

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
Norfolk Division**

INTELLIGENT VERIFICATION SYSTEMS, LLC,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 2:12-cv-00525-
	)	AWA-LRL
MICROSOFT CORPORATION	)	
	)	<b>JURY TRIAL</b>
and	)	<b>DEMANDED</b>
	)	
MAJESCO ENTERTAINMENT CO.,	)	
	)	
Defendants.	)	
	)	
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**FIRST AMENDED COMPLAINT**

Plaintiff Intelligent Verification Systems, LLC (“IVS”) brings this action against Microsoft Corporation (“Microsoft”), and Majesco Entertainment Company (“Majesco”), jointly and severally, for patent infringement arising out of the Patent Laws of the United States, Title 35, United States Code.

**I. PARTIES**

1. All facts herein are alleged on information and belief except those facts concerning IVS’s own activities.
  
2. IVS is a Virginia Limited Liability Company with its principal place of business at 4202 Sonia Court, Alexandria, Virginia 22309. IVS is the inventing and owning company of various patents related to biometric systems that facilitate user interaction, entertainment, and enjoyment.

3. Microsoft is a Washington corporation with its principal place of business at One Microsoft Way, Redmond, Washington 98052. Microsoft may be served with this complaint through its registered agent, Corporation Service Company, Bank of America Center, 16th Floor, 1111 East Main Street, Richmond, Virginia 23219.

4. Majesco is a Delaware corporation with its principle place of business at 160 Raritan Center Parkway, Edison, New Jersey 08837.

## **II. JURISDICTION AND VENUE**

5. This is an action for patent infringement under the Patent Act, 35 U.S.C § 271.

6. This Court has personal jurisdiction over Microsoft, in part, because Microsoft has subscribers who reside in the Eastern District of Virginia, and sells infringing products and provides infringing services and downloads and software updates to its subscribers and consumers in this district, and to subscribers and customers wherever located from the Microsoft Boydton Virginia Data Center located in the Eastern District of Virginia; sells and offers for sale through the Microsoft store at Tysons Corner and at Pentagon Plaza, Virginia, infringing gaming systems, video games and video game components, and regularly conducts business in this District; has solicited business and has attempted to derive financial benefit from residents of the Commonwealth of Virginia, including benefits directly related to the instant cause of action set forth herein; and has committed and continues to commit acts of patent infringement in this District. This Court has personal jurisdiction over Majesco, in part, because Majesco manufactures for sale and/or sells infringing video games to consumers in the United States and, more particularly, in the Eastern District of Virginia.

7. This Court has subject matter jurisdiction by virtue of Sections 1331 and 1338(a) of Title 28, United States Code.

8. Venue in this Court is proper by virtue of Sections 1391(b) and (c) and 1400(b) of Title 28, United States Code.

### **III. BACKGROUND**

#### **A. IVS and the IVS Patent**

9. IVS is one of the early pioneers of technology that allows computer or computer-like system users to enjoy the benefits of entertainment and interaction facilitated by the use of biometric recognition. Biometric recognition technology was historically relegated to security applications. IVS first recognized that biometric facial recognition could facilitate and enhance user interaction, entertainment and enjoyment of games, toys, and entertainment devices. Thus, IVS designed an efficient, near real-time system employing biometric facial recognition to facilitate end-user interaction, entertainment, and enjoyment. IVS's biometric recognition technology and invention covers entertainment apparatus, including specifically video games, video game consoles and systems, video game peripherals, and online and network based entertainment associated with video game systems, all of which employ biometric facial and/or expression recognition to facilitate interaction, entertainment and enjoyment.

10. To protect their inventions, IVS and its inventors filed numerous patent applications that cover biometric recognition technology, including specifically the application of that technology to video game systems, video games, and related entertainment apparatus. On June 13, 2006, the United States Patent and Trademark Office issued United States Patent No. 7,062,073 (the '073 patent). The '073 patent was

duly and legally issued to IVS as the legal assignee of the IVS inventors, David Tumey and Tianning (“Tony”) Xu. The title of the ’073 patent is “Animated Toy Utilizing Artificial Intelligence and Facial Image Recognition.” A true and correct copy of the ’073 Patent is attached as Exhibit A.

11. Prior to IVS’s invention, biometric facial recognition and expression recognition was relegated to use in security settings, which tolerate time-delayed identification results. Additionally, at that time, no one had conceived of using biometric facial recognition and expression recognition to facilitate end-user interaction, entertainment and enjoyment on adapted entertainment apparatus.

12. Recognizing these shortcomings, the IVS ’073 patent describes and claims an entertainment apparatus, including a video game and its associated subsystems, utilizing biometric recognition and expression recognition based on facial features in order to facilitate end-user interaction, entertainment, and enjoyment. Particularly, the ’073 patent describes and discloses, as a preferred embodiment, an entertainment apparatus, operable to perform biometric facial recognition, comprising an acquisition device (including a camera), a processor, memory, and an interactive entertainment device providing interaction, wherein said entertainment device is a computer or computer-like-system executing biometric face recognition and expression recognition algorithms such that the identification and expression result facilitates interaction, entertainment, and enjoyment during operation, particularly during play of video games or similar entertainment.

**B. Microsoft's Infringing Products and Services**

13. After IVS and its inventors Tumey and Xu invented and disclosed its claimed technology and video game system in the '073 patent, biometric facial recognition and facial expression recognition became the driving force behind a new era of identity-based interaction and entertainment in the video game arena. On November 15, 2001, Microsoft released its first Xbox game console for sale in the United States. The Xbox game console is an entertainment apparatus comprised of a processor, memory, and entertainment element, comprised of the game console platform itself used alone or in conjunction with video games. Subsequently, on or around November 15, 2002, Microsoft released its Xbox LIVE service, allowing players of Xbox games to play together over broadband connections to the Internet, to download entertainment content, including video games, and to play video games remotely.

14. On or around November 22, 2005, Microsoft released its next-generation Xbox 360 game console in the United States, a system which is also specially designed to be capable of using Microsoft's Xbox LIVE service. The Xbox 360 game console, like the original Xbox, is an entertainment apparatus comprised of a processor, memory, and entertainment element, either stand-alone or in conjunction with video games and/or Xbox LIVE. Between the November 22, 2005, Xbox 360 game console release and the November 4, 2010, debut of the Kinect Sensor and associated components (5 years), Microsoft sold 21,705,028 Xbox 360 game console units in the United States alone, for an average of 361,750 units sold per month. During this same five-year timeframe, world-wide Xbox LIVE membership rose from 2 million to 25 million, for an average of 366,666 newly added memberships per month.

15. On or about November 4, 2010, Microsoft introduced Kinect for the Xbox360 (“Kinect”), a sensor including a camera that is specifically designed to perform facial recognition and expression recognition to facilitate end-user interaction, entertainment and enjoyment when used in conjunction with the Xbox 360 game console. Kinect is sold for use with existing and new Xbox 360 video game consoles, XboxLIVE, and video games specifically designed to make use of Kinect (“Kinect Games”). Each Kinect sold is for use with a new or existing Xbox 360 game console, that when combined with the gaming console forms a Kinect Gaming System entertainment apparatus and that when used alone or in conjunction with Xbox LIVE or video games, facilitates end-user interaction, entertainment, and enjoyment through biometric facial and expression recognition. When a Kinect is connected to an Xbox 360 game console, the software of the console is updated by a download from Microsoft, the download making a new infringing device fully capable of practicing the patent.

16. Within 60 days of the Kinect’s introduction to the market, Microsoft sold 8 million Kinects. This unheralded 60-day sales rate of this new biometric facial recognition and expression recognition device allowed Microsoft’s Kinect to claim the Guinness World Record of being the "fastest selling consumer electronics device." In the immediate months following the Kinect debut, Kinect Bundles(pre-packaged combinations of a new Xbox360 gaming console, a Kinect, and several Kinect Games) accounted for more than two-thirds of all new Xbox 360 game console sales. Since the debut of Kinect, during a 23-month span as of September 13, 2012, a total of 24.27 million Xbox 360 game consoles have been sold worldwide, with approximately 13.35 million units of those sales occurring in North America. The average North American

sales rate for the Xbox 360 game console from the date of introduction of Kinect through September 13, 2012, is 580,000 units per month, which represents a rate increase in the rate of sales of Xbox 360 game consoles, associated with the debut of the Kinect, of 61% over pre-Kinect Xbox 360 sales. During this same 23-month timeframe, worldwide Xbox LIVE membership rose from 25 million to at least 45 million, for an average of 869,565 newly added memberships per month, which represents a rate increase in the rate of new Xbox LIVE memberships, associated with the debut of the Kinect, of 137% over pre-Kinect Xbox LIVE memberships. As of today, users spend an estimated 2.1 billion entertainment hours per month using Xbox LIVE. Since the Kinect debut, 20 million Kinect units have sold worldwide, with approximately 11 million Kinect units sold in the United States. The average North American sales rate for Kinect from its date of introduction through September 13, 2012 is 478,260 units per month. The ratio of Kinect to new Xbox 360 sales during this span averaged nearly 1:1.

17. In addition to income from the sales of Kinect, Kinect Game Systems, Xbox LIVE content and memberships, and sales of infringing third-party Kinect games through Microsoft stores, Microsoft derives additional revenue from its wholly owned subsidiary, Microsoft Game Studios. Microsoft Game Studios produces video games that use biometric-based facial and expression recognition to facilitate entertainment, interaction, and enjoyment as provided by the Kinect Gaming System and the IVS patent. These Kinect Games may be used alone with the Kinect Gaming System or in conjunction with Xbox LIVE, which likewise uses biometric-based facial and expression recognition to facilitate entertainment, interaction, and enjoyment as provided by the IVS patent.

18. On November 4, 2010, Microsoft, through Microsoft Game Studios, released Kinect Adventures, a Kinect Game specifically adapted to use, in combination with the Kinect Gaming System and optionally the Xbox LIVE service, biometric recognition and expression recognition based on facial features in order to facilitate end-user interaction, entertainment, and enjoyment during game-play. Since the date of Microsoft's release of Kinect Adventures, at least 16.88 million copies of the game have been sold worldwide, with at least 10.23 million copies sold in the United States. At least Kinect Adventures, along with Microsoft Kinect Games such as Kinect Rush, Kinect: Disneyland Adventures, Hole in the Wall, and Dance Central 2, used alone or in conjunction with Xbox LIVE, infringe the IVS patent because each is specifically adapted to use, in combination with the Kinect Gaming System and optionally the Xbox LIVE service, biometric recognition and expression recognition based on facial features in order to facilitate end-user interaction, entertainment, and enjoyment during game-play.

19. On June 6, 2011, Microsoft, through Microsoft Game Studios and its subsidiary Kinect Labs, released Kinect Me, a Kinect Game made operable by Xbox LIVE, specifically adapted to use, in combination with the Kinect Gaming System, biometric recognition and expression recognition based on facial features in order to facilitate end-user interaction, entertainment, and enjoyment during game-play. At least Kinect Me, along with Microsoft Kinect Labs Kinect Games such as Avatar Kinect, likewise made operable by Xbox LIVE, infringe the IVS patent because each is specifically adapted to use, in combination with the Kinect Gaming System and the Xbox LIVE service,



biometric recognition and expression recognition based on facial features in order to facilitate end-user interaction, entertainment, and enjoyment during game-play.

20. Microsoft also receives revenue from third-party game producers (directly or from sales through Microsoft stores) in exchange for allowing the third-party game producers to develop and sell Kinect Games for use with Kinect Game System and/or Xbox LIVE and to utilize the Kinect Gaming System software. Additionally, Microsoft retains direction and control over third-party game publishers and developers, such as Majesco and others through an agency, joint enterprise and/or contractual and actual relationship with regards to the manufacture, development, publishing, and distribution of Kinect games. This agency relationship is evidenced by Microsoft's requirement that publishers and developers submit to Microsoft's review, testing, approval, and certification with regards to all phases of game production, from concept to distribution of final product. This on-going relationship between Microsoft and Majesco reflects the community of interest and sharing of these parties in the development, manufacture, and profit as well as certain expenses from the sale of Kinect games. Microsoft and Majesco each have a voice and right in the control and management of their enterprise. For example, mutual approval is required and exercised by Microsoft and Majesco as to the manufacture and distribution of the Kinect Games, including selection of the replicator and the sharing of packaging costs. Indeed, the contractual relationship requires that Majesco and Microsoft each notify the other in writing promptly of notice of a claim which may be made, including third-party claims, such as those that arise from a warning letter.

21. Video game play, interactive entertainment, and interaction/entertainment on the Xbox 360 console and/or Xbox LIVE, when facilitated by the biometric facial and expression recognition technology implemented by the Kinect Gaming System, infringes the IVS '073 patent. As a result of Microsoft's unauthorized and infringing use of IVS's patented technology, IVS has suffered damages in at least the tens of millions of dollars.

22. Microsoft has had knowledge of the '073 Patent since at least the date of a letter it received, prepared and sent by counsel for IVS on June 30, 2011. Microsoft did not respond to the June 30, 2011, letter, and has continued acts of infringement which have been ongoing to this day. A second letter was sent to Microsoft, dated August 10, 2011, to which Microsoft also failed to respond, choosing instead to continue infringement despite notice of the patent, its scope, and claims. Further, Microsoft has had actual knowledge at least since the filing of the Complaint in this action.

**C. Majesco's Infringing Products and Services**

23. On February 13, 2012, Majesco released Zumba Fitness Rush, a Kinect Game specifically adapted to use, in combination with the Kinect Gaming System and optionally the Xbox LIVE service, biometric recognition and expression recognition based on facial features in order to facilitate end-user interaction, entertainment, and enjoyment during game-play.

24. Since the date of Majesco's release of Zumba Fitness Rush, at least 80,000 copies of the game have been sold worldwide, with at least 4,000 copies sold in the United States.

25. Majesco receives revenue and derives profits from the sales of infringing Kinect Games, including at least Zumba Fitness Rush.

26. Majesco, through at least its Kinect Game, Zumba Fitness Rush, infringes the IVS '073 patent. As a result of Majesco's unauthorized and infringing use of IVS's patented technology, IVS has suffered monetary damages.

27. Majesco manufactures, develops, distributes, and publishes biometric facial and expression recognition-based Kinect Games adapted for the Kinect Gaming System under the direction and control of Microsoft through an agency, joint enterprise and/or contractual relationship. This on-going relationship between Microsoft and Majesco reflects the community of interest and sharing of these parties in the development, manufacture, and profit as well as certain expenses from the sale of Kinect games. Microsoft and Majesco each have a voice and right in the control and management of their enterprise. For example, mutual approval is required and exercised by Microsoft and Majesco as to the manufacture and distribution of the Kinect Games, including selection of the replicator and the sharing of packaging costs. Indeed, the contractual relationship requires that Majesco and Microsoft each notify the other in writing promptly of notice of a claim which may be made, including third-party claims such as those that arise from a warning letter. Therefore, it is inferred that Majesco had knowledge of the '073 Patent and the scope of its claims as of the dates of the two warning letters sent Microsoft, or at least shortly thereafter.

28. Majesco has had actual knowledge at least since the filing of the Complaint in this action.

#### **IV. CAUSES OF ACTION**

##### **A. Patent Infringement**

29. IVS realleges and reincorporates the allegations set forth in Paragraphs 1-28.

30. Microsoft, through its Kinect Gaming System, Xbox LIVE service, and Microsoft Games Studio games, has, without authority, consent, right, or license, and in direct infringement of the IVS patent, made, used, offered for sale, and/or imported/exported the patented invention disclosed and claimed by at least claims 1, 2, 7, 8, 9, 10, 11, 12, 13, 14, and 15 of the IVS '073 patent in and from this country. This conduct constitutes direct infringement under 35 U.S.C. § 271(a) and/or (f).

31. Microsoft is liable for direct infringement committed by third-party game developers, such as Majesco, with respect to the '073 patent with such liability being attributable to Microsoft under joint infringement, agency and/or as a joint enterprise because Microsoft retains direction and control over these third-party games including Kinect Games through provision of the Kinect, the Xbox 360, Xbox LIVE, and through contracts with such third-party game developers of Kinect Games.

32. The end-user of a Kinect Gaming System, when operating the Kinect Gaming System alone, or in conjunction with games including Kinect Games and/or Xbox LIVE, uses the patented invention disclosed and claimed by at least claims 1, 2, 7, 8, 9, 10, 11, 12, 13, 14, and 15 of the IVS '073 patent. This use constitutes direct infringement under 35 U.S.C. § 271(a).

33. Microsoft is liable for direct infringement in that Microsoft supplies Kinect and games including Kinect Games, as well as software updates as downloads knowing that such elements will necessarily be used by the end-user in a Kinect Gaming System. Microsoft, through its sales, manufacturer, and marketing makes each end-user its agent in completing the manufacturer of an infringing system and is thereby liable as a direct infringer for this reason.

34. Microsoft's infringement has occurred despite actual pre-filing notice and knowledge of the '073 patent's existence, scope, and specific coverage relative to the Kinect Gaming System, Xbox LIVE service, Microsoft Games Studio games, and third party Kinect Games.

35. Microsoft was notified of the existence, scope and specific coverage of the '073 patent by letter transmitted on June 30, 2011, prepared by counsel for IVS. In this letter, to which a copy of the '073 patent was attached, Microsoft was informed that the '073 patent covered the use of biometrics to provide entertaining interaction with entertainment systems and video games. Specifically, the June 30, 2011 letter to Microsoft described the IVS '073 patent as covering "devices and systems that involve facial image/expression recognition and interaction between one or more individuals and machine-based media, including, specifically, video games, and other interactive entertainment systems." Microsoft did not respond to the June 30, 2011, letter, choosing instead to continue manufacture and sale of its infringing products.

36. A second letter was sent to Microsoft, dated August 10, 2011, referencing the June 30, 2011 letter. Microsoft again failed to respond, choosing instead to continue infringement despite notice of the patent, its scope, and claims. This infringement has been ongoing and continues to this day, despite the objectively high likelihood that its actions constitute infringement of the '073 patent.

37. Microsoft is a sophisticated company that likely has reviewed the '073 Patent and should have reviewed the '073 patent by at least the date of receipt of actual notice from IVS's letter of June 30, 2011 in connection with its own patent filings, as well as with other litigation involving its products, including Xbox 360, Xbox Live, and Kinect,

and Kinect Games (such litigation including but not limited to *Impulse Technology Ltd. v. Microsoft et al.*, C.A. No. 11-586-RGA-CJB, (Del. pending); *Virtual Solutions, LLC v. Microsoft Corp.*, (S.D.N.Y. pending); *Walker Digital, LLC v. Microsoft et al.*, (Del. pending)). Failure to review the '073 patent in connection with actual notice from IVS, Microsoft's own patents, and closely related cases constitutes willful ignorance of the '073 patent.

38. Microsoft is liable for inducing infringement as it has actively induced end-user customers as well as third-party game developers of Kinect Games to use its products, including at least the Kinect, Xbox 360, Xbox LIVE, and/or Kinect Games including Kinect Adventures, Kinect Rush, Kinect: Disneyland Adventures, Hole in the Wall, and Dance Central 2, intending that end-users and game developers will use said products in a manner that infringes at least one or more claims of the '073 patent. Despite pre-filing knowledge of the '073 patent, Microsoft instructs and directs the use of the Kinect Gaming System, Xbox Live, and the use and development of Kinect Games, including Kinect Adventures, Kinect Rush, Kinect:Disneyland Adventures, Hole in the Wall, and Dance Central 2, in a manner that directly infringes at least one or more claims of the '073 patent, with specific knowledge that such instruction and direction induces use of biometric identification to enhance or enable game play. This instruction and direction, specifically tailored to induce said infringement, occurs through online and hardcopy resources and literature, as well as game developer conferences and presentations. For example, the packaging for Dance Central, Disneyland Adventure, Kinect Rush, Hole in the Wall, and Kinect Adventures, contains a bold notice to consumers of "REQUIRES Kinect Sensor."

39. Microsoft is liable for inducing infringement as it has, despite pre-filing knowledge of the '073 patent, actively induced game developers to make use of the facial and expression recognition results produced by the Kinect Gaming System in Kinect Games through intentional and specific technical requirements, tailored to induce infringement of the '073 patent. Such requirements include that each and every Kinect Game, whether a Microsoft or third party developer product, must include software libraries to enable acquisition and use of biometric facial recognition and expression recognition data by the Kinect Game as supplied from the Kinect Gaming System.

40. Microsoft is liable for inducing infringement as it has, despite pre-filing knowledge of the '073 patent, packaged and required third party game developers to package Kinect Games with the included advisement to that at least a substantial number of Kinect Games are "Kinect Required," thereby actively and knowingly inducing users to purchase and use Kinect Gaming Systems to play Kinect Games in a manner that infringes one or more claims of the '073 patent.

41. Microsoft is liable for inducing infringement as it has, despite pre-filing knowledge of the '073 patent, offered and sold infringing articles and sub-combinations of infringing articles in Microsoft retail stores within this judicial district in a manner which intentionally induces retail customers and users to infringe one or more claims of the IVS '073 patent. Microsoft makes such offers through the internet, at its retail outlets, through advertising and in its packaging with the object of promoting such articles and sub-combinations to infringe the '073 patent and with the specific intent that its customers use such articles and sub-combinations sold to infringe the '073 patent.

42. Microsoft is liable for contributory infringement as it has knowledge that its products, including at least the Kinect, Xbox 360, Xbox LIVE, and/or Kinect Games including Kinect Adventures, Kinect Rush, Kinect: Disneyland Adventures, Hole in the Wall, and Dance Central 2, are components especially made or adapted for use in infringement of one or more claims of the '073 patent. Microsoft's products are material components of a combination, where the combination is the Kinect Gaming System alone or in conjunction with Xbox Live and/or Kinect Games, and where the combination is used to practice one or more claims of the '073 patent. Microsoft's products are specifically made for use with the Kinect Gaming System and are not a staple article of commerce suitable for substantial non-infringing use.

43. When a Kinect is first connected to an Xbox 360 (with an internet connection) to form a Kinect Gaming System, Microsoft causes the Kinect Gaming System to access or download or otherwise activate previously inactive or un-used software features made or distributed by Microsoft or its agents that are compiled to form components of a Kinect Gaming System and/or Kinect Game, which components are not staple articles of commerce and have no substantial use other than to utilize biometric recognition information for the specific adapted purpose of facilitating use of the Kinect Gaming System as an entertainment device, thereby infringing one or more claims of the IVS '073 patent. From that point forward the Xbox 360 no longer operates the same as it did previously (whether purchased in 2005 or otherwise) and can then only operate by infringing the '073 patent, thus rendering the Xbox 360 capable of use for the infringement of the '073 patent, and for no other purpose and including elements that are solely used for this purpose.



44. Microsoft is also liable for contributory infringement as it has knowledge that a Kinect Gaming System is specially adapted to use Facial Recognition as part of the navigation and manipulation of access screens and menus. Microsoft requires Kinect Games to be configured to manipulate and navigate menus in a Kinect Gaming System. Microsoft requires all Kinect Games to include software that is specially configured or adapted to interface with the Kinect Game System to utilize biometric recognition to enhance game play by allowing manipulation and navigation of Gaming System Menus, where that software and hardware constitutes a specially adapted material part of the invention recited in the claims of the '073 patent that is not a staple article of commerce, and which has no use other use than for infringing video game play.

45. Microsoft is also liable for contributory infringement as it has required all games sold, distributed, or authorized for sale or distribution and useable on a Kinect Gaming System after the introduction of Kinect from any publisher (including Microsoft) to include software libraries which Microsoft knows have specially adapted functions or components used solely and specifically to enable and create a system capable of acquisition and use of biometric recognition data by the game from the Kinect Gaming System, where said components are a material part of the infringing combination and have no other use than to practice one or more claims of the '073 patent.

46. Majesco has had knowledge of the '073 patent since at least the September 20, 2012 date of the filing of the action. Since the filing of this action, Majesco continues to make and sell Kinect Games and perform acts that constitute induced and contributory infringement.

47. Majesco has knowledge, both imputed and implied in law from its contractual and actual relationship with Microsoft as set forth hereinabove, since at least receipt by Microsoft of the June 30, 2011 letter from IVS. Majesco has entered into an Xbox 360 Publisher License Agreement with Microsoft. In this Agreement, the Publisher (Majesco) agrees that all publisher content...will not infringe...any third party...patents.” The publisher further agrees to indemnify Microsoft. The party being indemnified (Microsoft) was obligated to provide the indemnifying party (Majesco) “reasonably prompt notice in writing of any claim for which indemnity may be sought and thus Microsoft was obligated to notify Majesco of the June 30, 2011 letter to Microsoft from IVS. Therefore, it is inferred that Majesco received the notice from Microsoft shortly after Microsoft’s receipt of the June 30, 2012 letter.

48. Majesco, by making and selling games including Kinect Games such as its Kinect Game Zumba Fitness Rush, has, without authority, consent, right, or license, and in direct infringement of the IVS Patent, made, used, offered for sale, and/or imported/exported the patented invention disclosed and claimed by at least claims 1, 2, 7, 8, 9, 10, 11, 12, 13, 14, and 15 of the IVS ’073 patent in and from this country. This conduct constitutes direct infringement under 35 U.S.C. § 271(a) and/or (f).

49. Since the receipt by Microsoft of the June 30, 2011 letter from IVS, as well as, the August 10, 2011 letter from IVS, and from the filing of this action, Majesco continues to make and sell Kinect Games and perform acts that constitute induced and contributory infringement.

50. Majesco, by making and selling Kinect Games including at least Zumba Fitness Rush, has knowingly induced infringement of the IVS ’073 patent by providing software

and online and hardcopy resources and literature including packaging specifically promoting and intended to be instructive to end-users in using its products in a manner that directly infringes the aforesaid claims of the IVS patent. Specifically, the materials provided by Majesco and which advertise, market or explain Majesco Kinect Games teach and instruct customers in the use of such Majesco Kinect Games with a Kinect Gaming System in a manner that is a direct infringement of the claims of the IVE '073 patent and thus constitute induced infringement under 35 U.S.C. § 271(b).

51. Majesco produces Kinect Games, such as Zumba Fitness Rush, which must be played on an infringing Kinect Gaming System. Such Majesco produced Kinect Games make use of the biometric identification capabilities of the Kinect Gaming System to facilitate game play. Such Majesco produced Kinect Games require that users download software updates to their Kinect Gaming System that enable the use of biometric identification capabilities in the Kinect Gaming System in order to enable game play of the Majesco Kinect Games. This conduct constitutes induced infringement under 35 U.S.C. § 271(b).

52. Majesco has packaged and sold the Majesco Kinect Games with a bold packaging notice to advise users that at least a substantial number of Kinect Games are “Kinect Required”, thereby inducing users to purchase Kinect Gaming Systems to play Kinect Games with knowledge of the IVS '073 patent. This conduct constitutes induced infringement under 35 U.S.C. § 271(b).

53. Majesco is also liable for contributory infringement as it has knowledge that all games sold, distributed, or authorized for sale or distribution after the introduction of Kinect and usable on a Kinect Gaming System include software libraries required by

Microsoft, which libraries have specially adapted functions or components used solely and specifically to enable and create a system capable of acquisition and use of biometric recognition data by the game from the Kinect Gaming System as known by Majesco. Such components are a material part of the infringing combination and have no other use than to practice one or more claims of the '073 patent.

54. Majesco, through the Kinect Games it makes and sells including at least its Kinect Game Zumba Fitness Rush, has knowingly provided software and hardware designed for use in practicing the claims of the IVS '073 patent, where that software and hardware constitutes a material part of the invention that is not a staple article of commerce, and which has no use other use than for infringing video game play. These Kinect Games have no other use or purpose than to be played on a Kinect Gaming System and perform biometric recognition functions that enhance game play when used on a Kinect Gaming System. The Majesco Kinect Games include software libraries that have the singular purpose of allowing the acquisition and use of biometric recognition data by the Kinect Gaming System to enhance user interaction and game play. The Majesco Kinect Game components that incorporate and utilize these libraries have no substantial use other than in infringement of the '073 patent. Majesco has therefore committed these acts with knowledge that the software and hardware it provides is specially made for use in a manner that directly infringes the IVS '073 patent. This conduct constitutes contributory infringement under 35 U.S.C. § 271(c).

55. Microsoft's infringement of the '073 patent has been, and continues to be, willful, deliberate and intentional by continuing acts of infringement despite being placed on pre-filing notice of the '073 patent, possessing a pre-filing copy of the patent,

being instructed as to what the '073 patent covers, discloses and claims, having likely further reviewed the patent in relation to its own patents or related litigation. This infringement has been ongoing and continuous to this day, despite the objectively high likelihood that its actions constitute infringement of the '073 patent and subjective knowledge or obviousness of such risk. This willful conduct will likely continue unless enjoined by this Court. This willful conduct by Microsoft makes this an exceptional case as to Microsoft as provided in 35 U.S.C § 285.

56. Majesco's infringement of the '073 patent has been, and continues to be, willful, deliberate and intentional by continuing acts of infringement. Majesco has had knowledge, both imputed and implied in law due to its contractual relationship with Microsoft as described above. Majesco therefore has received prefiling notice and despite this notice of the '073 patent, continues to infringe the '073 patent. This infringement has been ongoing and continuous since such notice and continues to this day, despite the objectively high likelihood that its actions constitute infringement of the '073 patent. This willful conduct will likely continue unless enjoined by this Court. This willful conduct by Majesco makes this an exceptional case as to Majesco as provided in 35 U.S.C § 285.

57. As a result of Microsoft and Majesco's infringement, IVS has been damaged, and will continue to be damaged, until Microsoft and Majesco are enjoined from further acts of infringement.

58. IVS faces real, substantial and irreparable damage and injury of a continuing nature from Microsoft and Majesco's infringement for which IVS has no adequate remedy at law.

**B. Statutory and Common Law Conspiracy**

59. IVS incorporates by reference the allegations numbered one (1) through nineteen (19), twenty-one (21) through twenty-six (26), twenty-eight (28), through thirty (30), thirty-two (32), and thirty-four (34) through fifty-eight (58) hereinabove as if fully set forth.

60. Pleading in the alternative, by the actions set forth above, Microsoft, Majesco, and/or the end-user have mutually undertaken, combined, associated, agreed and/or acted in concert with the purpose of willfully and maliciously injuring IVS in its trade, reputation and business in violation of Virginia Code Section 18.2 – 499. Alternatively, each of the foregoing attempted to procure the participation, cooperation, agreement or other assistance of the other or others to enter into a mutual undertaking, combination, association, agreement and/or concert of action. The preconceived plan of Microsoft and Majesco was and is to create Kinect games and each of their roles is reflected in one or more contracts and actions taken by each in which Majesco develops, manufactures and distributes games in compliance with certain requirements and certifications by Microsoft for software created by Majesco. By way of further example, Microsoft and Majesco have jointly agreed as to certain manufacturing, distribution and packaging of the Kinect games to further their purpose in producing and selling Kinect games with a profit for each.

61. The actions referenced above reflect that Microsoft and Majesco (as well as many other game makers) combined and agreed to develop, manufacture, publish, distribute, and sell games requiring Kinect (as earlier defined) for the ultimate purpose of using Kinect (facilitated by the biometric facial and expression recognition

technology) to equal or exceed competitor features and/or functionality to generate profits for each by infringing the patent of IVS, and in turn injure IVS' reputation and trade.

62. In their actions set forth above, Microsoft, Majesco, and/or the end-user acted intentionally, purposefully, and without lawful justification and engaged in acts which may have appeared lawful, but were unlawful or brought about by unlawful means, such as, by way of example, forming an agreement through a preconceived plan to produce and sell Kinect games, that unlawfully infringes the IVS patent.

63. As a direct and proximate result of the above-referenced statutory conspiracy, IVS has suffered and continues to suffer damage, including but not limited to loss of licensing and other income, damage to business reputation, and other damages, such as lost goodwill.

64. Pursuant to Virginia Code Section 18.2-500, IVS is entitled to, *inter alia*, three-fold the damages it has sustained and an award of attorney's fees, costs and prejudgment interest.

65. By their actions set forth above Microsoft, Majesco, and/or the end-user have mutually undertaken, combined, associated, agreed and/or acted in concert without lawful justification and engaged in acts which may have appeared lawful, but were unlawful or brought about by unlawful means in violation of Virginia common law. Alternatively, each of the foregoing attempted to procure the participation, cooperation, agreement or other assistance of the other or others to enter into a mutual undertaking, combination, association, agreement and/or concert of action.

66. As a direct and proximate result of the above-referenced common law conspiracy, IVS has suffered and continues to suffer damage.

67. Pursuant to the common law IVS is entitled to, *inter alia*, the damages it has sustained an award of attorney's fees, costs and prejudgment interest.

**C. Jury Demand**

IVS demands a trial by jury on all issues.

WHEREFORE, IVS prays:

(a) That this Court find Microsoft and Majesco have committed acts of patent infringement under the Patent Act, 35 U.S.C § 271;

(b) That this Court enter judgment that:

(i) IVS is the owner of the '073 Patent and all rights of recovery under the '073 Patent;

(ii) the IVS '073 Patent is valid and enforceable; and

(iii) Microsoft and Majesco have infringed the IVS '073 Patent.

(c) That this Court issue an injunction enjoining the defendant(s), their officers, agents, servants, employees and attorneys, and any other person in active concert or participation with them, from continuing the acts herein complained of, and more particularly, that the defendant(s) and such other persons be permanently enjoined and restrained from further infringing the IVS '073 Patent;

(d) That this Court require defendants Microsoft and Majesco to file with this Court, within thirty(30) days after entry of final judgment, a written statement under oath setting forth in detail the manner in which Microsoft and Majesco have complied with the injunction;



(e) That this Court award IVS the damages to which it is entitled due to Microsoft's and Majesco's patent infringement with both pre-judgment and post-judgment interest;

(f) That Microsoft's and Majesco's infringement of IVS '073 Patent be adjudged willful and that the damages to IVS from Microsoft be increased by three times the amount found or assessed pursuant to 35 U.S.C. § 284;

(g) That this be adjudged an exceptional case and that IVS be awarded its attorney's fees in this action pursuant to 35 U.S.C. § 285 at least as to Microsoft;

(h) That this Court award IVS its costs and disbursements in this civil action, including reasonable attorney's fees at least as to Microsoft; and

(i) That this Court grant IVS such other and further relief, in law or in equity, both general and special, to which it may be entitled.

Dated: February 21, 2013

Respectfully submitted,

/s/ Michael K. Mutter

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Eastern District of Virginia: admitted

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the above document has been served on February 21, 2013, via the Court's ECF system to the counsel listed below:

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