

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

DAVID ALLISON, doing business as
CHEAT CODE CENTRAL, a sole
proprietorship,

Plaintiff,

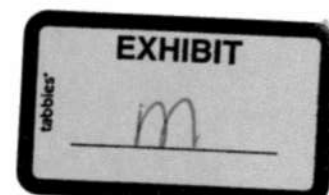
vs.

JEREMY N. WISE, an individual, and
WISE BUY NOW, LLC, an Ohio Corporation

Defendant.

Case No. 2:08-cv-00157-MHW-MRA

EXPERT REPORT OF GARRY E. KITCHEN



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I, Garry Kitchen, hereby declare under penalty of perjury that:

1. I have been retained by the law firm of Mudd Law Offices on behalf of Defendants Jeremy N. Wise and Wise Buy Now, LLC (the “Defendant”). I am compensated in this matter at a rate of \$300/hour. My compensation is in no way affected by the outcome of this litigation. Attached to this declaration as Exhibit 1 is a copy of my resume which describes my prior employment and work history in detail.

2. I have been asked by counsel for the Defendant to opine on the following subjects relating to this matter: 1) History, technology, creation and ownership rights of video game cheat codes, 2) the Game Shark accessory device, and 3) Internet advertising.

QUALIFICATIONS

3. I am an engineer, video game designer and consultant. I received a Bachelor of Science in Electrical Engineering in 1980 from Fairleigh Dickinson University where I was an Engineering Merit Scholar and a member of the Eta Kappa Nu Honor Society.

4. My career in the electronic entertainment/video game industry includes over 30 years of experience running game development companies, with significant hands-on technical and creative experience in all game genres, including console, PC retail and download, online, mobile, and dedicated electronic. I have been directly involved in the design of hundreds of commercially-released game products, across a breadth of hardware platforms, from the earliest Atari machine to the present day Apple iPhone. I have personally developed video game software products that have generated career sales in excess of \$350 million.

5. For example, I developed the handheld electronic game Bank Shot for Parker Brothers, named one of the “10 Best Games of 1980” by OMNI Magazine, and also recognized as one of the year’s top games by Games Magazine. I am a named inventor of U.S. Patent No. 4,346,892, entitled “Electronic Pool Game.”

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6. I also designed Space Jockey, one of the first third-party compatible games for the Atari 2600 system. In 1982, I designed and programmed the Atari 2600 adaptation of the hit arcade game Donkey Kong, which achieved revenues in excess of \$100 million on 4 million units sold.

7. From June 1982 to March 1986 I was a Senior Designer for Activision, Inc., during which time I designed and developed the hit title Keystone Kapers, which earned a Video Game of the Year – Certificate of Merit from Electronic Games Magazine in 1983.

8. From 1984–1985, I developed Garry Kitchen’s GameMaker, a suite of 5 professional quality design tools connected to an easy-to-use programming language that allowed novice game makers to create commercial quality video games. I was named Video Game Designer of the Year in 1985 by Computer Entertainer Magazine for my work on GameMaker.

9. In 1986, I co-founded Absolute Entertainment, Inc. and served as Chairman, President & CEO until November 1995. Absolute Entertainment, Inc. was a console game publisher licensed by Nintendo, Sega, Sony, 3DO and Atari and was a video game developer of over 100 marketed titles from 1986 to 1995.

10. In 1995, I co-founded Skyworks Technologies, Inc., a company that has become a leading publisher of games on the Apple iPhone platform. I served as Chairman, President & CEO from 1995 to December 2007. I then served as Chief Operating Officer from January 2008 to September 2009.

11. I have been recognized numerous times for my contributions to video games. For example, in 1992 I received a Lifetime Achievement Award in Video Games from The Doctor Fad Show, a syndicated educational television program. In 2003, I was honored with the Lifetime Achievement Award in Video Games from Classic Gaming Expo. In addition to these personal honors, individual games that I have developed have also received awards.

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12. In addition to my work in video games, I have extensive experience in the field of Internet Advertising. In 1996, as CEO of Skyworks, I played an integral role in conceiving, designing and managing the development of the Internet website Candystand.com for LifeSavers Company, then a division of the Nabisco Company. The “Candystand” is recognized as one of the first, and most successful examples of “advergaming”, the strategy of embedding consumer marketing within online video games. Advergaming has since become a well known and respected marketing technique, utilized by the world’s largest consumer brands, including Coke, Pepsi, BMW, Unilever, Kraft Foods and many others. Due to its groundbreaking innovation in the field of marketing, Candystand.com was subsequently featured as a case study by Harvard Business School.

13. As CEO of Skyworks, I was also involved in the development, management and maintenance of other large scale web properties, including Nabiscoworld.com, the ESPN (game) Arcade and Rcade.com, a wholly owned game site published by Skyworks. In this capacity I developed a thorough understanding of the monetization of web traffic through advertising and consider myself an expert in the field. I have given talks on the subject and have appeared as a speaker at numerous conferences, including the Consumer Electronics Show, the iMedia Breakthrough Summit (2006), and the USTA Telecom Conference (2003) in which I gave a talk entitled “Advertainment – Another way to pay for your network.”

INTRODUCTION

14. As an independent expert in the field, I feel it is my obligation to the court to set the record straight as it relates to this case. Cheat code web sites are for the most part aggregators of content that they do not own. I am not discriminating against Plaintiff Allison when I say this, as the same is true for the sites owned by Defendant. These sites are not Disney, or Fox News, or ESPN, or ABC, or NBS, or CNN, or even the big game news sites like IGN (division of News Corp) or Gamespot (division of CBS); i.e. these are not media companies that spend millions of dollars employing employees (i.e. content producers) who create original content protectable under the copyright laws of the United States. These are low overhead

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operations that aggregate facts (i.e. game codes), game hints, video game news, links, etc. that are found elsewhere. This is not news; the Plaintiff's Motion for Summary Judgment (Document 58), refers to Plaintiff Allison's practice of "gathering and organizing significant volumes of content on his website, including the Game Shark Code charts and cheat code charts... by collecting information from public sources and private contributors." The price that these sites pay for running a low overhead operation (as opposed to carrying CBS's payroll) is that they have very little that they can "call their own". In most cases there is no way to know where the material originated as it has been copied so many times before and since.

15. I have spent 30 years creating copyrighted content, personally investing many thousands of hours and utilizing many millions of dollars of resources in the process. I understand what it takes to create copyrighted material. Quoting from the "Reply to Defendant's Response to Plaintiff's Motion for Sanctions", when the document describes "Plaintiff's 25,000-page copyrighted website – over 12,000 pages of which are devoted to cheat codes", the truth needs to be told. As I will explain in the technology section below, Plaintiff Allison did not "author" the majority of the 12,000 web pages devoted to cheat codes. As I will explain below, the cheat codes (in all but a small minority of cases) are inherent in the copyrighted software of the games. They are not "authored" by the many sites that publish them. Plaintiff Allison is an aggregator of other people's content, as is Defendant. I am not a lawyer so I cannot opine on what rights that affords either of them in a court of law but in my expert opinion it is deceptive to tell this court that Plaintiff Allison is the sole author of the content on cheatcc.com.

SUMMARY OF OPINIONS

The Copyrighted Material

16. It is my opinion that no player, or website author, can legitimately claim ownership to the copyright of a pre-programmed game cheat code. While it may be possible to claim ownership or copyright to Game Shark game codes (as explained in detail below), it is my understanding of the facts in this case that Plaintiff Allison is not claiming "authorship" of any Game Shark code data, only the way in which it is presented and organized on the page.

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Therefore it is my opinion that Plaintiff Allison did not author the content on the five web pages in question (Documents 59-2, 59-4, 59-6, 59-8 and 59-10) as well as the “12,000 pages... devoted to cheat codes” referred to in the “Reply to Defendant’s Response to Plaintiff’s Motion for Sanctions.”

Damages

17. To the extent that the specific content in question (five web pages – Documents 59-2, 59-4, 59-6, 59-8 and 59-10) are covered by copyright laws, and if in fact the five pages of content in question were copied by the Defendant and displayed on his network of sites as alleged, the actual monetary damages, either defined as lost revenue to Plaintiff Allison or as net profits to Defendant, would be insignificant, certainly less than \$500 in total. My analysis to back up this estimate can be found later in this document.

18. Regarding the alleged damages based on increased advertising spending, marketing spending such as this could be the result of many extenuating market factors, as well as the understandable interest by the Plaintiff to grow his site. In my expert opinion given 15 years experience in Internet-related businesses, it is impossible to accurately attribute the \$410,000 in increased advertising spending to the alleged infringement by the Defendant.

INFORMATION CONSIDERED

19. In addition to the information and documents identified and/or cited in this report, the information and documents provided to me for my review are identified in Exhibit 2.

CHEAT CODES

The History of Video Game Cheat Codes: Easter Eggs

20. The earliest game cheat codes were known as “easter eggs”. Easter eggs were meant to be discovered, just like their namesake in the real world. Generally they were hidden

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messages or features put in the game by the video game programmer, sometimes as an “inside joke” or tribute to themselves, a girl friend or family member. Many of the early game companies failed to credit the programmers of the games so they would use easter eggs as a way to bring up some recognition on screen that they had programmed the game. Easter eggs are brought up on screen by performing a specific input sequence, sometimes at a predetermined period of time or on a certain level of the game.

21. One of the earliest easter eggs in a video game appeared in the Atari 2600 version of Adventure, programmed by Warren Robinett and released in 1979. To unlock the easter egg, on a certain level of the game the player was required to “find” and “move” an invisible (same color as the background), single pixel object, using the game’s joystick controller. If the player could accomplish this feat, a passageway would open, allowing the player to go into another room displaying the words “Created by Warren Robinett”.

22. I have personally programmed easter eggs into a number of games throughout my career. For example, in 1991 I was the lead programmer and designer of “Bart Simpson: Attack of the Space Mutants”, distributed on the Nintendo NES by Acclaim Entertainment. On the 1st level I programmed an invisible ledge which could be reached with a skilled leap to the left from a second store window. A player would have no reason to jump left (since there was no ledge visible) unless they were aware of the hidden feature. Once the player landed on the ledge, pulling down would earn two extra lives and release my daughters’ initials on the screen as game objects.

Cheat Codes as Development Tools

23. As games became more sophisticated, easter eggs evolved, with the category expanding to include “cheat codes”, sequences of numbers or letters that are entered to unlock certain features of the game. Unlike easter eggs, which were whimsical in nature and put in primarily for the enjoyment of the programmer and game players, cheat codes were created for a more utilitarian purpose. During game development, with the games becoming more and more complex, Q/A (quality assurance) departments needed a way to skip ahead to certain sections of

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the game. If a tester needed to play level 10, it was unacceptable from an efficiency standpoint to require them to complete levels 1-9 every time they played. The testers needed a mechanism to control the games outside of the normal, sequential play pattern. The cheat code mechanism became a standard feature of games to allow the testers quick access to any part of a game.

Examples of tester-friendly cheat codes included:

Unlock all levels	Full health
Skip levels	Unlock all weapons
Invincibility	Turn off collisions
Unlimited weapons	Stop enemies

24. As a personal example, in an online game release I developed, Mission Code Red, I looked for a certain key combination to be typed on the keyboard at any point during game play. MCR was a driving game in which the player was required to navigate a large city maze in order to find a certain building. When the testing department had trouble consistently solving the maze (as it changed dynamically from game play to game play), I installed the following “cheat”. Typing the phrase <return> c o d e r e d <return> would paint yellow arrows on the asphalt of the city streets guiding the player from game start to the front door of the target destination.

The Technology Behind Cheat Codes

25. In general (with the exception of certain hardware-specific devices, such as the Game Shark discussed below), cheat codes cannot be arbitrarily created, or authored, by game players. For a cheat code to work it must have been contemplated in advance by the game programmer and architected into the game as part of the actual copyrighted game code. It’s not magic that typing “give health” into the Jedi Knight 2 game rewards the player with full health (see Document 59-1, page 3). This works because the game programmer wanted it to work and wrote code to enable it to work.

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26. To recognize a cheat code, the game program is constantly “listening” to the keyboard, storing each typed key into an area of RAM referred to as the keyboard buffer. It then compares the string of characters in the keyboard buffer to a pre-defined list of valid cheat codes. Based on a match, the program calls a corresponding set of code which modifies key variables that affect the behavior of the game.

27. Since modern 3D games require massive amounts of computing power, it is usually undesirable to have extra code running over the action portions of the game. Consequently, this listening, or “polling”, of the keyboard or game controller usually occurs on a non-gameplay portion of the game experience, like the title page, or in the case of the Jedi Knight 2 example, the “console” screen (see Document 59-1, page 3). Sometimes a game makes cheat code entry very straightforward; it puts up a text entry box and the player is prompted to enter the code. In other instances cheat codes are entered surreptitiously, without obvious prompting. For example, in Activision’s Guitar Hero, the cheat codes are entered when the player is on the Game Mode selection menu. However, in the later release Guitar Hero World Tour, a “cheats” section was added under “options” to facilitate the “straightforward” entry of cheat codes.

28. In all cases it is important to note that a cheat code exists when the game is shipped to the consumer and is not “created” or “authored” by anyone other than the publisher/developer of the game. In addition, with the viral nature of the internet, it is my experience that it is impossible to trace the origins of the discovery of a cheat code to any one source. Cheat codes can reach the general public in many ways, including:

Direct publication in a video game magazine, periodical or game review website

Direct release from a publisher’s PR department

Promotional release through a retail game channel

Leak through the Q/A & testing department

Leak from a 3rd party Q/A & testing department

Leak from employees of the console manufacturer

Word of mouth

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Publication on a personal web site, Myspace or Facebook page

Inadvertent discovery by an end user consumer (rare)

The Game Shark Cheat Codes

29. Game Shark is a hardware-based game accessory device that enables players to enter “cheat” codes for many commercial games. Game Shark codes differ from the codes discussed above in that the device enables the creation of custom cheat codes, outside of the “fixed” codes programmed into the game by the original design team. Game Shark allows this by using the hardware connection to modify RAM (system memory) during game play.

30. The process for creating a Game Shark cheat code is an iterative process as follows. Game Shark allows the user to search system memory during game play for any specific value. For example, if I am playing the game and I have 10 lives, I would initially search for the value “10”. Many locations in the system RAM (random access memory) would come up based on that search. I would then lose a life and search for the value 9. A subset of locations would come up, matching both searches (first holding the value 10 and then holding the value 9). I would then lose another life and search for the value 8. Likely at this point only one location would be identified, based on both the current value of 8 and the pattern of change based on my operation of the game. The Game Shark device would now “know” the memory location that contains the program variable for “lives”. The player could then create a code that modifies that location during game play, giving the player (for example) 1000 lives.

31. The Game Shark device is currently marketed by a company called Mad Catz Interactive, Inc. of San Deigo, California. The Game Shark line was previously distributed by a company named InterAct, which went out of business. Historically, versions of the Game Shark device have been sold for the Playstation, Playstation 2, Sega Saturn, Sega Dreamcast, Nintendo 64, Nintendo NES, Nintendo Game Cube, PC and various hand held systems.

32. It’s important to note that while the Game Shark theoretically allows the “creation” of unique cheat codes, the Plaintiff Allison is not claiming “authorship” of the actual

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Game Shark cheat codes published on the web pages in question in this case. The Plaintiff's Motion for Summary Judgment (Document 58), refers to Plaintiff Allison's practice of "gathering and organizing significant volumes of content on his website, including the Game Shark Code charts and cheat code charts... by collecting information from public sources and private contributors." Plaintiff Allison is not claiming that he sat down with the Game Shark device and figured out the codes shown on the pages in question. Rather, Plaintiff Allison claims ownership of the "new and original tables and code charts reflecting the selected order and arrangement."

Opinion

33. Given the above facts, it is my opinion that no player, or website author, can legitimately claim ownership to the copyright of a pre-programmed game cheat code. While it may be possible to claim ownership or copyright to Game Shark game codes (as explained in detail below), it is my understanding of the facts in this case that Plaintiff Allison is not claiming "authorship" of any Game Shark code data, only the way in which it is presented and organized on the page. Therefore it is my opinion that Plaintiff Allison did not author the content on the five web pages in question (Documents 59-2, 59-4, 59-6, 59-8 and 59-10) as well as the "12,000 pages... devoted to cheat codes" referred to in the "Reply to Defendant's Response to Plaintiff's Motion for Sanctions."

POTENTIAL DAMAGES THROUGH LOSS OF ADVERTISING REVENUE

34. I have been informed by Defendant's counsel that the five pages of content that Plaintiff Allison claims copyright and ownership of at this stage of the proceedings are the pages containing code information for the games listed in the chart below. I am aware that in an earlier stage of these proceedings 12 pages of protectable content were alleged but evidence was brought to light questioning the authorship of the work in question. At this point only one of the 12 pages is addressed below (Sega Smash Pack):

Game	Platform	Game Release	Date of Code	Date of alleged copying

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		Date	Publication	
1. Star Wars: Jedi Outcast - Jedi Knight 2	PC	March 28, 2002 *	April 2002	"late 2006" to January 15, 2007
2. Star Wars: Episode 1 - Jedi Power Battles	Playstation (PSX) Game Shark	April 4, 2000 *	January 2001	"late 2006" to January 15, 2007
3. Star Wars: Episode 1 – The Phantom Menace	Playstation (PSX) Game Shark	Sept. 20, 1999 *	October 1999	"late 2006" to January 15, 2007
4. Star Wars: Racer Revenge – Racer 2	Playstation 2 (PS2) – Game Shark	February 12, 2002 *	May 2002	"late 2006" to January 15, 2007
5. Sega Smash Pack	Dreamcast	January 31, 2001 *	unknown	"late 2006" to January 15, 2007

* source of data - IGN.com

35. To clarify the above chart, it is my understanding that Plaintiff Allison claims ownership of the “new and original tables and code charts reflecting the selected order and arrangement” (see Document 58 - Plaintiff’s Motion for Summary Judgment) of the first 4 game pages in the above chart. It is unclear to me from the Motion for Summary Judgment what, if any, content is being claimed as original on page 5, featuring content about the Sega Smash Pack game. While it is included in the Motion for Summary Judgment as an example of copied material, I can find no explanation as to what content on the page is protectable vs. factual information.

36. I understand that the period in question is “late 2006” through January 15, 2007. As background, the following chart outlines the release dates of game console hardware before, during and after the time in question:

Game Platform Release History (in the relative timeframe)

Platform	Date of Release	Date of Discontinuation

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PC	August 1981	n/a
Nintendo 64	September 1996	August 2002
Sega Dreamcast	September 1999	November 2001
Playstation (1)	September 1995	March 2006
Playstation 2	October 2000	n/a
Nintendo GameCube	November 2001	August 2007
XBOX	November 2001	2006
XBOX 360	November 2005	n/a
Nintendo Wii	November 2006	n/a
Playstation 3	November 2006	n/a

37. In examining the timing of the publication of the Allison codes (in reference to the game publication dates), it's important to note that for pages 1-4, Plaintiff published codes for the various games within the first year in which the game was released. The longest period of time between game release and code publication was approximately 9 months, for the Star Wars: Episode I – Jedi Power Battles (April 2000 to January 2001). Note that I do not have a publication date for page 5, the Sega Smash Pack content.

38. For the pages in which I know the publication date, all of the accused codes were published by Plaintiff Allison during a timeframe in which the game platform was still the “current” platform from the console manufacturer. In other words, the codes for the Playstation (1) games were published by the Plaintiff before the Playstation 2 platform was shipped. Similarly, the codes for the Playstation 2 game (Star Wars: Racer Revenge – Racer 2) were published well before the release of the Playstation 3 (about 3.5 years later).

39. The reason for the above timing was to offer content during the time period in which it would be of most interest to the audience, thereby maximizing traffic to the site. Video game sales on a title-by-title basis peak very early after release, based on preorders and anticipation for the title coming out generated by pre-release marketing and PR efforts. Generally, the sales drop off quickly, leading to a title selling over 90% of its lifetime volume in the first twelve months.

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40. Interest in game cheat codes track the sales of the title, since the players tend to take the game home and immediately play it. In my experience, games are not purchased and put on the shelf to be archived for later enjoyment. Therefore, the bulk of the traffic to the pages in question would have occurred in the first 12 months after each of the games was released. An analysis of the games promoted on the home page of cheatcc.com (or other game cheat code sites) would confirm this, revealing that the games of most interest to the audience are ones that have been released in the last 12 months (or are about to be released).

41. In addition, as new consoles emerge into the marketplace, time spent playing older game systems (with inferior graphics and game play features) drops considerably.

42. Three of the five web pages in question promote codes compatible with the Game Shark hardware add-on for the Playstation (1) and Playstation 2. Peripheral devices such as Game Shark sell to a small minority of the game playing audience, usually 5% or less of the installed base of the game console. In the case of Game Shark, the market penetration would have been even lower due to the fact that the device was not “authorized” or “licensed” by the console manufacturers; neither Sony, Nintendo or Sega. Therefore, while the web pages with Game Shark codes would be of great interest to a subset of the audience, 9 out of 10 visitors to the site would have no interest in viewing these pages.

43. A review of the cheatcc.com web site from October 4, 2006 (viewed at web.archive.org) confirms that the codes in question were not being promoted by Plaintiff Allison on the home page of the site. Nor were the codes promoted on the sub home pages dedicated to each of the platforms in question; e.g. clicking through to the PS2 page of cheatcc.com shows that the game Star Wars: Racer Revenge – Racer 2 (the newest of the four games in question) is not listed as a “Top Cheat” on the PS2 game platform.

Observations based on the above factors

44. When Defendant allegedly published the copied game codes in question on his web site(s), all of the games were well out of their peak selling timeframe; i.e. the first 12 month

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period. Specifically, the games in question were between 4.5 and 7 years old by the time their codes allegedly appeared on the Wise websites. See the table below:

Game	Release Date	Wise alleged publication of codes	Time period since game release	Time period since first 12 months
Star Wars: Jedi Outcast - Jedi Knight 2; PC	March 28, 2002 *	Late 2006	54 months	42 months
Star Wars: Episode 1 - Jedi Power Battles; PSX	April 4, 2000 *	Late 2006	78 months	66 months
Star Wars: Episode 1 – The Phantom Menace; PSX	Sept. 20, 1999 *	Late 2006	84 months	72 months
Star Wars: Racer Revenge – Racer 2; PS2	February 12, 2002 *	Late 2006	55 months	43 months
Sega Smash Pack	January 31, 2001 *	Late 2006	55 months	43 months

45. In addition, at the time of the alleged publication by Wise (late 2006), the PSX/Playstation (1) and Dreamcast consoles were discontinued by Sony and Sega respectively, indicating an obvious lack of consumer interest in the platform (and compatible software).

Factors I considered in estimating potential damages

46. Based on the above facts, it is my opinion that traffic to the web pages containing the game codes in question would have been insignificant during the time period of late 2006 to January 2007. All of the games were over 4.5 years old; well past their sales peak. In fact the two oldest games were 6.5 and 7.0 years old.

47. Three of the five pages contained codes for games running on discontinued platforms; the Playstation (1) and the Dreamcast.

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48. Three of the five web pages hosted content specific to the Game Shark hardware accessory device, reducing the potential audience of the pages by a significant factor.

49. It is my experience that the bulk of traffic on a web site is attributable to “new”, or timely, content, or content specifically promoted on the home page of the website. None of the content in question was new, or timely, or promoted in any significant way on the Plaintiff’s site at the time of the alleged copying. A review of the Plaintiff’s web site log files would confirm that the bulk of his traffic was associated with “new” content or material promoted on the home pages or the sub home pages. However, I am informed by Defendant’s counsel that traffic reports for the time period in question cannot be produced by the Plaintiff.

Damages Calculation

50. Web sites sell advertising based on the number of times a specific advertisement is “viewed” by an end user. Each view of an advertisement is called an impression. Advertising is sold in ad units made up of 1,000 impressions. Advertising online is purchased at a cost per thousand (or CPM) price.

51. Web sites also host ads that are paid for each time a user clicks on the ad content. This advertising method is called cost-per-click, or CPC. Google Adwords is an example of CPC advertising utilized by the sites in question in this matter. However, the pages in question do not appear to contain Google Adwords or other CPC-type advertising.

52. As discussed in my background above, companies under my leadership have managed websites with comparable traffic to the sites discussed here for clients such as Nabisco, Kraft Foods and ESPN. I have first hand experience dealing with many of the ad networks utilized by the sites in question, including Tribal Fusion and Casale Media.

53. To monetize visitors to cheatcc.com, Plaintiff Allision displayed ads on the game pages. For example, a review of Document 59-2, a page from cheatcc.com, shows three advertisements on the page in question (top horizontal “ad council” banner, rectangular “credit

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score” banner and the vertical “cartoonize yourself” banner). A review of the other pages in question shows a similar layout of three ads, with the exception of the “Sega Smash Pack” page, which shows no advertising units (see 59-10 exhibit to Affidavit of David Allison in Support of Motion for Partial Summary Judgment). Given the lack of ads on the 5th page, I will not consider revenue from it as part of this calculation.

54. In my experience, the average CPM for ads of the type in question is \$3.00 or less (in other words, an advertiser pays \$3.00 for 1,000 ad impressions). As a worst case calculation, I will use \$3.00.

55. To properly allocate the total revenue generated by the site, I refer to the Document “58-main.pdf”, in which it is stated that Plaintiff Allison (today) provides cheat codes, hints, tips, etc. to more than 10,000 video games. For the period in question (late 2006 – January 2007), I will assume that the site had 8,000 video games, taking into account some growth in the archive over the last three years.

56. If the site hosted game data for 8,000 games, then the four pages in question would represent .05% of the editorial content on the site (4/8000). I will use that calculation below in my analysis.

57. Plaintiff Allison’s traffic data for the time period shows 190,500 visits per day (see the document cheatcc_visitors_12_21_06_12_31_07.jpg). If the pages in question represent .05% of the total pages on the site, and the pages were visited proportionally (an unlikely scenario given the age of the games in question), then the four pages would have generated 96 views per day in total (assuming one page view per visitor), or 2,880 views per month, or 8,640 views over the three month period in question. 8,640 views x 3 ad units per page = 25,920 ad units over the three month period. At a CPM of \$3.00 (per thousand impressions), the pages in question under this calculation would have generated **\$77.76** for Plaintiff Allison.

58.

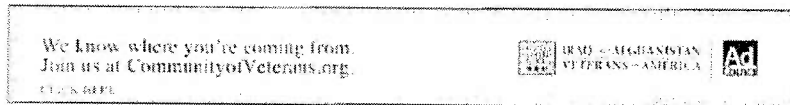
REDACTED

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REDACTED

59. In fact, it is my belief that both of the above calculations, resulting in results from \$77.76 to \$236.40, are generous in favor of the Plaintiff. In fact, an examination of the pages on the cheatcc.com web site supplied by the Plaintiff, shows a majority of ad placements running unpaid creative from the Ad Council. See pages “59-2.pdf”, “59-4.pdf”, “59-6.pdf”, “59-8.pdf” and below:

Star Wars: Jedi Outcast - Jedi Knight 2 Cheats, Codes, Secrets, FAQs for PC Page 1 of 3
 Case 2:08-cv-00157-MHW-MRA Document 59-2 Filed 12/29/09 Page 1 of 3



Star Wars: Jedi Outcast - Jedi Knight 2

(Last updated: April 4, 2002)

What are your 3 Credit Scores?

Free **Score** rate

▶ Excellent	750 - 850
▶ Good	660 - 749
▶ Fair	520 - 659
▶ Poor	340 - 619
▶ I Don't Know	????

Find Out For FREE!

Ben Stein, Economist and Financial Expert



Strategy Guide

- Double-bladed lightsaber

While playing a game in multi-player mode, press [Shift] + ~ to display the console window. Type "devman



Page 59.2 showing three display ads. The top (horizontal) ad is from the “Ad Council”.

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Star Wars: Episode 1 - Jedi Power Battles Cheats, Codes, Secrets, FAQs for PlayStation (... Page 1 of 5
Case 2:08-cv-00157-MHW-MRA Document 59-4 Filed 12/29/09 Page 1 of 10



Star Wars: Episode 1 - Jedi Power Battles

(Last updated: January 3, 2001)

Free Credit Scores! See Your 3 Credit Reports & Scores!	
Excellent	750 - 840
Good	660 - 749
Fair	520 - 659
Poor	340 - 619
I Don't Know	????

Find out instantly! FreeScore.com



[Strategy Guide](#)

- Play as Darth Maul

Successfully complete the game with Out Cast. This is the character selection screen. MHW: Out Cast: Final



Page 59.4 showing three display ads. The right (vertical) ad is from the "Ad Council".

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Star Wars: Episode 1 - The Phantom Menace Cheats, Codes, Secrets, FAQs for PlayStation... Page 1 of 3
Case 2:08-cv-00157-MHW-MRA Document 59-6 Filed 12/29/09 Page 1 of 3



Star Wars: Episode 1 - The Phantom Menace

(Last updated: October 19, 1999)

What are your 3 Credit Scores?

FreeScore.com

▶ Excellent	750 - 840
▶ Good	660 - 749
▶ Fair	620 - 659
▶ Poor	340 - 619
▶ I Don't Know	????

Find Out For FREE!

Ben Stein, Economist and Financial Expert



[Strategy Guide](#)

• Debug mode

You may have what it takes to adopt a teen from foster care.

Because teens don't need perfection, they need you.

Learn more at adoptuskids.org

Page 59.6 showing three display ads. Both the top (horizontal) and the right (vertical) ads are from the "Ad Council".

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Star Wars: Racer Revenge - Racer 2 Cheats, Codes, Secrets, FAQs for PlayStation 2 (PS2) Page 1 of 2
 Case 2:08-cv-00157-MHW-MRA Document 59-8 Filed 12/29/09 Page 1 of 2



Star Wars: Racer Revenge - Racer 2

(Last updated: May 31, 2002)

Free Credit Scores! See Your Credit Reports & Scores!	
Excellent	750 - 840
Good	660 - 749
Fair	620 - 659
Poor	340 - 619
I Don't Know	????

Find out instantly! FreeScore.com



- Cheat mode

To enable cheat mode, set a record (Best Lap, Best 3 Lap, Most KO's) and enter "NO TIME" on the name entry screen.
 The following codes may now be activated:

Use steroids.
 Get caught.
 Be labeled.

don't be an

Learn more >

Ad Council U.S.A. Olympic

Page 59.8 showing three display ads. The right (vertical) ad is from the “Ad Council”.

60. The “Ad Council” ad creative represents unpaid advertisements; essentially placeholders run by the ad network because no paid advertising was available at the time. Referencing the above, out of 12 advertisements in the images from the four pages in question, five are displaying placeholder advertising, with no revenue generation. This further shows that the pages containing the content in question were low traffic, difficult-to-monetize areas of the site, generating minimal revenue.

Damage Allegations

61. In addition to my own analysis above, I reviewed prior litigation initiated by Plaintiff Allison (see Allison v Carroll, Allison v Crave, Allison v Jupiter). In all cases including this matter, Plaintiff Allison alleges the same unspecified damage figure. With all of these different websites allegedly stealing the content of cheatcc.com at the same time, I know of no technical way for Plaintiff Allison to have been able to determine which of the alleged infringing

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sites would have been responsible for what percentage of his alleged “lost traffic”, and subsequent monetary damages. Therefore, barring additional evidence, I put no credence in any damages number that the Plaintiff would claim, either unspecified or otherwise.

62. I am informed by Defendant’s council that the Plaintiff alleges damages due to increased advertising costs in 2006, 2007 and 2008. Plaintiff alleges in the document “08-05-09 Ltr to C. Mudd re Settlement.pdf” - “[Plaintiff Allison] was able to maintain an impressive level of traffic based upon the content of his site and the success of his organic Google search rankings. Once the infringement took place, however, his organic search results dropped significantly because Google values uniqueness of content. To offset this change, he had to increase his advertising budget.” See the chart below:

Year	Advertising budget
2006	\$40,000
2007	\$279,673
2008	\$90,000

63. There are a number of factors that contribute to my lack of understanding of what basis Plaintiff has to claim that his entire advertising budget for 2006, 2007 and 2008 can be directly attributed to the alleged infringement by Defendant:

- During the same period in question the Plaintiff alleges infringement by and commenced litigation against at least three other entities (Carroll, Crave and Jupiter). What calculation was done to determine that with all of this alleged infringement Defendant is 100% responsible for the increase in advertising?
- Plaintiff admits that he aggregates content from other sources; Document 58 Motion for Summary Judgment – “Plaintiff gathered and organized significant volumes of content on his website... by collecting information from public sources and private contributors.” As outlined in the document 047-1_Response_Motion_Sanctions.pdf, the Defendant found content that the Plaintiff previously claimed to have authored on a third party website, www.gamewinners.com. How can Plaintiff claim that “Google values uniqueness of content” when the majority of the content on his site is

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aggregated from other sources, many of them online? By definition, aggregated content is not unique.

- At this point of the proceedings, I understand that Plaintiff is claiming infringement of the five specific pages that I have discussed throughout this report. Are we to believe that the existence of these five pages on the Defendant's web properties (containing information on 4+ year old games) cost the Plaintiff over \$400,000?

Opinion

64. Given the above analysis, to the extent that the specific content in question (five web pages – Documents 59-2, 59-4, 59-6, 59-8 and 59-10) are covered by copyright laws, and if in fact the five pages of content in question were copied by the Defendant and displayed on his network of sites as alleged, the actual monetary damages, either defined as lost revenue to Plaintiff Allison or as net profits to Defendant, would be insignificant, certainly less than \$500 in total.

65. Regarding the alleged damages based on increased advertising spending, marketing spending such as this could be the result of many extenuating market factors, as well as the understandable interest by the Plaintiff to grow his site. In my expert opinion given 15 years experience in Internet-related businesses, it is impossible to accurately attribute the \$410,000 in increased advertising spending to the alleged infringement by the Defendant.

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I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct and that I executed this declaration on January 21, 2010 at Franklin Lakes, New Jersey.

QuickTime™ and a
decompressor
are needed to see this picture.

Garry E. Kitchen

EXHIBIT 1

Garry E. Kitchen
<http://www.garrykitchen.com>

contact info available
by request

gk@garrykitchen.com

EDUCATION

Bachelor of Science, Electrical Engineering, 1980
Fairleigh Dickinson University, Teaneck, New Jersey
Eta Kappa Nu Honor Society, 1979-1980
Engineering Merit Scholarship - Matsushita Corp, 1978-1979

AFFILIATIONS

AIAS - Academy of Interactive Arts and Sciences
IGDA - International Game Developers Association
IEEE - Institute of Electrical & Electronics Engineers
BOSSLEVEL - The World's Top 100 Game Developers (by invitation only)
Elite Expert for IMS Expert Services, Pensacola, Florida
Eta Kappa Nu Honor Society
Gerson Lehrman Group Councils
Guidepoint Global (FNA Vista Research - Society of Industrial Leaders)
Coleman Research Group

RECENT ACCOMPLISHMENTS

2008 - In response to a dramatic shift in the investment environment, as COO of Skyworks I lead the repositioning a \$0 revenue investment-backed venture into a successful digital publishing business with 11 million consumer downloads and a \$2M+ run rate in the span of 7 months. My contribution to this effort included rethinking of the business strategy, initial technical R&D, proof-of-concept product development, product line strategy, marketing, and strategic analysis and recommendations.

EXPERIENCE

- 30 years of technical management experience running game development companies, with an unmatched 14 years of management experience in Internet gaming.
- Strategic business planning - a history of anticipating and influencing industry trends with pioneering initiatives:
 - 1980** Back-engineered the Atari 2600 in anticipation of the video game revolution
 - 1986** Established the 1st North American-based Nintendo development studio
 - 1996** Pioneered *Advergaming* with development of LifeSavers' Candystand.com
 - 2005** Applied dynamic in-game advertising technology to casual games - CGN
 - 2008** Repositioned Skyworks as leading iPhone publisher with 11M downloads
- Hands-on technical and creative experience in all genres of game development, including console, PC retail and download, online, mobile and dedicated electronic.

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EXPERIENCE

(cont'd)

- Expertise in developing comprehensive business plans, with application toward raising investment capital, either through IPO or private equity investment.
- Recognized as an industry expert in online gaming by numerous trade conferences, including Digital Hollywood, iMedia Breakthrough, GDC, CES, Gamer Technology Conference, Casual Game Conference, Advertising in Games conference, DMEXPO, VNU Digital Marketing conference, National Cable Show.
- Experience in dealing with broadcast and print media, including CNBC, ABC Eyewitness News, CNN, Good Morning Atlanta, The Today Show and various consumer and trade publications.
- Personally developed video game software products generating career retail sales in excess of \$350 million.
- Co-founded Skyworks Technologies, Inc., an industry pioneer in *Advergaming* - sponsorship-supported video games used as advertising vehicles. Skyworks was named a Top 50 Interactive Agency by Advertising Age for the years 2003 and 2004. Skyworks' client list included Nabisco/Kraft Foods, BMW, Toyota, Ford, PepsiCo, Campbell's, Fox Sports, CBS, Mattel, Weather Channel, Microsoft Network, Yahoo!, Miller Brewing Company, GlaxoSmithKline and MTV.
- Developed strategy and business plan for the Casual Games Network (CGN), Skyworks' initiative applying dynamic in-game advertising to online casual games, partnering with Massive Incorporated.
- Co-founded Absolute Entertainment, Inc., console game publisher licensed by Nintendo, Sega, Sony, 3DO and Atari and video game developer of over 100 marketed titles from 1986 to 1995, generating product retail sales of over \$300 million. Successfully lead Absolute through oversold IPO, raising \$12 million.
- Consulted for RCA David Sarnoff Research Labs (1986-1987) on entertainment applications of Digital Video Interactive (DVI), the first technology to store digital full-motion video on a CDROM.
- Designed & programmed Atari 2600 adaptation of hit arcade game Donkey Kong, 1982 wholesale revenues in excess of \$100 million on 4 million units.
- Conceived, designed and developed Bank Shot, an innovative electronic pool game marketed by Parker Brothers, named "10 Best Games of 1980", *Omni Magazine*.
- Back-engineered Atari 2600 game system in 1980, creating one of the first third party 2600-compatible game cartridges - Space Jockey.
- Performed as Legal Expert Witness in numerous cases involving patents, intellectual property, video games and software development for clients including Konami Entertainment, Nintendo of America, NCR, Taito and Activision.

Garry E. Kitchen

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EMPLOYMENT HISTORY

President/CEO

SGK Services Inc., Franklin Lakes, New Jersey
March 2007 - Present

Chief Operating Officer

Skyworks Interactive, Inc., Hackensack, New Jersey
December 2007 - September 2009

Chairman, President & CEO

Skyworks Technologies, Inc., Hackensack, New Jersey
November 1995 - December 2007

Chairman, President & CEO

Absolute Entertainment, Inc., Upper Saddle River, New Jersey
March 1986 - November 1995

Senior Designer

Activision, Inc., Mountainview, California
June 1982 - March 1986

President

Imaginative Systems Software, New Milford, New Jersey
November 1981 - May 1982

Engineer/Designer

James Wickstead Design Associates, Cedar Knolls, New Jersey
April 1976 - October 1981

HONORS AND AWARDS

- Nomination as an *Elite Expert* by IMS Expert Services
IMS Expert Services (www.ims-expertservices.com) - 2009
- Nomination to the Advisory Committee: "Reinventing Advertising: VOD, PVR, Broadband, Games, PODs & Mobile Consortium"
Digital Hollywood - 2005, 2006
- Lifetime Achievement Award in Video Games
Classic Gaming Expo - 2003
- New Jersey Entrepreneur of the Year - Finalist
Inc. Magazine, Merrill Lynch and Ernst & Young - 1993
- Best Simulation Game
Super Battletank
Game Informer Magazine - 1992

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HONORS AND AWARDS

(cont'd)

- Lifetime Achievement Award in Video Games
The Doctor Fad Show
Syndicated educational television program - 1990
- Video Game Designer of the Year
Computer Entertainer Magazine - 1985
- Best Creativity Product - Nominee
Garry Kitchen's GameMaker
SPA Excellence in Software - 1985
- Video Game of the Year - Certificate of Merit
Keystone Kapers
Electronic Games Magazine - 1983
- U.S. Patent #4,346,892
Bank Shot
Electronic Pool Game marketed by
Parker Brothers - 1981
- Ten Best Games of 1980
Bank Shot
OMNI Magazine - 1980
- The Games 100 - The Top 100 Games of 1980
Bank Shot
Games Magazine - 1980
- Engineering Merit Scholarship
Panasonic / Matsushita Corporation of Japan
Fairleigh Dickinson University - 1978, 1979

**Garry Kitchen Expert Witness History
November 2009**

Year	Attorney/Firm	Client	Case	Description	Report	Depositor	Testimony
2009-present	Bradford Newman / Paul, Hastings, Janofsky & Walker LLP	Zynga Game Network Inc.	Zynga Game Network Inc. v Playdom Inc. et al. Superior Court of the State of California, County of Santa Clara	Retained as a consultant/expert witness in the areas of game design, copyright infringement and related business issues.			
2009	Michael Gruenqglas, Lauren Aquiar / Skadden Arps	Jakks Pacific, Inc.	Jakks Pacific, Inc. v THQ Inc. (arbitration)	Case involved contractual issues in a video game licensing/distribution agreement. Retained as a consultant/expert witness in the areas of game design and related video game business/contract issues.			
2008-present	Vid Bhakar / Paul, Hastings, Janofsky & Walker LLP	Konami	Konami Digital Entertainment Co., LTD and Konami Digital Entertainment, Inc. v. Harmonix Music Systems, Inc., MTV Networks, Co, and Viacom, Inc. United States District Court, Eastern District of Texas, Tyler Division, Case No. 6:08-CV-286	Patent infringement case against Rock Band & Rock Band 2 involving three key patents in the area of rhythm-action video games. Retained by the patent holder (Konami) as a consultant/expert witness in the areas of video game software development, patent infringement and validity. Tasks to date include analysis of prior art, opinions on claim construction, analysis of software code regarding infringement.	✓	✓	
2008-2009	Courtney Holohan/Kirkland & Ellis	Activision Publishing Inc.	Activision Publishing Inc. v CONFIDENTIAL	Confidential arbitration case involving patent infringement/invalidity, copyright infringement and related video game industry business issues in the field of rhythm-action video games. Tasks included prior art research and analysis, numerous reports including Patent Invalidation and Copyright Infringement. Deposed numerous times and testified in front of the Arbitration Panel.	✓	✓	✓
2008	Rod Rummelsburg / Allan Law Group, PC	CONFIDENTIAL	Pre-litigation analysis of potential prior art	Retained to undertake pre-litigation search and analysis of potential prior art regarding a virtual world patent. Uncovered critical prior art which lead to a significant modification in the client's litigation strategy.	✓		
2007	Gary Hood / McDonnell Boehnen Hulbert & Berghoff LLP	NetJumper Software, LLC	NetJumper Software, LLC vs Google Inc. United States District Court, Eastern District of Michigan, Southern Division, Case No. 04-70366-CV	Patent infringement cast involving search technology. Wrote infringement report including demonstrative video presentation.	✓		
2005 / 2009	Jeff Pine / Valauskas & Pine LLC	Neomedia Technologies	Scanbuy Inc. vs. Neomedia Technologies, Inc. United States District Court, Southern District of New York, Civil Action No. 04 CV 02443 (JES)	Copyright and patent infringement case involving UPC barcode recognition software on mobile devices. Tasks included comparing source codes for Copyright Infringement and opining on Patent Infringement/Validity.	✓	✓	
2005	Laura Rinquelheim, Esq.	Hopeton Overton Browne	Hopeton Overton Browne, p/k/a Scientist vs. Greensleeves Records, LTD, Take Two Interactive Software, Inc. and Rockstar Games, Inc. United States District Court, Southern District of New York, Civil Action No. 03 CV 7696 (MGC)	Case involved copyright infringement for unauthorized inclusion of the client's music in the video game Grand Theft Auto 3. Wrote report opining on licensing costs and potential damages for usage of music in video games.	✓	✓	
2003	Rich Barbuto, Esq.	Tritech	Tritech v. Ectaco, United States District Court, Southern District of New York, Civil Action.	Retained as a consultant/expert witness in a case involving defective language translator units purchased by the client from an overseas manufacturer. My tasks included an engineering analysis to determine the cause for the malfunction (software), writing a report and testifying at trial.	✓		✓
2002	Russ Genet / Jenkins & Gilchrist	NCR	NCR Corporation v. Palm, Inc. and Handspring, Inc. United States District Court, Delaware, Civil Action No. 01-169-RRM	Client (NCR) sued Palm & Handspring for patent infringement regarding a handheld, tethered computing device. Tasks included code analysis to opine on patent infringement, associated report and deposition testimony.	✓	✓	
2000	Jacob Weingarten	Sylvan Gonska	Gonska v. Gonska	Web development	✓		
2000	Wilson Sonsini Goodrich & Rosati	Engineering Animation	Engineering Animation Inc. v. THQ	Video game development	✓	✓	
1998	Drinker, Biddle & Reath	QOP/Bruce Williams	QOP v. Impact	Video game contractual issues	✓	✓	
1995-1997	Brinks Hofer Gilson & Leone	Taito of America	Magnavox v. Taito of America	Patent infringement	✓	✓	
1995	Brinks Hofer Gilson & Leone	Taito of America	Atari v. Taito of America	Copyright infringement	✓	✓	
1991	Latham & Watkins LLP	Nintendo of America	Atari v. Nintendo	Video game contractual issues	✓	✓	✓
1990	-	Nintendo of Japan	Nintendo v. Codemasters	Copyright infringement	✓	✓	✓

EXHIBIT 2

Documents Provided to Garry E. Kitchen

1. Stipulated Protective Order.
2. List of websites owned and operated by Defendants provided in discovery.
3. Defendants' financial information provided in discovery.
4. Plaintiff's financial information provided in discovery.
5. Complaints from Plaintiff's previous litigations:
 - a. Case No: 05-cv-01186-RPM-BNB – David Allison v. Crave Online Media, LLC et al.
 - b. Case No: 06-vc-0098-EWN-MEH - David Allison v. Jupiter Electric, et al.
 - c. Case No: 07-cv-00373-RPM-CBS – David Allison v. Thomas Carroll
6. Plaintiff's Motion for Summary Judgment and related Exhibits.
7. Complaint and Order of Dismissal from the Colorado litigation.
8. Complaint and Jury Demand, Defendant Jeremy N. Wise's Answer to Plaintiff's Complaint, First Amended Complaint and Jury Demand and Defendant Wise Buy Now, LLC's Answer to Plaintiff's First Amended Complaint from the instant litigation.
9. Plaintiff's Objections and Response to Defendant Wise Buy Now's First Set of Interrogatories.
10. Plaintiff's Objections and Responses to Defendant Wise Buy Now, LLC's First Request for Production.
11. Letter from Thomas P. Howard and Wendi S. Temkin to Charles Lee Mudd, Jr. dated August 5, 2009 re Settlement.
12. Affidavit of David Allison in Support of Motion for Partial Summary Judgment and related exhibits.
13. Plaintiff's Motion for Sanctions, Correction to Motion for Sanctions, Defendants' Response in Opposition to Plaintiff's Motion for Sanctions and related exhibits.

14. Defendants' Motion for Leave to File Sur-Reply and relevant exhibits and Response to Defendants' Motion to Leave to File Sur-Reply.
15. Miscellaneous – analytics and traffic reports.