EXHIBIT "1"

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The Honorable Rodney Gilstrap
United States District Judge
Sam B. Hall, Jr. Federal Building and United States Courthouse
100 East Houston Street
Marshall, Texas 75670

Re: *Wildcat Intellectual Property Holdings, LLC v. 4Kids Entertainment, Inc. et al.*, Civil Action No. 2:11-cv-00305

Dear Judge Gilstrap:

Defendants Electronic Arts Inc., Konami Digital Entertainment, Inc., Panini America, Inc., Pokémon USA, Inc., Sony Computer Entertainment America LLC, Sony Online Entertainment LLC, The Topps Company, Inc., and Wizards of the Coast LLC request leave to file a motion for summary judgment of invalidity of the asserted claims of U.S. Patent No. 6,200,216 (the "'216 patent") under 35 U.S.C. § 101.[1] The asserted claims of the '216 patent cover merely an abstract idea and thus fail to claim patent-eligible subject matter under § 101.[2]

This case is set for a claim construction hearing on December 20, 2012. Fact discovery closes on February 25, 2013, and jury selection is set for July 1, 2013. Defendants submit that claim construction is not necessary to resolve this invalidity issue, or, in the alternative, that no construction of the claims renders them eligible for patent protection.[3] Accordingly, this invalidity issue is ripe for review, and if the Court grants the motion, it will resolve the entire case as to all Defendants.

[1] Wildcat has asserted two independent claims against all defendants – claims 1 and 21. Additionally, Wildcat has asserted dependent claims 9, 10, 29, 30, and/or 36 against some defendants.

[2] This letter brief focuses on the invalidity of the asserted independent claims under § 101. There are no additional limitations in the asserted dependent claims to make these claims patent-eligible.

[3] The Federal Circuit recently instructed that claim construction is not a prerequisite to an invalidity finding under § 101. *See Bancorp Servs., L.L.C. v. Sun Life Assurance Co. of Canada*, 687 F.3d 1266, 1273(Fed. Cir. 2012) ("Although *Ultramercial* has since been vacated by the Supreme Court, we perceive no flaw in the notion that claim construction is not an inviolable prerequisite to a validity determination under § 101.").

I. Abstract Ideas Are Not Patentable.

Determining the validity of a claim under 35 U.S.C. § 101 is a question of law. *See Dealertrack, Inc. v. Huber,* 674 F.3d 1315, 1333 (Fed. Cir. 2012). As the Supreme Court recognized in *Bilski v. Kappos*, "abstract ideas" are excepted from § 101's broad patent-eligibility principles. *See Bilski v. Kappos*, 130 S.Ct. 3218, 3225 (2010) ("*Bilski II*").

The Federal Circuit examines patent-eligibility on a claim-by-claim basis. *See Fuzzysharp Techs. Inc. v. 3DLabs Inc., Ltd.*, 447 F.App'x. 182, 185 (Fed. Cir. 2011) ("In addressing questions of patentable subject matter, however, we assess each claim independently."). In this case, the asserted claims (1, 9, 10, 21, 29, 30 and 36) attempt to secure broad patent protection for the abstract idea of a digitized electronic trading card. In *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 566 U.S. ___, 132 S. Ct. 1289 (2012), the Supreme Court instructed that a patent may not claim abstract ideas and apply them in some conventional fashion; instead, the invention must add some innovative concept to "transform[] the process into an inventive application of the formula[, idea, or law of nature]." *Id.* at 1292; *see also id.* at 1300 ("Other cases offer further support for the view that simply appending conventional steps, specified at a high level of generality, to laws of nature, natural phenomena, and abstract ideas cannot make those laws, phenomena, and ideas patentable."). Additionally, the Supreme Court has instructed that, although it is not the exclusive test, the machine-or-transformation test remains "a useful and important clue, an investigative tool, for determining whether some claimed inventions are processes under § 101." *Bilski II,* 130 S. Ct. at 3227.

When looking at claims that implement an abstract concept using a computer, the Federal Circuit has instructed that simply adding a computer limitation to an otherwise abstract idea is not sufficient to satisfy either the machine-or-transformation test or the patent-eligibility analysis generally. *See Bancorp*, 687 F.3d at 1278 ("[T]he use of a computer in an otherwise patent-ineligible process for no more than its most basic function – making calculations or computations – fails to circumvent the prohibition against patenting abstract ideas and mental processes."); *see also Dealertrack*, 674 F.3d at 1333 ("Simply adding a 'computer aided' limitation to a claim covering an abstract concept, without more, is insufficient to render the claim patent eligible.").[4] "In order for the addition of a machine to impose a meaningful limit on the scope of a claim, it must play a significant part in permitting the claimed method to be performed, rather than

[4] The Federal Circuit recently suggested a somewhat broader inquiry in *CLS Bank Int'l v. Alice Corp Pty. Ltd.*. but has since vacated that result and ordered an en banc rehearing. 685 F.3d 1341, 1353 (Fed. Cir. 2012), vacated by *CLS Bank Intern v. Alice Corp. Pty. Ltd.*, ___ Fed. Appx. ___, 2012 WL 4784336 (Fed. Cir Oct. 9, 2012). Even under *CLS Bank*, the present claims would not claim patent-eligible subject matter.

function solely as an obvious mechanism for permitting a solution to be achieved more quickly, i.e., through the utilization of a computer for performing calculations." *SiRF Tech., Inc. v. Int'l Trade Comm'n*, 601 F.3d 1319, 1333 (Fed. Cir. 2010).

II. The Asserted Claims Are Directed to "Implementing a Trading Card Metaphor" – An Abstract Idea.

The asserted claims of the '216 patent are all directed to an abstract idea – a "trading card metaphor." This claimed "metaphor" simply computerizes trading cards. Claim 21 is exemplary of the asserted claims of the '216 patent:

> 21. A method for the implementing a trading card metaphor, comprising the steps of:
>
> [ ] dissociating a computer program, consisting of a plurality of electronic trading cards (ETCs), each ETC corresponding to a disassociated computer code segment and having an electronic format that supports card scarcity and card authenticity.

The asserted claims do not recite anything else: no specific trading card concept and no trading card games. The inventor of the '216 patent takes advantage of the traditional paper trading cards that "have been popular for over 100 years" and computerizes them. *See* '216 patent, 1:11 (the '216 patent specification recognizes that "paper trading cards have been popular for over 100 years."); *see also CyberSource Corp. v. Retail Decisions, Inc.*, 654 F.3d 1366, 1376-77 (Fed. Cir. 2011) (finding claims using the Internet to detect fraud invalid under Section 101); *Bancorp,* 687 F.3d at 1278-79 (finding computerized method for managing and valuing a life insurance policy invalid under Section 101); *Vacation Exchange, LLC v. Wyndham Exchange & Rentals Inc., et al.,* No. 2:12-cv-04229, Dkt. No. 27 at 3 (C.D. Cal. Sept. 18, 2012), *appeal docketed,* No. 13-1012 (Fed. Cir. Oct. 12, 2012) (finding a computerized method of exchanging timeshares invalid under Section 101).

In claiming a computerized "trading card metaphor," claim 21 does nothing more than claim general purpose computer code having general purpose computer code segments. The "computer program" and "computer code segment" limitations are merely "computer aided" limitations that fail to confer patentability. The computer code and computer code segments implement "electronic trading cards (ETCs)." But the claims contain no other information about these electronic trading cards: they do not set forth any steps for creating the ETCs, for implementing the ETCs in a trading card game, or for building the environment for the ETCs. More important, the addition of the "computer program" and "computer code segment"

limitations does not "impose [any] meaningful limit" that transforms the claim from something other than the abstract idea of implementing a "trading card metaphor." *See, e.g., SiRF*, 601 F.3d at 1333. In other words, the computer program and code segments do not "play a significant part in permitting the claimed method to be performed." *See, e.g., id.* Instead, the computer program and code segments do nothing more than "function solely as an obvious mechanism for permitting a solution to be achieved more quickly...." *See, e.g., id.*

The abstract nature of claim 21 is further confirmed by its failure to satisfy the machine-or-transformation test, which assesses the patentability of a claim by asking whether "(1) it is tied to a particular machine or apparatus, or (2) it transforms a particular article into a different state or thing." *See In re Bilski*, 545 F.3d 943, 954 (Fed. Cir. 2008). The computer program and code limitations of claim 21 do not tie the claim to any specific machine or apparatus. Thus, the claim fails the machine prong of the test. Furthermore, claim 21 does not involve any transformation, let alone the sort of physical transformation required to satisfy the transformation prong of the test. *See id.* at 963 ("Purported transformations or manipulations simply of public or private legal obligations or relationships, business risks, or other such abstractions cannot meet the test because they are not physical objects or substances, and they are not representative of physical objects or substances.").

Simply put, claim 21 does nothing more than store an abstract idea on a computer. Because claim 21 fails the machine-or-transformation test and the computer program and code segment limitations do not impose limits sufficient to convert the otherwise abstract idea of a "trading card metaphor" into something patentable, claim 21 is not eligible for patent protection.

III. For the Same Reasons Stated Above, the System of Claim 1 Fails to Claim Patentable Subject Matter.

As the Federal Circuit explained in *CyberSource*, the type of claim is not as important as "the underlying invention for patent-eligibility purposes." 654 F.3d at 1374. Thus, the Federal Circuit has held that "a machine, system, medium, or the like may in some cases be equivalent to an abstract mental process for purposes of patent ineligibility." *Bancorp*, 687 F.3d at 1277.

In this case, for purposes of a § 101 inquiry, claim 21 (method claim) and claim 1 (system claim) are equivalent. Claim 1 is directed to the same unpatentable abstract idea as claim 21.

Claim 21	Claim 1
21. A method for the implementing a trading card metaphor, comprising the	1. A system for the implementation of a

steps of: [] dissociating a computer program, consisting of a plurality of electronic trading cards (ETCs), each ETC corresponding to a disassociated computer code segment and having an electronic format that supports card scarcity and card authenticity.	trading card metaphor, comprising: a disassociated computer program, consisting of a plurality of electronic trading cards (ETCs), each ETC corresponding to a disassociated computer code segment embodied in a tangible medium and having an electronic format that supports card scarcity and card authenticity.

The only difference between these claims is dissociating the computer program in claim 21 and having a disassociated computer program with code segments embodied in a tangible medium in claim 1. Other than this distinction, the claims are identical. Therefore, claim 1 should be governed by the same inquiry as claim 21. Claim 1 is a system claim comprising only one thing: "a dissociated computer program." The existence of a computer program in separate computer code segments is merely a "computer aided" limitation that fails to afford patentability. Claim 1 should also be found to claim ineligible subject matter under 35 U.S.C. § 101.

IV. Conclusion

The asserted claims of the '216 patent are directed to an abstract idea and are, therefore, invalid for failing to claim patent-eligible subject matter under 35 U.S.C. § 101. Given that this case is in its early stages with a claim construction hearing set for December 20 and fact discovery closing on February 25, 2013, resolving this issue now has the potential for saving the Court and the parties substantial time and resources. Accordingly, Defendants respectfully request permission to file a short motion for summary judgment of invalidity. Defendants could brief the matter in fewer than ten pages. Extensive evidentiary materials will not be submitted because the focus will be on the patent itself.

Sincerely,

/s Charles Everingham IV

Charles Everingham IV

cc: Counsel of Record via ECF