Docket No. 23-35468

In the

United States Court of Appeals

For the

Ninth Circuit

BUNGIE, INC., a Delaware corporation,

Plaintiff-Appellee,

v.

AIMJUNKIES.COM, a business of unknown classification; PHOENIX DIGITAL GROUP LLC, an Arizona limited liability company; JEFFREY CONWAY, an individual; DAVID SCHAEFER, an individual; JORDAN GREEN, an individual; JAMES MAY, an individual,

Defendants-Appellants.

Appeal from a Decision of the United States District Court for the Western District of Washington, No. 2:21-cv-00811-TSZ · Honorable Thomas S. Zilly

BRIEF OF APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Counsel for Appellants certifies the following:

1. The full names of every party or amicus represented by me are:

Phoenix Digital Group LLC
Aimjunkies.com
Jeffrey Conway
David Schaefer
Jordan Green
James May

2. The names of the real parties in interest (if the party named in the caption is not the real party in interest) represented by me are:

Phoenix Digital Group LLC
Aimjunkies.com
Jeffrey Conway
David Schaefer
Jordan Green
James May

3. The parent companies, subsidiaries (except wholly-owned subsidiaries), and affiliates that have issued shares to the public, of the party or amicus represented by me are:

None

4. The name of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are:

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I. APPELLATE JURISDICTIONAL STATEMENT

(a) Jurisdiction in the District Court was based upon a Federal Question under 117 U.S.C. § 501(a), as well as 28 U.S.C. §§1331 and 1338.

(b) This Court's jurisdiction is based on 28 U.S.C. § 1295(a), this being an appeal from a final decision of a District Court having jurisdiction under 28 U.S.C. § 1338(a).

(c) This appeal is timely under Fed. R. App. P. 4. A final judgment was entered by the District Court on June 23, 2023. ER-5-8. A timely Notice of Appeal to this Court was filed on July 11, 2023. ER-246-247.

(d) This appeal is from the final judgment dated June 23, 2023. ER-5-8.

II. STATEMENT OF THE ISSUE

The issue on appeal is as follows:

1. Did the District Court err in confirming an arbitration award wherein, during the arbitration hearing, the arbitrator, in clear violation of his arbitration contract with Appellants, blatantly failed to receive and consider deposition testimony despite the applicable arbitration rule reading, "The Arbitrator *shall receive and consider* relevant deposition testimony recorded by transcript or videotape, provided that the other Parties have had the opportunity to attend and cross-examine," (ER-178-179, ¶22(e))?

III. STATEMENT OF THE CASE

This case involves a dispute between Plaintiff-Appellee Bungie, Inc. ("Bungie"), a well-known purveyor of the popular "first person shooter" computer game, "Destiny 2," and Defendants-Appellants ("Appellants" or "Phoenix Digital") who, through Appellant Phoenix Digital Group LLC and its former website, Aimjunkies.com, once distributed third-party software programs, colloquially known as "cheats," that enable players to enhance their performance in playing online computer games.

The underlying arbitration that gives rise to this appeal is an ancillary battle in a larger, and still ongoing campaign brought by Bungie to, in its words, "put cheaters and those who assist them on notice that Bungie does not and will not tolerate cheating in Destiny 2." (ER-75, ¶4.) Bungie, in its campaign to "punish "cheaters and those who assist them," and to demonstrate that it, "does not and will not tolerate cheating in Destiny 2," has filed a series of well-publicized actions against a number of those it dubs, "cheaters." Targets of these numerous actions have been individuals, foreign residents of countries overseas, and even minor children. In virtually all of these cases, the targets of these lawsuits have either defaulted, or have entered into what are likely confidential settlement agreements that, apparently, still include highly publicized multi-million dollar "judgments"

for public consumption. Whether anyone has actually satisfied one of these judgments through actual payment is unknown.

To the best of Appellants' knowledge, they are the first actually to stand up to Bungie and seek a decision on the merits as to whether "cheating" in computer games is unlawful in the absence of an actual violation of a recognized and existing intellectual property right, such a patents and copyrights. Appellants have, throughout, maintained, correctly, that "cheating" in computer games is not, in and of itself, unlawful and that in order for companies such as Bungie to obtain legal relief for any such "cheating," they, as with any litigant, need to demonstrate violation of an actual law or statute, such as patent or copyright laws, rather than simply shout, "Cheaters" and hope the pejorative alone will be sufficient to establish liability.

A. THE PARTIES

As noted, Plaintiff-Appellee, Bungie, Inc., is a well-known creator and distributor of the popular, "First Person Shooter" computer game, "Destiny 2."

Defendant-Appellant Phoenix Digital Group LLC ("Phoenix Digital') is a Delaware Limited Liability Company initially formed, owned and operated by individual Defendant-Appellants Jordan Green, David Schaefer and Jeffrey Conway. Currently, Phoenix Digital is owned solely by Appellants Mr. Green and Mr. Schaefer. At one time, Phoenix Digital operated the website,

"Aimjunkies.com," through which Phoenix Digital distributed "cheat" software for a variety of computer games. As of May, 2022, Phoenix Digital no longer owns or operates the "Aimjunkies.com" site.

Defendant-Appellant James May is an individual who, as an independent contractor and developer of "cheat" software, would from time to time, contract with Phoenix Digital to distribute "cheats" he created. Mr. May is not, and never has been an owner, officer, employee or operator of Phoenix Digital. Significantly, Mr. May is *not* the developer, creator or distributor of the "cheat" software for Bungie's Destiny 2 game that is the subject matter of the action below.

B. THE CLAIMS

On June 15, 2021, Bungie sued Phoenix Digital, along with its founders, Mr. May, Mr. Green and Mr. Schaefer, and the third-party independent contractor, Mr. May, in the United States District Court for the Western District of Washington in Seattle. Bungie originally filed a twenty-three page, 136 paragraph Complaint largely complaining about the effects of "cheaters" playing the Destiny 2 game and making vague, non-specific allegations against the Defendants to the effect that they make cheating possible. (ER-74-96.) Bungie's initial Complaint alleged nine causes of action as follows:

1. Copyright Infringement;
2. Trademark Infringement;

3. False Designation of Origin;

4. Circumvention of Technological Measures;

5. Trafficking in Circumvention Technology;

6. Breach of Contract;

7. Tortious Interference;

8. Violation of the Washington Consumer Protection Act; and,

9. Unjust Enrichment.

Because the Complaint was woefully devoid of any allegations giving rise to plausible claims on any of the causes of action alleged, Appellants moved to dismiss the Complaint and further pointed out that, under the express terms of the very contract Bungie was asserting, all claims other than the claims for Copyright Infringement, Trademark Infringement and False Designation of Origin were subject to mandatory arbitration, rather than adjudication in federal court.

On April 27, 2022, the District Court largely agreed with Appellants and dismissed the Complaint with leave to amend the copyright an other causes, which the Court agreed were insufficiently alleged. (ER-233-245.)

Prior to filing an Amended Complaint, Bungie filed a Demand for Arbitration with Judicial Arbitration and Mediation Services, Inc. ("JAMS") against all Appellants seeking arbitration of its claims for Circumvention of Technological Measures, Trafficking in Circumvention Technology, Breach of

Contract, Tortious Interference, Violation of the Washington Consumer Protection Act and Unjust Enrichment. (ER-64-130.) Bungie explicitly brought it claims under the JAMS Comprehensive Arbitration Rules effective as of June 1, 2021. (ER-64, 175-180.) That the arbitration would be conducted under those rules was later confirmed by JAMS itself in it March 4, 2022 "Commencement of Arbitration" letter, which states, "This arbitration shall be conducted in accordance with JAMS Comprehensive Rules." (ER-132-133.) This was firmly established yet again by the arbitrator, Retired Judge Ronald E. Cox, himself, in his June 20, 2022 "Report of Preliminary Hearing and Scheduling Order No. 1 (ER-157-160), wherein, over Defendants-Appellants' objection, he confirmed that the JAMS Comprehensive Arbitration Rules would govern the arbitration rather than the JAMS Rules of Consumer Arbitration. (ER-157, ¶7.)

Both Bungie's Complaint in the District Court, and its subsequent Demand for Arbitration, accuse Appellants of creating and distributing a "cheat" software program that enables players of "Destiny 2" to, for example, "see" hidden players and improve their accuracy when shooting at other players and thereby gain an advantage over other players not using such software. The accused, "Destiny 2 Cheat" was alleged, by Bungie to, among other things, "circumvent" supposed technological measures Bungie had in place to restrict access to the Destiny 2

game only to those who opened a Bungie account and agreed to be bound by Bungie's "Limited Software License Agreement." (ER-113-119.)

During the course of discovery, several important facts were established. First, none of the individual defendants/appellants, and no one at Phoenix Digital, actually wrote, developed, or otherwise created the subject, "Destiny 2" cheat software. Instead, it was clearly established that the subject software was created and developed by a Ukraine-based developer operating under the likely fictitious name, "Andreas Banek." Under Phoenix Digital's business model, "cheat" developers, such as Mr. Banek, can, if they meet Phoenix Digital's standards, distribute their "cheat" software through the "Aimjunkies.com" website. When a customer wishes to purchase a subscription to a particular "cheat," the purchaser pays Phoenix Digital a subscription fee which is shared with the cheat developer on a 50-50 basis. Once the subscription fee has been paid, the purchaser is provided with a link through which he or she can download the "cheat" directly from the developer. Importantly, the actual "cheat" software itself is never in the possession of Phoenix Digital. Accordingly, neither Phoenix Digital or any of the other Appellants ever had or otherwise possessed the code for the subject "Destiny 2" cheat software. Accordingly, and despite Bungie's discovery requests, Appellants could not provide Bungie with a copy of the subject "Destiny 2" cheat software.

C. THE ARBITRATION BELOW

The underlying arbitration was filed by Bungie with JAMS on February 10, 2022. (ER-64-130.) As filed, Bungie expressly demanded that the "JAMS Comprehensive Arbitration Rules and Procedures" apply to the arbitration. (ER-64.)

On March 4, 2022, JAMS issued a "Commencement Of Arbitration" notice expressly stating, "This arbitration shall be conducted in accordance with JAMS Comprehensive Rules." (ER-132-133.)

On March 18, 2022, JAMS issued an "Appointment Of Arbitrator" notice appointing Arbitrator Cox as the arbitrator. This notice expressly states that, "*In accordance with the JAMS Comprehensive Rules* no party may have ex-parte communications with the Arbitrator." (ER-150-151, emphasis supplied.)

On June 20, 2022, Arbitrator Cox issued a "Scheduling Order" wherein he expressly states that, "The JAMS Comprehensive Arbitration Rules and Procedures shall apply in this matter." (ER-156-163.)

At no time thereafter did Arbitrator Cox or JAMS ever indicate that the JAMS Comprehensive Arbitration Rules and Procedures would not apply in the Arbitration. It is beyond reasonable question that the parties and Arbitrator Cox were bound by the JAMS Comprehensive Rules and were all contractually bound and required to abide by the provisions of those Rules.

The applicable "JAMS Comprehensive Rules" appear at Excerpt of the Record pages 175-180. (ER-175-180.) Rule 22(e), of the Comprehensive Rules, which govern the Arbitration Hearing, expressly states, "The Arbitrator *shall receive and consider* relevant deposition testimony recorded by transcript or videotape, provided that the other Parties have had the opportunity to attend and cross-examine." (ER-179, emphasis supplied.)

During the course of discovery, the parties reasonably agreed that, to avoid the time, expense and waste of conducting largely duplicative discovery, discovery conducted in the arbitration could be used in the federal court action and vice versa. Indeed, this was proposed by Bungie's counsel, Mr. Christian Marcello, in a September 26, 2022 email to Defendants' counsel (ER-165) wherein Mr. Marcello specifically proposed that, "We also think in the interest of efficiency, the parties should agree to combine the arbitration and litigation depositions of the parties." By doing so, "[W]e can keep each of Defendants/Respondents depositions to one day that way, without the need to do repetitive depositions." Defendants agreed to this sensible proposal and confirmed their agreement on the record during the October 5, 2022 deposition of Bungie's Rule 30(b)(6) designee, Dr. Kaiser. (ER-167-170.)

On October 4, 2022, Defendants took the personal deposition of Dr. Edward Kaiser, and on October 5, 2022, took the Rule 30(b)(6) deposition of Bungie

wherein Dr. Kaiser testified on Bungie's behalf. Bungie's counsel attended the deposition and had the opportunity to cross-examine. During the course of both depositions, Dr. Kaiser was questioned extensively regarding issues raised in the matter before this Court and Arbitrator Cox. In particular, he was closely examined regarding exactly what "technological measures" Bungie claimed the "Destiny 2" cheat software "circumvented," and exactly how these supposed "technological measures" were "circumvented" by the software at issue. Again, Dr. Kaiser, as a Rule 30(b)(6) designee was testifying as to both his personal knowledge and the knowledge of Bungie.

D. THE ARBITRATION HEARING

During the arbitration hearing, Dr. Kaiser testified on behalf of Bungie claiming, among other things, that Bungie has an extensive series of anti-counterfeiting "technological measures" that were in place at the time Defendants supposedly developed and distributed the subject "Cheat Software." Because Dr. Kaiser had never presented such testimony in either of his earlier depositions, Defendants' counsel had outlined, and was prepared to conduct, a detailed cross-examination seeking (1) to expose Dr. Kaiser's blatantly inconsistent sworn testimony and (2) establish that Bungie either did not have these supposed "technological measures" in place at the relevant time, or that Dr. Kaiser lied either in his deposition testimony or at the hearing.

This Court need not be reminded that prior inconsistent statements made under oath during deposition are one of the most basic ways of exposing false testimony at trial and demonstrating a witness' lack of credibility. The use of deposition testimony for impeachment purposes at trial is one of the most fundamental rights of all litigants.

Shortly after beginning his cross-examination of Dr. Kaiser, when Defendants' counsel first made reference to Dr. Kaiser's earlier deposition testimony, the following exchange occurred:

> Q. (By Mr. Mann) Now, do you recall when I took your deposition on October 4 and October 5 of this year?
>
> A. (By Dr, Kaiser) I believe the dates were October 5th and October 6th, but --[1]
>
> Q. Whatever it is. It's written down, but you do recall when I took your depositions?
>
> A. Yes.
>
> Q. I took the deposition of you both personally and as a corporate representative for Bungie?
>
> A. Correct.
>
> Q. Do you recall when I asked you to identify all the technological measures that Bungie contends were compromised by Phoenix Digital?
>
> MR. RAVA: Object to the form of this question. Those depositions were taken in the federal court litigation. His 30(b)(6)

[1] The arrogant Dr. Kaiser was wrong – the depositions were, in fact, conducted October 4 and 5, 2022.

> testimony explicitly did not include anything on the DNCA [sic] violation.
>
> ARBITRATOR COX: On the basis of the representations, *I'll sustain the objection. Ask another question.* (Emphasis supplied.)

(ER-172-173.)

In making this objection, Bungie's counsel misrepresented both the content and scope of the earlier depositions as well as counsel's prior agreement that depositions taken in either case could be used for both cases. By not even providing Defendants' counsel an opportunity to respond and going immediately to, "I'll sustain the objection...Ask another question," Arbitrator Cox was not even willing to consider the possibility that there might be another side to the false story told by Bungie's counsel.

As a result of the sustained objection, Appellants' counsel could not conduct the cross-examination he had prepared and planned, and thus was not provided with his *contractually agreed* entitlement to impeach Dr. Kaiser's credibility on points that go to the very heart of the issues in the Arbitration. In short, Arbitrator Cox materially breached the contract he entered into with Appellants.

E. THE ARBITRATION DECISION

In his Final Arbitration Award (ER-199-220), Arbitrator Cox rubber-stamped every argument advanced by Bungie, and, going above and beyond, even made holdings and, frankly, ludicrous "findings" that Bungie, itself, never even argued or

advanced.[2] Significantly, Arbitrator Cox expressly states in his Final Arbitration Award that, "Dr. Edward Kaiser gave expert testimony on behalf of Bungie" and that, "I find that he was a credible witness due to his educational and practical background on the subjects that are before me, as well as his professional demeanor at the evidentiary hearing." (ER-203.)

There is no question that Dr. Kaiser's supposed "credibility" as determined by Arbitrator Cox was central to his decision in favor of Bungie. Indeed, given that Dr. Kaiser was the only witness to testify as to the supposed unlawful aspects of the "Destiny 2" cheat software, his testimony provided the only basis for Arbitrator Cox's decision. Without Dr. Kaiser's testimony, Bungie had absolutely no case.

Dr. Kaiser, of course, is the very witness who Arbitrator Cox protected from effective cross examination through his improper refusal to permit cross examination based on his prior inconsistent deposition testimony. Indeed, as Dr. Kaiser was the only witness offered by Bungie to support its claims that the

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[2] For example, Arbitrator Cox "found" that, "The cheat May used to gain access was the same cheat sold by Phoenix over the Aimjunkies website." (ER 211.) Neither Bungie nor anyone else ever claimed that the subject "cheat" software is what provided Mr. May with "access" to Destiny 2, and the parties were, and remain in agreement that "cheat" software is used by players who have legitimate accounts with Bungie and already have access to the game. Similarly, he, out of the blue, stated that, "To operate, the cheats necessarily create unauthorized copies of the Destiny 2 code and unauthorized derivative works." Not only were such issues not before Arbitrator Cox, no testimony to this effect was ever introduced.

"cheat" software distributed by Phoenix Digital circumvented technological measures used by Bungie, the *entire* Final Arbitration Award is based on Arbitrator Cox's admitted wholesale acceptance of whatever Dr. Kaiser said. Again, Arbitrator Cox declined to permit cross-examination based on Dr. Kaiser's earlier, and contradictory deposition testimony *which goes to the very heart of the credibility issue.*

Not only did Arbitrator Cox commit blatant and gross error in failing to comply with the clear directive of JAMS Comprehensive Arbitration Rule 22(e), his Final Arbitration Award is replete with indications he either did not pay attention to the actual evidence presented at the hearing or intentionally ignored it. This is evident not only in his failure to get such basic things as the spelling of witnesses' names right, but in apparently hearing testimony that was never given and accepting arguments that Bungie itself never advanced. These are demonstrated as follows:

1. Bungie's Supposed "Technological Measures"

In his Final Arbitration Award, Arbitrator Cox makes the following specific findings indicated in italics below:

(a) "Destiny 2 is the subject of copyright filings." (ER-204.)

The arbitration, however, was not in any way, shape or form concerned with copyright infringement, which is one of the two issues that were not referred to

arbitration and that remain before the District Court of the Western District of Washington in Seattle for resolution. The existence and infringement of Bungie's copyrights was simply not an issue in the arbitration and Arbitrator Cox was neither asked nor required to make any findings in this regard.

(b) "Bungie maintains and develops robust measures to protect its game from unauthorized intrusions, at substantial expense. These measures were described, in detail, by Dr. Kaiser at the hearing as 'defenses in depth.'" (ER-204.)

Dr. Kaiser did indeed so testify, but Arbitrator Cox prevented cross-examination showing that such "defenses in depth" were never identified in his earlier deposition testimony and were apparently made up in the time between Dr. Kaiser's deposition and the arbitration hearing two months later.

(c) "These measures include, among other things, code obfuscation, user account bans, anti-process attachment tools, anti-reverse engineering tools, hardware bans…." (ER-204.)

Again, none of these "measures" was ever identified by Dr. Kaiser in his deposition testimony. Again, given that Arbitrator Cox found Dr. Kaiser's testimony "credible" on these matters, his refusal to permit legitimate cross-examination into these matter in defiance of JAMS' clear rules evidences bias on his part.

(d) "I find that it is undisputed from the evidence before me that these measures are all designed to prevent unauthorized access to Destiny 2 videogames." (ER-204.)

This reflects a serious and gross misunderstanding of the issue before Arbitrator Cox. What was "undisputed" is that the users of the subject "Cheat Software" are themselves authorized users of the Bungie "Destiny 2" game and therefore have the full right to access the game. Doing so pursuant to their established user accounts with Bungie does not, and cannot, constitute "unauthorized access." The question before Arbitrator Cox was whether the "Cheat Software" distributed by Phoenix Digital, itself defeats measures put in place to keep those without authorization from gaining unauthorized access to the game. Furthermore, the evidence Dr. Kaiser presented was clearly of recent origin, coming into existence long after Defendants voluntarily ceased distribution of the subject software, which could and would have been demonstrated had Arbitrator Cox permitted cross-examination using Dr. Kaiser's prior deposition testimony.

2. The Role Of James May

It was and remains undisputed that Appellant James May was never an owner, officer, director, employee or otherwise part of Appellant Phoenix Digital. As established at the arbitration hearing, Mr. May' sole connection with Phoenix Digital is that he, from time to time, created game "cheats" that were later accepted

for distribution through Phoenix Digital. It was undisputed that Mr. May did not create the "Destiny 2" cheat software that was at issue in the arbitration.

It was also un-refuted that the "Cheat Software" actually at issue in the arbitration was developed by an overseas developer who also was never an owner, officer, director, employee, etc., of Phoenix Digital. Indeed, none of the Appellants developed, wrote or otherwise had anything to do with the creation of the "Cheat Software" actually at issue.

Despite these clear, undisputed facts, Arbitrator Cox found that, "James May is not an owner of Phoenix. However, he acted in concert with Phoenix and its owners on matters giving rise to the claims that are the subject of this proceeding." (ER-203.) It was on this vague, ambiguous and unspecific basis that Arbitrator Cox imposed personal liability on Mr. May.

What is "he acted in concert with Phoenix and its owners on matters giving rise to the claims that are the subject of this proceeding," supposed to mean? Acting "in concert" with a company literally describes all independent vendors, outside agents, representatives and even independent professionals, such as lawyers and accountants retained to assist the company. Are all such third parties to be legally liable for whatever transgressions the company may commit? Arbitrator Cox's vague "holding" in this regard on a critical issue, (namely, whether Mr. May is liable for *anything* alleged against him) reflects either muddled

thinking or an inability to express with any sort of precision exactly what Mr. May is supposed to have done wrong.

As to, "matters giving rise to the claims that are the subject of this proceeding," this is contrary to the undisputed facts. There was no evidence whatsoever that Mr. May created or had anything to do with the "Cheat Software" that was, "the subject of [the] proceeding." Mr. May testified he received no compensation whatsoever from Phoenix Digital's distribution of the "Cheat Software" at issue.

Arbitrator Cox's vague references to "acting in concert" and "matters giving rise to the claims" are inadequate substitutes for clear legal analysis and rational thought. They come nowhere near establishing, as a matter of law, that Mr. May had any liability for distribution of the "Cheat Software" that was actually at issue.

Arbitrator Cox further makes the bizarre claim that, "May reverse engineered Destiny 2 in order to help develop a cheat for Destiny 2 that Phoenix sold on its website." (ER-210.) There is absolutely no evidence of record that Mr. May ever, "reverse engineered Destiny 2 in order to help develop a cheat for Destiny 2 that Phoenix sold on its website." Bungie, itself, never seriously claimed that he did.

The undisputed evidence was that the "Cheat Software" actually distributed by Phoenix Digital was created by an overseas creator and that Mr. May's only

involvement with that "Cheat Software" was that he once briefly used it for his own enjoyment as could any other customer of Phoenix Digital. There is no evidence whatsoever that any "Destiny 2" cheat Mr. May developed was ever sold by Phoenix Digital or anyone else for that matter. Again, Arbitrator Cox heard testimony that was never provided and accepted arguments that even Bungie itself never made.

3. Mr. Schaefer's Credibility

In his Final Arbitration Award, Arbitrator Cox unfairly attacks Mr. Schaefer's credibility stating that, "I find that Shaefer [sic] was not a credible witness for the matters that are material to my decision. First, he authored, but did not sign, the November 20, 2022 [sic], response to the Bungie cease and desist letter dated November 4, 2022 sic]."[3]

In point of fact, and as clearly testified to during the hearing, Bungie's "cease and desist letter dated November 4, 2022, [sic]" was sent to Defendant Jeffrey Conway, not Mr. Schaefer. Accordingly, Mr. Schaefer "did not sign, the November 20, 2022, [sic] response" because he reasonably drafted the response for signature by the actual addressee and recipient of the letter, namely, Mr. Conway.

[3] The "cease and desist" letter was sent by Bungie in November, 2020, not 2022, and Phoenix Digital's response was also sent in November, 2020, not 2022.

Similarly, and as Mr. Schaefer freely testified, PayPal had for some reason (possibly at Bungie's request) terminated Phoenix Digital's account and denied Defendants access to their account. This was subject to cross-examination, and, contrary to Arbitrator Cox's unsupported finding to the contrary, does not evidence dishonesty or chicanery on Mr. Schaefer's part.

4. The Testimony Of Steven Guris

In his Final Arbitration Award, Arbitrator Cox states: "Steven Guris provided expert testimony...regarding the technical functions of how the Phoenix cheats interact with Destiny 2," (ER-207) and that, "Notably, he tested the cheats by purchasing one from the Aimjunkies website in September 2022." (ER-207.) Again, Arbitrator Cox heard testimony that was never provided and accepted arguments Bungie, itself, never made.

As readily stated by Mr. Guris in his expert report Mr. Guris freely admits that all he reviewed was the "loader" software he downloaded from the Aimjunkies website in September, 2022, months after the website was no longer owned by Phoenix Digital, and nearly two years after the "Cheat Software" at issue was voluntarily removed from distribution by Phoenix Digital. Under cross-examination Mr. Guris admitted, as he had to, that he never saw, used, analyzed, tested, etc., the actual "Cheat Software" that is at issue, and that all he did was analyze only the "loader" (that is nowhere even mentioned in the Complaint or

Demand for Arbitration filed by Bungie) that he acquired long after the relevant period of time and from a website Defendants no longer owned or operated.

Again, in his Final Arbitration Award, Arbitrator Cox attributes testimony to Mr. Guris that Mr. Guris never provided. Indeed, Mr. Guris, who was actually far more credible than Dr. Kaiser, freely and honestly admitted the limitations on his actual knowledge and did not pretend to know more than he did. That Arbitrator Cox attributes testimony and findings to Mr. Guris that Mr. Guris, himself, admitted he did not make, demonstrates that Arbitrator Cox either did not understand or did not care what Mr. Guris actually said.

5. The Clearly Excessive Award Evidences Arbitrator Cox' Bias

It was unchallenged that Phoenix Digital ceased distributing the subject software in early 2021, shortly after receiving Bungie's "cease and desist" letter. It was also undisputed that Phoenix Digital's overall gross revenues for distribution of the "Cheat Software" was in the neighborhood of $43,000. Despite these undisputed facts, Arbitrator Cox saw fit to award more than $4.3 Million against all the Defendants, including James May who was not part of Phoenix Digital and had nothing to do with the creation or distribution of the "Cheat Software" at issue.

As demonstrated at the hearing, the law compels neither the court nor arbitrator to impose the maximum statutory award permitted under the statutes, and broad discretion is given to award a far lesser amount if justice so requires. *See,* 17

U.S.C. § 1203. Arbitrator Cox's grossly excessive award, – over 100 times the maximum possible actual damage found by Bungie's own damages expert and which will bankrupt the four individual Appellants if allowed to stand – demonstrates a clearly punitive intent on the part of Arbitrator Cox, far removed from any actual damage suffered by Bungie. It is further evidence of prejudice on the part of Arbitrator Cox, given that it rests largely on testimony that was never given and acceptance of arguments even Bungie itself never made.

F. THE POST-AWARD PROCEEDINGS

Following issuance of the Final Arbitration Award, Defendants-Appellants timely filed their motion to set it aside. (ER-47-62.) On June 13, 2023, the District Court denied Appellants' motion and confirmed the Final Arbitration Award. (ER-9-17.) In its Order denying Appellants' motion, the District Court held, in part, that, "Arbitrators, however, 'enjoy wide discretion to require the exchange of evidence, and to admit or exclude evidence, how and when they see fit," citing *U.S. Life Ins. Co. v. Superior Nat'l Ins. Co.,* 591 F.3d 1167 at 1175. (ER-14.) The District Court did not explain how an arbitrator's "wide discretion" permits him to blatantly ignore the clear mandate of the very rules he imposed and that he is contractually obligated to follow.

IV. SUMMARY OF THE ARGUMENT

The operative facts are a matter of record and are not subject to serious dispute.

There is no question that the underlying arbitration was filed with JAMS and conducted before Arbitrator Ronald E. Cox. (ER-150-151,)

There is no question that the parties, including each of the Defendant-Appellants, entered into a binding contract with JAMS, wherein JAMS contractually agreed, and was contractually obligated to provide arbitration services according to the terms they promised in both their contract and published information promoting their services.

There is no question that the underlying arbitration was conducted under the JAMS Comprehensive Arbitration Rules, effective June 1, 2021 (ER-132) ("This arbitration shall be conducted in accordance with JAMS Comprehensive Rules.")

There is no question that Arbitrator Cox was contractually obligated to adhere to, follow and administer the JAMS Comprehensive Arbitration Rules as published. (ER-150-151)

There is no question that JAMS Comprehensive Arbitration Rule 22(e) states, in its entirety, as follows: "*The Arbitrator shall receive and consider relevant deposition testimony recorded by transcript or videotape,* provided that the other Parties have had the opportunity to attend and cross-examine. The

Arbitrator may in his or her discretion consider witness affidavits or other recorded testimony even if the other Parties have not had the opportunity to cross-examine, but will give that evidence only such weight as he or she deems appropriate. (ER-179.) (Emphasis Supplied.)

There is no question Bungie "had the opportunity to attend and cross-examine" at the October 4-5, 2022 depositions of Dr. Kaiser.

There is no question that, pursuant to JAMS Comprehensive Rule 22(e), Arbitrator Cox was *mandated* to, "receive and consider" the deposition testimony of Dr. Kaiser, which was unquestionably, "relevant" and "recorded by transcript or videotape."

There is no question that Arbitrator Cox *failed* to "receive and consider" the deposition testimony of Dr. Kaiser during the arbitration hearing, thereby depriving Defendants-Appellants of their right to conduct a meaningful cross-examination of Dr. Kaiser at the arbitration hearing and expose the numerous and material discrepancies between his testimony at the hearing and his prior inconsistent testimony during deposition.

Finally, there is no question that Arbitrator Cox *relied* on the supposed "credibility" of Dr. Kaiser in issuing his Final Arbitration Award, so there can be no credible argument that his failure to adhere to the clear, and easily understood JAMS Comprehensive Rules was harmless or otherwise of no consequence.

Indeed, Arbitrator Cox's blatant failure to follow the clear mandate of JAMS Comprehensive Rule 22(e) taints and renders void the entirety of his Final Arbitration Award.

As a result of Arbitrator Cox's blatant and undeniable failure to follow the very JAMS Comprehensive Rules that he was *contractually obligated* to follow, Arbitrator Cox did not provide the very services both he and JAMS promised and were obligated to provide, thereby breaching the contract each had with Defendants-Appellants and depriving them of the very services they paid for and were entitled to receive.

The applicable laws of arbitration, namely 9 U.S.C. §12, and the Washington State Uniform Arbitration Act, RCW 7.04A.230, expressly provide that an arbitration award can and should be set aside where, as here, the Arbitrator, "refus[es] to hear evidence pertinent and material to the controversy"[4] and/or, "where the arbitrators exceeded their powers…."[5] The District Court erred in confirming the Final Arbitration Award in light of these clear and undeniable failures on the part of Arbitrator Cox to perform his contractually obligated duties.

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4 9 U.S.C. § 10(a)(3).

5 9 U.S.C. § 10(a)(4).

V. STANDARD OF REVIEW

A district court's decision confirming an arbitration award is reviewed *de novo*. *Asarco LLC v. United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union, AFL-CIO, CLC,* 893 F.3d 621 (9th Cir. 2018).

VI. ARGUMENT

A. ARBITRATOR COX BLATANTLY BROKE THE RULES

1. Arbitrator Cox Blatantly Violated JAMS' Own "Comprehensive Rules" In Breach Of His Contractual Obligations To The Parties

Given Bungie's demand that the arbitration be conducted under the JAMS Comprehensive Rules, and given that on at least three occasions both JAMS and Arbitrator Cox clearly stated that, "The JAMS Comprehensive Arbitration Rules & Procedures shall apply in this proceeding," there is no question that the JAMS Comprehensive Rules were applicable to, and binding upon, the arbitration. This is beyond any reasonable question.

It is also beyond reasonable question what those "Comprehensive Rules" actually say. In particular, Rule 22 (e) of the JAMS Comprehensive Rules, which expressly governs "The Arbitration Hearing," provides in clear, plain English that, "The Arbitrator *shall receive and consider* relevant deposition testimony recorded by transcript or videotape, provided that the other Parties have had the opportunity

to attend and cross-examine."[6] (ER-179, emphasis supplied.) This language is non-discretionary and expressly mandates that Arbitrator Cox, "shall receive and consider" the very deposition testimony he improperly excluded at Bungie's fraudulent behest.

Under the very rules Arbitrator Cox expressly ordered would apply to the arbitration and that he was contractually obligated to follow himself, Arbitrator Cox had no authority to sustain Bungie's objection and deny Defendants their opportunity to conduct a meaningful and effective cross-examination. Arbitrator Cox's blind acceptance of Bungie's baseless objection, combined with his blatant failure to follow the very rules of the organization that engages him and that he, himself, ordered apply during the arbitration, demonstrate clear bias, negligence, or indifference on his part to his contractual obligations. In any of these cases, Defendants did not receive the "services" they had contracted and paid for and that Arbitrator Cox was legally and contractually obligated to provide.

2. Arbitration Contracts Are Legally Binding And Must Be Enforced

At a fundamental level, arbitration proceedings are a creature of contract law and are based on the fundamental premise that the parties contractually agreed to have their dispute resolved by an arbitrator who, in turn, agrees, and is paid, to

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[6] There is and can be no dispute that Bungie not only had the opportunity, but did, in fact, attend the deposition and cross examine.

provide services under contract. As with all contracts, the parties thereto are expected and required to provide what they contractually agree to provide, and, in return, have a right to receive what they have paid for and have been promised. In this case, it was understood and agreed that the arbitration would be conducted under the JAMS Comprehensive Rules. Give that Arbitrator Cox *himself* ordered that these rules apply, he was contractually and legally obligated to follow those very rules himself.

Under these indisputable facts, Arbitrator Cox was contractually obligated to follow and abide by JAMS Comprehensive Rule 22 (e) mandating that he, "shall receive and consider relevant deposition testimony recorded by transcript or videotape…." Indeed, it was in reliance on the very rules and procedures published by JAMS that the parties agreed to have JAMS resolve the dispute, and it was in the reasonable expectation that the Arbitrator, would, in fact, follow those rules and procedures, that Defendants agreed to hire JAMS and Arbitrator Cox in the first place.

JAMS Comprehensive Rule 22(e) is clear, direct, and uses the directive, "shall," which has been held countless times to mean, "must." *See, U. S v. 267 Twenty-Dollar Gold Pieces,* 255 F. 217, 220 (W.D. Wash. 1919) ("`Shall' ought undoubtedly to be construed as meaning `must,' for the purpose of sustaining or enforcing an existing right.") The Rule does *not* say, "may" or include qualifiers,

such as, "in the Arbitrator's discretion" or other language eviscerating the clear, unequivocal, mandatory meaning of the Rule. There are no word games to be played to somehow relieve Arbitrator Cox from following the express rules he was contractually obligated to follow.

3. No Exceptions Or "Escape Hatches" Are Available Under JAMS Comprehensive Rule 22(e)

In its Reply in Support of its Motion to Confirm the Arbitration Award, (ER 183-189) Bungie attempts to show that Arbitrator Cox had discretion not to follow the clear mandates of JAMS Comprehensive Rule 22(e). Bungie is wrong.

In *U.S. Life Ins. Co. v. Superior Nat. Ins. Co.,* 591 F.3d 1167 (9th Cir. 2010) cited by the District Court in support of it erroneous view that arbitrators' "wide discretion" permits them to disregard the clear mandates of the rules they are contractually obligated to follow, "how and when they see fit," the issue was whether the arbitrator's *ex parte* contact with others was grounds for setting aside an arbitration award. In concluding that it was not, the Ninth Circuit expressly noted that, "the [Federal Arbitration Act] does not expressly prohibit *ex parte* contact." *Id* at 1176.

Here, however, and unlike in *U.S. Life Ins. Co., there is an express rule,* namely Rule 22(e) of the JAMS Comprehensive Rules, that *mandates* that the Arbitrator "[S]hall receive and consider relevant deposition testimony…." Thus, the issue in *U.S. Life Ins. Co*. was wholly different from the issue here, and *U.S.*

Life Ins. Co. does not stand for the proposition that Arbitrator Cox was free to ignore the express mandates of the very rule he was contractually obligated to follow. Indeed, 9 U.S. Code §10(a)(3) expressly provides that an arbitration award can be vacated where an arbitrator, "refus[es] to hear evidence pertinent and material to the controversy." *See, Gulf Coast Indus. Workers Union v. Exxon Co.,* 70 F.3d 847 (5th Cir. 1995) That is exactly what occurred here.

To accept the District Court's view that arbitrators are free to ignore binding rules, "how and when they see fit," raises the question of why even have rules in the first place, and provides ample grounds for people considering arbitration to question whether they can rely on the promises made by JAMS and the arbitrators they provide. If arbitrators are free to ignore the very rules they say they will follow, why bother hiring and paying them for advertised "services" they are under no obligation actually to deliver?

Nor was the District Court correct in claiming that it was somehow Appellants' fault that Arbitrator Cox failed to follow the rules. Although the objection Arbitrator Cox ruled on was styled an objection to the "form" of the question, in reality it was one of substance, not form. The objection was not to the wording of the question, it was clearly based on the substantive argument that any reference to Dr. Kaiser's earlier deposition testimony was improper because, "Those depositions were taken in the federal court litigation." (ER-173.)

Accordingly, there is no plausible way the question or any subsequent questions could have been reworded without still making reference to the very depositions Bungie argued, and Arbitrator Cox erroneously agreed, could not be used in the arbitration because, "[they] were taken in the federal court litigation."

The District Court's apparent belief that, even in light of a clear sustained objection, Appellants should have risked alienating the Arbitrator by continuing to ask questions the Arbitrator had already ruled are improper has no basis in law. Indeed, courts have held to the contrary. See, *Thomas v. Hubbard,* 273 F.3d 1164, 1177 (9th Cir. 2001) (overruled on other grounds at *Payton v. Woodford,* 299 F.3d 815 (9th Cir. 2002)) ("However, when defense counsel asked the deputy about his difficulty in locating Schwab, the court *sustained an objection, thus prohibiting further questioning* on the subject. *We conclude that it was error for the court to preclude this line of inquiry...*") (Emphasis supplied.) The District Court's attempt to blame Appellants for the failure of the Arbitrator to know and follow his own rules is without basis.

Title 9 U.S.C. §10(a)(4) expressly provides that an arbitration award can be vacated, "where the arbitrators exceeded their powers…." Here, by refusing to permit cross-examination based on the two depositions Dr. Kaiser had previously given, Arbitrator Cox exceeded his powers in direct and blatant contravention of JAMS Rule 22(e), which expressly denies him the ability to do so. By precluding

use of the depositions to impeach Dr. Kaiser in direct violation of Rule 22(e), Arbitrator Cox clearly exceeded his powers and authority. This, too, provides ample grounds for reversing the District Court and setting aside the Final Arbitration Award.

4. The Arbitrator's Refusal To Permit Cross-Examination Using Prior Deposition Testimony Was Prejudicial

It is fundamental law that prior deposition testimony may be used to impeach a witness at trial. *See*, Fed. R. Civ. P. 32(a)(2), "Any party may use a deposition to contradict or impeach the testimony given by the deponent as a witness," and 32(a)(3), "An adverse party may use for any purpose the deposition of a party or anyone who, when deposed, was the party's officer, director, managing agent, or designee under Rule 30(b)(6) or 31(a)(4)." There is no question that, at the arbitration hearing, Defendants' counsel sought to impeach Dr, Kaiser with prior deposition testimony Dr. Kaiser himself gave as both a personal witness as as Bungie's corporate designee.

Nor is there any question that the prior deposition testimony given by Dr. Kaiser directly related to the issues raised in the arbitration. A central issue in the arbitration was whether Defendants had "circumvented" any "technological measures" supposedly implemented by Bungie.. A critical factual question at the arbitration was what, exactly, those supposed "technological measures" were, given that the absence of "technological measures" in place at the relevant time

would necessarily preclude any "circumvention" of them. Dr. Kaiser's failure to previously identify the "technological measures" he suddenly and conveniently remembered and testified to at the arbitration hearing goes directly to his credibility and essential elements of Bungie's case.

During his prior depositions, Dr. Kaiser was directly asked to list all such technological measures and provided a very short list of them. At the arbitration hearing, Dr. Kaiser provided an extensive list of supposed "technological measures" never before mentioned in prior testimony or discovery. The intended cross-examination relying on the depositions Arbitrator Cox improperly refused to allow would have demonstrated Dr. Kaiser's inconsistent and conflicting answers that go directly to his credibility and the merits of Bungie's case. Indeed, it cannot come as a surprise to this Court that prior inconsistent deposition testimony is regularly used for impeachment purposes and likely comes up in most, if not all, trials.

Furthermore, Arbitrator Cox, himself, repeatedly states and admits in his Final Arbitration Award that the supposed "credibility" of Dr. Kaiser was a critical factor in reaching the decision he did. Denying Defendants a meaningful opportunity to impeach Dr. Kaiser with his prior inconsistent deposition testimony goes to the very heart not only of Dr. Kaiser's credibility but to Arbitrator Cox's Final Arbitration Award as well. It cannot credibly be argued that Arbitrator Cox's

erroneous refusal to permit cross-examination based on Dr. Kaiser's prior deposition testimony was harmless error or otherwise unimportant. Of course, Arbitrator Cox found Dr. Kaiser "credible" when Defendants were improperly denied a meaningful opportunity to demonstrate and prove otherwise.

VII. CONCLUSION

The entire arbitration system is based on the concept that, instead of formal litigation in court, parties can *agree* to resolve their disputes privately using the services of private arbitrators who, in turn, *agree* to resolve the dispute in accordance with clear rules that are published and made a part of the contract the parties, *and the arbitrator,* enter into.

The very existence and viability of the arbitration system *depends* on the belief and confidence the parties have that the arbitration will, in fact, be conducted fairly and in accordance with the published rules. It depends on a party's belief and confidence that the arbitrator *will,* in fact, provide the services he advertises and will, in fact, follow the very rules he advertises. In short, it depends on all parties, including the arbitrator himself, to honor their obligations under the contract they sign. Any material breach of that contract on the part of the arbitrator renders the entire proceeding a sham and mandates that the resulting Final Arbitration Award be set aside.

For all the foregoing reasons, the District Court erred in ruling that Arbitrator Cox somehow did *not* violate JAMS Comprehensive Rule 22(e), which deprived Defendants-Appellants of the very arbitration "service" they contracted for, paid for, and were entitled to receive. Accordingly, the District Court's confirmation of the legally defective Final Arbitration Award should be reversed.

Dated this 20th day of November, 2023

Respectfully submitted,

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VIII. REQUEST FOR ORAL ARGUMENT

Appellants respectfully request that this Court hear oral argument on this appeal pursuant to Fed. R. App. P. 34. Because of the procedural and factual subtleties that exist, Appellants believe oral argument would materially assist, and be of benefit to, the Court.

IX. STATEMENT OF RELATED CASES

Pursuant to Rule 28-2.6 of the rules of the Court, Defendants-Appellants identify *Bungie, Inc. v. Aimjunkies.com et al.,* Case No. 2:21-cv-0811 pending in

the United States District Court for the Western District of Washington before the Honorable Thomas S. Zilly as a related case.

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FOR THE NINTH CIRCUIT

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 20th day of November, 2023, I caused this Brief of Appellants and Excerpts of Record to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

By: /s/ Philip P. Mann
Philip P. Mann

Counsel of Appellants