IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

MULTIPLAYER NETWORK INNOVATIONS, LLC, ***Plaintiff,*** **v.** **AMAZON.COM, INC.,** ***Defendant*.**	**Civil Action No. 2:14-cv-825** **LEAD CASE** **JURY TRIAL DEMANDED**
MULTIPLAYER NETWORK INNOVATIONS, LLC, ***Plaintiff,*** **v.** **APPLE, INC.,** ***Defendant*.**	**Case No. 2:14-CV-00826-JRG-RSP** **JURY TRIAL DEMANDED**

PLAINTIFF MULTIPLAYER NETWORK INNOVATIONS, LLC'S BRIEF IN OPPOSITION TO APPLE, INC.'S MOTION TO DISMISS

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I. INTRODUCTION

Plaintiff Multiplayer Network Innovations, LLC ("Plaintiff" or "MNI") respectfully submits this Response to Defendant Apple, Inc.'s ("Defendant" or "Apple") Motion to Dismiss MNI's Complaint under Federal Rule of Civil Procedure 12(b)(6). (Dkt. No. 12.) MNI is the owner of fundamental patented technology developed by Dr. Michael Kagan and Mr. Ian Somolon relating to ways for electronic devices to communicate with one another for the playing of computer games involving two or more players. MNI has asserted U.S. Patent No. 5,618,045 (the "'045 patent") against Apple. Apple has recognized the importance of the '045 patent, including by citing the MNI patent as prior art in over 50 of Apple's United States patents. (Dkt. No. 1 at ¶¶ 11, 21.)

MNI's allegations of patent infringement are straightforward and consistent with established standards of pleading under the Federal Rules. Apple's motion ignores applicable Federal Circuit precedent confirming the sufficiency of MNI's allegations. MNI's core allegations are that MNI owns the asserted patents; that Apple infringes directly and willfully with respect to its sale and activities relating to its iPad, iPhone and Apple TV devices that practice the claims of the '045 patent; and that MNI is entitled to redress for Apple's widespread infringement. Rather than allow the record to be developed in the ordinary course of litigation, Apple filed the instant misguided motion. Indeed, Apple's motion is akin to a motion for summary judgment, but before any discovery or even an opportunity for discovery has occurred.

First, Apple tries to improperly litigate the sufficiency of MNI's direct infringement allegations. Contrary to Apple's assertions, MNI's complaint identifies the infringing products in a manner consistent with Form 18 and Federal Circuit precedent. (Dkt. No. 1. at ¶ 20.)

Second, MNI's Complaint contains allegations providing a basis to infer that Apple had knowledge of MNI's patent. (*Id*. at ¶ 21-22.) An inference of knowledge, or willful blindness, to the '045 patent, is more than sufficiently pled in MNI's Complaint. (*See, e.g.*, Dkt. No. 1 at ¶ 21 (specifically identifying 56 United States patents owned by Apple in which Apple has cited the '045 patent as prior art).[1] At a very minimum, there can be no debate that Apple had the requisite knowledge from the filing of this lawsuit. Courts in this District routinely hold that the filing of a complaint alleging infringement of a patent provides a defendant with knowledge of that patent, thus supporting MNI's claim of willful infringement at least for acts after the filing date.

Apple's challenge on the merits is premature, and the Court should deny Apple's motion and allow the parties to prepare their cases and present the matter on a developed factual record. This Court in several recent decisions has denied motions to dismiss under factual circumstances nearly identical to those here. In *Securenova, LLC v. LG Electronics, Inc., et al*., Civil No. 2:13-CV-00905-JRG-RSP, Dkt. No. 26 (E.D. Tex. Sept. 30, 2014) (Gilstrap, J.) ("*Securenova v. LG*") and *Tierra Intelectual Borinquen Inc. v. Toshiba America Information Systems, Inc., et al*, Civil No. 2:13-CV-00047-JRG, Dkt. No. 31 (E.D. Tex. Feb. 14, 2014) (Gilstrap, J.) ("*TIB v. Toshiba*") this Court denied motions to dismiss under scenarios that mirrored the ones at hand. MNI submits that this case warrants the same result and, as such, MNI respectfully requests that Apple's Motion to Dismiss be denied in its entirety.

[1] The Complaint identifies by patent number 56 United States patents assigned to Apple that reference the '045 patent. Additional patents assigned to Apple reference the '045 patent although these patents are not specifically recited in paragraph 21 of the Complaint. Dkt. No. 1 at ¶ 11 ("Apple has recognized Dr. Kagan and Mr. Solomon's inventions, including by citing the MNI patent as prior art in 59 United States patents.").

II. BACKGROUND

The '045 patent was filed on February 8, 1995. It describes how two devices can be connected to each other wirelessly to enable synchronized multiplayer gaming across the devices. At the time Dr. Michael Kagan and Ian Solomon conceived of their invention, they sought to address the need for two or more users to play one game despite each user playing the game on different devices. How did the users communicate information with each other? How did the devices synchronize game information across the devices? Kagan and Solomon's invention addressed these and other hurdles then existing in the prior art. Kagan and Solomon's invention was distilled in the '045 patent, which was issued by the United States Patent Office on April 8, 1997.

The '045 patent has been cited in 325 issued United States patents assigned to technology companies including Microsoft Corporation, Intel Corporation, Google Corporation, Samsung Electronics Co. Ltd., etc. The teachings in the '045 patent enable mobile phone users to connect to one another to play games across their devices. Today, gaming applications are the most widely used and top grossing applications on mobile phones and tables. *See* Declaration of Dorian S. Berger (hereinafter, "Berger Decl.") Ex. 1 (showing 10 of the top 20 paid applications for Apple's iPad and iPhones are games); Ex. 2 (showing 19 of the top 20 top grossing applications for Android Tablet and Phones are games).

MNI filed the present infringement suit against Apple on August 7, 2014. (Dkt. No. 1.) The Complaint alleges that Apple directly and willfully infringes the '045 patent through its use and sale of iPhones, iPads and Apple TV Media Players.

III. THE GOVERNING PLEADING STANDARDS

A complaint must be liberally construed in favor of the plaintiff, and all facts pleaded in the complaint must be taken as true. *Harrington v. State Farm Fire & Cas. Co.*, 563 F.3d 141, 147 (5th Cir. 2009). The complaint must, however, contain sufficient factual allegations, as opposed to legal conclusions, to state a claim for relief that is "plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Patrick v. Wal–Mart, Inc.*, 681 F.3d 614, 617 (5th Cir. 2012).

The plausibility requirement is not akin to a "probability requirement at the pleading stage; it simply calls for enough fact[s] to raise a reasonable expectation that discovery will reveal" that the defendant is liable for the misconduct alleged. *In re Bill of Lading Transmission and Processing Sys. Patent Litig.*, 681 F.3d 1323, 1341 (Fed. Cir. 2012). The plaintiff need not "prove its case at the pleading stage." *Id.*

A. Pleading Direct Infringement.

A complaint properly pleads a claim of direct infringement under 35 U.S.C. § 271(a) if it contains allegations at the specificity required by Form 18 from the Appendix of Forms to the Federal Rules of Civil Procedure. *In re Bill of Lading Transmission & Processing System Patent Lit.*, 681 F.3d at 1334. Form 18 requires "(1) an allegation of jurisdiction; (2) a statement that the plaintiff owns the patent; (3) a statement that defendant has been infringing the patent 'by making, selling, and using [the device] embodying the patent'; (4) a statement that the plaintiff has given the defendant notice of its infringement; and (5) a demand for an injunction and damages." *Id.* (*quoting McZeal v. Sprint Nextel Corp.*, 501 F.3d 1354, 1357 (Fed. Cir. 2007)).

B. Pleading Willful Infringement.

"[T]he bar for pleading willful infringement is not high." *MobileMedia Ideas LLC v. HTC Corp.*, No. 2:10-cv-112, 2011 WL 4347037, at *2 (E.D. Tex. Sept. 15, 2011). Willfulness does not equate to fraud, and thus, the pleading requirement for willful infringement does not

rise to the standard required by Rule 9(b). *Achates Reference Pub., Inc. v. Symantec Corp.*, 2:11-cv-294, 2013 WL 693955 (E.D. Tex. Jan. 10, 2013) *report and recommendation adopted*, 2:11-cv-294, 2013 WL 693885 (E.D. Tex. Feb. 26, 2013). "[A] complaint does not need detailed factual allegations to survive a Rule 12(b)(6) motion to dismiss." *Titanide Ventures, LLC v. Int'l Bus. Machines Corp.*, 4:12-cv-196, 2012 WL 5507327 (E.D. Tex. Oct. 18, 2012) *report and recommendation adopted*, 4:12-cv-196, 2012 WL 5507316 (E.D. Tex. Nov. 14, 2012). The allegations need only rise above labels and conclusions. *Id*. Facts alleged must simply "raise a reasonable expectation that discovery will reveal" the proof required. *Id*. Courts in this District deny motions to dismiss when the complaint alleges knowledge plus continued infringement in willful disregard of the patent holders' rights. *See MobileMedia Ideas LLC v. HTC Corp.*, 2011 WL 4347037, at *2; *e-Watch Inc. v. Avigilon Corp.*, CIV.A. H-13-0347, 2013 WL 5231521 (S.D. Tex. Sept. 16, 2013) ("Motion to dismiss denied where complaint contained allegations of knowledge plus continued infringement including expansion of infringing activities.").

IV. MNI'S COMPLAINT PROPERLY ALLEGES INFRINGEMENT AGAINST APPLE

A. MNI Alleges Facts Sufficient For Direct Infringement.

To sufficiently plead direct infringement it is not necessary to identify specific products; rather, all that is necessary is for a complaint to mimic Form 18 and identify a general category of products. *Bill of Lading*, 681 F.3d at 1336. The Federal Circuit has confirmed that, "[a]s long as the complaint in question contains sufficient factual allegations to meet the requirements of Form 18, the complaint has sufficiently pled direct infringement." *Bill of Lading*, 681 F.3d. at 1336. Such minimal pleading satisfies the need to "place the alleged infringer on notice as to what he must defend." *McZeal*, 501 F.3d 1354 at 1357. "[T]o the extent the parties argue that

Twombly and its progeny conflict with the Forms and create differing pleadings requirements, the Forms control." *Bill of Lading,* 681 F.3d at 1334 (citations omitted).

> To plead direct infringement, a complaint must contain:
>
> (1) an allegation of jurisdiction; (2) a statement that the plaintiff owns the patent; (3) a statement that defendant has been infringing the patent by making, selling, and using the device embodying the patent; (4) a statement that the plaintiff has given the defendant notice of its infringement; and (5) a demand for an injunction and damages.

In re Bill of Lading, 681 F.3d at 1334 (citing Form 18, Fed. R. Civ. P.). MNI's Complaint complies with all requirements of Form 18. First, MNI properly alleged jurisdiction. (*See* Dkt. No. 1 at ¶¶ 15-17.) Second, MNI properly asserted that it owned the '045 patent. (*Id*. at ¶ 12.) Third, MNI states that Apple "has infringed and continue to infringe the MNI patent by, among other things, making, using, offering for sale, and/or selling multiple player game systems and/or services." (*Id*. ¶ 20.) Fourth, the Complaint contains a statement that "the requirements of 35 U.S.C. § 287(a) have been met with respect to the '045 patent." (*Id.* at ¶ 23.) Section 287(a) states that the "[f]iling of an action for infringement shall constitute such notice" of infringement. 35 U.S.C. § 287(a). Fifth, the Complaint contains a demand for damages. (*Id.* at ¶¶ 22, 24; Prayer for Relief ¶¶ B, D.) MNI's complaint fully pleads each of the elements required by Form 18.

Apple puts forward the novel and incorrect view that because "MNI does not explain how Apple's products even could be multiplayer gaming systems," the direct infringement claims should be dismissed. (Dkt. 12 at 6.) Apple argues that, to survive a motion to dismiss, MNI must not only anticipate Apple's non-infringement defenses, but rebut those defenses at the pleading stage. Apple's improper attempt to force MNI to prove its entire case at the pleading stage ignores *Bill of Landing* and fails to comport with this Court's precedent. MNI has pled that

the accused devices (iPad, iPhone and Apple TV) practice the patent. Nothing more is required. Despite Apple's self-serving conjecture that "none of these products by itself is a multiplayer game product, generally, let alone one that meets the claims of the '045 patent," all statements in the complaint are to be assumed as true. (Dkt. 12 at 4 (quoting *Gonzalez v. Kay*, 577 F.3d 600, 603 (5th Cir. 2009).). Accordingly, Plaintiff's statement that Apple's iPhone, iPad, and Apple TV products infringe the '045 patent suffices.

Apple is not only procedurally wrong in its attempt to litigate the infringement merits at the pleading stage, but its position that none of the Apple products identified in MNI's Complaint are "multiplayer game product[s], generally, let alone one[s] that meet[] the claims of the '045 patent" is wrong. (Dkt. No. 12 at 6.) Apple's own documentation for the iPhone, iPad, and Apple TV establish that these products are referred to ***by Apple*** as multiplayer devices. *See* Berger Decl. Ex. 3 ("Copies of your application running on multiple devices can discover each other and exchange information, providing a simple and powerful way to create ***multiplayer games*** on iOS.") (emphasis added); Ex. 4 (presentation from Apple entitled "Multiplayer Gaming with Game Center," describing the multiplayer gaming functionality of the accused products).

The cases cited by Apple are clearly distinguishable on the facts. In *Bedrock Computer Technologies, LLC*, "Bedrock did not identify any accused products." *Bedrock Computer Techs., LLC v. Softlayer Techs*. Inc., 2010 U.S. Dist. LEXIS 62711, *7 (E.D. Tex. Mar. 29, 2010). In *Landmark Tech LLC,* the plaintiff did "not identify any accused products, services, or methods." *Landmark Tech. LLC v. Aeropostale*, 2010 U.S. Dist. LEXIS 136568, * 12 (E.D. Tex. Mar. 29, 2010). Here, as Apple concedes, MNI has identified both the category of accused products, "multiplayer game products and/or systems," as well as specific examples: "Apple's

iPhone, iPad, and Apple TV." (Dkt. No. 12 at 6.) Apple's unsupported belief that it does not infringe the '045 patent is no basis for dismissing MNI's claim.

Apple's citation of *Realtime Data, LLC v. Stanley*, is particularly egregious. As the Court's order there held—not as Apple would have this Court believe—the product description "data compression products and/or services" was held "too vague;" but the Court continued by stating, "while the Court has dismissed some complaints because the description of the infringement ***was too vague, it has not required a specific identification of accused products***." *Realtime Data, LLC v. Stanley*, 721 F. Supp. 2d 538, 543 (E.D. Tex. 2010) (emphasis added). MNI's Complaint far exceeds the requirements of Form 18 and this Court's pleading standards by identifying the specific product category, "multipler player game systems and/or services," and identifying specific exemplary products, including "the iPhone line of smartphones, the Apple TV Media player, and the iPad line of tablets." (Dkt. No. 1 at ¶ 20.)

B. Apple's Argument Regarding Dismissal Of Method Claims Is Unsupported.

Apple argues MNI's allegations of infringement of method claims should be dismissed at the pleading stage. Apple's request is a motion to exclude masquerading as a motion to dismiss. MNI has not asserted infringement of the method claims in the '045 patent. (Dkt. No. 1.) The only claim MNI has specifically identified – though it is not required to under Form 18 – is Claim 1, which is a system claim. (*Id.* at ¶ 20.) Apple's argument that, at the pleading stage, MNI is required to elect whether or not it is asserting the method claims contained in the '045 patent, then explain to Apple's satisfaction MNI's theory of infringement is completely without support. (*See* Dkt. No. 12 at 10.)

To be clear, there is nothing in Form 18 to support Apple's erroneous proposition that MNI and the underlying claims of the '045 patent must meet a heightened pleading standard. In

fact, a defendant is not immune from a direct infringement claim because he does not make a "device" but, rather, infringes through a system or method. *See K-Tech Telecomms., Inc. v. Time Warner Cable, Inc*., 714 F.3d 1277, 1286 (Fed. Cir. 2013).

First, an offer to perform a patented process on behalf of a potential customer constitutes "a commercial offer for sale." *Scaltech, Inc. v. Retec/Tetra, LLC*, 269 F.3d 1321, 1328 (Fed. Cir. 2001). In *Scaltech*, the Federal Circuit considered an offer to process dissolved air floatation ("DAF") waste "to constitute a commercial offer for sale" despite the fact that the offer, if accepted, "might not have actually led to the processing of DAF waste." *Id*. at 1329. Similarly, an inventor's license and lease of a computer program and network to a customer "qualified as an on-sale event" sufficient to invalidate the inventor's patent on a method for trading securities. *Minton v. NASD*, 336 F.3d 1373, 1378 (Fed. Cir. 2003). The transaction between Mr. Minton and his customer proved fatal to his patent, in part, because "Minton conveyed to [his customer] Starks a fully-operational computer program implementing and thus embodying the claimed method." *Id*. (emphasis added).

Second, if the patentee in the case at bar sold or offered to sell cellular phones coupled with a license to use software prior to the critical date, Apple would no doubt allege MNI's patent to be invalid following the same reasoning as *Minton* and *Scaltech*. However, "[t]hat which infringes if later anticipates if earlier." *Polaroid Corp. v. Eastman Kodak Co*., 789 F.2d 1556, 1573 (Fed. Cir. 1986).

Third, Apple's cited case (*Round Rock Research*) addresses specific and distinguishable factual circumstances, which fail to support the dismissal of the instant claims. Apple cites *Round Rock Research, LLC* for the proposition that MNI's claims of direct infringement of a method claim must be dismissed where Apple was providing the instrumentality that also

supported an apparatus claim. (Dkt. No. 12 at 10.) However, this allegation is predicated on the same product providing a basis for alleging both direct infringement of an identical system claim. Here, Defendants have not alleged that the same system is providing a basis for infringement of both the system and method claim. "Further, there is no requirement that a plaintiff's complaint specify which claims the plaintiff is asserting." *Round Rock Research, LLC v. Oracle Corp*., 2011 U.S. Dist. LEXIS 158278, *12 (E.D. Tex. Oct. 25, 2011). MNI's identification of Claim 1 of the '045 patent as an exemplary claim that Apple infringes surpasses the requirements of Form 18; it does not limit the potential claims MNI can assert.

MNI's allegations state at least a plausible claim that Apple conveys, or offers to convey, a license to use software in connection with its sale, or offer to sale, of a computer-implemented method. Such an allegation must be held to state a claim for which relief may be granted for the sale, or offer thereof, of a patented process. Still, Apple contends that "MNI does not allege that Apple itself performs any of the claimed methods steps in the United States or elsewhere." (Dkt. No. 12 at 10.) But Apple is not contesting personal jurisdiction in this case. And even if it were, it is highly likely, and therefore at least plausible, that Apple's employees and agents (whose acts are imputable to Apple) have used its own products that incorporate the patented computer implemented method during development, testing, servicing and or repairing devices on behalf of their customers. *See, Microsoft Corp*. v. AT&T Corp., 550 U.S. 437, 446 (2007) ("Microsoft stipulated that by installing Windows on its own computers during the software development process, it directly infringed the [speech-processing computer] patent."). Moreover, MNI specifically alleges that the acts of infringement, including Defendant's making, using, importing, offering for sale or selling the infringing products, are committed in this District. (Dkt. No. 1 at ¶ 16.)

This same Court very recently denied a motion to dismiss that was predicated upon identical arguments as those now advanced by Apple in the instant case. In the context of direct infringement of method patents, Judge Gilstrap concluded that:

> Though Defendants argue that Plaintiff's allegations "fall short of even the minimal requirements of Form 18," their argument is supported only by an insistence that Plaintiff must plead more facts to make plausible the inference that Defendants really do make, sell, or use an infringing device or method. []This is the opposite of the conclusion reached in *In re Bill of Lading*, where the Federal Circuit made clear that a pleading following the language of Form 18 is sufficient to state a claim, and may not be attacked on the basis of implausibility. To hold otherwise would be an injustice, since attorneys rely on the Forms in crafting their complaints. Form 18 is useful to attorneys pursuing patent claims only insofar as it provides safe-harbor language that they can be sure will survive a motion to dismiss. If an attorney may (within the bounds of Rule 11) submit such a complaint, he or she may be sure that their complaint will not be dismissed as implausible…Accordingly, Defendants' [] argument is unavailing.

TIB v. Toshiba, at 3-4.

In view of the foregoing, this Court should find that, as in *TIB v. Toshiba*, allegations of similar conduct by Apple, adequately state a claim for direct infringement for the sale and offer to sale of the claimed method and, as such, Apple's motion to dismiss should be denied.

C. MNI Sufficiently Pleads Willful Infringement

Apple's argument regarding the insufficiency of MNI's pleading of willful infringement hinges on MNI allegedly failing to "'provide enough facts that, when taken as true, show objective recklessness of the infringement risk.'" (Dkt. No. 12 at 8 (quoting *U.S. Ethernet Innovations, LLC v. Cirrus Logic, Inc.*, 12-366, 2013 WL 8482270, at *5 (E.D. Tex. Mar. 6, 2013).) Apple claims that "MNI alleges nothing more than conclusions, labels, and naked assertions." (Dkt. No. 12 at 9.) Apple, however, ignores the ***56 patents*** Apple owns that, going as far back as 2008, all cite the '045 patent as prior art. (Dkt. No. 1 at ¶ 21.) MNI alleges that

Apple had knowledge of the '045 patent "since at least as early as 2008" and lists the very Apple patents giving rise to this allegation – all 56 of them.

Apple's argument that MNI's pleadings insufficiently plead willful infringement has already been rejected in *Potter Voice Technologies, LLC v. Apple Inc.*, No. 13-1710, 2014 U.S. Dist. LEXIS 1165, at *2-7 (N.D. Cal. Jan. 6, 2014). In *Potter Voice*, the Plaintiff alleged that the patent-in-suit was cited as prior art in eight patents owned by SRI International, a company which Apple later acquired. *Id.* at *2. The Court determined that the Plaintiff in that case adequately alleged knowledge of the patent-in-suit for the purposes of pleading willful infringement because the employees of SRI went to work for Apple after the acquisition. *Id.* at *6-8. *See also St. Clair Intellectual Prop. Consultants, Inc. v. Hewlett-Packard Co.*, No. 10-425, 2012 U.S. Dist. Lexis 42749, at *3 (D. Del. Mar. 28, 2012) (Plaintiff properly pled willful infringement by alleging the patents-in-suit were often called to the attention of personnel for Defendant). The facts pled in MNI's complaint are far more compelling than those found sufficient in *Potter Voice*. MNI has specifically identified 56 separate issued patents owned by Apple, as opposed to a separate company acquired by Apple. (Dkt. No. 1 at ¶ 21.)

Irrespective of MNI's identification of specific patents owned by Apple that give rise to its willful infringement allegations, case law is clear that post-filing conduct alone can serve as the basis of willful infringement allegations. "[T]he determination of whether a patentee may pursue a claim for willful infringement based on post-filing conduct 'will depend on the facts of each case.'" *Id.* (citing *Seagate*, 497 F.3d at 1374). The factual inquiry, therefore, should not be resolved at the pleading stage. *DataQuill Ltd. v. High Tech Computer Corp.*, 2011 WL 6013022, at *12 (S.D. Cal. Dec. 1, 2011), is directly relevant here. In that case, the patentee did not practice the patented invention and was not in competition with the defendant. *Id.* at *12-*13.

The defendant, relying on *Seagate*, argued that because the patentee only sought willful infringement damages for post-filing conduct and had not sought a preliminary injunction, the plaintiff's claim for willful infringement was barred as a matter of law. *Id.* at *11. The defendant argued that the patentee must seek an injunction, even if it "might think that [it] will be denied," before a court could entertain its willfulness claim. *Id.* at *14. But the court found that "the *Seagate* bar should not apply to [the patentee] in this case because . . . [the patentee] would not have been able to obtain a preliminary injunction because it does not practice the IpVenture Patents and it does not compete with [the defendant]." *Id.* at *13. The court concluded that forcing the patentee to seek a preliminary injunction in these circumstances "would be a waste of time and resources." *Id.* at *14 (citing *Krippelz v. Ford Motor Co.*, 670 F. Supp. 2d 806, 813 (N.D. Ill. 2009)). MNI is like the patentee in *DataQuill* and would not be able to obtain a preliminary injunction. As such, MNI's willfulness allegations should be considered in the context of the specific facts of this case and therefore should survive the pleadings stage.

MNI has pled facts establishing Apple's objective recklessness of the infringement risk, namely that it has systematically cited the '045 patent as prior art to its own patents since at least 2008. Moreover, MNI adequately pled Apple's continuing infringement of the '045 patent despite its knowledge of infringement allegations arising from the filing of the Complaint in this action. Accordingly, MNI respectfully requests that the Court deny Apple's request to dismiss MNI's willful infringement allegations.

V. CONCLUSION

MNI's Complaint far exceeds the applicable standard for pleading allegations of direct and willful infringement of the patent-in-suit. Pleadings need only contain allegations sufficient to allow reasonable inferences that the defendant is liable. Pleading motions should not be used

as a substitute for determinations on the merits before discovery or the record is developed.[2]

Accordingly, Plaintiff respectfully requests that the Court deny Apple's motion to dismiss.

Dated: October 14, 2014

Respectfully submitted,

/s/ Elizabeth L. DeRieux

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[2] In the event that the Court is inclined to grant the motion in whole or in part, MNI requests that the Court do so without prejudice and with leave to amend.

CERTIFICATE OF SERVICE

I hereby certify that the all counsel of record who are deemed to have consented to electronic service are being served this 14th day of October 2014, with a copy of this document via the Court's CM/ECF system per Local Rule CV-5(a)(3). Any other counsel of record will be served by electronic mail, facsimile transmission and/or first class mail on this same date.

/s/ Elizabeth L. DeRieux
Elizabeth L. DeRieux

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

MULTIPLAYER NETWORK INNOVATIONS, LLC, ***Plaintiff,*** **v.** **AMAZON.COM, INC.,** ***Defendant*.**	**Civil Action No. 2:14-cv-825** **LEAD CASE** **JURY TRIAL DEMANDED**
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DECLARATION OF DORIAN S. BERGER IN SUPPORT OF PLAINTIFF MULTIPLAYER NETWORK INNOVATIONS, LLC'S BRIEF IN OPPOSITION TO APPLE, INC.'S MOTION TO DISMISS

I, Dorian S. Berger, declare as follows:

1. I am an attorney with Russ, August & Kabat, counsel for Plaintiffs in the above-captioned case. I have personal knowledge of the facts stated herein, and I could and would competently testify to them is asked to as a witness.

2. Attached hereto as Exhibit 1 is a true and correct copy of the "iTunes Charts," which shows "top paid apps on the App Store." The iTunes Charts attached hereto as Exhibit 1 is current as of October 14, 2014, and can be accessed online at: https://www.apple.com/itunes/charts/paid-apps/ (last visited October 13, 2014).

3. Attached hereto as Exhibit 2 is a true and correct copy of the "Top Grossing Android Apps," which shows the "Top Grossing Android Apps – Android Apps on Google Play." The list attached hereto as Exhibit 2 is current as of October 14, 2014, and can be accessed online at: https://play.google.com/store/apps/collection/topgrossing (last visited October 13, 2014).

4. Attached hereto as Exhibit 3 is a true and correct copy of a Game Kit Programming Guide: Networking & Internet from Apple's iOS Developer Library. The Game Kit Programming Guide can be publicly accessed at: http://www.cs.mun.ca/~yzchen/teaching/cs4768/notes/GameKit_Guide.pdf (last visited October 10, 2014).

5. Attached hereto as Exhibit 4 are excerpts from a true and correct copy of a presentation by Senior iOS Development Engineer, Christy Warren, entitled, "Multiplayer Gaming with Game Center." The presentation attached hereto as Exhibit 4 can be publicly accessed at: https://developer.apple.com/videos/wwdc/2012/?id=519 (last visited October 9, 2014).

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 14th day of October, 2014, at Los Angeles, California.

/s/ Dorian S. Berger
Dorian S. Berger

Exhibit 1

iTunes Charts

New content arrives on iTunes all the time. Here you can see what's new this week and browse the top 100 songs, albums, TV shows, movies, apps, and more.
Shop the iTunes Store now ›

1. 
Five Nights at
Games
Buy Now on iTunes ›

2. 

Minecraft – Pocket
Games
Buy Now on iTunes ›

3. 
Goblin Sword
Games
Buy Now on iTunes ›

4. 
Sleep Cycle alarm
Health & Fitness
Buy Now on iTunes ›

5. 
Afterlight
Photo & Video
Buy Now on iTunes ›

6. 

Heads Up!
Games
Buy Now on iTunes ›

7. 

7 Minute Workout
Health & Fitness
Buy Now on iTunes ›

8. 
Videoshop - Video
Photo & Video
Buy Now on iTunes ›

9. 
Geometry Dash
Games
Buy Now on iTunes ›

10. 
Rope'n'Fly 4
Games
Buy Now on iTunes ›

11. 

NFL Quarterback 15
Games
Buy Now on iTunes ›

12. 
Camera+
Photo & Video
Buy Now on iTunes ›

13. 
WolframAlpha
Reference
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14. 
Plague Inc.
Games
Buy Now on iTunes ›

15. 
TurboScan: quickly
Business
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16. 
Facetune
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17. 

iLocks - Custom Lock
Entertainment
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18. 

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19. 

MONOPOLY Game
Games
Buy Now on iTunes ›

20. 
Buddyman: Kick
Games
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21. 

22. 

23. 

24. 

25. 

Terraria
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Exhibit 2

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Apps | Categories | Home | Top Charts | New Releases

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Editors' Choice

Top Grossing Android Apps

1. Clash of Clans
Supercell
FREE

2. Candy Crush Sag
King

3. Game of War - Fir
Machine Zone, Inc.
FREE

4. Family Guy The Q
TinyCo
FREE

5. Farm Heroes Sag
King
FREE

6. Hay Day
Supercell
FREE

7. Bubble Witch 2 S
King
FREE

8. Pet Rescue Saga
King
FREE

9. Slotomania - FRE
Playtika
FREE

10. Diamond Digger
King
FREE

11. The Simpsons™
Electronic Arts Inc
FREE

12. Pandora® intern
Pandora

13. Big Fish Casino
Big Fish Games
FREE

14. Cookie Jam
SGN
FREE

15. KIM KARDASHI
Glu
FREE

16. Castle Clash
IGG.COM
FREE

17. FarmVille 2: Cou
Zynga
FREE

18. Summoners War
Com2uS
FREE

19. Boom Beach
Supercell
FREE

20. BINGO Blitz - FR
Buffalo Studios, LLC
FREE

21. Hit it Rich! Free
Zynga
FREE

22. DoubleDown Ca
Double Down Interactiv

23. Racing Rivals
Cie Games
FREE

24. Jackpot Party C
Williams Interactive

25. Slots - House of
Playtika HOF
FREE

26. Slots - myVEGA
PlayStudios
FREE

27. The Hobbit: King
Kabam
FREE

28. Marvel Puzzle Q
D3Publisher
FREE

29. Brave Frontier
gumi Inc.
FREE

30. Knights & Dragon
GREE, INC
FREE

31. Dragon City
socialpoint
FREE

32. Bingo Bash - Fre
GSN Games
FREE

33. GSN Casino FRE
GSN.com
FREE

34. MARVEL War of
Mobage
FREE

35. Clash of Lords 2
IGG.COM
FREE

36. Star Wars Force
KONAMI
FREE

37. Madden NFL Mo
ELECTRONIC ARTS
FREE

38. Star Wars: Comi
Disney
FREE

39. Age of Warring E
Silent Ocean
FREE

40. Puzzle & Dragon
GungHoOnlineEntertain
FREE

41. Empire: Four Kir
Goodgame Studios
FREE

42. The Sims™ Free
Electronic Arts Inc
FREE

43. Zynga Poker – T
Zynga
FREE

44. Injustice: Gods A
Warner Bros. Internatio
FREE

45. Dragons of Atlar
Kabam
FREE

46. Panda Pop
SGN
FREE

47. DoubleU Casino
DoubleUCasino
FREE

48. Minecraft - Pock
Mojang
$6.99

49. 8 Ball Pool
Miniclip.com
FREE

50. War of Nations
GREE, INC
FREE

51. Monster Busters
PurpleKiwii
FREE

52. Empire Z
Ember Entertainment
FREE

53. Caesars Slots
Playtika
FREE

54. NHL
NHL Interactive Cybere
FREE

55. World Series of
Playtika
FREE

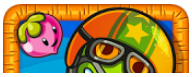
56. Kill Shot
Hothead Games
FREE

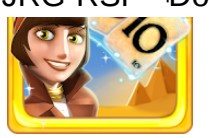
57. Dragonplay Slots
Dragonplay
FREE

58. Modern War by
GREE, INC
FREE

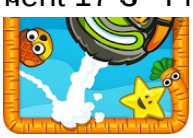
59. Monster Legend
socialpoint
FREE

60. DEER HUNTER
Glu
FREE

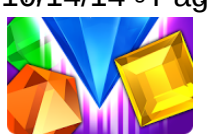




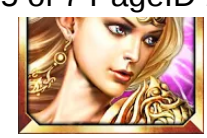
61. Pyramid Solitair
King
FREE



62. Papa Pear Saga
King
FREE



63. Bejeweled Blitz
Electronic Arts Inc
FREE



64. Dark Summoner
Ateam Inc.
FREE

65. Covet Fashion -
Crowdstar Inc
FREE

66. Crime City (Acti
GREE, INC
FREE

67. DH Texas Poker
DroidHen
FREE

68. Heroes of Camel
Kabam
FREE

69. Slots - Pharaoh's
Cervo Media
FREE

70. OkCupid Dating
okcupid.com
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71. Frozen Free Fall
Disney
FREE

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77. Megapolis
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GREE, INC
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PennyPop
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82. Solitaire TriPeak
GSN.com
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83. The Secret Soci
G5 Entertainment
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84. Real Racing 3
Electronic Arts Inc
FREE

85. Rage of Bahamu
Mobage
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86. Spider-Man Unli
Gameloft
FREE

87. Slot Machines b
IGG.COM
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89. Charm King
PlayQ Inc
FREE

90. WWE SuperCard
2K Games, Inc.
FREE

91. Heroes Charge
uCool
FREE

92. Kingdoms of Ca
Kabam
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Disney
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tap4fun
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95. Slots - Big Win C
FiveStar Games
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DeNA Corp.
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Zindagi Games
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99. Westbound: Pio
Kiwi, Inc.
FREE

100. War of Legions
Ateam Inc.
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101. Criminal Legac
GREE, INC

102. Angry Birds Ep
Rovio Mobile Ltd.

103. Plants vs. Zom
Electronic Arts Inc

104. Heroes of Drag
Electronic Arts Inc

105. Slots Vacation
Scopely
FREE

106. Plague Inc.
Miniclip.com
FREE

107. Wartune: Hall
Kabam
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108. DragonVale
Backflip Studios, Inc.
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diwip ltd
FREE

110. Family Farm S
FunPlus
FREE

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Space Ape Games
FREE

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Com2uS USA
FREE

113. My Singing Mo
Big Blue Bubble
FREE

114. Tyrant Unleash
Kongregate
FREE

115. Greed for Glory
PerBlue
FREE

116. Despicable Me
Gameloft
FREE

117. WhatsApp Mes
WhatsApp Inc.

118. Galaxy Legend
tap4fun
FREE

119. CSI: Hidden Cr
Ubisoft Entertainment
FREE

120. Shipwrecked: L
Kiwi, Inc.
FREE

Exhibit 3

Peer-to-Peer Connectivity

The `GKSession` class allows your application to create and manage an ad-hoc Bluetooth or local wireless network, as shown in Figure 1. Copies of your application running on multiple devices can discover each other and exchange information, providing a simple and powerful way to create multiplayer games on iOS. Further, sessions offer all applications an exciting mechanism to allow users to collaborate with each other.

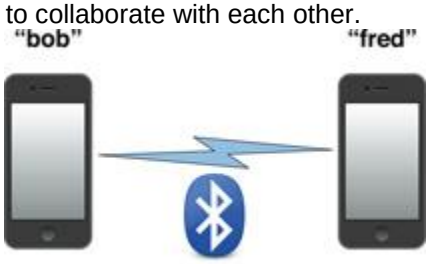


Figure 1 Bluetooth and local wireless networking

Bluetooth networking is not supported on the original iPhone or the first-generation iPod touch. It is also not supported in Simulator.

When you develop a peer-to-peer application, you can either implement your own user interface to show other users that have been discovered by the session or you can use a `GKPeerPickerController` object to present a standard user interface to configure a session between two devices.

Once a network between the devices is established, the `GKSession` class does not dictate a format for the data transmitted over it. You are free to design data formats that are optimal for your application.

Note: This guide discusses the infrastructure provided by the peer-to-peer connectivity classes. It does not cover the design and implementation of networked games or applications.

Requiring Peer-to-Peer Connectivity

If your application requires peer-to-peer connectivity, you should ensure that only users whose devices support it can purchase and download your application. To require peer-to-peer support, add the `peer-peer` key to the list of required device capabilities stored in your application's `Info.plist` file. See "iTunes Requirements" in *iOS App Programming Guide*.

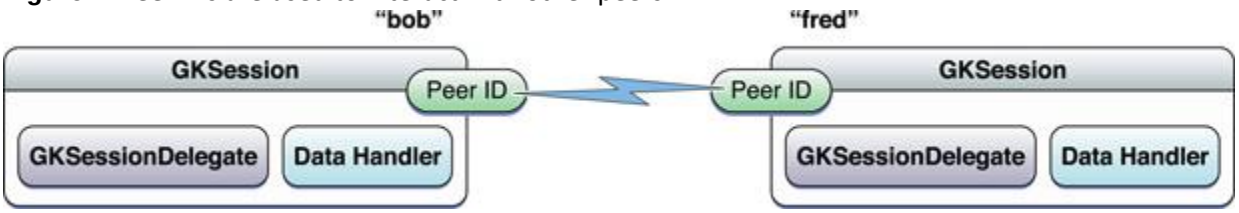
Sessions

Sessions are created, they discover each other, and they are connected into a network. Your application uses a connected session to transmit data to other devices. Your application provides a delegate to handle connection requests and a data handler to receive data directed to your application from another device.

Peers

iOS-based devices connected to an ad-hoc wireless network are known as **peers**. A peer is synonymous with a session object running inside your application. You need to be sure that each peer creates a unique peer identification string (peer ID), used to identify it to other peers on the network. Interactions with other peers on the network are done using peer IDs. For example, if one peer knows the peer ID of another peer, it can retrieve a user-readable name for that peer by calling the session object's `displayNameForPeer:` method, as shown in Figure 2.

Figure 2 Peer IDs are used to interact with other peers



Other peers on a network can appear in a variety of states relative to the local session. Peers can appear or disappear from the ad-hoc network, be connected to the session, or disconnect from the session. Your application implements the delegate's`session:peer:didChangeState:` method in order to be notified when peers change their state.

Discovering Other Peers

Every session implements its own specific type of service. This service might be a specific game or a feature like swapping business cards. You are responsible for determining the needs of your service type and the data it needs to exchange between peers.

Sessions discover other peers on the network based on a **session mode** which is set when the session is initialized. Your application can configure the session to be a **server**, which advertises a service type on the network; a **client**, which searches for servers advertising themselves on the network; or a **peer**, which advertises like a server and searches like a client simultaneously. Figure 3 illustrates the session mode.
Servers advertise their service type with a **session identification** string, or `sessionID`. Clients find only servers that have a matching session ID.

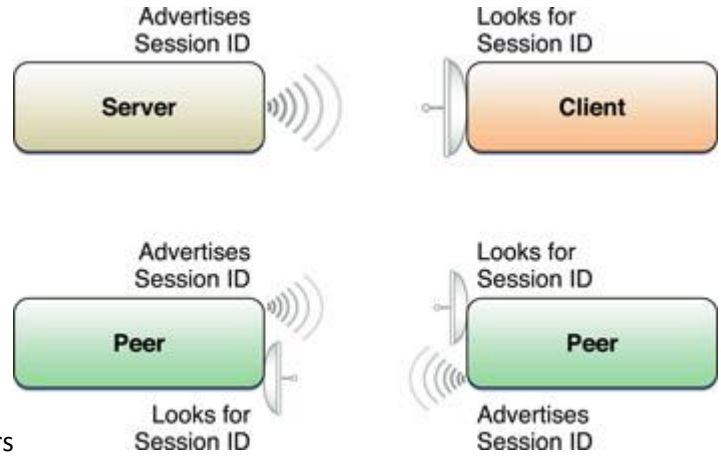


Figure 3 Servers, clients, and peers

The session ID should be the short name of a registered Bonjour service. For more information on Bonjour services, see Bonjour Networking. If you do not specify a session ID when creating a session, the session generates an ID using the application's bundle identifier.
To establish a connection, at least one device must advertise as a server and another must search for it. Your application provides code for both advertising and searching. Peers, which advertise and search simultaneously, are the most flexible way to implement this. However, because they both advertise and search, it takes longer for other devices to be detected by the session.

Note: The maximum size of a client-server game is 16 players.

Implementing a Server

An instance of your application acting as a server initializes a session by calling `initWithSessionID:displayName:sessionMode:` with the session mode parameter specifying either `GKSessionModeServer` or `GKSessionModePeer`. After the application configures the session, it advertises the service by setting the session's `available` property to `YES`.

The servers is notified when a client requests a connection to the service. When a client sends a connection request, the `session:didReceiveConnectionRequestFromPeer:` method on the server's delegate is called. A typical behavior of the delegate should be to use the`peerID` string to retrieve a user-readable name by calling

the `displayNameForPeer:` method. The server can then present an interface that lets users decide whether to accept the connection.

The delegate accepts the request by calling the session's `acceptConnectionFromPeer:error:` method or rejects it by calling the `denyConnectionFromPeer:` method.

When the connection is successfully created, the delegate's `session:peer:didChangeState:` method is called to inform the delegate that a new peer is connected.

Connecting to a Service

An instance of your application acting as a client initializes the session by calling the `initWithSessionID:displayName:sessionMode:` method with a session mode parameter specifying either `GKSessionModeClient` or `GKSessionModePeer`. After configuring the session, your application searches the network for advertising servers by setting the session's `available` property to `YES`. If the session is configured with the `GKSessionModePeer` session mode it also advertises itself as a server, as described in "Implementing a Server." When a client discovers an available server, the client session's delegate receives a call to its `session:peer:didChangeState:` method; Game Kit provides the `peerID` string of the discovered server. Your application can call the session's `displayNameForPeer:` method to retrieve a user-readable name to display to the user. When the user selects a peer to connect to, your application calls the session's `connectToPeer:withTimeout:` method to request the connection.

When the connection is successfully created, the delegate's `session:peer:didChangeState:` method is called to inform the application that a new peer is connected.

Exchanging Data

Peers connected to a session can exchange data with other connected peers. Your application sends data to all connected peers by calling the `sendDataToAllPeers:withDataMode:error:` method or to a subset of the peers by calling the`sendData:toPeers:withDataMode:error:` method. The data sent to other peers is encapsulated in an `NSData` object. Your application can design and use any data formats it wishes for its data. Your application is free to create its own data format. For best performance, it is recommended that the size of the data objects be kept small (under 1000 bytes in length). Messages larger than 1000 bytes may need to be split into smaller chunks and reassembled at the destination, incurring additional latency and overhead.

Note: The largest message size allowed is 87 kilobytes. If you need to send more than that, you must split your data into multiple messages.
You can choose to send data **reliably**, whereby a session retransmits data any that has failed to reach its destination, or **unreliably**, whereby a session only attempts to send the data once. Unreliable messages are appropriate when the data must arrive in real time to be useful to other peers, and when sending an updated packet is more important than resending the data that failed to reach its intended recipient (for example, when sending dead-reckoning information).

Reliable messages are received by participants in the order they were transmitted by the sender.

In order for your application to receive data sent by other peers, you must implement the `receiveData:fromPeer:inSession:context:` method on an object. Your application provides this object to the session by calling the `setDataReceiveHandler:withContext:`method. When data is received from connected peers, the data handler is called on your main thread of your application.

Important All data received from other peers should be treated as *untrusted* data. Your application should validate the data a peer receives from other peers; write your code carefully to avoid security vulnerabilities. See the *Secure Coding Guide* for more information.

Disconnecting Peers

To end a session, your application calls the `disconnectFromAllPeers` method.

Your application can call the `disconnectPeerFromAllPeers:` method to disconnect a particular peer from the connection.

Networks are inherently unreliable. If a peer is nonresponsive for a period of time, that peer is automatically disconnected from the session. Your application can modify the `disconnectTimeout` property to control how long the session waits for a peer before disconnecting it.

The session delegate's `session:peer:didChangeState:` method is called when a peer disconnects from the session.

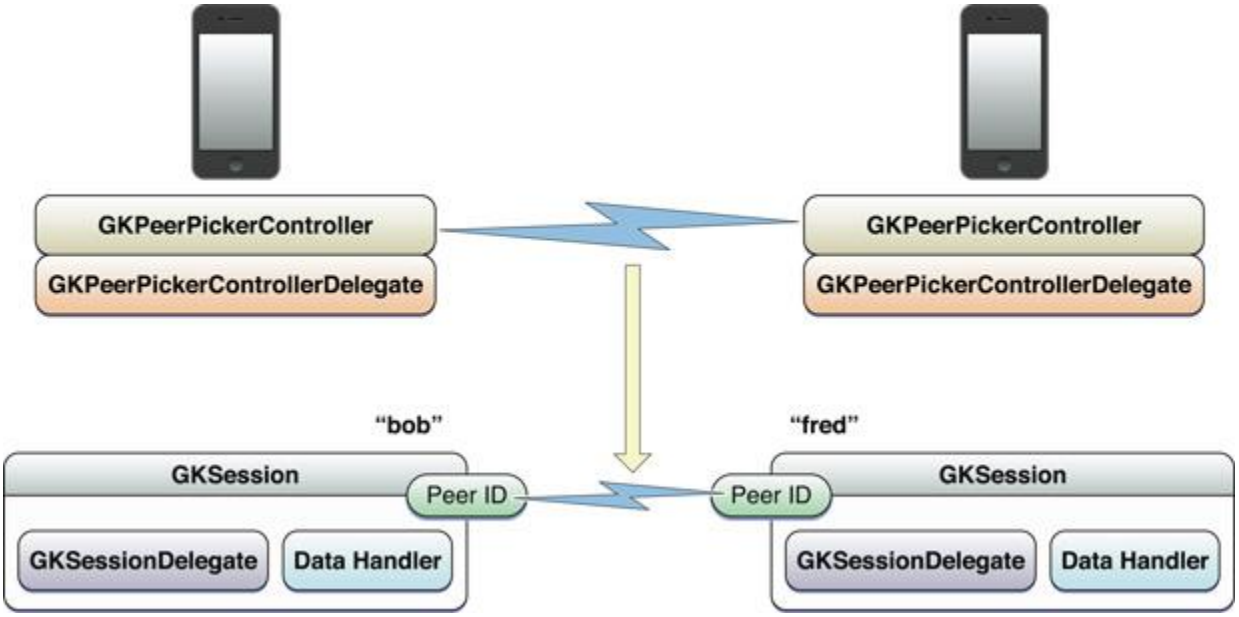
Cleaning Up

When your application is ready to dispose of the session, your application should disconnect from other peers, set the `available` flag to `NO`, remove the data handler and delegate, and then release the session.

The Peer Picker

Although you may choose to implement your own user interface using the `GKSession`'s delegate, Game Kit offers a standard user interface for the discovery and connection process. A `GKPeerPickerController` object presents the a peer picker user interface that allows a user to create a peer-to-peer connection to another device.
The `GKPeerPickerController` object returns a fully configured `GKSession` that connects the two peers. Figure 4 illustrates how the peer picker works..

Figure 4 The peer picker creates a session connecting two peers on the network



Configuring a Peer Picker Controller

Your application provides a delegate that the controller calls as the user interacts with the peer picker.

The peer picker controller's `connectionTypesMask` property is used to configure the list of available connection methods the application allows the user to choose from. A user can select between local Bluetooth networking and Internet networking. When your application sets the mask to include more than one form of network, the peer picker controller displays an additional dialog to allow users to choose which network they want to use. When a user picks a network, the controller calls the delegate's`peerPickerController:didSelectConnectionType:` method.

Important The peer picker creates only Bluetooth connections. If your application offers Internet connections, when the user selects an Internet connection, your application must dismiss the peer picker and present its own user interface to configure the Internet connection.

If your application wants to customize the session created by the peer picker, it can implement the delegate's `peerPickerController:sessionForConnectionType:` method. If your application does not implement this method, the peer picker creates a default session for your application.

Displaying the Peer Picker

Your application shows the peer picker by calling the controller's `show` method. If the user connects to another peer, the delegate's `peerPickerController:didConnectPeer:toSession:` method is called. Your application should take ownership of the session and call the controller's `dismiss` method to hide the dialog.

If the user cancels the connection attempt, the peer-picker delegate's `peerPickerControllerDidCancel:` method is called.

NextPrevious

Exhibit 4

Multiplayer Gaming with Game Center

Session 519

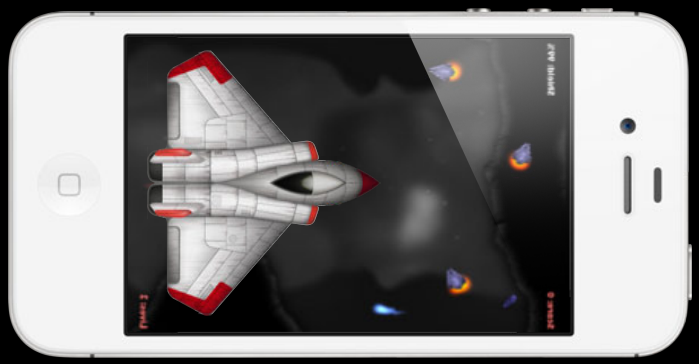
Christy Warren
Senior iOS Development Engineer

These are confidential sessions—please refrain from streaming, blogging, or taking pictures

What You Will Learn

Multiplayer support

- Matchmaking UI
- Programmatic auto-match
- Peer-to-peer communications
- Turn-Based gaming



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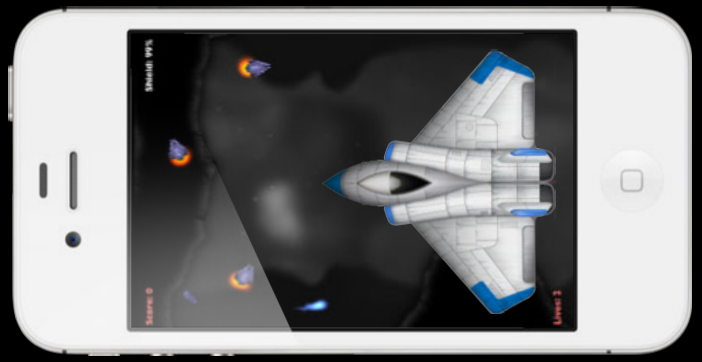
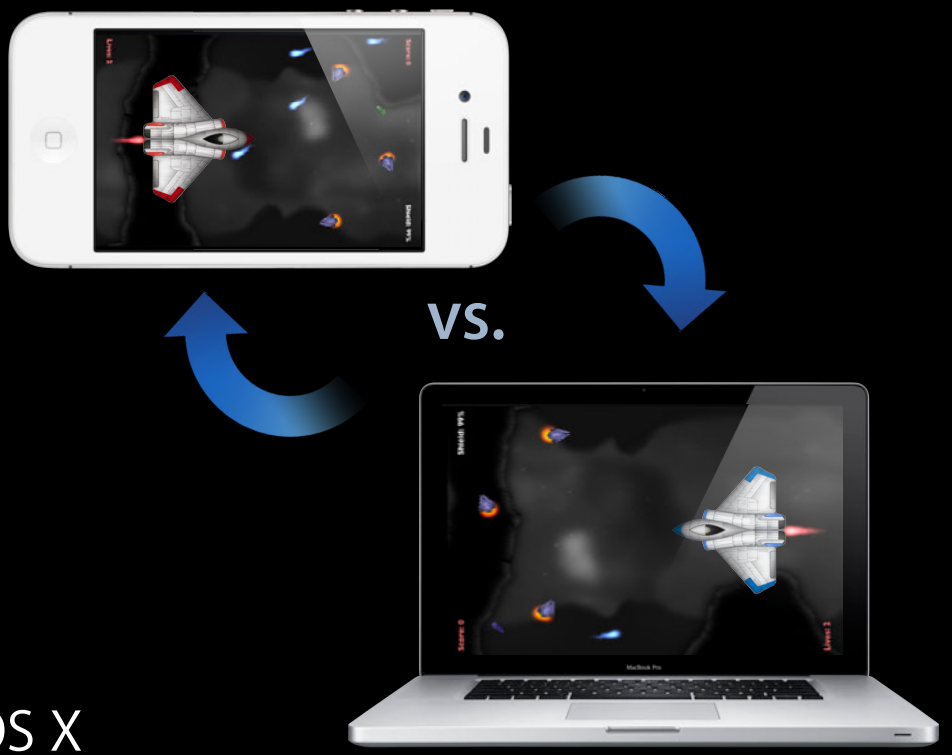


Why Add Multiplayer

- Discoverable
- Make it stand out
  - Players enjoy real opponents
  - Top games support multiplayer
- Increase longevity
  - Foster competition and engagement
  - Leaderboards and achievements
- Chance for immortality

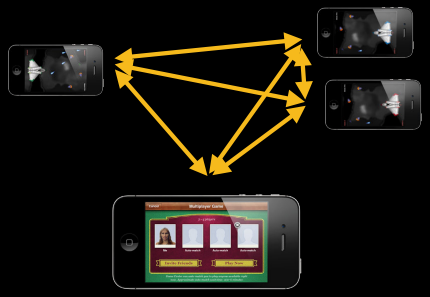
New in Game Center

- New Matchmaking UI
- Discover players on nearby devices
- Programatic invites
- Re-match API
- Host election API
- Turn-Based improvements
  - Better handling of missed turns
  - Turn match data saving
- Interoperates with Game Center for OS X

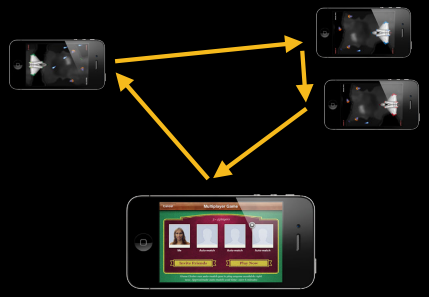


Styles of Multiplayer

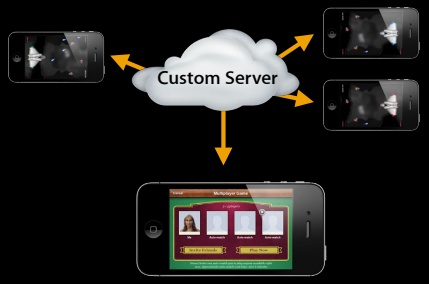
Comparison



Peer-to-Peer



Turn-Based



Server-Based

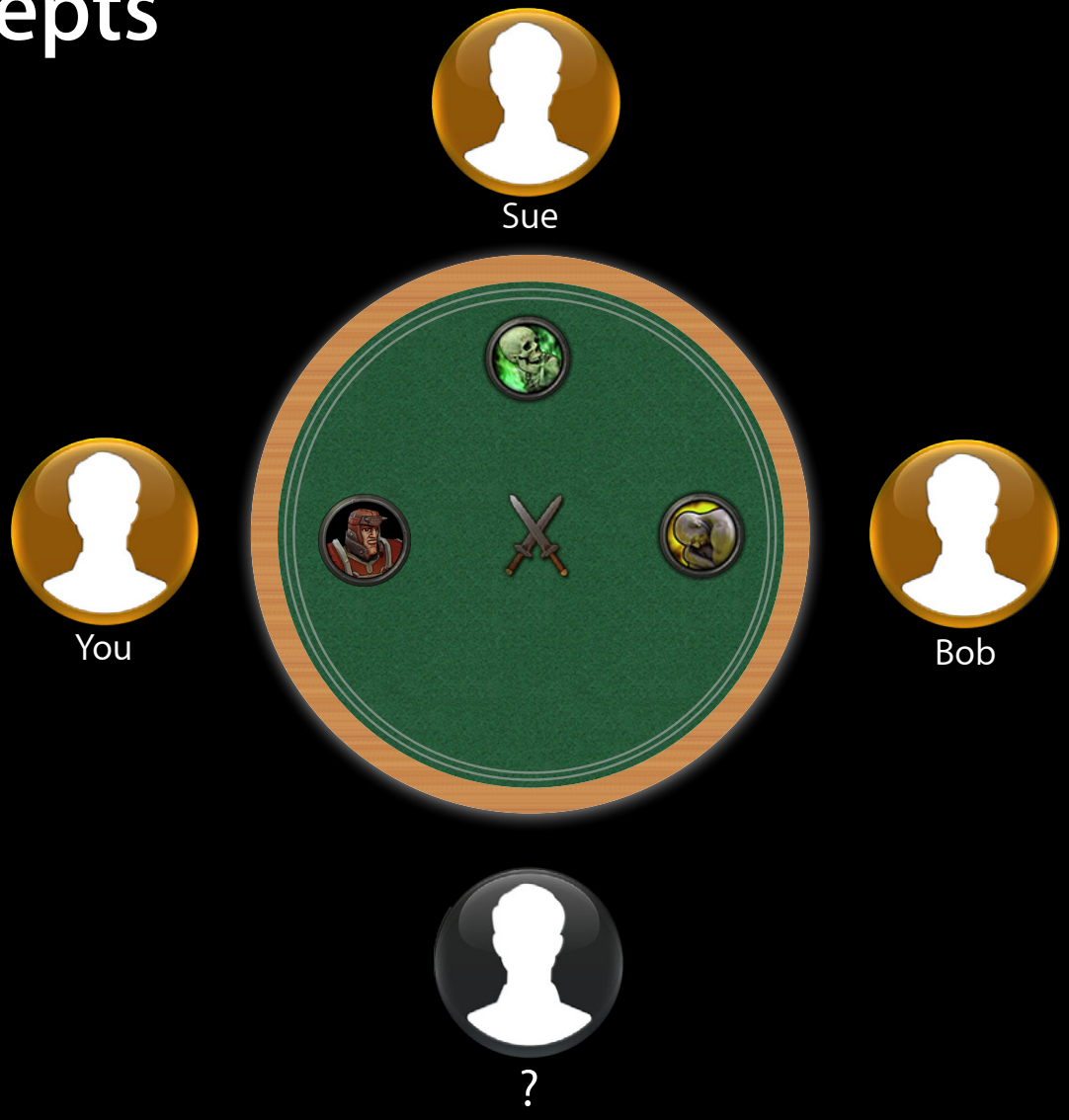
Players	2–4	2–16	2–16
Game Play	Simultaneous	Sequential	Simultaneous
Host	Device or Distributed	Distributed	Developer Server

Peer-to-Peer Multiplayer

Peer-to-Peer Concepts

Match and play

- Invite or auto-match
- Begin matchmaking
- Invite friends
- Friends accept



IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

MULTIPLAYER NETWORK INNOVATIONS, LLC, ***Plaintiff,*** **v.** **AMAZON.COM, INC.,** ***Defendant*.**	**Civil Action No. 2:14-cv-825** **LEAD CASE** **JURY TRIAL DEMANDED**
MULTIPLAYER NETWORK INNOVATIONS, LLC, ***Plaintiff,*** **v.** **APPLE, INC.,** ***Defendant*.**	**Case No. 2:14-CV-00826-JRG-RSP** **JURY TRIAL DEMANDED**

ORDER

Pending before the Court is Apple, Inc.'s Motion to Dismiss Plaintiff Multiplayer Network Innovations, LLC's Complaint Pursuant to Rule 12(B)(6). (Dkt. No. 12). The Court, having considered the Motion, the Opposition, Apple's Reply, and the entire file in this matter, is of the opinion that Apple's Motion must be DENIED.

It is therefore ORDERED that Defendant Apple's Motion to Dismiss Plaintiff Multiplayer Network Innovations, LLC's Complaint Pursuant to Rule 12(B)(6) is DENIED.

IT HEREBY IS SO ORDERED.