

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

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In re: : Chapter 11
: :
THQ INC., *et al.*, : Case No. 12 - 13398 (MFW)
: :
Debtors.¹ : (Joint Administration Requested)
: :
: **Hearing Date: To Be Determined**
: **Objection Deadline: To Be Determined**
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**DEBTORS' MOTION FOR ORDER APPROVING THE
DEBTORS' NON-INSIDER KEY EMPLOYEE RETENTION PLAN**

THQ Inc. ("THQI") along with its affiliated debtors and debtors in possession (collectively, the "Debtors"), hereby file this motion (the "Motion") for entry of an order, substantially in the form attached hereto as **Exhibit A**, approving the Debtors' non-insider key employee retention plan. In support of the Motion, the Debtors rely upon and incorporate by reference the *Declaration of Jason Kay in Support of the Debtors' Motion for an Order Approving Debtors' Non-Insider Key Employee Retention Plan* (the "**Kay Declaration**"), which is attached hereto as **Exhibit B**. In further support of this Motion, the Debtors respectfully represent:

PRELIMINARY STATEMENT

1. The Debtors are leading developers and publishers of interactive entertainment software for all popular gaming systems, including home video game consoles, hand-held platforms, wireless devices, and personal computers, including games played online.

¹ The Debtors in these chapter 11 cases and the last four digits of each Debtor's taxpayer identification number are as follows: THQ Inc. (1686); Volition, Inc. (4944); THQ Digital Studios Phoenix, Inc. (1056); THQ Wireless Inc. (7991); and Vigil Games, Inc. (8651). The Debtors' principal offices are located at 29903 Agoura Road, Agoura Hills, CA 91301.



The Debtors also develop and publish titles for digital distribution and offer certain content through online download stores and services, including Amazon.

2. THQI develops products using both internal and external development teams. On each game development team, internal resources consist of producers, game designers, software engineers, artists, animators and game testers. THQI makes the decision as to which development resources to use based upon the creative and technical challenges of the product, including whether the intellectual property being developed into a game is licensed, an original concept that they created, or an original concept created by a third-party developer. Once THQI determines where and how a product will be developed, the Debtors' product development team oversees the internal and/or external resources used in its design, technical assessment, and construction and progression of each game.

3. Most of the members of the Debtors' internal development teams are employed by THQI's subsidiaries, Volition, Inc. ("**Volition**"), THQ Canada, Inc., dba Relic Entertainment ("**Relic**"), Vigil Games, Inc. ("**Vigil**"), and THQ Montreal Inc. ("**THQ Montreal**"). THQI owns the games that these subsidiaries develop, and pays the subsidiaries for their services in developing the games.

4. The expertise and continuity of the teams at Vigil, Volition, Relic, and THQ Montreal are critical to maximizing the value of the Debtors' assets. There are fewer than one hundred game development teams worldwide that have the skills to develop "AAA" core console games, like those developed by the Debtors. An "AAA" game typically takes eighteen (18) to thirty-six (36) months to develop and costs over \$1 million per month on average. During such time, each team member works closely with each other under strict budget and time deadlines to make and perfect a game. Once a project is started with a particular development

team, it is nearly impossible to transition the development of the project to a new team, as each team develops and uses a proprietary set of tools and techniques to develop the respective game. The loss of a single key development team member could cause immediate and irreparable damage to the development process. The loss of multiple members of a core team could delay a project for months and could cost tens of millions of dollars in additional development. Retaining such members, therefore, is critical to realizing value from the Debtors' ongoing development business.

5. Concurrently herewith, the Debtors have filed a motion seeking this Court's approval of a sale of substantially all of the Debtors' operating assets (the "**Sale Motion**") to the proposed stalking horse bidder, Clearlake Capital Group, L.P ("**Clearlake**"), or to a higher bidder (the "**Proposed Sale**"). Because of the Debtors' cash flow problems, if the Proposed Sale is not closed or in the process of closing by January 15, 2013, the Debtors will likely run out of cash and have to cease operating.

6. Recognizing the negative impact to the value of the Debtors' businesses if certain members of the development teams and certain personnel at THQI's corporate headquarters (the "**Key Employees**") were to resign prior to the close of the Proposed Sale, THQI's management team determined that the implementation of a retention program for the Key Employees was in the best interests of the Debtors' estates and all parties in interest. THQI's management team and its advisors engaged in discussions with Clearlake regarding the implementation of a non-insider key retention plan for the Key Employees, pursuant to which the Debtors would agree to make available an aggregate amount of \$427,000 for bonus payments to the Key Employees; *provided, however*, each Key Employee would only receive a bonus payment under the KERP (a "**Bonus Payment**") if that Employee continued working for his or

her respective employer through the close of the Proposed Sale (the “**KERP**”). As a result of such discussions, Clearlake agreed that if it is the successful purchaser of the Debtors’ assets, it will assume and honor the Debtors’ obligations under the KERP. The agreement to assume such obligations, in the maximum total amount of \$427,000, is part of Clearlake’s proposed purchase price. If the KERP is not approved, the obligations under the KERP will not be assumed, and the proposed purchase price will be effectively reduced by \$427,000.

7. THQI’s management team advised THQI’s board of directors (the “**THQI Board**”) of the importance of retaining the Key Employees and sought approval to implement the KERP. Upon the advice of THQI’s management team, the THQI Board approved the KERP. No member of THQI’s management team or the THQI Board is eligible to receive any payment under the KERP.

JURISDICTION

8. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334(b) and 157, and the *Amended Standing Order of Reference* from the United States District Court for the District of Delaware dated as of February 29, 2012. This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409. The statutory predicates for the relief requested herein are sections 105(a), 363, and to the extent applicable, 503(c) of title 11 of the United States Code (the “**Bankruptcy Code**”).

BACKGROUND

9. On the date hereof (the “**Petition Date**”), each of the Debtors commenced a voluntary case under chapter 11 of the Bankruptcy Code. Pursuant to sections 1107(a) and

1108 of the Bankruptcy Code, the Debtors are continuing to manage their financial affairs as debtors in possession.

10. Contemporaneously herewith, the Debtors filed a motion seeking joint administration of their chapter 11 cases (the “**Chapter 11 Cases**”) pursuant to Rule 1015(b) of the Federal Rules of Bankruptcy Procedure (the “**Bankruptcy Rules**”) and Rule 1015-1 of the Local Rules of Bankruptcy Practice and Procedure for the United States Bankruptcy Court for the District of Delaware (the “**Local Rules**”). No trustee, examiner, or official committee of unsecured creditors has been appointed in these cases.

11. Information regarding the Debtors’ history and business operations, capital structure and primary secured indebtedness, and the events leading up to the commencement of these Chapter 11 Cases can be found in the *Declaration of Brian J. Farrell in Support of the Debtors’ Chapter 11 Petitions and Requests for First Day Relief*.

THE PROPOSED KERP

12. Fifty-nine (59) Key Employees are eligible to receive a Bonus Payment under the KERP. A Key Employee may only receive a Bonus Payment after the closing of the Proposed Sale, provided such Employee continued to work for his or her employer through the closing in the same capacity as prior to the Petition Date. No Key Employee qualifies as an “insider,” as that term is defined in section 101(31) of the Bankruptcy Code. The Key Employees are employees of THQI, Vigil, Volition, Relic and THQ Montreal, and members of such studios’ respective development teams.

13. The amounts of the Bonus Payments were determined through a collaborative effort with the studios’ management teams. THQI assigned each studio a budgeted amount and asked the general managers at each studio to (a) identify the most valuable and “at

risk” employees (i.e., those employees the management believed were most likely to leave as a result of the commencement of these Chapter 11 Cases) and (b) allocate bonus amounts to such employees, provided that the bonus amounts were within certain limits.

14. To determine which employees were “at risk,” the Debtors’ management engaged each of the studios’ general managers in a discussion to identify key team members who were essential to the ongoing development to each product. Each general manager was then provided a budgeted amount for Bonus Payments based on (1) the number of team members on the development team, (2) the proximity of the game to its commercial release, and (3) the competitive hiring environment where the studio resides. For the THQI Key Employees, the Debtors’ management consulted with the vice presidents of marketing, finance and legal affairs to identify which employees have been instrumental in the due diligence and sales process. The Debtors’ management also selected employees whose continued employment is critical to meeting upcoming scheduled release dates and staying within the respective budget for such game.

15. The following is a summary of each studio, its respective development team(s), and the amounts be paid under the KERP to each studios’ respective Key Employees. A summary of THQI’s Key Employees is also below.

16. Volition. Eight (8) of the Key Employees under the KERP are employees of Volition. Volition operates a development studio in Champaign, Illinois. The team of developers at Volition is responsible for the *Saints Row* series of games, the Debtors’ most successful product. The most recent Saints Row game, *Saints Row The Third*, has sold over five million copies, and the Volition Key Employees are currently developing a new installment of the game with the working title *Saints Row 4*, scheduled for release in calendar year 2013. The

total amount of Bonus Payments to be paid to Volition Key Employees under the proposed KERP is \$180,000.

17. Vigil. Thirteen (13) of the Key Employees under the KERP are employees of Vigil. Vigil operates a development studio in Austin, Texas. Its development team has been the developer of the *Darksiders* series of game, including the recently released *Darksiders II*. The Vigil Key Employees are currently developing a game with the working title *Crawler*. The total amount of Bonus Payments to be paid to Vigil Key Employees under the proposed KERP is \$80,000.

18. Relic. Eight (8) of the Key Employees under the KERP are employees of Relic. Relic, a Canadian subsidiary of THQI, is not a debtor in these Chapter 11 Cases. Relic operates a development studio in Vancouver, British Columbia, Canada. The Relic studio was acquired by THQI in April, 2004. The development teams at Relic are responsible for developing multiple games in the real-time strategy genre, including *Warhammer: 40,000: Dawn of War*, and the *Company of Heroes* series of games. Relic is currently developing *Company of Heroes 2* for a calendar year 2013 release and a new game with the working title "*Atlas*" for release in calendar year 2014. The total amount of Bonus Payments to be paid to Relic Key Employees under the proposed KERP is \$72,000.

19. THQ Montreal. Twenty (20) of the Key Employees under the KERP are employees of THQ Montreal. THQ Montreal, a Canadian subsidiary of THQI, is also not a debtor in these Chapter 11 Cases. THQ Montreal operates a development studio in Montreal, Quebec, Canada. One development team at THQ Montreal is developing the yet-as-untitled Patrice Desilets game. Other employees of THQ Montreal are working on the development of

Homefront 2, Evolve, and a new untitled game. The total amount of Bonus Payments to be paid to THQ Montreal Key Employees under the proposed KERP is \$95,000.

20. THQI. Eight (8) of the Key Employees under the KERP are employees of THQI at THQI's corporate headquarters in Agoura, California. The THQI Key Employees will provide essential administrative and marketing support for the projects in development during the administration of these cases. The total amount of Bonus Payments to be paid to THQI Key Employees under the proposed KERP is \$50,500.

RELIEF REQUESTED

21. By this Motion, the Debtors seek entry of an order (i) approving the Debtors' non-insider KERP, as described herein, and (ii) authorizing the Debtors to make payments pursuant to the KERP to the Key Employees thereunder.

BASIS FOR RELIEF REQUESTED

A. Implementing the KERP is a Valid Exercise of the Debtors' Business Judgment and is Warranted Under Section 363 of the Bankruptcy Code.

22. Section 363(b)(1) provides, in relevant part, that "[t]he trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate." 11 U.S.C. § 363(b)(1). A debtor's decision to use, sell or lease assets outside the ordinary course of business must be based upon the sound business judgment of that debtor. *See Official Comm. of Unsecured Creditors of LTV Aerospace & Def. Co. v. LTV Co. (In re Chateaugay Corp.)*, 973 F.2d 141, 143 (2d Cir. 1992) (holding that a court determining an application pursuant to section 363(b) must find from the evidence a good business reason to grant such application); *see also In re Del. & Hudson R.R. Co.*, 124 B.R. 169, 176 (D. Del. 1991) (explaining that the Third Circuit has adopted the "sound business purpose" test to evaluate motions brought pursuant to section 363(b)).

23. The debtor bears the burden of establishing a valid business purpose for the use of estate property in a manner that is not in the ordinary course of business. *See In re Lionel Corp.*, 722 F.2d 1063, 1071 (2d Cir. 1983). Once the debtor has articulated a valid business purpose, however, a presumption arises that the debtor's decision was made on an informed basis, in good faith and in the honest belief that the action was in the best interests of the company. *See Official Comm. of Subordinated Bondholders v. Integrated Res., Inc. (In re Integrated Res. Inc.)*, 147 B.R. 650, 656 (S.D.N.Y. 1992). Courts are cautious not to substitute their own business judgment for the debtor's judgment. *See, e.g., Myers v. Martin (In re Martin)*, 91 F.3d 389, 395 (3d Cir. 1996) (noting that under normal circumstances, courts defer to a trustee's judgment concerning use of property under §363(b) when there is a legitimate business justification); *Chaney v. Official Comm. of Unsecured Creditors (In re Crystal Apparel)*, 207 B.R. 406, 410 (S.D.N.Y. 1997) (“[C]ourts must exercise great deference in reviewing a corporation's decision to pay its employees.”). Thus, if a debtor's actions satisfy the business judgment rule, then the transaction in question should be approved under section 363(b)(1) of the Bankruptcy Code.

24. As outlined in the Kay Declaration, the Debtors believe that the implementation of the KERP is a proper exercise of the Debtors' business judgment and is in the best interest of the Debtors' estates and the interests of all stakeholders in these Chapter 11 Cases. The Debtors' ability to continue to operate their business and maximize the value of their estates will depend, in large part, on the continued employment, active participation, and dedication of the Key Employees. The Key Employees of the various studios each play an essential role in the development of a game and, therefore, it is extremely difficult, if not impossible, to replace such Employees without critically damaging the viability of the respective

games at a tremendous cost to the Debtors' estates. Thus, if the Key Employees were to leave the employment with THQI or the studios, the Debtors' ability to preserve their value as going concern during the sale process would be severely hampered. The retention of the THQI Key Employees is also critically important to the Debtors' ongoing business operations during these Chapter 11 Cases.

25. However, the Debtors' ability to retain the services of the Key Employees has been jeopardized by the commencement of these Chapter 11 Cases. Concerns over continued employment may cause many of the Debtors' employees, including the Key Employees, to pursue alternative employment. Accordingly, the Debtors submit that implementing the KERP is a valid exercise of the Debtors' business judgment and that approval of the KERP is in the best interests of the Debtors' stakeholders. The fact that Clearlake has agreed to assume the Debtors' obligations under the KERP provides further support of the importance of the Key Employees to the Debtors' value as a going concern.

26. Courts, including courts in this District, have approved employee bonus plans as a valid exercise of business judgment. *See, e.g., In re Nellson Nutraceutical, Inc.*, 369 B.R. 787, 801 (Bankr. D. Del. 2007) (Bankruptcy Code section 503(c)(1) does not restrict incentive payments to noninsider employees); *In re Global Home Prods., LLC*, 369 B.R. 778, 784 (Bankr. D. Del. 2007) ("The reasonable use of incentives and performance bonuses are considered the proper exercise of a debtor's business judgment."); *In re Montgomery Ward Holding Corp.*, 242 B.R. 147, 153 (D. Del. 1999) (affirming bankruptcy court approval of key employee retention program, stated that "in determining whether to authorize the use, sale, or lease of property of the estate under [section 363(b)], courts require the debtors to show that a sound business purpose justifies such actions")

B. The KERP Does Not Provide for Any Payments Prohibited by Section 503(c) of the Bankruptcy Code.

27. Sections 503(c)(1) and (2) do not apply to the KERP because the Key Employees are not “insiders” as such term is defined by section 101(31) of the Bankruptcy Code. Specifically, section 101(31) of the Bankruptcy Code defines “insider” in relevant part, as a (i) director of the debtor, (ii) officer of the debtor, or (iii) person in control of the debtor. The Key Employees, therefore, are not insiders because they are non-management employees that do not exercise control over the Debtors, determine general corporate policy, or perform other executive functions.

28. Moreover, the KERP is not a severance program for insiders subject to the provisions of section 503(c)(2) of the Bankruptcy Code. The KERP does not provide benefits to Key Employees upon termination of their employment. Rather, under the terms of the KERP, the Key Employee will receive compensation by continuing to work for their respective employers through the closing of the Proposed Sale. Therefore, the KERP is a short-term non-insider retention plan, not a severance plan subject to the requirements of section 503(c)(2) of the Bankruptcy Code.

29. Section 503(c)(3) of the Bankruptcy Code does not preclude approval of the KERP. Courts that have analyzed the prohibit on “other transfers” to certain categories of employees set forth in section 503(c)(3) of the Bankruptcy Code have applied the same standard under that section as they do under section 363 of the Bankruptcy Code – whether the decision to use estate property outside the ordinary course of business is based on the debtor’s sound business judgment. *See In re Nobex Corp.*, 2006 Bank. LEXIS 417 (Bankr. D. Del. Jan. 19, 2006) (the test for evaluation a compensation proposal under section 503(c)(3) of the Bankruptcy Code is the “sound business judgment” test); *In re Werner Holding Co. (DE), Inc.*, Case No. 06-

10578 (Carey, J.) (Bankr. D. Del. July 20, 2006, Aug. 22, 2006 and Dec. 20, 2006) (ordering various relief requested in connection with debtors' incentive bonus plans pursuant to sections 363(b) and 503(c) of the Bankruptcy Code); *In re Refco Inc.*, Case No. 05-60006 (Drain, J.) (Bankr. S.D.N.Y. Jan. 10, 2006) (approving non-insider retention plan pursuant to business judgment test in a liquidating case).

C. Necessity for Immediate Relief and Effectiveness of Order

30. Bankruptcy Rule 6003 provides that “[e]xcept to the extent that relief is necessary to avoid immediate and irreparable harm, the court shall not, within 21 days after the filing of the petition, grant relief regarding . . . a motion to use, sell, lease, or otherwise incur an obligation regarding property of the estate, including a motion to pay all or part of a claim that arose before the filing of the petition” Fed. R. Bankr. P. 6003(b). As described herein, the Debtors will suffer immediate and irreparable harm without Court authorization to make the Bonus Payments. Consequently, the relief requested herein is consistent with Bankruptcy Rule 6003.

31. To implement the foregoing immediately, the Debtors respectfully request a waiver of the notice requirements under Bankruptcy Rule 6004(a).

32. Furthermore, to implement the foregoing immediately, the Debtors seek a waiver of any stay of the effectiveness of the order approving this Motion. Pursuant to Bankruptcy Rule 6004(h), any “order authorizing the use, sale, or lease of property other than cash collateral is stayed until the expiration of 14 days after entry of the order, unless the court orders otherwise.” Fed. R. Bankr. P. 6004(h). As set forth above, proposed payments to Key Employees pursuant to the KERP is essential to prevent potentially irreparable damages to the Debtors' operations, value and ability to be sold as a going concern. Accordingly, the Debtors

submit that ample cause exists to justify a waiver of the 14-day stay imposed by Bankruptcy Rule 6004(h)


33. For all of the forgoing reasons, the KERP is an appropriate exercise of the Debtors' business judgment, is necessary, and in the best interest of the Debtors, their creditors, and their estates and is justified by the facts and circumstances of these cases. Accordingly, the KERP should be approved.

NOTICE

34. Notice of this Motion has been provided to: (a) the Office of the United States Trustee for the District of Delaware; (b) the Debtors' forty (40) largest unsecured creditors on a consolidated basis, as identified in their chapter 11 petitions; (c) counsel for Wells Fargo Capital Finance, LLC; (d) counsel to the ad hoc committee of the Debtors' prepetition unsecured noteholders; (e) counsel to Clearlake; and (f) the Banks. Notice of this Motion and any order entered hereon will be served in accordance with Local Rule 9013-1(m). In light of the nature of the relief requested herein, the Debtors submit that no other or further notice is necessary.

WHEREFORE, the Debtors respectfully request that the Court grant the relief requested herein and such other and further relief as the Court may deem just and proper.

Dated: December 19, 2012
Wilmington, DE



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*Proposed Counsel to the Debtors
and Debtors in Possession*

Exhibit A
Proposed Order

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE**

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In re: : Chapter 11
THQ INC., *et al.*, : Case No. 12 - 13398 (MFW)
Debtors.¹ : Jointly Administered
: RE: Docket No. ____
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**ORDER APPROVING THE DEBTORS'
NON-INSIDER KEY EMPLOYEE RETENTION PLAN**

Upon the motion (the “**Motion**”)² of the above-captioned debtors and debtors in possession (collectively, the “**Debtors**”) for entry of an order (a) approving the Debtors’ KERP for certain key employees and (b) authorizing the Debtors to make payments pursuant to the KERP to the eligible employees, all as more fully set forth the Motion; and upon the Fay Declaration; and the Court having found that the Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334; and the Court having found that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2); and the Court having found that venue of this proceeding and the Motion in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and the Court having found that the relief requested in the Motion is in the best interests of the Debtors’ estates, their creditors, and other parties in interest; and the Court having found that the Debtors provided appropriate notice of the Motion and the opportunity for a hearing on the Motion under the

¹ The Debtors in these chapter 11 cases and the last four digits of each Debtor’s taxpayer identification number are as follows: THQ Inc. (1686); THQ Digital Studios Phoenix, Inc. (1056); THQ Wireless, Inc. (7991); Volition, Inc. (4944); and Vigil Games, Inc. (8651). The Debtors’ principal offices are located at 29903 Agoura Road, Agoura Hills, CA 91301.

² Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Motion.

circumstances; and the Court having reviewed the Motion and having heard the statements in support of the relief requested therein before the Court (the “**Hearing**”); and the Court having determined that the legal and factual bases set forth in the Motion and at the Hearing establish just cause for the relief granted herein; and upon all of the proceedings had before the Court; and after due deliberation and sufficient cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED THAT:

1. The Motion is granted as set forth herein.
2. The Debtors’ KERP is approved in all respects.
3. The Debtors are authorized to make any and all payments to eligible employees under the KERP.
4. The requirements set forth in Bankruptcy Rule 6003(b) are satisfied.
5. Notice of the Motion as provided therein shall be deemed good and sufficient and the requirements of Bankruptcy Rule 6004(a) and the Local Rules are satisfied by such notice.
6. Notwithstanding Bankruptcy Rule 6004(h), the terms and conditions of this Interim Order shall be immediately effective and enforceable upon its entry
7. The Debtors are authorized to take all actions necessary to effectuate the relief granted pursuant to this Order in accordance with the Motion.

8. This Court shall retain jurisdiction with respect to any matters, claims, rights or disputes arising from, based upon or related to this Order.

Dated: Wilmington, Delaware
December ____, 2012

Mary F. Walrath
United States Bankruptcy Judge

Exhibit B

Declaration of Jason Kay

**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

-----X
In re: : Chapter 11
THQ INC., *et al.*, : Case No. 12 - 13398 (MFW)
Debtors.¹ : (Joint Administration Requested)
-----X

**DECLARATION OF JASON KAY IN SUPPORT OF
THE DEBTORS' MOTION FOR ORDER APPROVING THE
DEBTORS' NON-INSIDER KEY EMPLOYEE RETENTION PROGRAM**

I, Jason Kay, hereby declare, pursuant to section 1746 of title 28 of the United States Code, as follows:

1. I am over eighteen (18) years of age and if called upon I would competently testify to the matters set forth herein from my own personal knowledge, except as otherwise stated. I am the Chief Strategy Officer of THQI, Inc. (“**THQI**” and together with its above-captioned debtor affiliates, the “**Debtors**”). Prior to joining THQI in June 2012, I co-founded Flektor, a media mash-up company. I have also considerable other experience in the media and technology industry, including extensive experience at Activision, Time Warner’s Home Box Office business unit, and News Corporation.

2. I submit this Declaration in in support of the Debtors’ motion for an order approving the Debtors’ non-insider key employee retention plan, as more fully described therein (the “**KERP Motion**”).² Except as otherwise indicated, all statements in this Declaration are

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based upon my review of relevant documents, my discussions with the Debtors and their professionals, and my personal knowledge and experience. If I were called upon to testify, I could and would testify to each of the facts set forth below.

Background of the KERP

3. The Debtors are leading developers and publishers of interactive entertainment software for all popular gaming systems, including home video game consoles, hand-held platforms, wireless devices, and personal computers, including games played online. The Debtors also develop and publish titles for digital distribution and offer certain content through online download stores and services, including Amazon.

4. THQI develops products using both internal and external development teams. On each game development team, internal resources consist of producers, game designers, software engineers, artists, animators and game testers. THQI's management team, on which I serve, makes the decision as to which development resources to use based upon the creative and technical challenges of the product, including whether the intellectual property being developed into a game is licensed, an original concept that they created, or an original concept created by a third-party developer. Once THQI's management determines where and how a product will be developed, the Debtors' product development team oversees the internal and/or external resources used in its design, technical assessment and construction and progression of each game.

5. Most of the members of the Debtors' internal development teams are employed by THQI's subsidiaries, Volition, Inc. ("**Volition**"), THQ Canada, Inc., dba Relic Entertainment ("**Relic**"), Vigil Games, Inc. ("**Vigil**"), and THQ Montreal Inc. ("**THQ**

Montreal”). THQI owns the games that these subsidiaries develop, and pays the subsidiaries for their services in developing the games.

6. The expertise and continuity of the teams at Vigil, Volition, Relic, and THQ Montreal are critical to maximizing the value of the Debtors’ assets. There are fewer than one hundred game development teams worldwide that have the skills to develop “AAA” core console games, like those developed by the Debtors. An “AAA” game typically takes eighteen (18) to thirty-six (36) months to develop and costs over \$1 million per month on average. During such time, each team member works closely with each other under strict budget and time deadlines to make and perfect a game. Once a project is started with a particular development team, it is nearly impossible to transition the development of the project to a new team, as each team develops and uses a proprietary set of tools and techniques to develop the respective game. The loss of a single key development team member could cause immediate and irreparable damage to the development process. The loss of multiple members of a core team could delay a project for months and could cost tens of millions of dollars in additional development. Retaining such members, therefore, is critical to realizing value from the Debtors’ ongoing development business.

7. The Debtors have filed a motion seeking this Court’s approval of a sale of substantially all of the Debtors’ operating assets (the “**Sale Motion**”) to the proposed stalking horse bidder, Clearlake Capital Group, L.P (“**Clearlake**”), or to a higher bidder (the “**Proposed Sale**”). Because of the Debtors’ cash flow problems, if the Proposed Sale is not closed or in the process of closing by January 18, 2013, the Debtors will likely run out of cash and have to cease operating.

8. I and other members of THQI's management team recognize the negative impact to the value of the Debtors' businesses if certain members of the development teams and certain personnel at THQI's corporate headquarters (the "**Key Employees**") were to resign prior to the close of the Proposed Sale. Accordingly, THQI's management team determined that the implementation of a retention program for the Key Employees was in the best interests of the Debtors' estates and all parties in interest.

9. THQI's management team, together with its advisors, engaged in discussions with Clearlake regarding the implementation of a non-insider key retention plan for the Key Employees, pursuant to which the Debtors would agree to make available an aggregate amount of \$427,000 for bonus payments to the Key Employees; *provided, however*, each Key Employee would only receive a bonus payment under the KERP (a "**Bonus Payment**") if that Employee continued working for his or her respective employer through the close of the Proposed Sale (the "**KERP**"). Clearlake agreed that if it is the successful purchaser of the Debtors' assets, it will assume and honor the Debtors' obligations under the KERP. The agreement to assume such obligations, in the maximum total amount of \$427,000, is part of Clearlake's proposed purchase price. If the KERP is not approved, the obligations under the KERP will not be assumed, and the proposed purchase price will be effectively reduced by \$427,000.

10. THQI's management team advised THQI's board of directors (the "**THQI Board**") of the importance of retaining the Key Employees and sought approval to implement the KERP. Upon the advice of THQI's management team, the THQI Board approved the KERP. No member of THQI's management team or the THQI Board is eligible to receive any payment under the KERP.

The Proposed KERP

11. Fifty-nine (59) Key Employees are eligible to receive a Bonus Payment under the KERP. The KERP does not provide benefits to Key Employees upon termination of their employment. Rather, a Key Employee may only receive a Bonus Payment after the closing of the Proposed Sale, provided such Employee continued to work for his or her employer through the closing in the same capacity as prior to the Petition Date. The Key Employees are employees of THQI, Vigil, Volition, Relic and THQ Montreal, and members of such studios' respective development teams. The Key Employees are non-management employees that do not exercise control over the Debtors, determine general corporate policy, or perform other executive functions.

12. The amounts of the Bonus Payments were determined through a collaborative effort with the studios' management teams. THQI assigned each studio a budgeted amount and asked the management team at each studio to (a) identify the most valuable and "at risk" employees (i.e., those employees the management believed were most likely to leave as a result of the commencement of these Chapter 11 Cases) and (b) allocate bonus amounts to such employees, provided that the bonus amounts were within certain limits.

13. To determine which employees were "at risk," I and other members of the Debtors' management engaged each of the studios' general managers in a discussion to identify key team members who were essential to the ongoing development to each product. Each general manager was then provided a budgeted amount for Bonus Payments based on (1) the number of team members on the development team, (2) the proximity of the game to its commercial release, and (3) the competitive hiring environment where the studio resides. For the THQI Key Employees, the Debtors' management consulted with the vice presidents of

marketing, finance and legal affairs to identify which employees have been instrumental in the due diligence and sales process. We also selected employees whose continued employment is critical to meeting upcoming scheduled release dates and staying within the respective budget for such game.

14. Eight (8) of the Key Employees under the KERP are employees of Volition. Volition operates a development studio in Champaign, Illinois. The team of developers at Volition is responsible for the *Saints Row* series of games, the Debtors' most successful product. The most recent *Saints Row* game, *Saints Row The Third*, has sold over five million copies and the Volition Key Employees are currently developing a new installment of the game with the working title *Saints Row 4*, scheduled for release in calendar year 2013. The total amount of Bonus Payments to be paid to Volition Key Employees under the proposed KERP is \$180,000.

15. Thirteen (13) of the Key Employees under the KERP are employees of Vigil. Vigil operates a development studio in Austin, Texas. Its development team has been the developer of the *Darksiders* series of game, including the recently released *Darksiders II*. The Vigil Key Employees are currently developing a game with the working title *Crawler*. The total amount of Bonus Payments to be paid to Vigil Key Employees under the proposed KERP is \$80,000.

16. Eight (8) of the Key Employees under the KERP are employees of Relic. Relic, a Canadian subsidiary of THQI, is not a debtor in these Chapter 11 Cases. Relic operates a development studio in Vancouver, British Columbia, Canada. The Relic studio was acquired by THQI in April, 2004. The development teams at Relic are responsible for developing multiple games in the real-time strategy genre, including *Warhammer: 40,000: Dawn of War*,

and the *Company of Heroes* series of games. Relic is currently developing *Company of Heroes 2* for a calendar year 2013 release and a new game with the working title "*Atlas*" for release in calendar year 2014. The total amount of Bonus Payments to be paid to Relic Key Employees under the proposed KERP is \$72,000.

17. Twenty (20) of the Key Employees under the KERP are employees of THQ Montreal. THQ Montreal, a Canadian subsidiary of THQI, is also not a debtor in these Chapter 11 Cases. THQ Montreal operates a development studio in Montreal, Quebec, Canada. One development team at THQ Montreal is developing the yet-as-untitled Patrice Desilets game. Other employees of THQ Montreal are working on the development of *Homefront 2*, *Evolve*, and a new untitled game. The total amount of Bonus Payments to be paid to THQ Montreal Key Employees under the proposed KERP is \$95,000.

18. Eight (8) of the Key Employees under the KERP are employees of THQI at THQI's corporate headquarters in Agoura, California. The THQI Key Employees will provide essential administrative and marketing support for the projects in development during the administration of these cases. The total amount of Bonus Payments to be paid to THQI Key Employees under the proposed KERP is \$50,500.

19. The Debtors' ability to continue to operate their business and maximize the value of their estates will depend, in large part, on the continued employment, active participation, and dedication of the Key Employees. I believe that the Key Employees of the various studios each play an essential role in the development of a game and, therefore, it is extremely difficult, if not impossible, to replace such Employees without critically damaging the viability of the respective games at a tremendous cost to the Debtors' estates. Thus, if the Key Employees were to leave the employment with THQI or the studios, the Debtors' ability to

preserve their value as going concern during the sale process would be severely hampered. The retention of the THQI Key Employees is also critically important to the Debtors' ongoing business operations during these Chapter 11 Cases.

20. I believe, and the Debtors submit, that the Debtors' ability to retain the services of the Key Employees has been jeopardized by the commencement of these Chapter 11 Cases. Concerns over continued employment may cause many of the Debtors' employees, including the Key Employees, to pursue alternative employment.

21. The Debtors submit, and I believe, that the implementation of the KERP is a proper exercise of the Debtors' business judgment and is in the best interest of the Debtors' estates and the interests of all stakeholders in these Chapter 11 Cases. The fact that Clearlake has agreed to assume the Debtors' obligations under the KERP provides further support of the importance of the Key Employees to the Debtors' value as a going concern.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Dated: December 19, 2012

/s/ Jason Kay
Jason Kay