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THE HONORABLE THERESA L. FRICKE

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

UTHERVERSE GAMING LLC,

Plaintiff,

v.

EPIC GAMES, INC.,

Defendant.

Case No. 2:21-cv-00799-RSM-TLF

**DEFENDANT EPIC GAMES, INC.'S  
TRIAL BRIEF**

Trial Date: May 12, 2025

Pursuant to the Court’s September 11, 2024 order (Dkt. 427), Epic Games, Inc. (“Epic”) respectfully submits this trial brief outlining the evidence and issues remaining for trial in Plaintiff Uthervse Gaming LLC’s (“Uthervse Gaming”) suit against Epic alleging infringement of U.S. Patent No. 9,724,605 (the “’605 Patent”). This brief contains: (1) an overview of the case; (2) an overview of the evidence to be presented at trial; (3) a description of issues of law that Epic anticipates may arise at the charge conference; and (4) a preview of Epic’s anticipated motion seeking a judgment pursuant to Rule 50.

## **I. OVERVIEW OF THE CASE**

### **A. Overview of the Parties**

Epic is the creator of one of the world’s largest social entertainment ecosystems, *Fortnite*. *Fortnite* includes various animated virtual worlds that were developed using Epic’s 3D graphics engine, Unreal Engine. Among other things, *Fortnite* allows players to attend “live” events in its virtual worlds. At issue in this case are two such events: animated events featuring music by Travis Scott and Ariana Grande. A still from the Travis Scott animated event is depicted below:



1 Uthervese Gaming purchased the '605 Patent (among others) from Uthervese Digital,  
2 Inc. ("Uthervese Digital"). Notwithstanding the similarity in their names, there is no relationship  
3 between Uthervese Gaming (which was created to purchase and own these patents) and  
4 Uthervese Digital.

5 **B. Overview of the Claims and Defenses**

6 Uthervese Gaming alleges that the Travis Scott and Ariana Grande events (the "Accused  
7 Events"), infringe claims 2, 5, and 8 of the '605 Patent (the "Asserted Claims"). Uthervese  
8 Gaming seeks damages for Epic's alleged use of the patented technology during the Accused  
9 Events.

10 Epic contends that the Accused Events do not infringe the Asserted Claims. Epic also  
11 contends that the Asserted Claims are invalid under 35 U.S.C §§ 101, 102, 103, and 112. In  
12 particular, Epic contends that Uthervese Gaming's positions regarding claim scope are  
13 inconsistent with respect to infringement and validity such that if the Accused Events infringe,  
14 then the Asserted Claims must also be invalid. Epic also denies that Uthervese Gaming is entitled  
15 to damages and contends that even if Epic is found liable for infringement, the amount of damages  
16 requested by Uthervese Gaming is unsupported by the evidence and governing law.

17 **C. Overview of the '605 Patent**

18 The '605 Patent is titled "Method, System, and Apparatus of Recording and Playing Back  
19 an Experience in a Virtual Worlds System." TX 1 ('605 Patent) at title. The invention claimed in  
20 the '605 Patent purports to enable users "to replay a scene that occurred in a [virtual] environment,  
21 such as a concert, a wedding, or a lecture." *Id.* at 1:38-40; *see also id.* at 10:1-11. It envisions that  
22 users might participate in events, like weddings, inside a virtual world, and that, for example,  
23 participants in virtual weddings "may wish to re-experience the event on their anniversary." *Id.* at  
24 10:8-9.

The Asserted Claims all depend from claim 1 and incorporate claim 1's requirements. Accordingly, if the Accused Events did not practice claim 1, they cannot be found to have infringed the Asserted Claims. Claim 1 is shown below, annotated to highlight the claim elements that the parties may focus on at trial.

What is claimed is:

1. A method of playing back a recorded experience in a virtual worlds system, comprising:

instantiating, using one or more processors of a server, a new instance of a scene, the new instance being defined by data stored in memory, at least one client device displaying and participating in the new instance;

retrieving a recorded experience file from the memory, the recorded experience file having been generated by saving an initial scene state and saving subsequent changes and respective times during a time period of the recorded experience;

playing back the recorded experience file by rendering, for display by the at least one client device, objects of the initial scene state in the new instance, including one or more avatars, and rendering updates to the initial scene state based on the subsequent changes over the time period; and

automatically transporting the one or more avatars to a different new instance of the scene, upon occurrence of a threshold event, wherein the threshold event comprises when a maximum capacity of avatars has been reached in the new instance of the scene.

The Court has construed several terms that appear in claim 1, including:

Term	Construction
Avatar	A computer-generated figure in a virtual environment that represents and is operated by a human player. Dkt. 133 at 3, 10-11.
Initial Scene State	Scene state information, including at least a position and orientation of objects, including avatars, rendered in the scene at a beginning of a time period of a new recording of a scene. Dkt. 133 at 3, 13.
Recorded Experience [File]	[A file containing] a recording of a prior experience that occurred in a virtual environment. Dkt. 133 at 3, 13-14.

## II. OVERVIEW OF THE EVIDENCE

### A. Evidence Regarding Infringement

Utherverse Gaming bears the burden of proving infringement by a preponderance of the evidence. Epic will show that the Accused Events did not practice at least three claim requirements: (1) “retrieving” and “playing back” a “recorded experience file”; (2) “playing back the recorded experience file by rendering . . . objects of the initial scene state in the new instance, including one or more avatars”; and (3) “automatically transporting the one or more avatars to a different new instance of the scene.”

#### 1. “Recorded Experience File”

The core facts are undisputed. The figures of Travis Scott and Ariana Grande were animated using a tool called the Unreal Engine Sequencer. Those animations were, of course, created prior to the events, and the animation sequence files (along with the rest of the animated game world) were played several times (reflecting the multiple “show times” for the events). Epic will show that the animations in the Accused Events were not recordings of a prior experience that occurred in a virtual environment and thus are not a “recorded experience file” as construed by the Court. There was no experience in a virtual environment until the animations were played as part of the Accused Events, and Epic did not record those events or the experiences that took place within them.

#### 2. “Objects . . . Including One or More Avatars”

The core facts related to the “one or more avatars” claim requirement are also undisputed. In particular, the claims require “playing back the recorded experience file by rendering objects . . . including one or more avatars.” But it is undisputed that the Travis Scott and Ariana Grande animation sequence files did not contain “avatars” under the Court’s construction of the term “avatar.” Specifically, none of the objects generated from the Travis Scott and Ariana Grande

1 animation sequence files, including the figures of Travis Scott and Ariana Grande, were “operated  
 2 by a human player,” as required by the Court’s construction of the term “avatar.”<sup>1</sup> Epic will show  
 3 that playing the animation sequence files during the Accused Events did not involve rendering any  
 4 “avatars.” Thus, the Accused Events did not meet the claim requirement for “playing back the  
 5 recorded experience file by rendering objects . . . including one or more avatars.”

### 6 **3. “Automatically Transporting the One or More Avatars”**

7 The claims further require “automatically transporting the one or more avatars to a different  
 8 new instance of the scene.” Epic will show that, even if the *Fortnite* lobby menu Uthervers  
 9 Gaming accuses could be considered a “scene” from which avatars are “transport[ed]” (it is not),  
 10 the *Fortnite* lobby menu is not the same “scene” as the *Fortnite* island where the Accused Events  
 11 occurred. Epic will further show that no player “avatars” were “transport[ed]” (or could have been  
 12 transported) from one instance of the *Fortnite* island to a different instance of the *Fortnite* island  
 13 during the Accused Events. The evidence will therefore show that no “avatars” were  
 14 “rendere[d] . . . in [a] new instance” of a scene and then “automatically transported . . . to a  
 15 different new instance of the scene” as required by the Asserted Claims.

### 16 **B. Evidence Regarding Invalidity**

17 Epic bears the burden of proving invalidity by clear and convincing evidence. Epic will  
 18 show that, particularly if the jury accepts Uthervers Gaming’s contentions regarding the scope of  
 19 the claims for infringement, then multiple prior-art references anticipate and/or render obvious the  
 20

21  
 22 <sup>1</sup> Under the Court’s construction, “avatars” would include the characters that players operated in  
 23 *Fortnite* to watch the Accused Events. Dkt. 133 at 3, 11 (construing the term “avatar” to mean “a  
 24 computer-generated figure in a virtual environment that represents and is operated by a human  
 player”). These are distinct from “mannequins” like Ariana Grande and Travis Scott, which are  
 animated figures that are not player-controlled. While player avatars appeared on the *Fortnite*  
 island to watch the Accused Events, they were not generated from the Travis Scott and Ariana  
 Grande animation sequence files.



1 Asserted Claims under 35 U.S.C §§ 102 and 103. This prior art includes system references (the  
2 video games StarCraft II and MASSIVE-3) as well as written prior art (the patents and patent  
3 application referred to as “Sony,” “Miura,” and “Brook”).

4 Epic will also provide evidence that the Asserted Claims are invalid based on deficiencies  
5 in the claims and the patent’s written description. Epic will provide evidence that the patent does  
6 not include instructions or technical details that would inform a person of ordinary skill in the art  
7 how to implement the claimed method—including, for example, the requirement that the “avatars”  
8 from the “recorded experience file” are “automatically transport[ed]” to a different new instance  
9 of the scene in the virtual world. Epic will contend that the lack of technical detail and instruction  
10 means that the claims are invalid under 35 U.S.C. §§ 101 and 112.

### 11 **C. Evidence Regarding Damages**

12 Utherverse Gaming bears the burden of proving the amount of damages by a preponderance  
13 of the evidence. Utherverse Gaming will contend that Epic should pay 15% of the revenue it  
14 received from sales related to the Accused Events, relying on a license agreement between  
15 different parties for an unrelated patent (the “Ephere License”).

16 Epic will provide evidence that the Ephere license is not comparable to a license between  
17 Epic and Utherverse Digital for the ’605 Patent. Epic will provide evidence that the Ephere license  
18 (which was a license to a hair-and-fur animation company for a patent covering a hair-and-fur  
19 animation tool) involved different parties and different technology. Epic will also provide  
20 evidence that the form of the Ephere license (a percentage royalty) is inconsistent with the lump-  
21 sum payment that both Epic and Utherverse Gaming employed in every single patent license or  
22 acquisition either party has ever entered into. Epic will further provide evidence that the licenses  
23 and acquisitions actually entered into by the parties—including one in which the ’605 Patent itself  
24 was offered for sale—are much more relevant data points for damages and involved payments that

were orders of magnitude smaller. Finally, Epic will provide evidence that a payment of 15% of Epic’s revenue from the events is unreasonable in light of the substantial effort Epic, and the artists, put into creating and hosting the Accused Events.

### III. ISSUES OF LAW FOR THE CHARGE CONFERENCE

In view of the parties’ disputes regarding jury instructions, Epic anticipates that the following issue may arise at the charge conference: whether the jury should be instructed that it can only rely on license agreements that are economically and technologically comparable.

As Epic previewed above, one of the primary issues related to damages is whether the Ephere license is economically and technologically comparable to a hypothetical license between Utherverse Gaming and Epic for the ’605 Patent. *See supra* section II(C). Under Federal Circuit law, a prior license used to establish a quantum of damages must be “sufficiently comparable for evidentiary purposes and any differences in circumstances must be soundly accounted for.” *Elbit Sys. Land & C4I Ltd. v. Hughes Network Sys., LLC*, 927 F.3d 1292, 1299 (Fed. Cir. 2019); *see also Apple Inc. v. Wi-LAN Inc.*, 25 F.4th 960, 971 (Fed. Cir. 2022) (“When relying on comparable licenses to prove a reasonable royalty, we require a party to account for differences in the technologies and economic circumstances of the contracting parties.”). If the license is not comparable, or there is insufficient evidence to account for any differences in circumstances, then the license cannot be used as a basis for awarding damages. *Id.*; *see also Adasa Inc. v. Avery Dennison Corp.*, 55 F.4th 900, 915 (Fed. Cir. 2022); *ResQNet.com, Inc. v. Lansa, Inc.*, 594 F.3d 860, 873 (Fed. Cir. 2010); *CEMCO, LLC v. KPSI Innovations, Inc.*, No. C23-0918JLR (W.D. Wash. Dec. 6, 2024).

The Ephere license is Utherverse Gaming’s primary evidence regarding damages. Whether it is a proper basis for a damages award is of critical importance to this case. Accordingly, Epic requests that the Court give the jury the special instruction on comparable licenses attached hereto



as Exhibit A.<sup>2</sup> The special instruction makes clear that although the jury can rely on existing license agreements to determine a reasonable royalty, it can only rely on agreements that: (1) relate to comparable technology; and (2) arose from circumstances that are economically comparable to the hypothetical negotiation. The special instruction also informs the jury that, to the extent that there is an evidentiary basis for comparability, the jury must make adjustments to account for any technological or economic differences.

#### IV. ISSUES OF LAW FOR A RULE 50 MOTION

Epic anticipates that, at the close of Plaintiff's case, there will be insufficient evidence for the jury to find that Epic infringes the Asserted Claims on each of the following three independent grounds: (1) the Accused Events did not contain "a 'recorded experience file'"; (2) the Accused Events did not "play[] back" the "recorded experience file" by "rendering . . . objects of the initial scene state in [a] new instance [of a scene], including one or more avatars"; and (3) the Accused Events did not "automatically transport[] the one or more avatars to a different new instance of the scene." Accordingly, Epic anticipates bringing a Rule 50 motion requesting that the Court enter judgment of non-infringement for each of these three grounds.

Dated: April 21, 2025

I certify that this memorandum contains 4,159 words, in compliance with the Local Civil Rules.

By: /s/ Daralyn J. Durie

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<sup>2</sup> This instruction has also been submitted with the parties' joint proposed jury instructions as Instruction No. 24A.

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**CERTIFICATE OF SERVICE**

I hereby certify that on April 21, 2025 the within document was filed with the Clerk of the Court using CM/ECF which will send notification of such filing to the attorneys of record in this case.

*/s/ Daralyn Durie*

Daralyn Durie

# **EXHIBIT A**

**DISPUTED Final Instruction No. 24A – Damages – Comparable Agreements (PROPOSED BY EPIC)**

When determining a reasonable royalty, you may consider evidence concerning the amounts that the parties or other parties have paid for rights to the asserted patent, or have paid for comparable rights to similar technologies. A license agreement need not be perfectly comparable to a hypothetical license that would be negotiated between Utherverse Digital and Epic Games in order for you to consider it. However, if you choose to rely upon evidence from any license agreements, you must account for any differences between those licenses and the hypothetically negotiated license between Utherverse Digital and Epic Games. Such differences include differences in the technologies underlying the licenses and the economic circumstances of the contracting parties as compared to the technologies and economic circumstances of the hypothetically negotiated license between Utherverse Digital and Epic Games. To the extent that a license agreement is not economically or technologically comparable to the hypothetical license to the asserted patent, it should not be used to determine a reasonable-royalty award.

Sources: Final Jury Instructions at 34, *CEMCO, LLC v. KPSI Innovations, Inc.*, No. C23-0918JLR (W.D. Wash. Dec. 6, 2024); *Adasa Inc. v. Avery Dennison Corp.*, 55 F.4th 900, 915 (Fed. Cir. 2022); *ResQNet.com, Inc. v. Lansa, Inc.*, 594 F.3d 860, 873 (Fed. Cir. 2010).