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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").

- 3.1 For purposes of this Agreement, the term "Intellectual Property" means inventions, know-how, patents, patent rights, and registrations and applications, renewals and extensions therefor, copyrights, copyrightable works of art and works of 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 therefor, trademarks, service marks, trade names, trademark registrations and applications, renewals and extensions therefor, 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

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 (f) 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,

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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 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 unrecouped 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.

- 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);

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- 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.

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