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**UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY**

CRAIG THORNER and VIRTUAL
REALITY FEEDBACK CORPORATION,

Plaintiffs,

vs.

SONY COMPUTER ENTERTAINMENT
AMERICA INC.; SONY COMPUTER
ENTERTAINMENT INC.; GREGORY S.
GEWIRTZ; LERNER DAVID
LITTENBERG KRUMHOLZ &
MENTLIK, LLP; PERFORMANCE
DESIGNED PRODUCTS LLC; RILEY
RUSSELL; LARRY C. RUSS; MARC A.
FENSTER and RUSS AUGUST &
KABAT, A PROFESSIONAL
CORPORATION,

Defendants.

Civil Action No.

**COMPLAINT
and
JURY DEMAND**

Plaintiffs Craig Thorner ("Thorner") and Virtual Reality Feedback Corporation ("VRF"), by their undersigned attorneys, as and for their Complaint against the above-named defendants, say:

PARTIES

1. Plaintiff Thorner is a citizen of the State of New Jersey who resides at 14 Stuyvesant Road, Brick, New Jersey 08723.

2. Plaintiff VRF is a corporation organized and existing under the laws of the State of New Jersey with a place of business located at 14 Stuyvesant Road, Brick, NJ 08723.

3. Defendant Sony Computer Entertainment America Inc. ("Sony America") is a Delaware corporation that maintains its principal place of business at 919 East Hillside Boulevard, Foster City, California 94404.

4. Defendant Sony Computer Entertainment Inc. ("Sony Japan") is a Japanese corporation that maintains a place of business at 1-1 Akasaka 7-chrome, Minato-ku, Tokyo, 107-0052, Japan.

5. Defendant Gregory S. Gewirtz ("Gewirtz") is an attorney-at-law of the State of New Jersey and a partner of defendant Lerner David Littenberg Krumholz & Mentlik, LLP.

6. Defendant Lerner David Littenberg Krumholz & Mentlik, LLP ("Lerner David") is a New Jersey limited liability partnership that is engaged in the practice of law and maintains its principal place of business at 600 South Avenue, Westfield, New Jersey 07090.

7. Defendant Performance Designed Products LLC is a California

limited liability company that maintains its principal place of business at 14144 Ventura Boulevard, Sherman Oaks, California 91423 and, upon information and belief, was formerly known as Electro Source, LLC ("PDP/Electro Source").

8. Defendant Riley Russell ("Russell") is an attorney-at-law and an employee and a Vice President of Business and Legal Affairs of defendant Sony Computer Entertainment America Inc., who maintains an office at 1840 East 27th Street, Vernon, California 90058.

9. Defendant Larry C. Russ ("Russ") is an attorney-at-law of the State of California and a partner of defendant Russ August & Kabat, A Professional Corporation ("Russ August"), who maintains an office at 12424 Wilshire Boulevard, Los Angeles, California 90025.

10. Defendant Marc A. Fenster ("Fenster") is an attorney-at-law of the State of California and a partner of defendant Russ August, who maintains an office at 12424 Wilshire Boulevard, Los Angeles, California 90025.

11. Defendant Russ August is a professional corporation organized under the laws of the State of California that is engaged in the practice of law and maintains its principal place of business at 12424 Wilshire Boulevard, Los Angeles, California 90025.

CAUSES OF ACTION AND JURISDICTION

12. This Complaint asserts claims for patent infringement pursuant

to 35 U.S.C. § 271, as well as common law causes of action for, *inter alia*, attorney malpractice, fraud, and conspiracy arising from defendants' collusive and deceitful conduct to induce plaintiff Thorner to grant rights to his patents on unfair terms.

13. This Court has jurisdiction over the patent infringement claims pursuant to 28 U.S.C. §§ 1331 and 1338 as they arise under the patent laws of the United States, 35 U.S.C. § 1, *et seq.*

14. This Court has supplemental jurisdiction pursuant to 28 U.S.C. § 1367 over the common law causes of action as they relate to the patent infringement claims.

FACTS

A. Thorner and His Inventions

15. After graduating with a degree in electronic communications from The College of New Jersey in 1993, Thorner founded VRF. Since then, Thorner and VRF have devoted much time and effort to develop and improve vibration and sensory technology for use in a variety of fields.

16. Of relevance here, Thorner invented tactile sensation generators for computer gaming systems, such as Sony's PlayStation[®] products. These generators produce vibrations or other sensations that correspond to events playing out on the screen of a video game. Such "tactile sensations" greatly enhance the experience and enjoyment of players of video games.

17. The United States Patent and Trademark Office recognized Thorner's contributions in the field of vibration and sensory technology by awarding him several patents, including:

- United States Patent No. 5,684,722, entitled "Apparatus And Method For Generating A Control Signal For A Tactile Sensation Generator" ("the '722 patent").

- United States Patent No. 6,422,941, entitled "Universal Tactile Feedback System For Computer Video Games And Simulations" ("the '941 patent").

- United States Patent No. 5,565,840, entitled "Tactile Sensation Generator."

- United States Patent No. 5,669,818, entitled "Seat-Based Tactile Sensation Generator."

- United States Patent No. 6,232,932, entitled "Apparatus And Method For Providing Modular Reconfigurable Multi-Function Displays For Computer Simulations."

18. Thorner and VRF are the owners of all right, title and interest in and to the '722 patent.

19. Thorner is the owner of all right, title and interest in and to the '941 patent.

20. Upon information and belief, Defendants Sony America and Sony Japan manufacture, or have manufactured, and sell devices that incorporate the subject matter of the '941 patent, including, but not limited to, PlayStation[®] products, including game controllers, within this district and elsewhere throughout the United States.

21. Upon information and belief, Defendants Sony America and Sony Japan manufacture, or have manufactured, and sell devices that incorporate the subject matter of the '722 patent, including, but not limited to, vibrating headphones having model number MDR-IF 540RK, within this district and elsewhere throughout the United States.

22. Upon information and belief, Defendant PDP/Electro Source manufactures, or has manufactured, and sells devices that incorporate the subject matter of the '941 patent, including, but not limited to, game controllers compatible with PlayStation[®] products, within this district and elsewhere throughout the United States.

B. Immersion and Sony

23. In 2002, Immersion Corporation ("Immersion") commenced a patent infringement action against, *inter alia*, defendants Sony America and Sony Japan (collectively, "Sony") in the Northern District of California, asserting that Sony's PlayStation[®] products infringed certain patents covering computer game

vibration technology.

24. During the Immersion-Sony suit, an attorney representing Sony contacted Thorner seeking information concerning Thorner's work with vibration technology that might affect the validity of the patents Immersion asserted against Sony. Thorner declined to assist that attorney because he believed that Sony might infringe his patents as well.

25. Although Thorner believed that the PlayStation[®] products might infringe his patents, he recognized that he did not have the resources or the experience necessary to license his patents to, or to enforce them against, Sony.

26. Thorner, however, believed that Immersion might be willing to license and enforce his patents for the mutual benefit of Immersion and Thorner.

27. Hence, acting alone and without the benefit of counsel, Thorner offered Immersion an opportunity to take a license under his patents. Thorner and Immersion eventually entered into an agreement whereby Immersion obtained the exclusive right to license and enforce Thorner's '722 patent and promised to share any license revenue with Thorner. Thorner, in turn, agreed not to cooperate with third parties in connection with the development or operation of vibration technology.

28. Immersion did not license the '722 patent to any third parties.

29. On September 21, 2004, a jury found that Sony infringed

Immersion's patents and awarded Immersion damages of \$82 million, despite Sony's attempt to use Thorner's patents to invalidate Immersion's patents.

30. Sony appealed that verdict, and retained defendants Lerner David and Gewirtz to assist with the appeal.

C. Sony, PDP/Electro Source, and Their Attorneys Contrive to Obtain Thorner's Testimony and an Unfair License and Option Under the Thorner Patents

31. Three days after its verdict against Sony, Immersion commenced an action against defendant PDP/Electro Source, a nationwide distributor of video games and accessories, for infringement of the same patents that Immersion had asserted against Sony.

32. Thereafter, defendants Sony and PDP/Electro Source entered into a joint defense agreement and formulated a plan to pursue their common interests in overturning Immersion's judgment against Sony and in defeating Immersion's infringement claims against PDP/Electro Source.

33. Although unknown to Thorner at the time, at least one aspect of that plan called for PDP/Electro Source to recruit Thorner to help Sony obtain a new trial in the Immersion case on the basis of supposedly "newly discovered" evidence concerning Thorner's patents, even though Sony was well aware of Thorner's patents before the Immersion trial.

34. To that end, on April 4, 2005, Fenster, an attorney at Russ

August representing PDP/Electro Source, sent an e-mail to Thorner, asking that Thorner contact Fenster because "your [Thorner's] patents are at the heart of our [PDP/Electro Source's] invalidity defense to several of Immersion's patent claims."

35. Thorner was reluctant to respond to Fenster's request in light of his agreement with Immersion not to cooperate with anyone concerning vibration technology.

36. Nevertheless, unhappy that Immersion had done nothing to enforce his '722 patent and believing that his agreement with Immersion may have expired on April 18, 2005, Thorner replied to Fenster's e-mail on that day.

37. Fenster and another PDP/Electro Source attorney, Russ, subsequently questioned Thorner in a series of telephone conversations about his patents and work with vibration technology, ostensibly to develop prior art evidence that PDP/Electro Source could use to invalidate Immersion's patents.

38. In the course of these discussions, Thorner pointed out that PDP/Electro Source infringed his patents and that PDP/Electro Source would need a license from Thorner even if it invalidated Immersion's patents. Thorner also expressed concern that Immersion might sue him if he cooperated with PDP/Electro Source.

39. Upon information and belief, Russ and Fenster fully apprised defendant Russell, an in-house Sony lawyer, of their discussions with Thorner, and

Russell advised defendants Gewirtz and Lerner David of the substance of these discussions.

40. Unknown to Thorner, PDP/Electro Source and Sony recognized that they infringed Thorner's patents and were concerned that Thorner would not testify voluntarily about his work unless they respected his patents and protected him from suit by Immersion. Indeed, at a hearing in November 2005 related to Sony's attempt to obtain a new trial in the Immersion case (the "November 2005 hearing"), defendant Gewirtz admitted that Sony was "scared" of Thorner's patents for a variety of reasons. *See* Exhibit A at 41, line 20 to 42, line 11.

41. Hence, defendants PDP/Electro Source and Sony, through their attorneys, including defendants Gewirtz, Lerner David, Russ, Fenster and Russ August contrived to take advantage of Thorner's inexperience and lack of resources in order to (i) obtain a patent license from Thorner on extremely favorable terms, and (ii) induce Thorner to testify against Immersion.

D. Defendants' Plan

42. PDP/Electro Source and Sony first decided that PDP/Electro Source, rather than Sony, would negotiate a license with Thorner. They adopted this approach because, as defendant Gewirtz later explained at the November 2005 hearing, Sony believed that "it was highly beneficial to have Electrosorce [sic] negotiate with Mr. Thorner because if Mr. Thorner was speaking to Sony directly,

perhaps he would ask for a much, much higher number." *Id.* at 31, lines 17-20.

43. Second, under the plan, PDP/Electro Source would offer to pay Thorner an advance against future royalties in the amount of \$150,000.00. However, it was agreed that Sony would secretly funnel this sum to PDP/Electro Source. *See id.* at 26-27. Sony agreed to fund the advance royalty because Sony feared that Thorner would demand a larger advance royalty if he knew that Sony was involved. According to defendant Gewirtz, this was a windfall for Sony because "[Sony] would have paid 50 times more in legal fees alone" – i.e., \$7,500,000.00 -- if it were sued for infringement of Thorner's patents. *Id.* at 32, lines 18-22.

44. Third, in accordance with the plan, PDP/Electro Source would induce Thorner to cooperate with Sony in seeking a new trial in the Immersion case on the grounds that PDP/Electro Source and Thorner would benefit if Sony prevailed against Immersion.

45. Fourth, under the plan, PDP/Electro Source would insist that Sony receive an option to take a license under Thorner's patents on the same terms and conditions as PDP/Electro Source ("the Sony option") because Sony was taking the lead in attacking Immersion's patents and because the Sony option would eventually be of great value to Thorner.

46. Lastly, PDP/Electro Source would agree to pay Thorner a

running royalty on sales exceeding the advance royalty, but have the right to deduct or set-off any payment PDP/Electro Source made to Immersion (or anyone else) for permission to use patented vibration technology from any royalty PDP/Electro Source owed to Thorner.

47. Joseph Littenberg, a partner of defendant Lerner David, explained during the November 2005 hearing that the royalty set-off provision and the Sony option provided Sony with an "insurance policy" against any infringement claim that Thorner might assert against Sony. *See id.* at 36, lines 14-15 and 44, lines 7-9.

E. Defendants Implement Their Plan

48. On May 4, 2005, Russ e-mailed a proposed "Deal Point Memorandum" to Thorner. The proposal implemented the elements of the plan between PDP/Electro Source and Sony as set forth in paragraphs 42 to 47.

49. Thorner rejected this proposal because it contained terms that came as a complete surprise to Thorner, including a requirement that Thorner assign his patents to a separate entity, as well as the royalty set-off provision and the Sony option. In addition, Thorner was unhappy with the proposed advance royalty payment of \$150,000 and the royalty rate.

50. Three days later, after consulting, upon information and belief, with defendants Sony and Lerner David, Russ sent another proposed Deal Point

Memorandum and License Agreement to Thorner. This proposal deleted the assignment provision and otherwise provided, in pertinent part, that:

a. PDP/Electro Source would pay Thorner an advanced royalty of \$150,000.00 against future sales of "Licensed Products," which were defined as "any products . . . [that] . . . would constitute, in whole or in part, direct or indirect infringement of any of the [Thorner] patents."

b. In the future, PDP/Electro Source would pay Thorner a royalty of one-half of one percent (0.5%) on sales of "Licensed Products." Russ represented to Thorner that PDP/Electro Source sold about two million controllers a year, and that Thorner should receive about \$0.25 per controller or about \$500,000.00 per year in royalties.

c. However, as discussed above, PDP/Electro Source's future royalty payments would be set-off, or reduced "dollar for dollar by any royalties paid by [PDP/Electro Source] to any third parties for patent rights relating to vibro-tactile technology or wireless controller devices with vibration."

d. Sony would receive an option to take a license under the Thorner's patents on the same terms as the proposed license to PDP/Electro Source.

51. Thorner was uncertain about the fairness of the PDP/Electro Source proposal, but could not afford to discuss his concerns with an attorney. Thus, acting on his own, Thorner told Russ by e-mail of May 9, 2005, that he

generally agreed with PDP/Electro Source's proposal, but asked for a larger advance royalty of \$200,000.00 and a larger unit royalty percentage of 0.75%.

52. Upon information and belief, Russ consulted with defendants Sony and Lerner David concerning Thorner's counter-proposal. Russ then advised Thorner by e-mail of May 9: "Cannot get you \$200,000" and "Cannot budge on the royalty rate either." Russ also advised Thorner that Sony was preparing a declaration for him so that Sony could obtain a new trial against Immersion. Upon information and belief, Russ, Gewirtz and Sony were collectively preparing Thorner's declaration.

53. Thorner replied to Russ by email of May 9, 2005, stating that he would accept PDP/Electro Source's terms if Russ agreed to assist Thorner with any differences he might have with Immersion and with a trademark cancellation proceeding.

54. Despite repeated e-mails from Russ, Thorner did not sign the proposed agreement with PDP/Electro Source because he remained concerned about its fairness and the threat of a lawsuit by Immersion if he aided PDP/Electro Source or Sony.

55. Russ and Fenster assured Thorner that the proposed agreement was fair, and also advised Thorner that his agreement with Immersion did not restrict his ability to work with PDP/Electro Source. During phone conversations

with Thorner throughout their dealings with Thorner, Russ and Fenster also assured Thorner that PDP/Electro Source would not settle with Immersion so that the set-off clause in the proposed agreement would never be invoked.

56. Thereafter, upon information and belief, Sony and PDP/Electro Source agreed that their goal of obtaining rights to Thorner's patents and obtaining Thorner's testimony would be better served if Russ referred Thorner to Gewirtz. Accordingly, Russ urged Thorner to meet with defendant Gewirtz to discuss the PDP/Electro Source proposal and a declaration in support of Sony's motion to vacate Immersion's judgment. Thorner agreed to do so.

57. However, PDP/Electro Source and Sony with, upon information and belief, the knowledge of defendants Lerner David and Gewirtz, decided to rewrite the definition of "Licensed Products" in the PDP/Electro Source proposal so that PDP/Electro Source and Sony would only have to pay a 0.5% royalty on the value of peripheral products, such as controllers or headsets. As originally drafted and approved by the defendants, the PDP/Electro Source proposal would have required Sony to pay a royalty based on the PlayStation[®] as a whole, which has a substantially higher value than peripheral products, so the proposed change significantly reduced the value of the license to Thorner. Littenberg of defendant Lerner David subsequently described this substantial reduction of the royalty base as a "magnificent" benefit for Sony. *See id.* at 40, lines 4-8.

58. Russ forwarded the revised PDP/Electro Source proposal to Thorner by e-mail of Thursday, May 26, 2005, and confirmed that he had been advised that a meeting between Thorner and defendant Gewirtz had been arranged for Friday, May 27, or Monday, May 30, 2005. Russ also advised Thorner of the change to the definition of "Licensed Products" and that he would send a check covering PDP/Electro Source's advance royalty payment to defendant Gewirtz for delivery to Thorner once he signed the proposed deal. *See* Exhibit B.

59. In fact, unknown to Thorner, on about May 24, 2005, Sony had wired Russ August the \$150,000 advance payment pursuant to its agreement to secretly fund PDP/Electro Source's advance royalty payment to Thorner. *See* Exhibit C.

F. Gewirtz and Lerner David Undertake to Represent Thorner

60. Thorner met defendant Gewirtz for the first time on or about Tuesday, May 31, 2005, at defendant Lerner David's offices in Westfield, New Jersey.

61. At this meeting, Thorner told Gewirtz that he was in dire financial circumstances and, after negotiating with attorneys for Immersion and PDP/Electro Source, was concerned about his ability to represent himself. Thorner acknowledged that he was interested in licensing his patents to Sony and PDP/Electro Source, but told Gewirtz that he did not like PDP/Electro Source's

proposal. In particular, Thorner told Gewirtz that he was concerned about the proposed royalty rate, the royalty base, the set-off provision, and Sony's option to take a license on the same terms as PDP/Electro Source. Thorner also discussed his apprehension that Immersion would sue him if he cooperated with PDP/Electro Source and Sony.

62. Thorner, in short, needed counsel but could not afford one. Hence, he asked Gewirtz: "Who will represent me?"

63. Gewirtz responded that he and defendant Lerner David could represent Thorner. To that end, Gewirtz gave Thorner a Lerner David firm brochure and touted his and Lerner David's abilities as the "best of the best" in the field of intellectual property law, including licensing and litigating patents.

64. Thorner was impressed with Gewirtz and Lerner David, but he also recognized that they represented Sony. Thorner thus asked Gewirtz whether Gewirtz and Lerner David could represent him and Sony.

65. Gewirtz assured Thorner that he could "wear two hats" and fully represent Thorner's interests and Sony's interests at the same time. Gewirtz emphasized to Thorner that he was bound to do his best for Thorner and could get in "a lot of trouble" if he did not represent Thorner to the fullest of his ability.

66. Based on Gerwitz' representations, Thorner accepted Gewirtz' offer of representation and considered Gewirtz and Lerner David to be his

attorneys from May 31, 2005, onward. Gewirtz subsequently confirmed, while representing Thorner at a deposition and during the November 2005 hearing, that his and Lerner David's attorney-client relationship with Thorner started in May 2005. *See* Exhibit D at 441, line 7 to 442, line 16 and Exhibit A at 55-56 respectively.

67. In addition to their first meeting on May 31, Thorner and Gewirtz met at Lerner David's offices on June 1, June 2, June 3, and June 6, 2005. On each occasion, they discussed Thorner's concerns about the PDP/Electro Source proposal and worked on Thorner's declaration for Sony's motion for a new trial. During this period, Gewirtz and Littenberg assured Thorner that he was in good hands and would be well taken care of.

68. More particularly, during the course of these meetings, Gewirtz urged Thorner to accept the proposed PDP/Electro Source agreement. First, regarding Thorner's concerns about the royalty rate and royalty base, Gewirtz ratified Russ's earlier representation that PDP/Electro Source sold about two million controllers a year and that Thorner would receive about \$0.25 per controller, or \$500,000.00 per year under the PDP/Electro Source proposal, and told Thorner that he could not obtain a better rate from PDP/Electro Source.

69. Gewirtz further explained that Thorner would earn many times the annual amount paid by PDP/Electro Source once Sony exercised its option

under the PDP/Electro Source proposal after it overturned the Immersion verdict. Gewirtz explained to Thorner that Sony could not take a license, exercise its option, or pay anything to Thorner while the Immersion suit was pending because it would look like Sony was buying his testimony. Russell of Sony confirmed these representations of Gewirtz to Thorner during a phone call with Thorner in early June 2005.

70. Second, regarding Thorner's concerns about the set-off clause, Gewirtz advised Thorner that Sony and PDP/Electro Source would never settle with Immersion and that they would ultimately overcome Immersion's allegations of patent infringement. Therefore, Gewirtz assured Thorner that the set-off clause would never be invoked. Russell of Sony confirmed this representation to Thorner during the phone call with Gewirtz and Thorner.

71. Third, regarding Thorner's fear of being sued by Immersion if he cooperated with PDP/Electro Source and Sony, Gewirtz advised Thorner that he was free to deal with Sony and PDP/Electro Source despite the Immersion Agreement and promised Thorner that he and Lerner David would represent him at no cost if Immersion did so.

72. Finally, on or about June 6, 2005, at Lerner David's offices, Gewirtz told Thorner that he had to sign the PDP/Electro Source proposal. Trusting in Gewirtz' advice about the fairness of PDP/Electro Source's proposal,

Thorner signed the Deal Point Memorandum and the License Agreement (collectively the "PDP/Electro Source agreement"), but backdated the License Agreement to May 26, 2005, at Gewirtz' insistence. The executed PDP/Electro Source agreement is attached as Exhibit E.

73. Gewirtz then handed Thorner a check covering PDP/Electro Source's advance payment of \$150,000.00, which Sony had secretly funded.

G. Aftermath

74. Sony submitted Thorner's declaration in support of its motion for a new trial in the Immersion case. Consequently, Immersion's attorneys examined Thorner during a two-day deposition in September 2005. Gewirtz represented Thorner at the deposition, and repeatedly instructed Thorner not to respond to questions relating to communications between Gewirtz and Thorner based on the privilege afforded attorney-client communications.

75. Thorner learned during his deposition that Sony had secretly funded PDP/Electro Source's advanced royalty payment, and that defendant Gewirtz was well aware of this fact. After the deposition, Thorner questioned Gewirtz' fidelity to his pledge to do "his best" for Thorner, and instructed Gewirtz to get him out of the PDP/Electro Source agreement. Gewirtz refused, stating that that was not possible because it would destroy Sony's ability to gain a new trial against Immersion. Gewirtz also lamented that he should have never have gotten

involved with PDP/Electro Source. Gewirtz, nevertheless, assured Thorner that Thorner could trust him, that the PDP/Electro Source agreement was a "good deal" and that all would work out in the end. Thorner was not mollified by Gewirtz' assurances, and attempted to raise his concerns about Gewirtz' representation of him with Charles Kennedy ("Kennedy"), another Lerner David partner with whom Thorner had worked. Kennedy told Thorner that he would have to deal with Gewirtz.

76. During the November 2005 hearing, defendant Gewirtz described the PDP/Electro Source agreement as a "windfall" for Sony. *See* Exhibit A at 42, lines 12-14.

77. For his part, Littenberg of defendant Lerner David described the PDP/Electro Source agreement as:

- "a huge win for lawyers to get for Sony this kind of option at this price. It's ridiculous." (*Id.* at 35, lines 16-18);
- "an insurance policy for half a percent" for Sony (*Id.* at 36, lines 14-15);
- "a great deal for Sony" (*Id.* at 38, line 5); and
- "one of the cheapest insurance policies – I'm doing this over 40 years – that I've ever seen or gotten for a client, in a sense." (*Id.* at 44, lines 7-9).

78. Sony's motion for a new trial was denied on March 8, 2006. On March 9, 2006, Immersion dismissed its suit against PDP/Electro Source pursuant to a settlement agreement.

79. Immersion then sued Thorner for cooperating with Sony and PDP/Electro Source in California state court on March 24, 2006.

80. On or about March 30, 2006, Thorner sent Gewirtz copies of Immersion's summons and complaint with the expectation that Gewirtz would honor his promise to represent him. Gewirtz refused with two simple words: "Good luck."

81. Thorner eventually settled Immersion's suit against him, though he was forced to negotiate from a position of weakness because he was still experiencing financial difficulties and facing possible bankruptcy if he lost the suit with Immersion. As a result, the settlement with Immersion diminished the value of Thorner's patents because Thorner had to give up certain rights in his patents.

COUNT I
PATENT INFRINGEMENT

82. Plaintiff repeats and re-alleges the allegations of paragraphs 1 through 81 as if fully set forth at length herein.

83. Defendants Sony America and Sony Japan have infringed and are infringing, either directly and/or indirectly, the '941 Patent by, *inter alia*, importing and selling PlayStation[®] computer game consoles with vibrating

controllers, and through the manufacture, importation, and sale of individual vibrating controllers for use with game consoles.

84. Defendants Sony America and Sony Japan have infringed and are infringing, either directly and/or indirectly, the '722 Patent by, *inter alia*, importing and selling vibrating headphones, including model number MDR-IF 540RK, for use with game consoles.

85. Defendant PDP/Electro Source has infringed and is infringing, either directly and/or indirectly, the '941 Patent by, *inter alia*, manufacturing, importing and selling, vibrating controllers for use with game consoles.

86. On information and belief, Sony's infringement of the '941 and '722 Patents and PDP/Electro Source's infringement of the '941 Patent, has been deliberate and willful, rendering this case "exceptional" under 35 U.S.C. § 285.

87. Plaintiff Thorner has suffered damages due to the Sony defendants' infringement of the '722 and '941 Patents and due to PDP/Electro Source's infringement of the '941 Patent.

WHEREFORE, Thorner and VRF demand judgment in their favor against Sony Japan, Sony America and PDP/Electro Source for compensatory damages, treble damages for willful infringement under 35 U.S.C. § 284, interest, costs of suit, and such other relief as this Court may deem proper

COUNT II
ATTORNEY MALPRACTICE

88. Plaintiff repeats and re-alleges the allegations of paragraphs 1 through 87 as if fully set forth at length here.

89. An attorney-client relationship existed between Thorner and defendants Gewirtz and Lerner David from Thorner's first meeting with Gewirtz on or about May 31, 2005. This relationship was formed to afford Thorner legal representation and advice in connection with (i) the proposed PDP/Electro Source agreement, (ii) Thorner's declaration and testimony in support of Sony's motion for a new trial, and (iii) any litigation by Immersion against Thorner related to his cooperation with Sony or PDP/Electro Source.

90. As a result, Gewirtz and Lerner David had a duty to represent and advise Thorner loyally and in good faith with that degree of knowledge, skill, and care that attorneys of ordinary ability possess.

91. Gewirtz and Lerner David negligently, recklessly, or intentionally breached their duties to Thorner in numerous ways, and damaged the value of Thorner's patents, as described without limitation in the following paragraphs.

**Failure to Properly Advise Thorner
of Conflicts with Sony and PDP/Electro Source**

92. A clear conflict existed between Thorner's interests and those of

Gewirtz' and Lerner David's larger client, Sony, in regard to the proposed PDP/Electro Source agreement. This conflict was or should have been manifest to Gewirtz and Lerner David.

93. For example, Gewirtz knew when he undertook to represent Thorner that Thorner believed that Sony and PDP/Electro Source infringed his patents and that his patents had great value. Gewirtz' own words at the November 2005 hearing prove the point: "Mr. Thorner believes, Your Honor, it's our understanding and Sony's, that, in fact, claims of his '941 patent which is issued does cover Sony, does cover Immersion, does cover Electro Source." *See Exhibit A at 43, lines 14-17.*

94. On the other hand, Gewirtz and Lerner David knew that Sony was "scared" of Thorner's patents and did not want to incur the risk or expense of litigation, and that the option afforded Sony under the PDP/Electro Source agreement gave Sony a financial "windfall" and an "insurance policy" that were detrimental to Thorner's legal and pecuniary interests. *See id.* at 42, lines 12-14 and at 36, lines 14-15, respectively.

95. Moreover, defendants Gewirtz and Lerner David were aware that Sony and PDP/Electro Source had entered into a joint defense agreement and that they had a common interest in obtaining a license under the Thorner patents on terms that were favorable to Sony and PDP/Electro Source. *See id.* at 33, lines 3-9.

96. Defendants Gewirtz and Lerner David thus had a duty to advise Thorner of the relationship between the Sony and PDP/Electro Source and of the obvious conflict that relationship created between Thorner's interests and those of PDP/Electro Source and Sony. Gewirtz and Lerner David failed to disclose this conflict to Thorner.

97. In addition, in the face of these conflicts, Gewirtz and Lerner David had a duty to advise Thorner to seek independent legal advice with respect to the PDP/Electro Source agreement.

98. Instead, Gewirtz wrongly and falsely assured Thorner that he and Lerner David could represent Thorner; indeed, Gewirtz told Thorner that "he had his back" and would do his best for Thorner.

99. Accordingly, Gewirtz and Lerner David did not obtain Thorner's informed consent prior to undertaking to represent Thorner.

100. Thorner would not have agreed to let Gewirtz and Lerner David represent him, and Thorner would have negotiated a fair agreement with PDP/Electro Source and Sony for the Thorner patents, but for the failures of defendants Gewirtz and Lerner David to fulfill their duties of candor and full disclosure to Thorner concerning the conflicts between Sony and PDP/Electro Source's interests and Thorner's interests.

Failure To Represent Thorner Zealously and Competently

101. Upon offering and agreeing to represent Thorner, defendants Gewirtz and Lerner David had the duties to fully apprise Thorner of all relevant facts and to represent his interests zealously and competently. Defendants Gewirtz and Lerner David negligently, recklessly, or intentionally breached each of these duties to Thorner by failing to apprise Thorner of many relevant facts, by concealing material facts, and by failing to give him competent advice concerning the PDP/Electro Source agreement. These breaches of duty include, by way of example, but not limitation:

a. Failing to advise Thorner that Sony collaborated with PDP/Electro Source in the negotiation and drafting of the PDP/Electro Source agreement, and that Sony secretly funded PDP/Electro Source's advance royalty payment in the amount of \$150,000, all to Thorner's detriment.

b. Falsely advising Thorner that the PDP/Electro Source agreement was fair and reasonable when, in fact, Gewirtz and Lerner David considered the PDP/Electro Source agreement to be a "windfall" and a "huge win" for Sony, with a "magnificent" royalty base and an "insurance policy for half a percent." *See id.* at 42, lines 12-14; at 35, lines 16-18; at 40, lines 4-8; and at 36, lines 14-15, respectively.

c. Failing to advise Thorner to consider returns generated

by comparable patent portfolios, such as the \$82 million judgment Immersion had obtained against Sony.

d. Falsely advising Thorner that Sony could not exercise its option under the PDP/Electro Source agreement to take a license to Thorner's patents, or pay Thorner any remuneration, while the Immersion judgment was outstanding, when Gewirtz knew that Sony had secretly funded PDP/Electro Source's advance royalty payment.

e. Falsely advising Thorner that the advance royalty payment and the 0.5% royalty rate of the PDP/Electro Source agreement were reasonable and the best that could be obtained.

f. Falsely advising Thorner that he would receive about \$500,000 per year from PDP/Electro Source under the PDP/Electro Source agreement and many times that amount when Sony exercised its option under that agreement.

g. Falsely advising Thorner that the set-off provision of the PDP/Electro Source agreement was reasonable and would never be invoked.

h. Failing to advise Thorner that Sony and PDP/Electro Source's change to the definition of Licensed Product would significantly diminish the amount of any payment that might be made to Thorner.

i. Failing to advise Thorner of alternatives to signing the

PDP/Electro Source agreement, including asserting his patents against Sony and PDP/Electro Source.

j. Failing to advise Thorner of terms normally included in a patent license such as the rights to receive royalty reports and to audit royalty payments.

k. Failing to advise Thorner that Sony was "scared" of the Thorner patents.

l. Failing to advise Thorner that Sony would have paid fifty times the amount of PDP/Electro Source's advanced royalty payment (i.e., \$7,500,000) in legal fees alone if Thorner asserted his patents against Sony.

m. Failing to act on Thorner's request to terminate the PDP/Electro Source agreement after Thorner learned that Sony had secretly funded PDP/Electro Source's advance royalty payment.

n. Taking advantage of Thorner's relative poverty and inexperience in licensing and enforcing patents to convince Thorner to sign the PDP/Electro Source agreement to benefit Sony and PDP/Electro Source.

102. For at least the reasons set forth in the previous paragraphs, defendants Gewirtz' and Lerner David's representation of Thorner fell below the standard of care required of legal professionals and Gewirtz and Lerner David were negligent in performing or in failing to perform the acts described above.

103. But for Gewirtz' and Lerner David's breaches of duty to Thorner, Thorner would not have signed the PDP/Electro Source Agreement and would have negotiated a fair license with PDP/Electro Source and Sony under Thorner's patents.

104. As a proximate result of the negligence and recklessness of Gewirtz and Lerner David, the value of Thorner's patents was damaged as a result of the "windfall" and "insurance policy" that defendants Gewirtz and Lerner David engineered and secured for Sony, their longstanding client, and for PDP/Electro Source.

WHEREFORE, Thorner demands judgment in his favor and against defendants Gewirtz and Lerner David for compensatory damages, punitive damages, interest, costs of suit, and such other relief as this Court may deem proper.

COUNT III
BREACH OF FIDUCIARY DUTY

105. Plaintiff Thorner repeats and re-alleges the allegations of paragraphs 1 to 104 as if fully set forth at length here.

106. Having offered and agreed to represent Thorner, defendants Gewirtz and Lerner David assumed a fiduciary duty to act in the best interests of Thorner and his patents, and to avoid acting in a manner detrimental to those interests. As fiduciaries, defendants Gewirtz and Lerner David also owed Thorner

a duty of complete honesty and candor.

107. Thorner placed his trust and confidence in defendants Gewirtz and Lerner David as his attorneys and fiduciaries.

108. As described herein, defendants Gewirtz and Lerner David negligently, recklessly, or intentionally breached their fiduciary duties to Thorner by misrepresenting facts or failing to tell Thorner of facts in advising Thorner to enter into the PDP/Electro Source agreement.

109. Thorner detrimentally relied on the advice of Gewirtz and Lerner David with the result that the value of the Thorner patents has been significantly damaged.

WHEREFORE, Thorner demands judgment in his favor and against defendants Gewirtz and Lerner David for compensatory damages, punitive damages, interest, costs of suit, and such other relief as this Court may deem proper.

COUNT IV
FRAUD

110. Plaintiff Thorner repeats and re-alleges the allegations of paragraphs 1 to 109 as if fully set forth here.

111. Acting on behalf of defendant Sony and the pecuniary benefit of defendant Lerner David, defendant Gewirtz made numerous misrepresentations of fact to Thorner while concealing material facts, during their meetings from May

31, 2005 to June 6, 2005, at Lerner David's offices. Gewirtz did so to induce Thorner to enter into the PDP/Electro Source agreement so that Sony and PDP/Electro Source could obtain rights to the Thorner patents as well as Thorner's testimony in support of Sony's motion for a new trial in the Immersion case. Gewirtz' misrepresentations and concealments include, but are not limited to, the following:

a. Advising Thorner that the PDP/Electro Source agreement was reasonable and fair for Thorner, while concealing the fact that Gewirtz and Lerner David knew the PDP/Electro Source agreement to be a "windfall" and a "huge win" for Sony, with a "magnificent" royalty base, and "one of the cheapest insurance policies . . . ever seen or gotten for a client." *See id.* at 42, lines 12-14; at 35, lines 16-18; at 40, lines 4-8; and at 36, lines 14-15, respectively.

b. Advising Thorner that Sony could not exercise the option provided by the PDP/Electro Source agreement to take a license under Thorner's patents or pay Thorner any remuneration while the Immersion judgment was outstanding, while concealing the fact that Gewirtz knew that Sony had secretly funded PDP/Electro Source's advance royalty payment. *See Exhibit C.*

c. Advising Thorner that the 0.5% royalty rate and \$150,000.00 advance payment of the PDP/Electro Source agreement were reasonable and the best that could be obtained, while concealing the fact that

Gewirtz knew: (1) that Sony colluded with PDP/Electro Source to negotiate the agreement because, otherwise, Sony would have paid much more; (2) that Sony would have paid \$7,500,000.00 in legal fees alone disputing Thorner's patents; and (3) that Sony was "scared" of the Thorner patents. *See* Exhibit A at 31, lines 17-20; at 32, lines 18-22; and at 41, line 20 to 42, line 11, respectively.

d. Advising Thorner that the set-off clause was reasonable and fair for Thorner, while concealing the fact that Gewirtz and Lerner David knew Sony and PDP/Electro Source would accept a reasonable offer from Immersion to settle the dispute with Immersion.

112. As Gewirtz and Littenberg's representations to the Court during the November 2005 hearing make plain (*see* Exhibit A), Gewirtz knew or should have known that each of the misrepresentations and omissions identified in the previous paragraphs was either false or misleading or both.

113. Defendant Russell misrepresented to Thorner that Sony could not pay Thorner any remuneration while the Immersion judgment was outstanding, when Russell had already authorized Sony's secret funding of PDP/Electro Source's advance royalty payment. Defendant Russell of Sony America also misrepresented to Thorner that the set-off clause in the proposed Immersion agreement would not be invoked as PDP/Electro Source and Sony would never settle with Immersion, when Russell knew that settlement was likely if Sony did

not obtain a new trial in the Immersion matter.

114. Defendant Russ and Fenster of Russ August, while negotiating on behalf of PDP/Electro Source, also misrepresented to Thorner that the set-off clause in the proposed PDP/Electro Source agreement would not be invoked, as PDP/Electro Source would never settle with Immersion, when Russ and Fenster knew that settlement was likely if Sony did not obtain a new trial in the Immersion matter.

115. Gewirtz, Russell, Russ and Fenster made the foregoing false and misleading misrepresentations to Thorner with the intention and expectation that he would rely on them, as he did. But for Gewirtz, Russell, Russ and Fenster's misrepresentations, Thorner would not have entered into the PDP/Electro Source agreement, or would have bargained for and obtained more favorable terms.

116. The foregoing conduct of Gewirtz, Lerner David, Russell, Sony America, Russ, Fenster, Russ August and PDP/Electro Source constitutes fraud, misrepresentation, and deceit.

117. Thorner suffered damages as a consequence of defendants' fraud, misrepresentations, and deceit.

WHEREFORE, Thorner demands judgment in his favor and against defendants Gewirtz, Lerner David, Russell, Sony America, PDP/Electro Source, Russ, Fenster and Russ August, for compensatory damages, punitive damages,

interest, costs of suit, and such other relief as this Court may deem proper.

COUNT V
NEGLIGENT MISREPRESENTATION

118. Plaintiff Thorner repeats and realleges the allegations of paragraphs 1 to 117 as if fully set forth at length here.

119. Defendant Gewirtz negligently misrepresented facts to Thorner that were material to the formation of the PDP/Electro Source agreement, including but not limited to those facts set forth in paragraph 111.

120. As shown through Gewirtz and Littenberg's representations during the November 2005 hearing (*see* Exhibit A), Gewirtz knew or should have known that his misrepresentations to Thorner were false and misleading.

121. Defendant Russell of Sony America also misrepresented to Thorner that Sony could not pay Thorner any remuneration while the Immersion judgment was outstanding, when Russell had authorized Sony's secret funding of PDP/Electro Source's advance royalty payment.

122. Defendants Russ and Fenster of Russ August, while negotiating on behalf of PDP/Electro Source, also misrepresented to Thorner that the set-off clause would not be invoked as PDP/Electro Source would never settle with Immersion, when Russ and Fenster knew that settlement was likely if Sony did not obtain a new trial in the Immersion matter.

123. Gewirtz, Russell, Russ and Fenster negligently made these

misrepresentations with the intent to induce Thorner to enter into the PDP/Electro Source agreement so that defendants Sony America, Sony Japan, and PDP/Electro Source could obtain rights to the Thorner patents that amounted to a "windfall" and an "insurance policy."

124. In agreeing to sign the PDP/Electro Source agreement, Thorner reasonably relied on Gewirtz, Russell, Russ and Fenster's misrepresentations.

125. Thorner has sustained damages as a consequence of Gewirtz, Russell, Russ and Fenster's negligent misrepresentations.

WHEREFORE, Thorner demands judgment in his favor and against defendants Gewirtz, Lerner David, Russell, Sony America, PDP/Electro Source, Russ, Fenster and Russ August for compensatory damages, punitive damages, interest, costs of suit, and such other relief as this Court may deem proper.

COUNT VI
CONSPIRACY

126. Plaintiff Thorner repeats and realleges the allegations of paragraphs 1 to 125 as if fully set forth at length here.

127. Defendants Gewirtz, Lerner David, PDP/Electro Source, Russ, Fenster, Russ August, Russell, Sony America, and Sony Japan, combined pursuant to an actual or tacit agreement, for the purpose of obtaining rights under Thorner's patents and his testimony for use against Immersion by unlawfully misrepresenting and concealing material facts from Thorner to induce him to enter into the

PDP/Electro Source agreement.

128. To that end, with the knowledge and approval of all defendants, defendant Gewirtz convinced Thorner to sign the PDP/Electro Source agreement through unlawful means, including, *inter alia*, fraud, malpractice, and breach of fiduciary duty as detailed above.

129. Thorner has sustained damages as a result of defendants' conspiracy.

WHEREFORE, Thorner demands judgment in his favor and against all defendants for compensatory damages, punitive damages, interest, costs of suit, and such other relief as this Court may deem proper.

COUNT VII
AIDING AND ABETTING

130. Plaintiff Thorner repeats and realleges the allegations of paragraphs 1 to 129 as if fully set forth at length here.

131. As set forth above, defendants Gewirtz and Lerner David breached fiduciary and attorney-client duties owed to Thorner and fraudulently and negligently misrepresented material facts to Thorner.

132. Upon information and belief, defendants Sony America, Sony Japan, Russell, PDP/Electro Source, Russ, Fenster and Russ August were aware that Gewirtz and Lerner David's conduct toward Thorner represented a breach of the fiduciary and attorney-client duties owed to Thorner.

133. Nevertheless, by their actions described above, defendants Sony America, Sony Japan, Russell, PDP/Electro Source, Russ, Fenster and Russ August substantially assisted and encouraged defendants Gewirtz and Lerner David's breach of duties owed to Thorner as well as Gewirtz and Lerner David's fraudulent and negligent misrepresentations to Thorner.

134. Thorner has sustained damages as a consequence of defendants Russell, Sony America, Sony Japan, PDP/Electro Source, Russ, Fenster and Russ August's actions in aiding and abetting Gewirtz and Lerner David in their breach of their fiduciary and attorney-client duties owed to Thorner and in their fraudulent and negligent misrepresentations of material facts to Thorner.

WHEREFORE, Thorner demands judgment in his favor and against defendants Sony America, Sony Japan, Russell, PDP/Electro Source, Russ, Fenster and Russ August for compensatory damages, punitive damages, interests, costs of suit, and such other relief as this Court may deem proper.

COUNT VIII
BREACH OF CONTRACT

135. Plaintiff Thorner repeats and realleges the allegations of paragraphs 1 to 134 as if fully set forth at length here.

136. Defendants Gewirtz and Lerner David offered and agreed to act as Thorner's attorneys if Immersion commenced an action against Thorner.

137. Defendants Gewirtz and Lerner David breached their

contractual obligations to Thorner by declining to represent him when he was sued by Immersion.

138. Thorner has sustained damages as a consequence of that breach.

WHEREFORE, Thorner demands judgment in his favor and against Gewirtz and Lerner David for compensatory damages, interest, costs of suit, and such other relief as this Court may deem proper.

COUNT IX
BREACH OF CONTRACT

139. Plaintiff Thorner repeats and realleges the allegations of paragraphs 1 to 138 as if fully set forth at length here.

140. In the PDP/Electro Source agreement (*see* Exhibit E), defendant PDP/Electro Source agreed to pay royalties to Thorner for the use of Thorner's patents.

141. PDP/Electro Source breached its contractual obligations to Thorner by failing to pay him the royalties specified in the PDP/Electro Source agreement.

142. Thorner has sustained damages as a consequence of that breach.

WHEREFORE, Thorner demands judgment in his favor and against PDP/Electro Source for compensatory damages, interest, costs of suit, and such other relief as this Court may deem proper.

Dated: April 21, 2009

Respectfully submitted,

By: s/ Glen M. Diehl
Glen M. Diehl, Esq.

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Attorneys for Plaintiffs

DEMAND FOR JURY TRIAL

Pursuant to Fed. R. Civ. P. 38 and L. Civ. R. 38.1, Plaintiffs Virtual Reality Feedback Corporation and Craig Thorner hereby demand a trial by jury on all issues so triable.

Dated: April 21, 2009

Respectfully submitted,

By: s/ Glen M. Diehl
Glen M. Diehl, Esq.

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Attorneys for Plaintiffs

CERTIFICATION PURSUANT TO LOCAL CIVIL RULE 11.2

I hereby certify that the patents in suit here are not the subject of any other action pending in any other court.

Respectfully submitted,

Dated: April 21, 2009

By: s/ Glen M. Diehl
Glen M. Diehl, Esq.

DIEHL SERVILLA LLC
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Clark, New Jersey 07066
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Attorneys for Plaintiffs

CERTIFICATION OF NON-ARBITRABILITY

I hereby certify, pursuant to L. Civ. R. 201.1(d)(3), that the above-captioned matter is not arbitrable because the damages recoverable exceed the sum of \$150,000.00 exclusive of interest and costs and any claim for punitive damages.

Respectfully submitted,

Dated: April 21, 2009

By: s/ Glen M. Diehl
Glen M. Diehl, Esq.

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