
  - 2.4 What is the basic interactive structure (e.g. chapters vs. great middle section, Levels, etc.)?
  - 2.5 What is the "heart" of the gameplay (e.g. speed, actions, style, continuous, tumbased, etc.)?
  - 2.6 How does multi-player work?
  - 2.7 How difficult is the game?
  - 2.8 How long will it take the average player to complete?
- 3 Story
  - 3.1 What is the basic story? Include a fully developed back-story (context and subtext).
  - 3.2 What is the genre?
  - 3.3 What is the tone?
  - 3.4 What is the basic narrative?
  - 3.5 What is the "heart" of the story?
  - 3.6 Is it a linear story?
  - 3.7 What is the player's goal and why would they want to accomplish it?
  - 3.8 Who does the player play? Single/multi player?
  - 3.9 Are there other key characters?
- 4 Gameplay
  - 4.1 Description of play.
  - 4.2 Describe a typical play session including what the player does, what happens, player response, and so forth. The idea is to give a kinetic sense of gameplay.
  - 4.3 Describe each mission or Level of the game (as applicable).
  - 4.4 Preliminary maps of each Level or mission of the game (as applicable).
  - 4.5 Describe all characters and enemies in the game.
  - 4.6 Provide a written walk-through of a sample path through the entire game.
  - 4.7 Provide sample art (in the form of conceptual drawings or CGI).
  - 4.8 Provide a detailed description of the sound design (music and effects).
  - 4.9 Provide a detailed description of any cinematic sequences (as applicable).
- 5 Market
  - 5.1 Who is the target audience and what are their expectations?
  - 5.2 Is this a product for core gamers or more "mass-market"?
  - 5.3 Does this product target one core audience or multiple audiences?
  - 5.4 How does this product compare with its competition?
  - 5.5 What is the key competition for the product?
  - 5.6 What does this product offer that they don't?
  - 5.7 What do they offer that this product doesn't?
  - 5.8 What competitive products are in development?

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5.9 This should also function as a potential list of Do's and Don'ts for the production team.

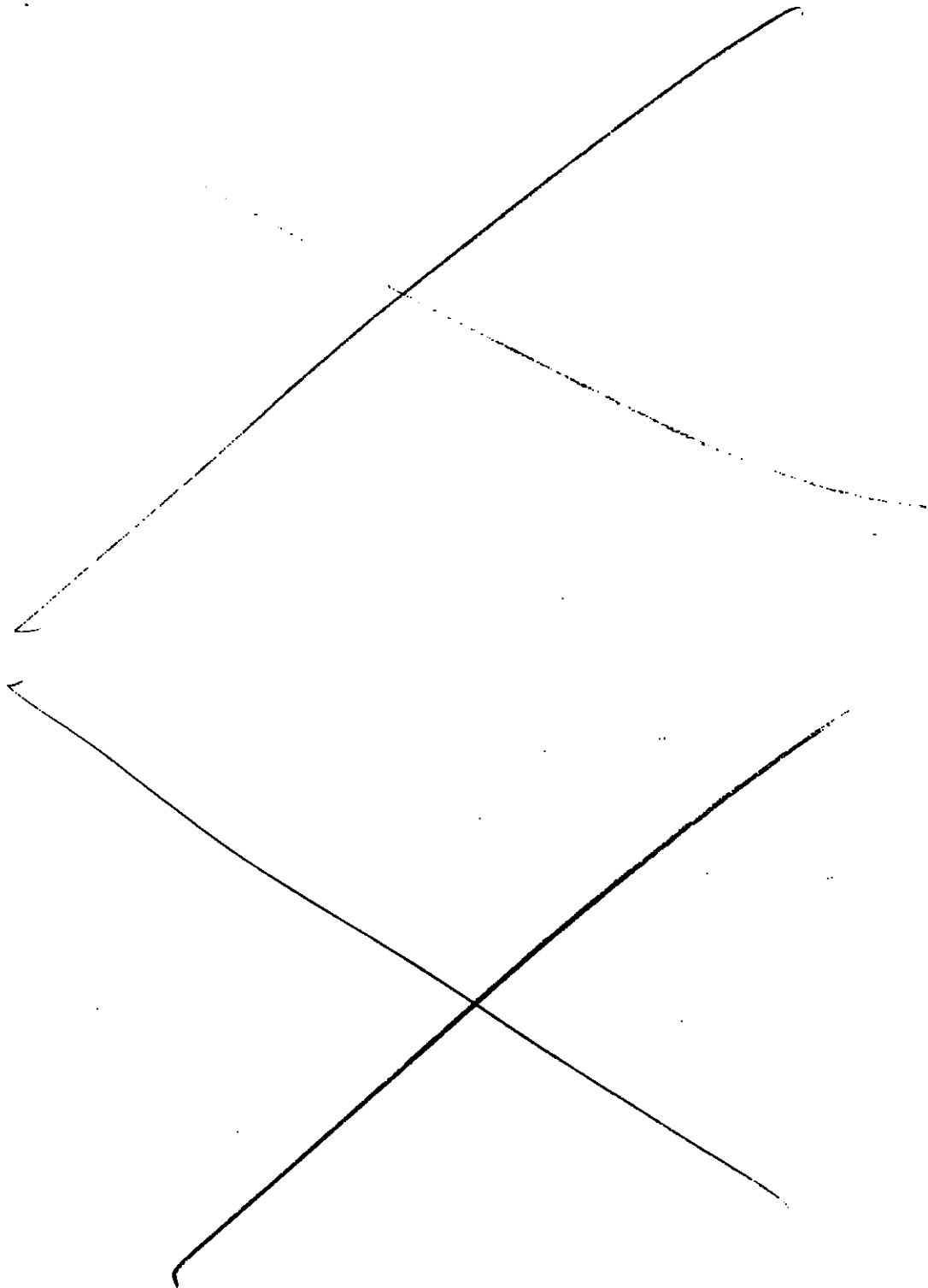


EXHIBIT B

**Key Employees for the First Product and the Second Product**

Name:

Title:

Erik Church  
Jonathan Gregerson  
Dave Prout  
Sunil Thankamushy

Design Lead  
Art Director  
Art Lead  
Animation Director

Adrian Jones  
Ike Macoco  
Scott Langteau  
Craig Allen

Engineering Director  
Engineer  
Producer  
General Manager

**Development Team for the First Product and the Second Product**

Design Team

Designer  
Designer  
Designer  
Designer

John Castro  
Greg Hillegas  
Tony Rowe  
Steve Skelton

Art Team

3D Artist  
3D Artist  
3D Artist  
3D Artist  
3D Artist

Jerry Kowalczyk  
Stephen Ratter  
Eric Serrano  
TBH  
TBH

Animation/Character Team

Animation Lead  
Animator  
Animator  
Animator  
Animator

Kevin Scharff  
Neil Ishimine  
Craig McPherson  
TBH  
TBH

Character Artist (Rigger)  
Modeler  
Modeler  
Texture Artist  
Character Artist  
Concept Artist

Lonnie Kraatz  
Scott Eaton  
Tom Inesi  
Kevin Chen  
Matt Hall  
TBH

Engineering

Lead Animation Eng.  
Engineer  
Engineer  
Engineer  
Engineer  
Engineer

Marshall Robin  
Bradley Fitzgerald  
Jim Schuler  
Jordan Johnson  
TBD  
TBD

Tools Programmer

TBD

Engineer  
Engineer  
Engineer

TBD  
TBD  
TBD

Audio

Audio Lead

Jack Grillo

Production

Office Mgr/HR  
Associate Producer

TBD  
John Garcia

EXHIBIT C

**Copyright Assignment**

The undersigned hereby assigns all rights, title and interest in and to the materials described below, including the copyright thereof, in the United States and throughout the world, together with any rights of action which may have accrued under said copyrights, which are owned by the undersigned, for One Dollar (\$1.00) and other good and valuable consideration, the receipt of which is hereby acknowledged, to Activision Publishing, Inc. ("Activision"), a Delaware corporation with offices at 3100 Ocean Park Blvd., Santa Monica, CA 90405.

**Work:** Except as otherwise set forth in the Software Publishing and Development Agreement between Activision and the undersigned, all protectible elements and materials relating to the entertainment software product tentatively titled "Tour of Duty".

**SPARK ENTERTAINMENT, INC.**

Dated: Sept. 10, 2002

By: [Signature]  
Name: CLARK ALLEN  
Title: CEO  
Address: 2001 WILSHIRE BLVD.  
Santa Monica, CA

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EXHIBIT D

Activision Development Aids

Qty Description	Unit Cost	Total	Estimated Life	Deprec/month (This is the cost to Developer)
7 PS Dev Kits	\$ 10,000	\$ 70,000	3 years	\$ 1,944
7 ProDG Software	\$ 4,330	\$ 30,310	2 years	\$ 1,263
10 PS Debug	\$ 1,000	\$ 10,000	3 years	\$ 278
6 Xbox Dev	\$ 10,000	\$ 60,000	3 years	\$ 1,667
6 Xbox Debug	\$ 1,000	\$ 6,000	3 years	\$ 167
6 Game CubeDev	\$ 6,000	\$ 36,000	3 years	\$ 1,000
6 Game Cube Debug	\$ 1,000	\$ 6,000	3 years	\$ 167
1 GC Disc Writer	\$ 2,500	\$ 2,500	3 years	\$ 69
		<b>\$220,810</b>		<b>\$ 6,555/mo</b>

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49





3100 Ocean Park Boulevard  
Santa Monica, California 90405  
Tel: 310.255.2000  
Fax: 310.255.2152  
www.activision.com

Party: Spark Unlimited, Inc.  
Deal Type: Software Development (Amendment-Revised Deal Terms)  
Product: Call of Duty: Finest Hour (Console)

## AMENDMENT NO. 2

TO

### SOFTWARE PUBLISHING AND DEVELOPMENT AGREEMENT

This Amendment No. 2 to Software Publishing and Development Agreement (this "Amendment No. 2") is entered into as of May 1, 2004 (the "Amendment No. 2 Effective Date"), by and between SPARK UNLIMITED, INC. (formerly known as Spark Entertainment, Inc.) ("Developer"), and ACTIVISION PUBLISHING, INC. ("Activision").

#### RECITALS:

A. Activision and Developer entered into that certain Software Publishing and Development Agreement dated as of September 10, 2002, as amended by Amendment No. 1 dated as of March 20, 2003 (collectively, the "Agreement"), related to the development by Developer of multiple console-based products for Activision, including the First Product, which is a reality-based World War 2 first person action entertainment software product that has been tentatively entitled *Call of Duty: Finest Hour* and which is intended to be developed for the Sony PlayStation 2 computer entertainment system (the "PS2 Platform"), the Microsoft Xbox video game system (the "Xbox Platform") and the Nintendo GameCube video game system (the "GameCube Platform").

B. The parties desire to amend certain terms of the Agreement according to the terms and conditions set forth in this Amendment No. 2.

#### AGREEMENT:

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

- 1 Platforms for First Product:** Section 2.1 of the Agreement shall be amended such that Developer shall no longer be responsible for developing the First Product for either the Xbox Platform or the GameCube Platform. Developer shall remain responsible for developing the First Product for the PS2 Platform. Subject to Paragraph 3 below, Activision shall be responsible, at Activision's expense, for the completion of the development of the First Product for the Xbox Platform and the GameCube Platform, provided that (a) Activision elects, in its sole discretion, to complete the First Product for such Platforms, and (b) Developer shall be obligated to provide Activision and its other contractors or developers reasonable cooperation and assistance with respect to the development of the First Product for the Xbox Platform and the GameCube Platform, including assistance with programming, source code, development tools and assets developed by Developer in connection with the First Product for the PS2 Platform, in order to facilitate Activision's stated goal of releasing the First Product for all of the Platforms simultaneously.

2. Additional Development Advance/Amended Milestone Schedule: In order to complete the development of the First Product for the PS2 Platform, Activision agrees to pay Developer an Additional Advance (the "Additional Development Advance") in the amount of Two Million Seven Hundred Sixteen Thousand Four Hundred Eighty One Dollars (\$2,716,481), such that the total development Advance for the First Product set forth in Section 10.1 of the Agreement is hereby amended from Eight Million Five Hundred Thousand Dollars (\$8,500,000) to Eleven Million Two Hundred Sixteen Thousand Four Hundred Eighty One Dollars (\$11,216,481). All payments (including the payment of the Additional Development Advance) and development work remaining as of the Amendment No. 2 Effective Date on the First Product for the PS2 Platform, as agreed upon by the parties, is attached hereto as Exhibit A2, and, as such, the Milestone Schedule attached hereto as Exhibit A2 shall supersede any remaining payments or development work for the First Product as contemplated in any prior Milestone Schedule(s) (the parties acknowledge and agree that Activision has already paid Developer the first milestone payment set forth in the Milestone Schedule attached hereto in the amount of \$513,900). The Notes to the Milestone Schedule set forth in Exhibit A-1 attached to the Agreement shall otherwise remain in full force and effect and shall not be altered or amended by this Amendment No. 2. Notwithstanding the foregoing, nothing in this Paragraph 2 shall be construed as amending in any way the last sentence of Section 10.1 of the Agreement, which provides in relevant part that the advances or development fees payable for any subsequent Products developed by Developer under the Agreement shall not, in any event, exceed the Advance payable for the First Product. For the avoidance of doubt, the Advance amount for the First Product that shall be applicable to this last sentence of Section 10.1 of the Agreement shall be Eight Million Five Hundred Thousand Dollars (\$8,500,000) and not the increased amount of Eleven Million Two Hundred Sixteen Thousand Four Hundred Eighty One Dollars (\$11,216,481) payable pursuant to this Amendment No. 2.
3. Additional Hiring/Additional Advances: The parties agree that Developer shall be permitted to hire a new Technical Director and/or a new Development Director. The person(s) that Developer proposes to assume such role(s) shall be subject to the prior approval of Activision, such approval to be in Activision's sole discretion. In the event that Developer does in fact hire a new Technical Director and/or a new Development Director, Activision agrees to pay Developer the following amounts, which shall be in addition to the Additional Development Advance:
- (a) Technical Director: (i) a one-time payment to cover Developer's actual, documented, out-of-pocket costs associated with the hiring of such person, including recruiting fees (if any) and hardware, software and other related start-up costs, provided that such payment shall not exceed Thirty Three Thousand Dollars (\$33,000); and (ii) an additional sum per milestone in the amount of Seven Thousand Six Hundred Sixty Eight Dollars (\$7,668).
  - (b) Development Director: (i) a one-time payment to cover Developer's actual, documented, out-of-pocket costs associated with the hiring of such person, including recruiting fees (if any) and hardware, software and other related start-up costs, provided that such payment shall not exceed Twenty Two Thousand Four Hundred Dollars (\$22,400); and (ii) an additional sum per milestone in the amount of Five Thousand One Hundred Twelve Dollars (\$5,112).
4. Development Assistance/Additional Advances: The parties acknowledge and agree that, in addition to the Advance and the Additional Development Advance, as well as any payments that may be made to Developer by Activision pursuant to Section 3 of this Amendment No. 2, Activision has provided and continues to provide Developer considerable development assistance, and, in turn, has incurred and continues to incur significant additional costs, in connection with the First Product. The parties further acknowledge and agree that, in accordance with Sections 4.3, 10.2 and 10.4 of the Agreement, the costs of all such development assistance provided by Activision, including, but expressly not limited to, the Additional Development Advance, any payments made pursuant to Section 3 of this Amendment No. 2, and Activision's completion of the Xbox Platform and GameCube Platform versions of the First Product pursuant to this Amendment No. 2, shall constitute Additional Advances and shall therefore be recoupable by Activision from any and all Royalties due to Developer on the First Product. Nothing in this Paragraph 3 or this Amendment No. 2 shall be construed as modifying or limiting in any way the terms of that certain Side Agreement for Additional Advances between the parties, dated as of January 15, 2003, as amended by agreement of the parties, pursuant to which the parties agreed that up to Eight Hundred Fifty Thousand Dollars (\$850,000) of Developer's legal expenses, which were paid by Activision in connection Developer's lawsuit with EA, would also be recoupable by Activision from any and all Royalties payable to Developer with respect to the First Product.

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5 **Royalties:**

(a) For First Product/PS2 Platform: Section 11.1 of the Agreement shall be amended and restated in its entirety solely with respect to the First Product for the PS2 Platform as follows:

In consideration of its development, production and completion of the First Product for the PS2 Platform, Developer shall be entitled to receive royalties ("Royalty" or "Royalties") equal to the following respective percentages of Adjusted Gross Invoices (as defined in Section 11.2) for the First Product for the PS2 Platform that are sold by Activision, or licensed by Activision for sale, and not returned (provided that, solely for purposes of calculating unit threshold amounts and not for purposes of determining Adjusted Gross Invoices, the unit threshold amounts set forth below shall be calculated by combining the units of the First Product sold and not returned for both the PS2 Platform and the Xbox Platform, i.e., units of the First Product for the Xbox Platform will be counted for purposes of determining the number of units applicable to each Royalty percentage break set forth below): (a) twenty percent (20%) for the first 3,000,000 units; (b) twenty five percent (25%) for 3,000,001 units up to 7,000,000 units; (c) thirty percent (30%) for 7,000,001 units up to 11,000,000 units; and (d) thirty five percent (35%) for units in excess of 11,000,000 units.

(b) For First Product/Xbox Platform: Section 11.4 of the Agreement shall be amended solely to provide that Developer shall be entitled to receive passive Royalties equal to fifteen percent (15%), rather than ten percent (10%), of Adjusted Gross Invoices with respect to all units of the First Product for the Xbox Platform that are sold by Activision, or licensed by Activision for sale, in the retail channel. All other provisions of Section 11.4 of the Agreement shall remain in full force and effect.

(c) For First Product/GameCube Platform: In accordance with Section 11.4 of the Agreement, Developer shall be entitled to receive passive royalties equal to ten percent (10%) of Adjusted Gross Invoices with respect to all units of the First Product for the GameCube Platform that are sold by Activision, or licensed by Activision for sale, in the retail channel.

6 **General Conditions:** All capitalized terms used and not otherwise defined in this Amendment No. 2 shall have the meanings ascribed to such terms in the Agreement, except as otherwise noted in this Amendment No. 2, or where such terms and conditions are by their nature inapplicable. The parties agree that all terms and conditions contained in the Agreement shall otherwise remain in full force and effect. Notwithstanding the foregoing, if any term or provision of the Agreement is contradictory to, or inconsistent with, any term or provision of this Amendment No. 2, then the terms and provisions of this Amendment No. 2 shall in all events control and such contradictory or inconsistent term or provision of the Agreement shall be null and void for purposes of interpreting this Amendment No. 2.

IN WITNESS WHEREOF, the parties hereto have executed this Amendment No. 2 as of the Amendment No. 2 Effective Date.

**ACTIVISION:**

Activision Publishing, Inc.

**DEVELOPER:**

Spark Unlimited, Inc.

By: \_\_\_\_\_

Name: Ron Doornink  
Title: Chief Executive Officer

By: \_\_\_\_\_

Name: Craig Allen  
Title: Chief Executive Officer

5 Royalties:

(a) For First Product/PS2 Platform: Section 11.1 of the Agreement shall be amended and restated in its entirety solely with respect to the First Product for the PS2 Platform as follows:

In consideration of its development, production and completion of the First Product for the PS2 Platform, Developer shall be entitled to receive royalties ("Royalty" or "Royalties") equal to the following respective percentages of Adjusted Gross Invoices (as defined in Section 11.2) for the First Product for the PS2 Platform that are sold by Activision, or licensed by Activision for sale, and not returned (provided that, solely for purposes of calculating unit threshold amounts and not for purposes of determining Adjusted Gross Invoices, the unit threshold amounts set forth below shall be calculated by combining the units of the First Product sold and not returned for both the PS2 Platform and the Xbox Platform, i.e., units of the First Product for the Xbox Platform will be counted for purposes of determining the number of units applicable to each Royalty percentage break set forth below): (a) twenty percent (20%) for the first 3,000,000 units; (b) twenty five percent (25%) for 3,000,001 units up to 7,000,000 units; (c) thirty percent (30%) for 7,000,001 units up to 11,000,000 units; and (d) thirty five percent (35%) for units in excess of 11,000,000 units.

(b) For First Product/Xbox Platform: Section 11.4 of the Agreement shall be amended solely to provide that Developer shall be entitled to receive passive Royalties equal to fifteen percent (15%), rather than ten percent (10%), of Adjusted Gross Invoices with respect to all units of the First Product for the Xbox Platform that are sold by Activision, or licensed by Activision for sale, in the retail channel. All other provisions of Section 11.4 of the Agreement shall remain in full force and effect.

(c) For First Product/GameCube Platform: In accordance with Section 11.4 of the Agreement, Developer shall be entitled to receive passive royalties equal to ten percent (10%) of Adjusted Gross Invoices with respect to all units of the First Product for the GameCube Platform that are sold by Activision, or licensed by Activision for sale, in the retail channel.

- 6 General Conditions: All capitalized terms used and not otherwise defined in this Amendment No. 2 shall have the meanings ascribed to such terms in the Agreement, except as otherwise noted in this Amendment No. 2, or where such terms and conditions are by their nature inapplicable. The parties agree that all terms and conditions contained in the Agreement shall otherwise remain in full force and effect. Notwithstanding the foregoing, if any term or provision of the Agreement is contradictory to, or inconsistent with, any term or provision of this Amendment No. 2, then the terms and provisions of this Amendment No. 2 shall in all events control and such contradictory or inconsistent term or provision of the Agreement shall be null and void for purposes of interpreting this Amendment No. 2.

IN WITNESS WHEREOF, the parties hereto have executed this Amendment No. 2 as of the Amendment No. 2 Effective Date.

ACTIVISION:

Activision Publishing, Inc.

By: 

Name: Ron Doornink  
Title: Chief Executive Officer

DEVELOPER:

Spark Unlimited, Inc.

By: 

Name: Craig Allen  
Title: Chief Executive Officer

EXHIBIT A2

MILESTONE SCHEDULE FOR CALL OF DUTY: FINEST HOUR (PLAYSTATION 2 VERSION)

Milestone	Description	Delivery Date	Payment Date (if accepted)	Payment
A	E3 Demo		PAID	\$513,900
B	TBD	22-May	1-Jun	\$318,000
C	TBD	5-Jun	15-Jun	\$318,000
D	TBD	21-Jun	1-Jul	\$316,000
E	Alpha + Demo	5-Jul	15-Jul	\$316,000
F	TBD	22-Jul	1-Aug	\$222,500
G	TBD	5-Aug	15-Aug	\$222,500
H	TBD	22-Aug	1-Sep	\$234,500
I	Beta	5-Sep	15-Sep	\$234,500
J	TBD	21-Sep	1-Oct	\$195,176
K	Submission to First Party	5-Oct	15-Oct	\$195,176
				<b>\$3,086,252</b>

EXHIBIT **B**  
**54**

FOR COURT USE ONLY

**FILED**

LOS ANGELES SUPERIOR COURT

AUG 25 2005

JOHN A. GLARKE, EXECUTIVE OFFICER/CLERK

BY J. SUNGA, DEPUTY

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, state bar number, and address):

Stephen S. Smith/166539  
Greenberg Glusker Fields Claman Machtinger  
& Kinsella LLP  
1900 Avenue Of The Stars, Suite 2100  
Los Angeles, CA 90067-4590

TELEPHONE NO (310)553-3610 FAX NO

ATTORNEY FOR (Name): Plaintiff Spark Unlimited, Inc.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF Los Angeles

STREET ADDRESS 111 N. Hill Street

MAILING ADDRESS same

CITY AND ZIP CODE Los Angeles, CA 90012

BRANCH NAME Central

CASE NAME: SPARK v. ACTIVISION

**CIVIL CASE COVER SHEET**

**Unlimited** (Amount demanded exceeds \$25,000)  **Limited** (Amount demanded is \$25,000 or less)

**Complex Case Designation**

**Counter**  **Joinder**  
Filed with first appearance by defendant (Cal. Rules of Court, rule 1811)

CASE NUMBER

BC338918

JUDGE:

DEPT.:

All five (5) items below must be completed (see instructions on page 2).

1. Check one box below for the case type that best describes this case:

**Auto Tort**

- Auto (22)
- Uninsured motorist (46)

**Other PI/PD/WD (Personal Injury/Property Damage/Wrongful Death) Tort**

- Asbestos (04)
- Product liability (24)
- Medical malpractice (45)
- Other PI/PD/WD (23)

**Non-PI/PD/WD (Other) Tort**

- Business tort/unfair business practice (07)
- Civil rights (08)
- Defamation (13)
- Fraud (16)
- Intellectual property (19)
- Professional negligence (25)
- Other non-PI/PD/WD tort (35)

**Employment**

- Wrongful termination (36)
- Other employment (15)

**Contract**

- Breach of contract/warranty (06)
- Collections (09)
- Insurance coverage (18)
- Other contract (37)

**Real Property**

- Eminent domain/Inverse condemnation (14)
- Wrongful eviction (33)
- Other real property (26)

**Unlawful Detainer**

- Commercial (31)
- Residential (32)
- Drugs (38)

**Judicial Review**

- Asset forfeiture (05)
- Petition re: arbitration award (11)
- Writ of mandate (02)
- Other judicial review (39)

**Provisionally Complex Civil Litigation** (Cal. Rules of Court, rules 1800-1812)

- Antitrust/Trade regulation (03)
- Construction defect (10)
- Mass tort (40)
- Securities litigation (28)
- Environmental/Toxic tort (30)
- Insurance coverage claims arising from the above listed provisionally complex case types (41)

**Enforcement of Judgment**

- Enforcement of judgment (20)

**Miscellaneous Civil Complaint**

- RICO (27)
- Other complaint (not specified above) (42)

**Miscellaneous Civil Petition**

- Partnership and corporate governance (21)
- Other petition (not specified above) (43)

2. This case  is  is not complex under rule 1800 of the California Rules of Court. If case is complex, mark the factors requiring exceptional judicial management:

- a.  Large number of separately represented parties
- b.  Extensive motion practice raising difficult or novel issues that will be time-consuming to resolve
- c.  Substantial amount of documentary evidence
- d.  Large number of witnesses
- e.  Coordination with related actions pending in one or more courts in other counties, states or countries, or in a federal court
- f.  Substantial post-judgment judicial supervision

3. Type of remedies sought (check all that apply):

- a.  monetary
- b.  nonmonetary, declaratory or injunctive relief
- c.  punitive

4. Number of causes of action (specify):

5. This case  is  is not a class action suit.

Date: August 25, 2005

Stephen S. Smith

(TYPE OR PRINT NAME)

[Signature]

(SIGNATURE OF PARTY OR ATTORNEY FOR PARTY)

**NOTICE**

- Plaintiff must file this cover sheet with the first paper filed in the action or proceeding (except small claims cases or cases filed under the Probate, Family, or Welfare and Institutions Code). (Cal. Rules of Court, rule 201.8.) Failure to file may result in sanctions.
- File this cover sheet in addition to any cover sheet required by local court rule.
- If this case is complex under rule 1800 et seq. of the California Rules of Court, you must serve a copy of this cover sheet on all other parties to the action or proceeding.
- Unless this is a complex case, this cover sheet shall be used for statistical purposes only.

**CIVIL CASE COVER SHEET ADDENDUM AND STATEMENT OF LOCATION  
(CERTIFICATE OF GROUNDS FOR ASSIGNMENT TO COURTHOUSE LOCATION)**

**This form is required pursuant to LASC Local Rule 2.0 in all new civil case filings in the Los Angeles Superior Court.**

Item I. Check the types of hearing and fill in the estimated length of hearing expected for this case:

JURY TRIAL?  YES CLASS ACTION?  YES LIMITED CASE?  YES TIME ESTIMATED FOR TRIAL 10  HOURS/  DAYS.

Item II. Select the correct district and courthouse location (4 steps – If you checked "Limited Case", skip to Item III, Pg. 4):

**Step 1:** After first completing the Civil Case Cover Sheet Form, find the main civil case cover sheet heading for your case in the left margin below, and, to the right in Column A, the Civil Case Cover Sheet case type you selected.

**Step 2:** Check one Superior Court type of action in Column B below which best describes the nature of this case.

**Step 3:** In Column C, circle the reason for the court location choice that applies to the type of action you have checked. For any exception to the court location, see Los Angeles Superior Court Local Rule 2.0.

**Applicable Reasons for Choosing Courthouse Location (See Column C below)**

1. Class Actions must be filed in the County Courthouse, Central District.
2. May be filed in Central (Other county, or no Bodily Injury/Property Damage).
3. Location where cause of action arose.
4. Location where bodily injury, death or damage occurred.
5. Location where performance required or defendant resides.
6. Location of property or permanently garaged vehicle.
7. Location where petitioner resides.
8. Location wherein defendant/respondent functions wholly.
9. Location where one or more of the parties reside.
10. Location of Labor Commissioner Office.

**Step 4:** Fill in the information requested on page 4 in Item III; complete Item IV. Sign the declaration.

	<b>A</b> Civil Case Cover Sheet Category No.	<b>B</b> Type of Action (Check only one)	<b>C</b> Applicable Reasons - See Step 3 Above
<b>Auto Tort</b>	Auto (22)	<input type="checkbox"/> A7100 Motor Vehicle - Personal Injury/Property Damage/Wrongful Death	1., 2., 4.
	Uninsured Motorist (46)	<input type="checkbox"/> A7110 Personal Injury/Property Damage/Wrongful Death – Uninsured Motorist	1., 2., 4.
<b>Other Personal Injury/Property Damage/Wrongful Death Tort</b>	Asbestos (04)	<input type="checkbox"/> A6070 Asbestos Property Damage	2.
		<input type="checkbox"/> A7221 Asbestos - Personal Injury/Wrongful Death	2.
	Product Liability (24)	<input type="checkbox"/> A7260 Product Liability (not asbestos or toxic/environmental)	1., 2., 3., 4., 8.
	Medical Malpractice (45)	<input type="checkbox"/> A7210 Medical Malpractice - Physicians & Surgeons	1., 2., 4.
		<input type="checkbox"/> A7240 Other Professional Health Care Malpractice	1., 2., 4.
Other Personal Injury Property Damage Wrongful Death (23)	<input type="checkbox"/> A7250 Premises Liability (e.g., slip and fall)	1., 2., 4.	
	<input type="checkbox"/> A7230 Intentional Bodily Injury/Property Damage/Wrongful Death (e.g., assault, vandalism, etc.)	1., 2., 4.	
	<input type="checkbox"/> A7270 Intentional Infliction of Emotional Distress	1., 2., 3.	
	<input type="checkbox"/> A7220 Other Personal Injury/Property Damage/Wrongful Death	1., 2., 4.	
<b>Non-Personal Injury/Property Damage/Wrongful Death Tort</b>	Business Tort (07)	<input type="checkbox"/> A6029 Other Commercial/Business Tort (not fraud/breach of contract)	1., 2., 3.
	Civil Rights (08)	<input type="checkbox"/> A6005 Civil Rights/Discrimination	1., 2., 3.
	Defamation (13)	<input type="checkbox"/> A6010 Defamation (slander/libel)	1., 2., 3.
	Fraud (16)	<input type="checkbox"/> A6013 Fraud (no contract)	1., 2., 3.
	Intellectual Property (19)	<input type="checkbox"/> A6016 Intellectual Property	2., 3.

SHORT TITLE: SPARK V. ACTIVISION		CASE NUMBER
A Civil Case Cover Sheet Category No.	B Type of Action (Check only one)	C Applicable Reasons - See Step 3 Above
Professional Negligence (25)	<input type="checkbox"/> A6017 Legal Malpractice	1., 2., 3.
	<input type="checkbox"/> A6050 Other Professional Malpractice (not medical or legal)	1., 2., 3.
Other (35)	<input type="checkbox"/> A6025 Other Non-Personal Injury/Property Damage tort	2., 3.
Wrongful Termination (36)	<input type="checkbox"/> A6037 Wrongful Termination	1., 2., 3.
	Other Employment (15)	<input type="checkbox"/> A6024 Other Employment Complaint Case <input type="checkbox"/> A6109 Labor Commissioner Appeals
Breach of Contract/Warranty (06) (not insurance)	<input type="checkbox"/> A6004 Breach of Rental/Lease Contract (not Unlawful Detainer or wrongful eviction)	2., 5.
	<input type="checkbox"/> A6008 Contract/Warranty Breach-Seller Plaintiff (no fraud/negligence)	2., 5.
	<input type="checkbox"/> A6019 Negligent Breach of Contract/Warranty (no fraud)	1., 2., 5.
	<input type="checkbox"/> A6028 Other Breach of Contract/Warranty (not fraud or negligence)	1., 2., 5.
Collections (09)	<input type="checkbox"/> A6002 Collections Case-Seller Plaintiff	2., 5., 6.
	<input type="checkbox"/> A6012 Other Promissory Note/Collections Case	2., 5.
Insurance Coverage (18)	<input type="checkbox"/> A6015 Insurance Coverage (not complex)	1., 2., 5., 8.
Other Contract (37)	<input checked="" type="checkbox"/> A6009 Contractual Fraud	1., 2., 3., 5.
	<input type="checkbox"/> A6031 Tortious Interference	1., 2., 3., 5.
	<input type="checkbox"/> A6027 Other Contract Dispute (not breach/insurance/fraud/negligence)	1., 2., 3., 8.
Eminent Domain/Inverse Condemnation (14)	<input type="checkbox"/> A7300 Eminent Domain/Condemnation Number of parcels _____	2.
Wrongful Eviction (33)	<input type="checkbox"/> A6023 Wrongful Eviction Case	2., 6.
Other Real Property (26)	<input type="checkbox"/> A6018 Mortgage Foreclosure	2., 6.
	<input type="checkbox"/> A6032 Quiet Title	2., 6.
	<input type="checkbox"/> A6060 Other Real Property (not eminent domain, landlord/tenant, foreclosure)	2., 6.
Unlawful Detainer - Commercial (31)	<input type="checkbox"/> A6021 Unlawful Detainer-Commercial (not drugs or wrongful eviction)	2., 6.
Unlawful Detainer - Residential (32)	<input type="checkbox"/> A6020 Unlawful Detainer-Residential (not drugs or wrongful eviction)	2., 6.
Unlawful Detainer - Drugs (38)	<input type="checkbox"/> A6022 Unlawful Detainer-Drugs	2., 6.
Asset Forfeiture (05)	<input type="checkbox"/> A6108 Asset Forfeiture Case	2., 6.
Petition re Arbitration (11)	<input type="checkbox"/> A6115 Petition to Compel/Confirm/ Vacate Arbitration	2., 5.



	<b>A</b> Civil Case Cover Sheet Category No.	<b>B</b> Type of Action (Check only one)	<b>C</b> Applicable Reasons - See Step 3 Above
Judicial Review (Cont'd.)	Writ of Mandate (02)	<input type="checkbox"/> A6151 Writ - Administrative Mandamus <input type="checkbox"/> A6152 Writ - Mandamus on Limited Court Case Matter <input type="checkbox"/> A6153 Writ - Other Limited Court Case Review	2., 8. 2. 2.
	Other Judicial Review (39)	<input type="checkbox"/> A6150 Other Writ / Judicial Review	2., 8.
Provisionally Complex Litigation	Antitrust/Trade Regulation (03)	<input type="checkbox"/> A6003 Antitrust/Trade Regulation	1., 2., 8.
	Construction Defect (10)	<input type="checkbox"/> A6007 Construction defect	1., 2., 3.
	Claims Involving Mass Tort (40)	<input type="checkbox"/> A6006 Claims Involving Mass Tort	1., 2., 8.
	Securities Litigation (28)	<input type="checkbox"/> A6035 Securities Litigation Case	1., 2., 8.
	Toxic Tort Environmental (30)	<input type="checkbox"/> A6036 Toxic Tort/Environmental	1., 2., 3., 8.
	Insurance Coverage Claims from Complex Case (41)	<input type="checkbox"/> A6014 Insurance Coverage/Subrogation (complex case only)	1., 2., 5., 8.
	Enforcement of Judgment	Enforcement of Judgment (20)	<input type="checkbox"/> A6141 Sister State Judgment <input type="checkbox"/> A6160 Abstract of Judgment <input type="checkbox"/> A6107 Confession of Judgment (non-domestic relations) <input type="checkbox"/> A6140 Administrative Agency Award (not unpaid taxes) <input type="checkbox"/> A6114 Petition/Certificate for Entry of Judgment on Unpaid Tax <input type="checkbox"/> A6112 Other Enforcement of Judgment Case
RICO (27)		<input type="checkbox"/> A6033 Racketeering (RICO) Case	1., 2., 8.
Other Complaints (Not Specified Above) (42)		<input type="checkbox"/> A6030 Declaratory Relief Only	1., 2., 8.
		<input type="checkbox"/> A6040 Injunctive Relief Only (not domestic/harassment)	2., 8.
		<input type="checkbox"/> A6011 Other Commercial Complaint Case (non-tort/non-complex)	1., 2., 8.
		<input type="checkbox"/> A6000 Other Civil Complaint (non-tort/non-complex)	1., 2., 8.
Miscellaneous Civil Petitions	Partnership/Corporation Governance (21)	<input type="checkbox"/> A6113 Partnership and Corporate Governance Case	2., 8.
	Other Petitions (Not Specified Above) (43)	<input type="checkbox"/> A6121 Civil Harassment <input type="checkbox"/> A6123 Workplace Harassment <input type="checkbox"/> A6124 Elder/Dependent Adult Abuse Case <input type="checkbox"/> A6190 Election Contest <input type="checkbox"/> A6110 Petition for Change of Name <input type="checkbox"/> A6170 Petition for Relief from Late Claim Law <input type="checkbox"/> A6100 Other Civil Petition	2., 3., 9. 2., 3., 9. 2., 3., 9. 2. 2., 7. 2., 3., 4., 8. 2., 9.


SHORT TITLE: SPARK v. ACTIVISION	CASE NUMBER
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Item III. Statement of Location: Enter the address of the accident, party's residence or place of business, performance, or other circumstance indicated in Item II., **Step 3** on Page 1, as the proper reason for filing in the court location you selected.

REASON: CHECK THE NUMBER UNDER COLUMN C WHICH APPLIES IN THIS CASE			ADDRESS:
<input type="checkbox"/> 1. <input checked="" type="checkbox"/> 2. <input type="checkbox"/> 3. <input type="checkbox"/> 4. <input type="checkbox"/> 5. <input type="checkbox"/> 6. <input type="checkbox"/> 7. <input type="checkbox"/> 8. <input type="checkbox"/> 9. <input type="checkbox"/> 10.			3100 Ocean Park Blvd.
CITY Santa Monica	STATE: CA	ZIP CODE 90405	

Item IV. Declaration of Assignment: I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that the above-entitled matter is properly filed for assignment to the Los Angeles Superior courthouse in the Central District of the Los Angeles Superior Court (Code of Civ. Proc., § 392 et seq., and LASC Local Rule 2.0, subs. (b), (c) and (d)).

Dated: August 25, 2005

  
 \_\_\_\_\_  
 (SIGNATURE OF ATTORNEY/FILING PARTY)  
 Stephen S. Smith

**PLEASE HAVE THE FOLLOWING DOCUMENTS COMPLETED AND READY TO BE FILED IN ORDER TO PROPERLY COMMENCE YOUR NEW COURT CASE:**

1. Original Complaint or Petition.
2. If filing a Complaint, a completed Summons form for issuance by the Clerk.
3. Civil Case Cover Sheet form JC 982.2(b)(1).
4. Complete Addendum to Civil Case Cover Sheet form CIV 109 \_\_\_\_\_ (eff. Date).
5. Payment in full of the filing fee, unless fees have been waived.
6. Signed order appointing the Guardian ad Litem, JC form 982(a)(27), if the plaintiff or petitioner is a minor under 18 years of age, or if required by Court.
7. Additional copies of documents to be conformed by the Clerk. Copies of the cover sheet and this addendum must be served along with the summons and complaint, or other initiating pleading in the case.