Chief Civil Department
Hearing Date: Tuesday, September 15, 2015
Without Oral Argument

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

MARTIN O'DONNELL, an individual,

Plaintiff,

v.

BUNGIE, INC., a Delaware corporation, and HAROLD RYAN, an individual,

Defendants.

No. 14-2-19913-9 SEA

DECLARATION OF TIMOTHY B. FITZGERALD IN SUPPORT OF MOTION TO CONFIRM AND ENFORCE FINAL ARBITRATION AWARD

I, TIMOTHY B. FITZGERALD, declare under penalty of perjury of the laws of the State of Washington that the following statements are true and correct and based on personal knowledge.

1. I am over the age of eighteen years and have personal knowledge of the facts set forth in this Declaration. I make this Declaration based upon my own personal knowledge and am competent to testify thereto. I am an attorney at the law firm of McNaul Ebel Nawrot & Helgren, PLLC, and am counsel to Plaintiff Martin O'Donnell ("O'Donnell") in the arbitration matter referenced in the Revised Final Award attached hereto as **Exhibit A**.

2. On April 28, 2014, in accordance with an arbitration clause contained in an Amended Services Agreement between O'Donnell and Bungie, Inc., O'Donnell commenced arbitration against defendants Bungie, Inc ("Bungie") and Harold Ryan

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(collectively, the "Defendants") before JAMS. A true and correct copy of the Amended Services Agreement is attached hereto as **Exhibit B**.

3. Attached hereto are true and correct copies of the following documents:

Exhibit A: Revised Final Award, dated September 4, 2015, entered by the Honorable Sharon S. Armstrong (Ret.) in the JAMS arbitration matter captioned *O'Donnell v. Bungie, Inc. and Harold Ryan*, JAMS Case No. 1160019992; and

Exhibit B: Amended and Restated Services Agreement between Martin O'Donnell and Bungie, Inc., dated as of December 31, 2010.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 4th day of September, 2015, at Seattle, Washington.

s/ Timothy B. Fitzgerald
Timothy B. Fitzgerald

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DECLARATION OF SERVICE

On September 4, 2015, I caused to be served a true and correct copy of the foregoing document upon counsel of record, at the address stated below, via the method of service indicated:

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- ☐ Via Facsimile
- ☑ Via E-mail (Per Agreement)

I declare under penalty of perjury under the laws of the United States of America and the State of Washington that the foregoing is true and correct.

DATED this 4th day of September, 2015, at Seattle, Washington.

Katie Walker, *Legal Assistant*

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Exhibit A

JAMS ARBITRATION
NO. 1160019992

MARTIN O'DONNELL, an individual

Claimant and Counterclaim Respondent,

and

BUNGIE, INC., a Delaware corporation,

Respondent and Counterclaimant,

and

HAROLD RYAN, an individual,

Respondent.

REVISED FINAL AWARD

The undersigned arbitrator was designated in accordance with the arbitration agreement in Section 16 of the Amended and Restated Services Agreement dated December 31, 2010 ("the Amended Services Agreement") between claimant Martin O'Donnell ("O'Donnell") and respondent Bungie, Inc. ("Bungie").

I. PROCEDURAL BACKGROUND

O'Donnell's claims are set forth in the Demand for Arbitration before JAMS dated April 28, 2014. O'Donnell asserts claims for declaratory relief, breach of contract, tortious interference, and fraud. Bungie and Ryan's response and initial counterclaims are set forth in the Response to Arbitration Demand and Affirmative Defenses dated June 14, 2014. On February 15, 2015 Bungie and Ryan filed an Amended Response and Counterclaims. They assert counterclaims for breach of contract (including breach of the duty of good faith and fair dealing), copyright infringement, conversion, breach of fiduciary duty, and declaratory relief.

On July 16, 2014 the arbitrator entered a preliminary injunction concerning the status of O'Donnell's Bungie stock. On March 27, 2015 the arbitrator entered a second preliminary injunction prohibiting violation of Bungie's copyright interests and directing delivery to O'Donnell's counsel certain materials developed during employment.

The arbitration hearing was held June 8 through 12, 2015. The following individuals testified at the hearing: Martin O'Donnell, Harold Ryan, Ondraus Jenkins, Jonty Barnes, Jason Jones, Christopher Butcher, Jamie Greismer, Michael Salvatori (by affidavit), William Partin, Matthew Case, David Dague, Allan Peter Parsons, Jeffrey Tarbell, and Nancie Stern. The arbitrator admitted exhibits offered by each party. A stenographic record of the hearing was made; the arbitrator requested and has relied on the transcript of testimony by expert witnesses Partin and Tarbell and the parties' closing arguments. The arbitrator also received additional authorities from counsel, as well as counsel's responses to additional questions from the arbitrator. The hearing was closed on June 12, 2015.

The arbitrator issued an Interim Award on July 2, 2015. Paragraph 2 required the Clamant to elect among three damages formulations:

> 2. Claimant has established that Bungie breached the duty of good faith and fair dealing when it caused the forfeiture of all O'Donnell's stock and denied him any participation in the Profit Participation Plan. Claimant is entitled to recover, at his election: (1) 192,187.5 shares of vested Bungie common stock, (2) the cash equivalent value of 20% of O'Donnell's preferred and common stock valued as of April 11, 2014, or (3) the cash equivalent value of 50% of vested common stock valued as of July 2, 2014. Within 15 days of this Interim Award, Claimant shall advise of his election and, if electing cash equivalent value, shall submit an agreed revised calculation of the value. If the parties cannot agree, Bungie may submit its proposed valuation within 15 days thereafter. Claimant is also entitled to recover payments under the Profit Participation Plan and Exhibit A of the Amended Services Agreement. The first payment, for 2014, shall be due within 15 days of this award. If Claimant seeks pre-judgment interest, he shall submit briefing and a calculation within 15 days. Bungie may file any objection within 15 days thereafter.

In response, Claimant argued, correctly, that the proper calculation of vested stock would be 60% of Claimant's outstanding shares rather than 50% as described in the Interim Award. The arbitrator's determination of remedy, though premised on a breach of the duty of good faith and fair dealing, necessarily relied on equitable considerations. Other components of the damages award were premised on an assumption of 50% of stock vesting. The arbitrator declines to modify this

component of damages. Mr. O'Donnell has advised he elects to receive the common stock.

Paragraph 4 of the Interim Award required the following:

> 4. Bungie has not established that O'Donnell violated the non-compete or confidential information provisions of the Amended Services Agreement. Bungie is entitled to a return of Bungie property that was not gifted to O'Donnell. The property, currently in the custody of Claimant's counsel, shall be returned within 15 days of issuance of this Interim Award.

O'Donnell has advised that he has returned the property.

Paragraph 7 of the Interim Award required the following:

> 7. The parties are requested to brief the issue of whether O'Donnell shall be required to execute any form of waiver or release in exchange for the amounts to be paid him.

The parties have advised they have reach agreement on the form of release.

Counsel and the arbitrator also discussed the issue of prevailing party attorney fees. Neither party has filed a request for attorney fees.

The Final Award was issued on August 25, 2015. On August 31, 2015 Bungie requested the arbitrator make 22 (substantive and clerical) changes to the Final Award, permit Bungie to provide the Final Award to a non-party, and consider the non-party's comments on the award. On September 1, 2015 Claimant filed his objections to all but four computational and typographical errors. On September 3, 2015 Bungie filed its reply, and both O'Donnell and Bungie filed sur-replies the same day.

After a Final Award is issued, the arbitrator may modify it only to correct "computational, typographical or other similar error in an Award." Rule 24(j), JAMS Employment Arbitration Rules & Procedures. Consistent with Rule 24(j), the arbitrator makes several computational and typographical revisions in this Revised Final Award. The requests for substantive relief are without merit and are denied. With respect to alleged commercial information, the arbitrator has made minor revisions to delete information not currently in the public domain.

Rule 26 of the JAMS Employment Arbitration Rules & Procedures requires the arbitrator to "maintain the confidential nature of the Arbitration proceeding and the Award, including the Hearing, except as necessary in connection with a judicial

challenge . . . or unless other required by law or judicial decision." The arbitrator is not authorized to release the award to non-parties. Nor would the arbitrator consider comments on the award by third parties.

Having considered the submissions of the parties, the testimony and exhibits introduced in evidence at the arbitration hearing, and the arguments of counsel, the arbitrator hereby makes and enters the following Revised Final Award on the merits. This Revised Final Award incorporates the Interim Award and the Final Award, except where modified.

II. FACTUAL BACKGROUND

The following is a statement of the facts found by the arbitrator to be true and necessary to resolve the issues presented by the parties. The findings reflect the arbitrator's determinations as to the credibility of witnesses, the relevance of information, and the weighing of the evidence, both oral and written.

1. Martin O'Donnell is a conservatory-trained music composer known for his brilliant and iconic work on video games, including *Halo*, one of the most successful video game franchises of all time, and *Destiny*. O'Donnell began work for the company currently known as Bungie, Inc. in 1996 as a contractor. He became an employee in 2000 and ultimately served as its Audio Director and a member of the Bungie Executive Team until Bungie terminated his employment in 2014. O'Donnell was one of seven founding members of Bungie, LLC and upon its conversion to a corporation became an owner of 336,375 shares of Bungie, Inc.'s Series B-1 Preferred Stock, and an additional 48,000 shares of common stock.

2. Bungie, Inc. is a Delaware corporation located in Bellevue, Washington that develops console-based video games. Its predecessor, Bungie Software Products Corporation, was founded in 1991 and was purchased by Microsoft in 2000 as a source of video games for Microsoft's X-box. The Bungie group was spun out of Microsoft as Arete Seven, LLC in 2007, which was owned by seven Bungie founders, including O'Donnell. Arete Seven, LLC was later renamed Bungie, LLC, which was then converted to Bungie, Inc. in December 2010. Microsoft's oversight of Bungie concluded in 2010. Bungie has nearly 600 employees.

3. Harold Ryan is the President, Chief Executive Officer and Chair of the Board of Directors of Bungie, Inc., the positions he held when Bungie fired O'Donnell.

4. In 2010, Bungie entered into a ten-year development and marketing agreement with publisher Activision Publishing, Inc. to fund development of Bungie's new first-person shooter video game that later became *Destiny*. The

agreement anticipated issuance of multiple episodes of the game over a period of ten years. The first game was scheduled for release in September 2013. *Destiny* is Bungie's most significant game franchise in development. Activision's development advances for *Destiny* have been a significant source of Bungie's income. Currently Bungie plans to issue additional episodes of *Destiny*.

5. In 2010 Bungie's Chief Operating Officer suggested that O'Donnell compose a score for the entire *Destiny* game franchise, rather than writing the theme music for each issue as it was developed. The music would inspire the game development team, and it would also be published as a stand-alone work in advance of the game's release to attract audience attention. O'Donnell was inspired by the prospect and during 2011 and 2012 composed a symphonic and choral suite of eight movements, working with Sir Paul McCartney as collaborator. O'Donnell recorded the music in early 2013. The music, titled *Music of the Spheres*, is by all accounts extraordinary, and it will be used throughout the *Destiny* franchise. O'Donnell considers the experience of composing and recording this music the high point of his career.

6. The Audio Director is, in a broad sense, responsible for all the sound that comes from the video game speakers. He composes music, which requires about 20% of his time, but also manages the audio team, works on sound design, sound effects and cinematics, works with the story writers, schedules and records dialogue, and oversees the final sound mix. While *Music of the Spheres* provided the thematic music for the entire game series, additional music must be written to accompany game play.

7. Activision had little enthusiasm for releasing *Music of the Spheres* as a standalone work, and O'Donnell became increasingly frustrated that Bungie was making insufficient effort to release it. In June 2013 Bungie was preparing for the 2013 Electronic Entertainment Expo (E3 2013), the most significant annual video game industry trade show (the super bowl of gaming), during which new games are previewed. Bungie believed the E3 2013 reveal was critical to future *Destiny* sales and to the company's viability. Bungie planned to have six employees play the game in real time before a huge conference and on-line audience, and to play game music, provide attendees with game-playing experience, and make presentations to the press. In preparation, Bungie was developing a game trailer, but shortly before E3, Activision took over the trailer work and supplied its own music, rather than Bungie's *Music of the Spheres* segments.

8. O'Donnell reacted angrily and believed Activision had overstepped its proper role by assuming artistic control of the trailer music. CEO Ryan and Bungie management shared his concern and later filed a "veto" letter with Activision, which overruled the objection. During E3, O'Donnell issued tweets stating that Activision,

not Bungie, had composed the trailer music, threatened Bungie employees in an attempt to keep the trailer from being posted online, and interrupted press briefings.

9. O'Donnell believed he was preserving Bungie's creative process, artistic integrity and reputation, keeping faith with fans, and protecting Bungie and its intellectual property from Activision's encroachment into artistic decisions. He believed the "Band of Brothers" ethos that had inspired the group's earlier work was being damaged by the Activision relationship. Ryan and other Bungie management believed O'Donnell's conduct hurt the Bungie team, hurt the game, drove a negative online discussion, and violated Ryan's instructions. They also believed O'Donnell was elevating his interest in publishing *Music of the Spheres* over the best interests of the company. Activision advised that O'Donnell's conduct may constitute a breach of the parties' contract. Ryan recommended that O'Donnell be fired. O'Donnell was not fired, but his fall 2013 performance review, covering the first six months of 2013, was "unacceptable." O'Donnell objected to the review. Whatever the immediate embarrassment and chagrin caused by O'Donnell's conduct at E3 2013, Bungie presented no evidence of significant or permanent damage to the Activision relationship, the audio team, or to ultimate game sales.

10. Although *Destiny* was planned for release in September 2013, the story was substantially revised beginning August 2013, requiring a new release date of March 2014 and edits to much of the work previously completed. After a brief vacation/sabbatical in early fall, O'Donnell returned, worked on the story and recorded dialogue, but wrote no additional music. His supervisor and the audio team did not consider him to be fully engaged in the work of Audio Director. For reasons unrelated to O'Donnell's performance, the release date was again moved, to September 2014.

11. In lieu of providing the next six-month performance review in February 2014, Bungie prepared a Transition and Separation Agreement ("Transition Agreement") designed to terminate O'Donnell's employment. The agreement, which was presented to O'Donnell on March 18, 2014 on a "non-negotiable" basis, set dates for deliverables, provided for additional months of salary, vested 20% of O'Donnell's Preferred B-1 and common shares, paid a performance bonus, but forfeited the remaining shares and terminated employment not later than July 31, 2014. The proposed agreement also increased the bases of "for cause" termination, revised the stock forfeiture provision, and required O'Donnell to release all rights. While O'Donnell was considering the Transition Agreement, the Bungie Board expressed concern that the longer the time to his decision, the greater the risk he would become entitled to vested stock and participation in the profit-sharing plan. O'Donnell believed the deliverable dates were not achievable because the audio work could not be completed until the game was in a bug-free playable state, and he also thought the new "for cause" and forfeiture provisions were unjust and inconsistent with the

Amended Services Agreement. O'Donnell rejected the proposal but said he would continue to work.

12. In early April 2014, there was an overwhelming amount of audio work remaining, and O'Donnell wasn't contributing as expected. Members of the audio team complained that O'Donnell's continued presence at Bungie was frustrating completion of the audio work. CEO Ryan proposed that the Board terminate O'Donnell and the Board terminated him without cause on April 11, 2014. The termination letter advised that O'Donnell's shares in Bungie were forfeited.

13. After termination, Bungie wrongfully withheld payment for O'Donnell's accrued but unused vacation and other time unless he waived his equity interest, requiring O'Donnell to initiate a Superior Court wage action against Respondent Ryan under RCW 49.52.070, ultimately concluded in O'Donnell's favor.

14. On June 24, 2014 O'Donnell's counsel requested that Bungie maintain O'Donnell's shares pending arbitration. Receiving no response, on July 1, 2014 counsel again inquired as to the status of the shares. The Bungie Board did not respond but proceeded to convert all Bungie preferred stock to common stock effective July 1, 2014. Such a conversion had been contemplated to occur before July 22, 2014 in conjunction with the anticipated RTX (release to certification) date of the first *Destiny* game. It is not clear whether the RTX date was accelerated to strategically benefit Bungie as it opposed issuance of a preliminary injunction.

15. Bungie filed copyright applications on the eight songs of *Music of the Spheres* and their recordings, effective August 13, 2013. (Only individual songs can be granted a copyright.) Before Bungie obtained the copyrights, in approximately May 2013, O'Donnell shared the music with his friend and pastor Dick Staub as he sought counsel in his troubled employment situation.

16. In late 2013, in an effort to find promotional partners for publishing *Music of the Spheres*, Bungie created 100 CDs of the music and authorized O'Donnell to distribute them. The CD's bore the legend "Confidential-Do Not Distribute-For Promotional Use Only." Bungie did not assure that everyone receiving the CDs had signed a non-disclosure agreement. There is no evidence, for example, that NDAs were in place when CDs were provided to Bungie competitors Microsoft and Sony.

17. In addition to authorizing distribution of CDs to potential promotional partners, Bungie also played parts of the music in various public settings, described in more detail below. O'Donnell and his co-composer testified that 40 minutes of the 48-minute *Music of the Spheres* suite is also included in the first release of *Destiny* and the *Destiny* soundtrack. There is evidence that Bungie management believed withholding release of *Music of the Spheres* gave them "leverage" over O'Donnell.

Bungie now claims the non-release was due to the pendency of arbitration. CEO Ryan does not know if there is a market for a standalone release of the *Music of the Spheres*.

18. Most of the *Music of the Spheres* CDs were distributed before O'Donnell's termination. But after termination he continued to distribute the music, including playing five excerpts at the May 2014 Nordic Games Conference; conveying the music by CD, or in one instance by digital file transfer, to a journalist, a symphony music director, a film producer, an employee of a talent agency, members of the video game industry, and several friends. O'Donnell did not distribute the CDs for commercial use, nor did he receive any financial gain. There is no evidence the music was republished to Bungie's detriment.

19. The first episode of *Destiny* was released in September 2014 and had pre-release and first-day orders of $500 million. The game was not as highly rated as *Halo*, but there is no evidence O'Donnell was at fault for the lower rating. Third quarter 2014 sales amounted to 6.3 million units or $47,528,369. Since release, it is estimated that users have spent billions of hours playing *Destiny*.

20. O'Donnell's employment relationship and his stock rights are governed by the Amended and Restated Services Agreement and related documents, which became effective December 31, 2010 at the time Bungie converted from LLC to corporation. The Amended Services Agreement grants Bungie, LLC members unvested stock in exchange for their LLC shares, provides for vesting of the stock over time, includes an "at will" employment provision, funnels all company profit into profit-sharing, and purports to forfeit all unvested stock if employment ceases for any reason, including death or disability. The Amended Services Agreement and related documents are discussed in detail below.

Other facts may be cited as necessary to address the various legal issues raised by the parties.

III. ANALYSIS

The primary issues for resolution are (1) what are O'Donnell's rights to salary, stock, and profit-sharing after termination, (2) did respondent Ryan engage in tortious interference with a business relationship/expectancy, (3) did O'Donnell violate the confidentiality and non-compete provisions of the Amended Services Agreement, (4) did O'Donnell violate Bungie's copyright interests in *Music of the Spheres*.

A. O'Donnell's Contract Claims

i. Base Salary

O'Donnell argues that his right to salary continues until conclusion of the Term of Employment, which he asserts is through April 21, 2020, or at least April 21, 2017. Section 2 of the Amended Services Agreement provides as follows:

> 2. Term of Employment. Subject to Section 11, the Company hereby employs the Employee [specifically defined as O'Donnell] **and the Employee hereby accepts such employment . . . for the period (the "Term of Employment")** commencing on the Effective Date and ending on April 21, 2017; *provided, however,* that the Term of Employment shall be automatically extended to April 21, 2020, unless written notice of non-extension is provided by either Party to the other Party on or before March 22, 2017. **NOTWITHSTANDING THE FOREGOING OR ANYTHING HEREIN TO THE CONTRARY, THE EMPLOYEE'S EMPLOYMENT WITH THE COMPANY IS TERMINABLE AT WILL WITH OR WITHOUT CAUSE; PROVIDED, HOWEVER, THAT A TERMINATION OF THE EMPLOYEE'S EMPLOYMENT SHALL BE GOVERNED IN ACCORDANCE WITH THE TERMS HEREOF.**

O'Donnell argues that the language following "Notwithstanding" creates an ambiguity, and that the ambiguity must be construed against Bungie, whose counsel drafted the document. He also argues that Section 4 of the Amended Services Agreement, which provides that Base Salary of $165,000 may be increased by the Board but may not be decreased during the Term of Employment, was intended to protect the Employee's salary even after termination. Finally, O'Donnell points out the Employee is not required to be a Service Provider (an employee or consultant actively providing services to the company) to receive a base salary.

Bungie responds that the at will provision is conspicuous and unambiguous, that Section 10(h) expressly limits salary, and that O'Donnell's at will status is confirmed by the Restricted Stock Agreement.

Section 10(h) of the Amended Services Agreement limits the employee to only those payments and benefits provided expressly in the Amended Services Agreement, which is inconsistent with O'Donnell's argument. (Although Claimant is correct that the reference in 10(h) to "termination of the Employee's employment, even if during the Term of Employment . . ." is non-sensical. If the Term of Employment continues until termination for any reason, then termination cannot occur during the Term of Employment.)

More significantly, Section 7 of the Restricted Stock Agreement confirms the meaning of the at will provision in the Amended Services Agreement. Section 7 of the RSA provides:

> 7. No Guarantee of Continued Service. PARTICIPANT FURTHER ACKNOWLEDGES AND AGREES THAT THIS AGREEMENT, THE TRANSACTIONS CONTEMPLATED HEREUNDER AND THE VESTING SCHEDULE SET FORTH HEREIN DO NOT CONSTITUTE AN EXPRESS OR IMPLIED PROMISE OF CONTINUED ENGAGEMENT AS A SERVICE PROVIDER FOR THE VESTING PERIOD, FOR ANY PERIOD, OR AT ALL, AND SHALL NOT INTERFERE IN ANY WAY WITH PARTICIPANT'S RIGHT OR THE RIGHT OF THE COMPANY . . . TO TERMINATE PARTICIPANT'S RELATIONSHIP AS A SERVICE PROVIDER AT ANY TIME, WITH OR WITHOUT CAUSE.

The arbitrator finds that the at will provision in Section 2 of the Amended Services Agreement is unambiguous. Despite what appears to be a drafting error in Section 10(h) described above, the intent clearly expressed in the Amended Services Agreement is that the Term of Employment continues only until either party terminates the relationship. That is, the Term of Employment runs until April 21, 2020 unless it is terminated or notice of non-extension is given sooner by either party.

This interpretation is bolstered by the requirement that during the Term of Employment, the Employee is required to perform duties. Section 3(a) requires that "During the term of Employment, the Employee shall be employed and serve as Audio Director. . . . " He is also required to "devote substantially all of his or her business, time, attention and skill to the performance of such duties and responsibilities" and shall not "engage in any other business activity." This language cannot be reconciled with an interpretation that the Term of Employment continues past the employee's termination.

Finally, the reference to April 21, 2020 simply means that, barring an earlier end to the Agreement, it will automatically terminate at that time. A new employment agreement must be negotiated. O'Donnell's employment was terminated without cause and his Term of Employment ended April 11, 2014.

ii. Stock

O'Donnell argues that provisions in the parties' agreements governing stock forfeiture must be interpreted to require forfeiture only if he makes the decision to leave Bungie. He relies on textual differences between the Amended and Restated Services Agreement of December 31, 2010 and the Services Agreement of April 11, 2010, the language of the Transition Agreement, and extrinsic evidence of

negotiations. It must be remembered that in the conversion to a corporation, O'Donnell and other Bungie, LLC executives voluntarily gave up their vested ownership units in Bungie, LLC for unvested shares in Bungie, Inc. After December 31, 2010, O'Donnell's 336,375 shares of Bungie Series B-1 Preferred Stock and 48,000 shares of common stock were all unvested.

The forfeiture language of the April 2010 Services Agreement was clear that unvested shares would be forfeited upon termination of employment for any reason.

Section 10(k) provided:

> (k) Equity Interests in the Company. In the event of the termination for any reason of the Employee's employment, (i) all of the Employee's unvested equity interests in the Company shall be automatically forfeited to the Company without the payment of any consideration therefor . . . [and the Company had the right to purchase the employee's vested stock on the terms set forth on Exhibit B].

Exhibit B provided:

> 1.B Forfeiture and Buy Back. Upon termination of the Employee's employment with the Company for any reason (including without limitation, the death of the Employee), with or without cause, then such Employee's Units . . . that are not vested as of the date of such termination will automatically and without further action be forfeited to the Company and cancelled without compensation effective as of the date of such termination.

The December 2010 Services Agreement retained the meaning of Section 10(k)(i), but modified Exhibit B, as follows:

> A. Forfeiture of Unvested Shares upon Termination as a Service Provider. Notwithstanding any contrary provision of this Agreement, if Employee terminates service as a Service Provider for any or no reason prior to vesting in all Shares, then, unless otherwise agreed to by the Board of Directors, the then Unvested Shares will thereupon be forfeited and automatically transferred to and reacquired by the Company at no cost to the Company upon the date of such termination and Employee will have no further rights thereunder. . . .

O'Donnell argues that the "notwithstanding" phrase means this language supersedes inconsistent terms in Section 10 (k). He asserts this language should be read to mean that forfeiture occurs only if the employee makes the decision to

voluntarily terminate, and that the language implies that if the employee does not make the decision to voluntarily terminate, then no forfeiture can occur. O'Donnell testified this language change was necessary to protect his and other LLC members' interests because the newly proposed ownership structure would bring in a significant number of new owners and place his ownership interests at risk. O'Donnell believed the new language created a "golden handcuffs" provision.

He also asserts that his interpretation is supported by the vesting provisions of Exhibit B. Exhibit B provides for three types of vesting. Milestone Vesting occurs at the rate of 20% on the RTX date of each of five *Destiny* game releases. In order to participate in Milestone Vesting, the Employee must be a current Service Provider, i.e., an active employee. But if a Change of Control occurs (e.g., Bungie is purchased), all unvested shares accelerate and vest, without any requirement that the Employee be a current Service Provider. Finally, if the Employee resigns for Good Reason or is terminated without cause after the RTX date of the first release, 50% of the Employee's remaining unvested shares are vested. O'Donnell argues that because Change of Control vesting does not expressly require the Employee to be a Service Provider at the time, the Employee could have been terminated but would have retained his stock, which would then vest if Bungie were sold. If the Employee always had to be a Service Provider to vest, the Change of Control language would be unnecessary.

O'Donnell also argues that language differences in the Transition Agreement evidence Bungie's admission that the Exhibit B language did not clearly require forfeiture if Bungie terminated the employee. The Transition Agreement grants O'Donnell 20% of his stock if conditions are met, but forfeits the balance. If Exhibit B were clear, O'Donnell argues, this language (which expressly amends the Amended Services Agreement) would be unnecessary.

Finally, O'Donnell argues that the language change in the December 2010 Services Agreement was specifically negotiated to address the potential threat to the founders' ownership interests. However, neither party presented documentation of negotiations concerning this critical Exhibit B language. One would expect that a change in equity rights of this magnitude would have generated email exchanges among counsel, red-line drafts, correspondence or a similar paper trail. Knowing the thoroughness with which the parties conducted discovery, the arbitrator concludes such evidence does not exist.

Although O'Donnell served on the Bungie Board of Directors during 2012 through July 11, 2013, there is no evidence the Board reviewed stock forfeiture provisions when it terminated an employee. Rather, the Board made the decision to terminate, while Human Resources or legal counsel handled the equity forfeitures without further Board involvement. There is insufficient evidence that O'Donnell

saw or acquiesced in the implementation of the Exhibit B forfeiture provisions as employees were terminated.

Washington law, which applies to the Amended Services Agreement and related documents here, requires that a contract be interpreted to give effect to the parties' mutual intent based on their objective manifestations contained in the agreement, rather than the unexpressed subjective intent of the parties. *Hearst Communications, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503 (2005).

Washington also follows the context rule of contract interpretation, which determines the parties' mutual intent by examining (1) the subject matter and objective of the contract, (2) the circumstances surrounding the making of the contract, (3) the subsequent acts and conduct of the parties to the contract, and (4) the reasonableness of the parties' respective interpretations. *Hearst Communications, Inc.*, 154 Wn.2d at 502. Extrinsic evidence may be used to determine the meaning of specific words and terms, but not to show an intention independent of the instrument or to vary, contradict, or modify the written terms of the contract. *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 695 (1999).

Contracts should be read as a whole "and, if reasonably possible, in a way that effectuates all its provisions," *Colorado Structures, Inc. v. Ins. Co. of the West*, 161 Wn.2d 577, 588 (2007). Finally, the court will give a contract a practical and reasonable interpretation that fulfills the contract's object and purpose rather "a strained or forced construction that leads to an absurd conclusion, or that renders the contract nonsensical or ineffective." *WA. Public Utility Districts' Utilities System v. Public Utility District No. 1 of Clallam County*, 112 Wn.2d 1, 11 (1989).

Claimant is correct that "if Employee terminates" should be read to mean that the Employee, the actor and subject of the sentence, is the one who in this provision decides or elects to terminate. And to be given meaning, the Exhibit B language "Notwithstanding any contrary provision of this Agreement, if Employee terminates service as a Service Provider for any or no reason" should mean something different than Section 10(k) of the Amended Services Agreement, which forfeits the Employee's Unvested Shares "in the event of the termination for any reason." Further, there is no explanation for the change in the Exhibit B forfeiture language from the April 2010 version to the December 2010 version. Unfortunately, there is no evidence of the parties' meeting of the minds as to O'Donnell's proposed interpretation.

The problem is that it is not possible to adopt Claimant's interpretation without adding terms. That is, to reach Claimant's interpretation, one must insert the word "only," as in "only if Employee terminates service." Additionally, the fact that an Employee can lose his shares by deciding to quit "for any or no reason" is inconsistent with the protections given elsewhere in the contract to an employee who

quits for "good reason." Claimant's interpretation that the Employee retains his unvested shares unless he decides to voluntarily quit is also inconsistent with the contract's clear intent to punish an employee terminated for cause.

The provision that accelerates and vests unvested shares at Change of Control would be necessary even if an Employee is required to be a Service Provider, as the provision applies to all Employees with any Unvested Shares.

The language difference in the Transition Agreement is to be expected, as it terminates O'Donnell's employment and prescribes what will happen to his shares at termination. The language is necessary to overcome the purported automatic forfeiture that would otherwise occur. O'Donnell did not voluntarily quit, and thus Section 10(k) of the Amended Services Agreement, rather than Exhibit B, applies.

Finally, the Amended Services Agreement is an integrated contract. Section 14(a). While it is surprising that O'Donnell (and other LLC founders) would give up his vested LLC units for unvested stock absent assurances that his ownership interest would be protected, the evidence is insufficient to establish that his subjective intent concerning a "golden handcuffs" provision was incorporated into the Amended Services Agreement. Nor is there clear, cogent and convincing evidence that O'Donnell detrimentally relied on fraudulent misrepresentations by Bungie or Ryan that his shares would receive special protection from forfeiture.

The disputed language in Exhibit B is likely another drafting error. Although ambiguities are to be construed against the drafter, Claimant's interpretation would require rewriting the parties' Agreement. Claimant's proposed interpretation is not the more reasonable in light of the available evidence.

iii. Profit Participation Plan

The Bungie Board of Directors adopted a Profit Participation Plan on March 7, 2014, in anticipation of millions of dollars coming to Bungie from *Destiny* sales. The new plan is designed to distribute all Bungie's profits among employees (thus avoiding double taxation) and to motivate and reward individual and collective performance and commitment. Although the Profit Participation Plan serves much the same function as payment of dividends, it is not the same.

Under the PPP, a Board-appointed committee (which is a compensation sub-committee of the Board) determines in its sole discretion whether an employee has met required performance criteria to participate in distribution of the profit pool.

> 3.1 Selection of Participants. The Committee, in its sole discretion, shall select the Employees who shall be Participants for any Performance Period.

> Participation in the Plan is in the sole discretion of the Committee, on a Performance Period by Performance Period basis . . .

The employee's profit sharing percentage is driven by the number of his profit sharing points. Section 2.12. The points are based on various factors, including the employee's annual review ranking, his "ladder level," tenure, and performance criteria. Section 2.13. The committee, in its sole discretion, may adjust the employee's profit sharing percentage, and may reduce the employee's percentage to zero. Section 2.12. Bungie pays an award for the preceding performance period. While there is some correlation between profit sharing percentage and stock ownership, this correlation is due to the fact that senior management tends to have greater tenure with the company and therefore owns more stock. The profit sharing award is not a right of stock ownership.

In light of the contract language, there is no mechanism for separating a portion of the profit pool into "dividends" payable to all shareholders in accordance with their number of shares, and the more traditional profit-sharing distribution based on individual performance. The Profit Participation Plan is not an incidence of share ownership.

B. O'Donnell's Alternative Claim for Relief

O'Donnell alternatively seeks relief based on Bungie's breach of the duty of good faith and fair dealing.

There is an implied covenant of good faith and fair dealing in every contract. *Badgett v. Security State Bank,* 116 Wn.2d 563, 569 (1991). The duty requires that each party cooperate with the other so that he may obtain the full benefit of the promised performance. *Frank Collucio Constr. Co., Inc. v. King County,* 136 Wn. App. 751, 564 (2007), citing *Metro. Park Dist. v. Griffith,* 106 Wn.2d 425, 437 (1986). The duty exists only in relation to performance of a specific contract term. *Keystone Land & Dev. v. Xerox Corp.,* 152 Wn.2d 171,177 (2004).

The duty of good faith does not obligate a party to accept a material change in the terms of its contract. *Betchard-Clayton, Inc. v. King,* 41 Wn. App. 887, 890, *review denied,* 104 Wn.2d 1027 (1985). Nor does it inject substantive terms into the parties' contract. *Barrett v. Weyerhaeuser Co. Severance Pay Plan,* 40 Wn. App. 630, 635 n.6 (1985).

Typically the duty arises when one party to a contract has discretionary authority to determine a contract term. In a goods contract, for example, the duty may be invoked when one party has discretion to determine quantity, price or time. *Goodyear Tire & Rubber Co. v. Whiteman Tire Inc.,* 86 Wash. App. 732 (1997). The duty was applied in

Rekhter v. State of Washington DSHS., 180 Wn.2d 102 (2014), where DSHS had the authority to determine the authorized hours of support and payment for live-in caretakers. And plaintiff stated a claim for breach of the duty where the City attempted to unwind a lease, even though lease provisions contemplated future amendments for an additional facility and financing, requiring that the City act in good faith to consider such amendments proposed by the other party. *Building 11 Investors LLC v. City of Seattle*, 912 F. Supp.2d 972 (W.D. WA. 2012). The duty requires the party to exercise its discretion in a manner that permits the other party to obtain the full benefit of the bargain.

The Amended Services Agreement grants the Bungie Board wide discretion to manage its contractual relationship with an employee. In this case, the Agreement gave the Board discretion to alter O'Donnell's duties as Audio Director (Section 3(a)), to direct O'Donnell to perform his duties at a new location (Section 3(c)), to decide the effective date of termination, (Section 10(d)(2)), and, most significantly, to modify the requirement that unvested shares be forfeited. Section A of Exhibit B provides: "Notwithstanding any contrary provision of the Agreement, if Employee terminates service as a Service Provider for any or no reason prior to vesting in all Shares, then, **unless otherwise agreed to by the Board of Directors**, the then Unvested Shares will thereupon be forfeited . . . " (emphasis added)

The Board had the discretion to terminate O'Donnell as Audio Director but also to establish the effective date of termination and to modify the stock forfeiture provisions. It made these discretionary decisions in the Transition Agreement it proposed to O'Donnell in March 2014.

But the Bungie Board was advised that the longer it waited to terminate O'Donnell, the more likely he could make a claim for vesting and profit sharing. The Board then terminated O'Donnell effective April 11, 2014. With its April 11, 2014 decision, the Board forfeited all of O'Donnell's 336,375 shares of Bungie Series B-1 Preferred Stock and 48,000 shares of common stock. The effect of O'Donnell's "Unacceptable" rating was to also deny him payment from the Profit Participation Plan.

The Board could have exercised its discretion to vest 20% of O'Donnell's stock, which he would have received as an employee on the first RTX date. Or the Board could have extended the effective date of his good cause termination to the day after the first RTX date, thereby entitling O'Donnell to vesting of 60% of his stock.

Exhibit B of the Amended Services Agreement, at (second) Paragraph A (iii) accelerates vesting after the RTX release date of the first *Destiny* game. It provides:

> (iii) Acceleration of Vesting. In the event that (1) the Employee resigns for Good Reason after the RTX Date of Retail Release 1 of Tiger [Destiny] or (2) the Employee's employment is terminated by the Company without Cause (other than due to Disability or death) after the RTX Date of Retail Release 1 of Project Tiger,

then 50% of any then Unvested Shares held by the Employee shall accelerate and vest in full.

The Preferred B-1 stock was set to convert to common stock on the first RTX date, and O'Donnell's 336,375 shares of preferred stock would have been converted to 336,375 shares of common stock. He already owned 48,000 shares of common stock. Thus, on July 1, 2014 O'Donnell would have owned 384,375 shares of Bungie common stock. Had the Board extended the effective date of O'Donnell's without cause termination to the day after the RTX date, O'Donnell would have vested in 230,625 shares of Bungie common stock. That is, he would have vested in 20% of his shares on the first RTX release date, and an additional 50% of his remaining shares on the first day after the first RTX date, a total of 60% of his common stock. Instead, the Board forfeited all his shares.

The duty of good faith and fair dealing required the Board to exercise its discretion by considering O'Donnell's long-term, invaluable and unique contributions to Bungie. Over O'Donnell's many years with the company, Bungie had promoted and capitalized on his extraordinary composing gifts, featuring him on promotional releases and at conferences. Bungie was well aware of his loyal fan following when it assured the gaming community that O'Donnell, the famous composer of *Halo*, was composing the *Destiny* music. The Board had a duty to give proper weight to the fact that, at the request of Bungie management, by early 2013 O'Donnell had composed and recorded all the theme music that would carry the *Destiny* franchise for the following years. Without O'Donnell's unique contribution and his fan loyalty, *Destiny* might not succeed.

Yet having produced the music that was essential to the entire game franchise, O'Donnell is now denied the anticipated benefits from his creative work, even as Bungie is poised to enjoy millions in future revenue from use of the music. The Board had a duty to act in good faith when it exercised its discretion to either forfeit or allow some of O'Donnell's shares to vest. The Board failed to exercise its discretion in good faith. Bungie thereby breached the duty of good faith and fair dealing.

Rule 24 (c) of the JAMS Employment Arbitration Rules and Procedures authorizes the Arbitrator to grant any remedy or relief that is just and equitable and within the scope of the Parties' agreement, including but not limited to specific performance of a contract or any other equitable or legal remedy.

Consistent with that authority, the arbitrator grants relief the Board was authorized to give under the Amended Services Agreement, and should have given in discharge of its duty of good faith and fair dealing. O'Donnell has exercised his election to receive a portion of vested common stock. The total amount awarded is 192,188 shares of vested Bungie common stock, representing 50% of his total shares held at termination.

The newly-adopted Profit Participation Plan vests total discretion with the compensation committee (a Board sub-committee) to determine which employees shall participate in a given year, and the employee's percentage of participation. Although Mr. O'Donnell received an "Unacceptable" rating in September 2013 (he did not receive a rating in February of 2014), the Board's committee had sole discretion to determine the effect to be given to such a rating. Consistent with the analysis above, the Board breached its duty of good faith and fair dealing when it exercised its discretion to deny O'Donnell any participation in the Profit Participation Plan.

Absent violation of Section 11 of the Amended Services Agreement, discussed below, O'Donnell is entitled to receive for 2014 the approximately $142,000 calculated by compensation committee member Christopher Butcher, together with the spin-down amounts authorized in Exhibit A to the Agreement. The amounts for 2015 and 2016 cannot be calculated until those years' profits and the amounts in the profit pool are determined at the end of each year.

C. O'Donnell's Claim for Tortious Interference with Business Relationship/Expectancy

O'Donnell claims that CEO Harold Ryan tortiously interfered with his employment contract and/or business expectancy. To prove this claim, O'Donnell must establish (1) the existence of a valid contractual relationship or business expectancy; (2) knowledge of the relationship or expectancy; (3) intentional interference that induced or caused a breach or termination of the relationship or expectancy; (4) interference for an improper purpose or by improper means; (5) proximately caused damage. *Pacific NW Shooting Park Ass'n v. City of Sequim,* 158 Wn.2d 342. 351 (2006).

Claimant has proved the existence of his employment contract, Ryan's familiarity with the contract, Ryan's recommendation to the Bungie Board that O'Donnell's employment be terminated, and O'Donnell's economic and emotional damages caused by the termination.

However, Claimant is unable to establish the fourth element of the tort—that Ryan interfered for an improper purpose or by improper means. As Bungie's President and CEO, Ryan had responsibility to oversee Bungie's business operations and had a legitimate role in recommending termination of employees, a task clearly within his scope of employment. It is evident that he was enraged by O'Donnell's conduct at E3 2013, recommended his firing at the time, and barely spoke with O'Donnell thereafter. He may have been gathering evidence over time to support O'Donnell's firing. Such conduct does not constitute either an improper purpose or improper means. O'Donnell has not established this claim.

D. Bungie's Counterclaims for Breach of the Amended Services Agreement

i. The Non-Compete Provision

Section 11(a) of the Amended Services Agreement provides that for twelve months after termination, the employee shall not participate directly or indirectly in a "Competing Enterprise", defined as an entity that develops or publishes a first-person shooter video game. The Agreement provides

> **"Competing Enterprise"** shall mean any entity or enterprise located anywhere within or outside the United States whose business includes to any extent the development and/or publication of computer video games and/or related software to the extent such games and/or related software are or are related or ancillary to "first person shooter" games and/or other games of the same or substantially similar genre as those games and/or related software that are or were during the Term of Employment actively being developed by the Company . . . .

After termination, O'Donnell formed a limited liability company and composed music for a video award show, which did not violate the non-compete provision. With Jamie Greismer, O'Donnell formed Highwire Games, LLC, a virtual reality prototype company, but no evidence was presented as to work performed for Highwire.

O'Donnell became a non-owner unpaid consultant to Red Lens, a 6-person company developing the virtual reality games *Frontier* and *Golem*. O'Donnell is included in product pitches prepared by Red Lens, and he worked on the virtual reality prototypes.

Jamie Greismer is a game designer who runs some of his consulting projects through Red Lens. He worked at Bungie from 1998 to 2010 on the *Myth* and *Halo* game franchises and also on *Destiny*, primarily on combat design. He gave expert testimony as to the meaning of a "first person shooter" game. The arbitrator finds him to be the most credible witness who testified on the topic.

A "first person shooter" video game is defined by two criteria: (1) the game is seen through the perspective of the "I" character in the game, and (2) shooting and aiming are the game's primary actions. The shooting consists of nearly constant, rapid firing (at least every thirty seconds); the game console buttons are all related to shooting (i.e. aiming, shooting, reloading, changing weapons); the shooter sees through crosshairs; and the primary skill is aiming. A first person shooter game is played from a console on a PC platform.

Red Lens' virtual reality games *Frontier* and *Golem*, by contrast, create a virtual world for the gamer to experience, but not through the character's eyes. The game must be played with a specialized headset and not on a console. *Frontier* is a game preserve ranger game, where the goal is to maintain the game preserve. The controls are related to exploring, tracking, managing animals, and using equipment; shooting may occur but not more than every ten minutes. There are no cross-hairs and aiming is not the primary skill.

Red Lens' games are not first-person shooter games. There are currently no commercially available virtual reality first person shooter games. They may be difficult to develop because of likely user nausea from fast action movement in the virtual reality setting.

During the twelve months following his termination, O'Donnell did not become involved with an enterprise that develops either first person shooter games or games similar to *Destiny*. Bungie has not established that O'Donnell violated the non-compete provision of the Amended Services Agreement.

ii. The Confidential Information Provision; Conversion

Section 11(c) of the Amended Services Agreement requires that the employee, both during and after employment, "not divulge to anyone or make use of any Confidential Information except in the performance of his or her duties . . . or when legally required to do so . . . ." "Confidential Information" is defined as

> any knowledge or information of any type relating to the business of the Company, as well as any information obtained from customers, clients or other third parties, including, without limitation, all types of trade secrets and confidential commercial information . . . . Confidential Information shall not include information that is or becomes part of the public domain, other than through the breach of this Agreement by the Employee.

The employee is also required at termination to return to the Company all documents, records or reports that contain any Confidential Information.

At termination O'Donnell took with him an electronic version of *Music of the Spheres* as well as the music score and undistributed CDs. He later returned his laptop, which contained both Bungie and personal information. He provided the CDs to others, as previously described. There is no evidence these recipients re-published the music.

Bungie placed *Music of the Spheres* into the public domain, piecemeal. Bungie provided the CDs to Microsoft and Sony, both game competitors, without assurances

NDAs were in place. In February 2013 Bungie played snippets of six of the pieces at a Bungie press event, and hosted a special show where longer (three minute) tracks of each of the pieces were played. At E3 2013 Bungie played portions of the music from speakers at the venue, as well as at Bungie's press event. In July 2013 O'Donnell was asked to provide both a digital version and sheet music for an orchestral performance of the second piece in San Diego, which was posted on YouTube. In November 2013 O'Donnell hosted an hour-long session at the IGDA conference, an event open to over 100 game developers as well as the public, where he was authorized to play much of the music. Some of the *Music of the Spheres* suite was played at E3 2014. 40 of 48 minutes of the music is included in the *Destiny* game and on the *Destiny* soundtrack, available for free on YouTube. In April 2014 Bungie's content and communications manager even suggested that Bungie distribute free copies of *Music of the Spheres* to winners of a proposed Bungie-sponsored contest.

Bungie intended *Music of the Spheres* to be issued for promotional purposes to enhance *Destiny* game sales, and it has been. Bungie carefully protects its intellectual property through high physical security, IT infrastructure security, extensive security policies, NDA requirements with visitors and partners, secure file transfer, and limitations on employee access to internal files. Bungie did not follow all these procedures with *Music of the Spheres*. The music, though issued piecemeal, is in the public domain and is not "Confidential Information." Bungie has not established O'Donnell's breach of the Section 11(c) of the Amended Services Agreement.

Even though O'Donnell did not breach the "Confidential Information" provision, after O'Donnell's termination Bungie requested that he return any of its property. Pursuant to the arbitrator's prior order, O'Donnell's counsel currently holds property that belongs to Bungie. The *Music of the Spheres* score, digital master, CDs, and related materials are work made for hire and Bungie did not gift them to O'Donnell. The property currently held by counsel shall be returned.

E. Copyright Infringement

O'Donnell composed the *Music of the Spheres* music within the scope of his employment with Bungie, and thus the composition and recording is a work for hire under the federal Copyright Act, 17 U.S.C. §§101 *et seq.* Bungie obtained copyrights on the music and the recordings effective August 13, 2013. Bungie alleges that O'Donnell's unauthorized distribution of *Music of the Spheres* infringed its copyrights. The claimed acts of infringement are O'Donnell's post-termination distribution of CDs, transfer of a digital file via Dropbox to a symphony conductor, and playing a portion of the music at a gaming conference.

This conduct exceeds the publication permitted under fair use, and O'Donnell has technically infringed Bungie's copyrights in *Music of the Spheres*. O'Donnell did

not publish the music for commercial gain, and there is no evidence any recipient republished the music or that the infringement caused Bungie actual damage. Bungie instead asserts statutory damages pursuant to Section 504 of the federal Copyright Act, 17 U.S.C. § 504. Once a copyright owner elects to recover statutory damages, he may not also recover actual damages. *Nintendo of America, Inc. v. Dragon Pac. Int'l.*, 40 F.3d 1007, 1010 (9th Cir. 1994).

Bungie's expert Nancie Stern opines that O'Donnell's conduct was willful infringement and that Bungie should recover statutory damages between $70,000 and $90,000 for infringement of each of the eight copyrights, i.e. between $560,000 and $630,000.

Section 412 of the federal Copyright Act, 17 U.S.C. § 412, provides that when an alleged course of infringement begins prior to registration of the copyright with respect to unpublished work, but continues after the registration, the copyright holder is barred from recovering statutory damages or attorney fees otherwise available under 17, U.S.C. § 504.

In May 2013 *Music of the Spheres* was an unpublished work when O'Donnell forwarded it to his friend and pastor Dick Staub. This distribution was unauthorized by Bungie, as it was unrelated to the effort to identify a publishing partner. O'Donnell continued his acts of infringement with respect to the same work after his termination, as described in Paragraph No. 18 above. However, because of the pre-registration distribution to Staub, Bungie's statutory damages claim is barred. Bungie is, however, entitled to injunctive relief as described below.

F. Breach of Fiduciary Duty

O'Donnell was a member of Bungie's Board of Directors in 2012 and through mid-2013. Bungie alleges O'Donnell breached his fiduciary duty owed as a Board member to the company. Bungie points to three alleged incidents of breach: (1) publicly disclosing that the *Destiny* trailer played at E3 2013 did not include Bungie music; (2) disclosing the existence of *Music of the Spheres* to the press and public before termination and disclosing CDs after termination; (3) while at Bungie focusing on release of *Music of the Spheres* rather than assisting with the development of *Destiny*.

Bungie has conflated O'Donnell's fiduciary duty owed as a member of the Bungie Board of Directors with his responsibilities as an Audio Director, which is merely a management position. It is not clear that any of the alleged incidents of breach involved actions taken as a Board member. But even assuming that public disclosure concerning the *Destiny* trailer music was somehow a breach of the Director's duty, Bungie has failed to prove monetary damages.

Under Delaware law, a member of a corporation's board of directors owes duties of care and loyalty to the corporation, modified by the business judgment rule. "The starting point in analyzing breach of fiduciary duty claims is with the well-established presumption of the business judgment rule." *Zutrau v. Jansing*, 2014 Del. Ch. LEXIS 156, 53-54. The business judgment rule is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company. The standard of director liability under the business judgment rule is predicated upon concepts of gross negligence. *In re: Citigroup Inc. Shareholder Derivative Litigation*, 964 A.2d 106, 124 (Del. 2009).

The director's fiduciary duty of loyalty "mandates that the best interest of the corporation and its shareholders takes precedence over an interest possessed by a director, officer or controlling shareholder and not shared by the stockholders in general." *Zutrau*, 2014 Del. Ch. LEXIS 156 at 55.

O'Donnell's disclosures of the "counterfeit" nature of the E3 2013 trailer music were likely motivated by at least two goals: to protect Bungie's best interests by defending its artistic and creative integrity from Activision's interference, and to protect his own brand and reputation as a composer. His methods, however, ignored the disclosure's potential ramifications. His action created a negative online discussion (about which little evidence was produced), upset his coworkers, and resulted in threats of breach from Activision. Despite the negative reactions to O'Donnell's conduct, Bungie has not proved any monetary damage proximately caused by the conduct. Activision did not declare breach. There is no evidence that game sales were affected. Consequently, Bungie has not established a claim for breach of fiduciary duty.

G. Remedy

1. O'Donnell's Stock

O'Donnell shall receive 192,188 shares of vested Bungie common stock (the balance will be forfeited).

2. The Profit Participation Plan

O'Donnell is entitled to three years participation in Bungie's Profit Participation Plan, in accordance with Exhibit A of the Amended Services Agreement. The first year's payment, calculated to be approximately $142,500 was due March 2015. The two subsequent years shall be paid in 2016 and 2017 in accordance with the spin-down provisions of Exhibit A.

3. Return of Bungie Property

Claimant shall return to Bungie property belonging to Bungie that pursuant to prior order is currently in the custody of O'Donnell's counsel. This property includes the following related solely to *Music of the Spheres* and *Destiny*: (a) audio/visual assets of any kind and in any format including but not limited to CDs, CD cases, printed art, masters and stems, sub-mixes, or other tracks; (b) any b-roll or outtakes related to the production/ recording thereof; (c) any recording assets of any kind and in any format including but not limited to masters and stems; (d) any Bungie voice-over assets of any kind including but not limited to recordings, audio/visual outtakes, audio/visual b-roll and/or scripts; and (e) any other Bungie audio or visual assets of any kind including, but not limited to, cinematic Foley, outtakes, sound effects, or other recordings or copies thereof.

4. Injunction Re Publication of *Music of the Spheres* and *Destiny*

Consistent with provisions of the preliminary injunction previously issued, O'Donnell is enjoined from the following conduct with respect to *Music of the Spheres* and *Destiny*, unless O'Donnell has obtained permission from the copyright owners or has obtained the music from a publicly available source, provided that such source of public information was not the result of O'Donnell breaching any contractual agreements with Bungie;

i. Uploading the music, or any portion thereof, to the Internet or any file-sharing service;

ii. Copying any version of *Music of the Spheres or Destiny*, or any portion thereof, currently within his possession, custody, or control, including print music, master copies, audio and digital files, the score, and promotional CDs;

iii. Publicly performing or playing *Music of the Spheres* or *Destiny*;

iv. Otherwise exceeding the scope of permitted fair use of *Music of the Spheres* or *Destiny*, in violation of the federal Copyright Act.

IV. CONCLUSIONS

1. Claimant's Term of Employment ended April 11, 2014. This decision does not address whether O'Donnell is entitled to one year of Base Salary pursuant to Section 10(d)(iii)(A) of the Amended Services Agreement, upon execution of the contractually required waiver. The parties have advised they have resolved this issue separately.

2. Claimant has established that Bungie breached the duty of good faith and fair dealing when it caused the forfeiture of all O'Donnell's stock and denied him any participation in the Profit Participation Plan. Claimant is entitled to recover 192,188 shares of vested Bungie common stock. The balance of O'Donnell's shares is forfeited. Claimant is also entitled to recover payments under the Profit Participation Plan and the spin-down provisions in Exhibit A of the Amended Services Agreement. The first payment, for 2014, shall be due within 15 days of this award.

3. Claimant has not established that Respondent Ryan engaged in tortious interference with a business relationship/expectancy.

4. Bungie has not established that O'Donnell violated the non-compete or confidential information provisions of the Amended Services Agreement. Bungie has established that O'Donnell converted certain Bungie property, which has now been returned to Bungie.

5. Bungie has established that O'Donnell committed violations of Bungie's copyrights in *Music of the Spheres* and is entitled to injunctive relief but no damages.

6. Bungie has not established its claim for breach of fiduciary duty.

7. All unsuccessful claims and counterclaims are dismissed.

REVISED FINAL AWARD

Pursuant to the foregoing,

IT IS HEREBY ORDERED:

A. Respondent Bungie, Inc. shall issue Claimant O'Donnell 192,188 shares of vested Bungie common stock within 15 days of the date of this award.

B. Respondent Bungie, Inc. shall pay Claimant O'Donnell payments under the Profit Participation Plan and the spin-down provisions in Exhibit A of the Amended Services Agreement. The first payment of $142,500, for 2014, shall be paid within 15 days of this award.

C. O'Donnell is enjoined from the following conduct with respect to *Music of the Spheres* and *Destiny*, unless O'Donnell has obtained permission from the copyright owners or has obtained the music from a publicly available source, provided that such source of public information was not the result of O'Donnell breaching any contractual agreements with Bungie:

1. Uploading *Music of the Spheres* or *Destiny* or any portion thereof, to the Internet or any file-sharing service, including Dropbox.com.

2. Copying any version of *Music of the Spheres or Destiny,* or any portion thereof, currently within his possession, custody, or control, including print music, master copies, audio and digital files, the score, and promotional CDs.

3. Publicly performing or playing *Music of the Spheres*, or *Destiny*, other than such material that O'Donnell can demonstrate was obtained from a publicly-available source; provided that such source of public information was not the result of O'Donnell breaching any contractual agreements with Bungie.

4. Otherwise exceeding the scope of permitted fair use of *Music of the Spheres* or *Destiny*, in violation of the federal Copyright Act

5. The material referenced in this Order includes, but is not limited to the following as related solely to *Music of the Spheres* and *Destiny*: (a) audio/visual assets of any kind and in any format including but not limited to CDs, CD cases, printed art, masters and stems, sub-mixes, or other tracks; (b) any b-roll or outtakes related to the production/ recording thereof; (c) any recording assets of any kind and in any format including but not limited to masters and stems; (d) any Bungie voice-over assets of any kind including but not limited to recordings, audio/visual outtakes, audio/visual b-roll and/or scripts; and (e) any other Bungie audio or visual assets of any kind including, but not limited to, cinematic Foley, outtakes, sound effects, or other recordings or copies thereof.

6. This injunction is binding on Mr. O'Donnell, his agents, servants, employees, and attorneys, and those persons in active concert or participation with them who receive actual notice of this injunction by personal service or otherwise.

D. Each party shall bear its attorney fees and costs.

E. All other claims and counterclaims are hereby dismissed.

F. The two preliminary injunctions previously issued in this case have been superseded by this Revised Final Award and have by their terms expired.

Dated this 3rd day of September, 2015.

Judge Sharon S. Armstrong (Ret.)
Arbitrator

Exhibit B

AMENDED AND RESTATED SERVICES AGREEMENT

THIS AMENDED AND RESTATED SERVICES AGREEMENT (this "**Agreement**"), is effective as of December 31, 2010 by and between BUNGIE, INC., a Delaware corporation (the "**Company**"), and Martin O'Donnell (the "**Employee**") and amends and restates the Amended and Restated Services Agreement by and between the Employee and Bungie, LLC, a Delaware limited liability company and the predecessor entity of the Company ("**Bungie, LLC**") dated as of April 21, 2010 (the "**Previous Services Agreement**").

RECITALS

WHEREAS, the Employee is a former member of Bungie, LLC and received shares of the Company's capital stock (i) in connection with the conversion of Bungie, LLC into the Company, a Delaware corporation (the "**Conversion**"), pursuant to the Agreement and Plan of Conversion of Bungie, LLC into Bungie, Inc. effective December 31, 2010 (the "**Conversion Agreement**") and (ii) pursuant to a Restricted Stock Agreement by and between the Company and the Employee, effective as of December 31, 2010 (the "**Purchase Agreement**") (such shares of capital stock, the "**Shares**"); and

WHEREAS, the Shares that were issued to Employee upon conversion of Class B Units of Bungie, LLC in connection with the Conversion are subject to the vesting and forfeiture provisions of the Previous Services Agreement, and the Company and the Employee desire that this Agreement shall amend and restate the vesting and forfeiture provisions that such Shares shall be subject to as set forth in this Agreement (including Exhibit B hereto).

WHEREAS, in connection with the Conversion and the issuance of the Shares pursuant to the terms of the Conversion Agreement and the Purchase Agreement, the Company and the Employee desire to amend the terms of the Previous Services Agreement to make certain other changes as set forth herein, including subjecting the Shares to the vesting and forfeiture provisions set forth in this Agreement, including Exhibit B hereto.

NOW, THEREFORE, in consideration of the promises and mutual covenants contained herein and for other good and valuable consideration, the receipt and sufficiency of which is hereby mutually acknowledged, the Company and the Employee (individually a "**Party**" and together the "**Parties**") hereby agree that the Previous Service Agreement is restated and replaced in its entirety as follows:

AGREEMENT

1. Definitions.

(a) "**Base Salary**" shall mean the salary granted to the Employee pursuant to Section 4, regardless of whether the amounts so granted are deemed to be "compensation" or "distributions" for tax or other purposes.

(b) "**Board**" shall mean the board of directors of the Company.

(c) "**Bungie Executive Team**" shall mean Brent Abrahamsen, Jonty Barnes, Christopher

Barrett, Paul Bertone, Christopher Butcher, Curtis Creamer, David Dunn, Charles Gough, Ondraus Jenkins, Jason Jones, Marcus Lehto, Martin O'Donnell, Allan Parsons, Zachary Russell, Harold Ryan, Joseph Staten, Joseph Tung and Benjamin Wallace.

(d) **"Cause"** shall mean (i) the Employee's violation in any material respect of any material provision of this Agreement or violation in any respect of the provisions of Section 11 hereof; (ii) the Employee's conviction (including following a plea of *nolo contendere*) of a crime constituting a felony or involving dishonesty or moral depravity; (iii) the Employee's engaging in conduct that constitutes fraud, dishonesty, willful misconduct or gross negligence in the performance of the Employee's duties under this Agreement; (iv) the Employee's substantial and repeated failure or refusal to perform diligently the duties assigned to the Employee under or pursuant to this Agreement or by the Board (provided such assigned duties are legal), or failure to comply with the reasonable and lawful instructions of the Board, which failure or refusal continues after written warnings to correct such deficiency; (v) the Employee's material and repeated failure or refusal to abide by the Company's written policies, rules, procedures or directives, provided such policies, rules, procedures or directives are legal, which failure or refusal continues after written warnings to correct such deficiency; (vi) the Employee's material violation of any confidentiality agreement between the Employee and the Company; (vii) the Employee's repeated and excessive absenteeism and/or use (or being under the influence) of illegal drugs during business hours; or (viii) the Employee's engaging in conduct tending to bring the Company or any of its subsidiaries into substantial public disgrace or disrepute.

(e) **"Code"** shall mean the Internal Revenue Code of 1986, as amended.

(f) **"Committee"** shall mean the Compensation Committee of the Board or any other committee of the Board performing similar functions.

(g) **"Disability"** shall mean the Employee's inability to substantially perform his or her duties and responsibilities under this Agreement by reason of any physical or mental incapacity, as determined by the Board, (x) for a period of 90 consecutive days or (y) for 180 days, whether or not consecutive, in any 24-month period, after any reasonable accommodation if required by applicable law.

(h) **"Good Reason"** shall mean the Employee's resignation within thirty (30) days following the expiration of any Company cure period (discussed below) following the occurrence, without the Employee's express consent, of any of the following: (i) a material diminution in the Employee's responsibilities, duties or authority, other than for Cause or Disability; (ii) a material reduction in the Employee's Base Salary, other than for Cause or Disability; (iii) the relocation of the Company's principal office to a location more than fifty (50) miles from Bellevue, Washington; (iv) the Company's material breach of this Agreement; or (v) the failure of the Company to obtain the assumption in writing of its obligation to perform this Agreement by any successor to all or substantially all of the assets of the Company on or prior to a merger, consolidation, sale or similar transaction, which shall be considered a material breach of this Agreement. The Employee will not resign for Good Reason without first providing the Company with written notice of the acts or omissions constituting the grounds for "Good Reason" within ninety (90) days of the initial existence of the grounds for "Good Reason" and a reasonable cure period of not less than thirty (30) days following the date of such notice.

(i) Employee shall be a **"Service Provider"** if (i) Employee is an employee of the Company, (ii) Employee is serving as a member of the Board or (iii) Employee is serving as an advisor that is engaged by the Company or a parent or subsidiary of the Company to render services to such entity.

2. Term of Employment. Subject to Section 11, the Company hereby employs the Employee, and the Employee hereby accepts such employment (whether or not the Employee is considered an

"employee" for tax purposes), for the period (the "**Term of Employment**") commencing on the Effective Date and ending on the April 21, 2017; *provided, however*, that the Term of Employment shall be automatically extended to April 21, 2020, unless written notice of non-extension is provided by either Party to the other Party on or before March 22, 2017. NOTWITHSTANDING THE FOREGOING OR ANYTHING HEREIN TO THE CONTRARY, THE EMPLOYEE'S EMPLOYMENT WITH THE COMPANY IS TERMINABLE AT WILL WITH OR WITHOUT CAUSE; PROVIDED, HOWEVER, THAT A TERMINATION OF THE EMPLOYEE'S EMPLOYMENT SHALL BE GOVERNED IN ACCORDANCE WITH THE TERMS HEREOF.

3. Position, Duties and Responsibilities.

(a) During the Term of Employment, the Employee shall be employed and serve as Audio Director of the Company (or such other position or positions as may be agreed upon in writing by the Employee and the Company) and be responsible for duties as are incident to and consistent with position as are from time to time determined by the Board. The Employee shall devote substantially all of his or her business time, attention and skill to the performance of such duties and responsibilities and shall use his or her best efforts to promote the interests of the Company. The Employee shall not, without the prior written approval of the Board, engage in any other business activity, and shall not engage in any activity which is in violation of policies established from time to time by the Company.

(b) Anything herein to the contrary notwithstanding, nothing shall preclude the Employee from (i) serving on the boards of directors of a reasonable number of trade associations and/or charitable organizations (subject to the reasonable approval of the Board), (ii) engaging in charitable activities and community affairs, and (iii) managing his or her personal investments and affairs, in each case provided that such activities do not materially interfere with the proper performance of his or her duties and responsibilities as an Employee officer of the Company and do not in any respect conflict with the Employee's obligations under Section 11 hereof.

(c) The Employee shall perform his or her services hereunder primarily at the Company's headquarters in Bellevue, Washington or such other location as may be determined by the Board in its sole discretion.

4. Base Salary. During the Term of Employment, the Employee shall be paid an annualized Base Salary, payable in accordance with the regular payroll practices of the Company, in the amount of $165,830.00. The Base Salary may from time to time be increased at the discretion of the Board. The Base Salary, including any such increase, shall not be decreased during the Term of Employment.

5. Bonus Plans. During the Term of Employment, the Employee shall be eligible to participate in such bonus plans as may from time to time be established by the Company and made available to management level employees of the Company. If the Employee is employed with the Company through April 21, 2017, then following any termination of the Employee's employment with the Company, the Employee shall be eligible to receive distributions under the Company's Profit Participation Plan, as adopted by the Board on April 20, 2010 and as amended from time to time after the date hereof, to the extent set forth on Exhibit A (the "**Profit Participation Plan**"); *provided, however*, that such right shall terminate automatically upon the earliest to occur of (i) the Employee's termination for Cause, (ii) upon final determination by an arbitrator pursuant to Section 16 of the Agreement, it is determined that the Employee has violated the restrictive covenants set forth in Section 11 of the Agreement (whether such violation occurred before, on or after the Employee's employment by the Company) or (iii) the closing of a Change of Control (as defined in Exhibit A). Except for the rights expressly set forth in Exhibit A, nothing herein shall require the Company to implement or maintain any particular bonus plan, any or all of which may (subject to applicable legal requirements) be terminated at any time by the Company at the discretion of the Board.

6. Discretionary Bonuses. During the Term of Employment, the Employee shall be entitled to such additional bonus compensation as may from time to time be determined by the Board in its discretion.

7. Employee Benefit Programs. During the Term of Employment, the Employee shall be eligible to participate in all employee pension and welfare benefit plans and programs made available generally to similarly situated employees of the Company, as such plans or programs may be in effect from time to time, which plans and programs may include, without limitation, pension, profit sharing, savings and other retirement plans or programs, medical, dental, hospitalization, short-term and long-term disability and life insurance plans, accidental death and dismemberment protection, travel accident insurance, and any other pension or retirement plans or programs and any other employee welfare benefit plans or programs that may be sponsored by the Company from time to time, including any plans that supplement the above-listed types of plans or programs, whether funded or unfunded (collectively, "**Company Benefit Plans**"). Nothing herein shall require the Company to implement or maintain any particular Company Benefit Plan, any or all of which may (subject to applicable legal requirements) be terminated at any time by the Company at the discretion of the Board.

8. Vacation. The Employee shall be entitled to paid vacation each year in accordance with, and subject to, the Company's vacation policy as applicable to management-level employees.

9. Terms Applicable to Shares – General; Forfeiture, Vesting and Escrow of Shares; Transfer Restrictions and Tax Consequences.

(a) General. The Employee represents and warrants that the Employee has received and reviewed the following agreements: (i) the Transfer Restriction, Right of First Refusal and Co-Sale Agreement effective December 31, 2010 by and among the Company and certain stockholders of the Company, as such may be amended from time to time (the "**Transfer Restriction Agreement**"), (ii) the Stockholders' Rights Agreement effective December 31, 2010 by and among the Company and certain stockholders of the Company, as such may be amended from time to time (the "**Stockholder Rights Agreement**"), (iii) the Voting Agreement effective December 31, 2010 by and among the Company and certain stockholders of the Company, as such may be amended from time to time (the "**Voting Agreement**," and together with the Transfer Restriction Agreement and the Stockholder Rights Agreement, the "**Stockholder Agreements**"). The Employee hereby acknowledges and agrees that the Shares are and shall be subject to the terms and conditions set forth in the Stockholder Agreements and this Agreement.

(b) Forfeiture, Vesting and Escrow of Shares. All of the Shares are and shall be subject to the forfeiture, vesting and other provisions as set forth on Exhibit B hereto (the "**Forfeiture Provisions**"). Any of the Shares which have not yet vested pursuant to the vesting schedule set forth in Exhibit B as of a given time are referred to herein as "**Unvested Shares**."

(c) Transfer Restrictions. Except for the escrow of the Shares described above or the transfer of the Shares to the Company or its assignees contemplated by this Agreement, none of the Unvested Shares or any beneficial interest therein shall be transferred, encumbered or otherwise disposed of in any way without the Company's prior written consent. In addition, the Shares (whether vested or unvested) may only be transferred in compliance with the restrictions on transfer set forth in the Stockholder Agreements. In addition, any transferee of the Shares must furnish the Company with (a) written notice of his or her status as transferee, (b) evidence satisfactory to the Company to establish the validity of the transfer and compliance with any laws or regulations pertaining to said transfer and (c) such transferee's agreement to be bound by the terms of this Section 9 of the Agreement (including Exhibit B) and the Stockholder Agreements.

(d) Tax Consequences. The Employee has reviewed with the Employee's own tax

advisors the federal, state, local and foreign tax consequences of the Forfeiture Provisions. The Employee is relying solely on such advisors and not on any statements or representations of the Company or any of its agents. The Employee understands that the Employee (and not the Company) shall be responsible for any tax liability to the Employee that may arise as a result of the transactions contemplated by this Agreement (including the Forfeiture Provisions), the Conversion Agreement, the Purchase Agreement and the issuance of the Shares to Employee. The Employee understands that Section 83 of the Code, taxes as ordinary income the difference between the purchase price for the Shares and the fair market value of the Shares as of the date any restrictions on the Shares lapse. In this context, "restriction" includes the forfeiture of Unvested Shares to the Company pursuant to the Forfeiture Provisions. The Employee understands that the Employee may elect to be taxed at the time the Shares are transferred rather than when and as the Forfeiture Provisions expire by filing an election under Section 83(b) of the Code with the IRS within 30 days from the date of purchase. THE FORM FOR MAKING THIS SECTION 83(B) ELECTION IS ATTACHED TO THIS AGREEMENT AS EXHIBIT E AND THE EMPLOYEE (AND NOT THE COMPANY OR ANY OF ITS AGENTS) SHALL BE SOLELY RESPONSIBLE FOR APPROPRIATELY FILING SUCH FORM, EVEN IF THE EMPLOYEE REQUESTS THE COMPANY OR ITS AGENTS TO MAKE THIS FILING ON THE EMPLOYEE'S BEHALF.

10. Termination of Employment.

(a) Termination Due to Death. In the event the Employee's employment is terminated due to his or her death, his or her estate or his or her beneficiaries as the case may be, shall be entitled to the following:

(i) Base Salary through the date of death;

(ii) a prorated annual bonus for the year in which the Employee's death occurs (with such prorated amount equal to the total annual bonus multiplied by a fraction, the numerator of which is the number of days the Employee was employed during the year of termination and the denominator of which is 365), (x) in the case of the Profit Participation Plan (i.e., the Company's regular bonus plan), based on the bonuses paid thereunder in respect of such year to other management employees in the same "Tier" (as defined in the Profit Participation Plan) as the Employee; (y) in the case of any ship bonus paid in such year, based on the average ship bonus amount paid during such year to the remaining members of the Bungie Executive Team; and (z) in the case of any discretionary bonus plan, as determined by the Board or relevant committee thereof in its sole discretion; which bonus (if any) shall, in each case, be paid in accordance with the terms and provisions of the relevant bonus plan; and

(iii) any amounts earned by, accrued by or owing to the Employee but not yet paid under this Agreement.

(b) Termination Due to Disability. The Company may, by written notice to the Employee following a majority vote of the Board, terminate the Employee's employment by reason of the Employee's Disability. In the event the Employee's employment is terminated due to his or her Disability, he or she shall be entitled in such case to the following:

(i) Base Salary through the date of termination;

(ii) a prorated annual bonus for the year in which termination occurs (with such prorated amount equal to the total annual bonus multiplied by a fraction, the numerator of which is the number of days the Employee was employed during the year of termination and the denominator of which is 365), (x) in the case of the Profit Participation Plan, based on the bonuses paid thereunder in respect of such

year to other management employees in the same "Tier" (as defined in the Profit Participation Plan) as the Employee; (y) in the case of any ship bonus paid in such year, based on the average ship bonus amount paid during such year to the remaining members of the Bungie Executive Team; and (z) in the case of any discretionary bonus plan, as determined by the Board or relevant committee thereof in its sole discretion; which bonus (if any) shall, in each case, be paid in accordance with the terms and provisions of the relevant bonus plan; and

(iii) any amounts earned, accrued or owing to the Employee but not yet paid under this Agreement.

(c) Termination by the Company for Cause. The Company may, by written notice to the Employee following the affirmative vote of at least two-thirds (2/3) of the members of the Board (excluding the Employee if he or she is a member of the Board at such time), terminate the Employee's employment for Cause. Such notice of termination shall set forth in reasonable detail the basis for such for Cause termination. In the event the Company terminates the Employee's employment for Cause, he or she shall be entitled to:

(i) Base Salary through the date of the termination of his or her employment; and

(ii) any amounts earned, accrued or owing to the Employee but not yet paid under this Agreement.

(d) Termination Without Cause or Resignation for Good Reason.

(i) Subject to the notice and cure requirements of Section 1(h), the Employee may resign his or her employment for Good Reason by delivering such resignation in writing to the Board, which resignation shall set forth in reasonable detail the basis for such Good Reason resignation.

(ii) The Company may, by written notice to the Employee following the affirmative vote of at least two-thirds (2/3) of the members of the Board (excluding the Employee if he or she is a member of the Board at such time), terminate the Employee's employment without Cause, for any reason or for no reason.

(iii) In the event that (1) the Employee resigns for Good Reason, (2) the Employee's employment is terminated by the Company without Cause (other than due to Disability or death), or (3) the Employee's employment is terminated upon expiration of the Term of Employment following the Company's having given notice of non-extension of the Term of Employment, then in any such event and subject to this Section 10 and Section 11, the Employee shall be entitled to:

(A) Continued payments of the Employee's Base Salary for a period of twelve (12) months following the date of such termination of the Employee's employment, payable in accordance with the Company's normal payroll practices; *provided, however*, that the Company shall no longer be required to make any such payments to the Employee if, after the written request of Employee, the Company waives its rights under Section 11(a) of this Agreement to restrict the Employee from competing with the Company;

(B) If the Employee elects continuation coverage pursuant to the Consolidated Omnibus Budget Reconciliation Act of 1985, as amended ("**COBRA**") for the Employee and the Employee's eligible dependents, within the time period prescribed pursuant to COBRA, the Company will reimburse the Employee for the COBRA premiums for such coverage (at the coverage levels in effect

immediately prior to the Employee's termination) until the earlier of (A) a period of twelve (12) months from the last date of employment of the Employee with the Company, or (B) the date upon which the Employee and/or the Employee's eligible dependents becomes covered under similar plans. Notwithstanding the foregoing, if the Company determines in its sole discretion that it cannot provide the foregoing benefit without potentially violating, or being subject to an excise tax under, applicable law (including, without limitation, Section 2716 of the Public Health Service Act), the Company shall in lieu thereof provide to the Employee a taxable payment in an amount equal to two times the aggregate of COBRA premiums that the Employee would be required to pay as in effect on the date of termination for a period of twelve (12) months (which amount shall be based on the premium for the first month of COBRA coverage) (the "**Taxable Payment**"), which Taxable Payment shall be made regardless of whether the Employee elects COBRA continuation coverage and shall be made in lump sum, less any applicable withholding of federal, state, local or foreign taxes. COBRA reimbursements other than the Taxable Payment will be made by the Company to the Employee consistent with the Company's normal expense reimbursement policy, but in no event later than the last day of the Employee's second taxable year following the taxable year of the Employee's separation from service;

(C) Continued participation, on a prorated basis, for the same period referenced in clause (A) above, in the Company's bonus plans in which the Employee was eligible to participate as of the date of his or her termination, the amount of each such bonus, if any, (x) in the case of the Profit Participation Plan, to be based on the bonuses paid thereunder in respect of such period year to other management employees in the same "Tier" as the Employee; (y) in the case of any ship bonus paid in such year, to be based on the average ship bonus amount paid during such period to the remaining members of the Bungie Executive Team; and (z) in the case of any discretionary bonus plan, to be determined by the Board or relevant committee thereof in its sole discretion; which bonuses (if any) shall, in each case, be paid in accordance with the terms and provisions of the relevant bonus plan. Such prorated bonus, if any, for the year following the year of the Employee's termination shall be equal to the amount of the applicable bonus under (x), (y) or (z) above for such year multiplied by a fraction, the numerator of which is the number of days from January 1 through the twelve (12) month anniversary of the Employee's termination of employment and the denominator of which is 365; and

(D) Any amounts earned, accrued or owing to the Employee but not yet paid under this Agreement.

(e) Voluntary Termination. In the event of a termination of employment by the Employee on his or her own initiative (including, without limitation, upon expiration of the Term of Employment following the Employee's having given notice of non-extension of the Term of Employment), other than a termination due to death or Disability or Good Reason, the Employee shall have the same entitlements as provided in Section 10(c) above for a termination for Cause.

(f) No Mitigation: No Offset. In the event of any termination of employment under this Section 10, the Employee shall be under no obligation to seek other employment and there shall be no offset against amounts due the Employee under this Agreement on account of any remuneration attributable to any subsequent employment that he or she may obtain except as specifically provided in this Section 10.

(g) Nature of Payments. Any amounts due under this Section 10 are in the nature of severance payments considered to be reasonable by the Company. Failure to qualify for any such payment is not in the nature of a penalty.

(h) Exclusivity of Severance Payments. Upon termination of the Employee's employment, even if during the Term of Employment, he or she shall be entitled only to the payments and

benefits, if any, as are expressly provided herein and to any benefits which may be due to the Employee under any employee benefit plan of the Company which by its terms provides benefits after termination of employment. The Employee shall not be entitled to any other payments or benefits from the Company upon or following the termination of his or her employment, including, without limitation, any payment or benefits on account of any claim by the Employee of wrongful termination (including, without limitation, on account of any claims under any federal, state or local human and civil rights or labor laws).

(i) Non-competition. The Employee agrees that any right to receive any payments and/or benefits hereunder, other than any other compensation already earned by the Employee and required to be paid by state law other than under this Agreement, will cease and be immediately forfeited if the Employee breaches in any respect the provisions of Section 11 below, the parties agreeing that any such breach shall be deemed material.

(j) Release of Claims. As a condition of the Employee's entitlement to the payment and/or delivery of any of the severance rights and benefits provided in this Section 10 (other than in the event of the Employee's death), the Employee shall be required to execute and honor a release of claims in the form reasonably requested by the Company (the "**Release**").

(k) Equity Interests in the Company. In the event of the termination for any reason of the Employee's employment, (i) all of the Employee's Unvested Shares (as defined in Exhibit B) shall be automatically forfeited to the Company without the payment of any consideration as set forth in Exhibit B.

11. Restrictive Covenants.

(a) Non-Compete. By and in consideration of the substantial compensation and benefits provided by the Company hereunder, and further in consideration of the Employee's exposure to the proprietary information of the Company, the Employee agrees that, other than with the prior written consent of the Company approved by the affirmative vote of at least two-thirds (2/3) of the members of the Board (excluding the Employee if he or she is a member of the Board at such time), he or she shall not, during the Term of Employment and for a period ending 12 months following termination of his or her employment for any reason, directly or indirectly own, manage, operate, join, control, be employed by, or participate in the ownership, management, operation or control of or be connected in any manner, including, but not limited to, holding the positions of officer, director, shareholder, consultant, independent contractor, employee, partner, or investor, with any Competing Enterprise; *provided, however*, that the Employee may invest in stocks, bonds or other securities of any corporation or other entity (but without participating in the business thereof) if such stocks, bonds, or other securities are listed for trading on a national securities exchange or The NASDAQ Stock Market and the Employee's investment does not exceed 2% of the issued and outstanding shares of capital stock, or in the case of bonds or other securities, 2% of the aggregate principal amount thereof issued and outstanding. For purposes of this Section 11, "**Competing Enterprise**" shall mean any entity or enterprise located anywhere within or outside the United States whose business includes to any extent the development and/or publication of computer/video games and/or related software to the extent such games and/or related software are or are related or ancillary to "first person shooter" games and/or other games of the same or substantially similar genre as those games and/or related software that are or were during the Term of Employment actively being developed by the Company (i.e., one or more employees of the Company are or, at any time during the Term of Employment, were actively working on the development thereof).

(b) Nonsolicitation. By and in consideration of the substantial compensation and benefits to be provided by the Company hereunder, and further in consideration of the Employee's exposure to the proprietary information of the Company, the Employee agrees that he or she shall not, during the Term

of Employment and for a period of 24 months following termination of employment for any reason, without the express prior written approval of the Company, (i) directly or indirectly, in one or a series of transactions, recruit, solicit or otherwise induce or influence any proprietor, partner, member, stockholder, lender, director, officer, employee, sales agent, joint venturer, investor, lessor, supplier, agent, representative or any other person which has a business relationship with the Company, or had a business relationship with the Company within the 24-month period preceding the date of the incident in question, to discontinue, reduce or modify such employment, agency or business relationship with the Company, or (ii) directly or indirectly, employ or seek to employ (including through any employer of the Employee) or cause any Competing Enterprise to employ or seek to employ any person or agent who is then (or was at any time within six months prior to the date the Employee or the Competing Enterprise employs or seeks to employ such person) employed or retained by the Company.

(c) Confidential Information. The Employee agrees that, during the Term of Employment and at all times thereafter, Employee will not divulge to anyone or make use of any Confidential Information except in the performance of his or her duties as an Employee of the Company or when legally required to do so (in which case the Employee shall give prompt written notice to the Company in order to allow the Company the opportunity to object or otherwise resist such disclosure). **"Confidential Information"** shall mean any knowledge or information of any type relating to the business of the Company or any of its subsidiaries or affiliates, as well as any information obtained from customers, clients or other third parties, including, without limitation, all types of trade secrets and confidential commercial information. The Employee agrees that he or she will return to the Company immediately upon termination, any and all documents, records or reports (including electronic information) that contain any Confidential Information. Confidential Information shall not include information that is or becomes part of the public domain, other than through the breach of this Agreement by the Employee. The Employee acknowledges that the Company has expended, and will continue to expend, significant amounts of time, effort and money in the procurement of its Confidential Information, that the Company has taken all reasonable steps in protecting the secrecy of the Confidential Information, that said Confidential Information is of critical importance to the Company.

(d) Non-Disparagement. The Employee agrees that, during the Term of Employment and for a period of 5 years following termination of employment for any reason, the Employee shall not make statements or representations, or otherwise communicate, directly or indirectly, in writing, orally, or otherwise, or take any action which may, directly or indirectly, disparage the Company or any subsidiary or affiliate or their respective officers, directors, employees, advisors, businesses or reputations. Notwithstanding the foregoing, nothing in this Agreement shall preclude the Employee from making truthful statements or disclosures that are required by applicable law, regulation or legal process.

(e) Section 409A.

(i) Notwithstanding anything to the contrary in this Agreement, no severance pay or benefits to be paid or provided to the Employee, if any, pursuant to this Agreement that, when considered together with any other severance payments or separation benefits, are considered deferred compensation under Code Section 409A, and the final regulations and any guidance promulgated thereunder (**"Section 409A"**) (together, the **"Deferred Payments"**) will be paid or otherwise provided until the Employee has a "separation from service" within the meaning of Section 409A. Similarly, no severance payable to the Employee, if any, pursuant to this Agreement that otherwise would be exempt from Section 409A pursuant to Treasury Regulation Section 1.409A-1(b)(9) will be payable until Employee has a "separation from service" within the meaning of Section 409A.

(ii) Subject to the Employee executing and not revoking the Release, any severance payments or benefits under this Agreement that would be considered Deferred Payments will be

paid on, or, in the case of installments, will not commence until, the sixtieth (60th) day following the Employee's separation from service, or, if later, such time as required by Section 11(e)(iii). Except as required by Section 11(e)(iii), any installment payments that would have been made to Employee during the sixty (60) day period immediately following the Employee's separation from service but for the preceding sentence will be paid to the Employee on the sixtieth (60th) day following the Employee's separation from service and the remaining payments shall be made as provided in this Agreement.

(iii) Notwithstanding anything to the contrary in this Agreement, if the Employee is a "specified employee" within the meaning of Section 409A at the time of the Employee's termination (other than due to death), then the Deferred Payments that are payable within the first six (6) months following the Employee's separation from service, will become payable on the first payroll date that occurs on or after the date six (6) months and one (1) day following the date of the Employee's separation from service. All subsequent Deferred Payments, if any, will be payable in accordance with the payment schedule applicable to each payment or benefit. Notwithstanding anything herein to the contrary, if the Employee dies following the Employee's separation from service, but prior to the six (6) month anniversary of the separation from service, then any payments delayed in accordance with this paragraph will be payable in a lump sum as soon as administratively practicable after the date of the Employee's death and all other Deferred Payments will be payable in accordance with the payment schedule applicable to each payment or benefit. Each payment and benefit payable under this Agreement is intended to constitute a separate payment for purposes of Section 1.409A-2(b)(2) of the Treasury Regulations.

(iv) Any amount paid under this Agreement that satisfies the requirements of the "short-term deferral" rule set forth in Section 1.409A-1(b)(4) of the Treasury Regulations will not constitute Deferred Payments for purposes of clause (i) above.

(v) Any amount paid under this Agreement that qualifies as a payment made as a result of an involuntary separation from service pursuant to Section 1.409A-1(b)(9)(iii) of the Treasury Regulations that does not exceed the Section 409A Limit will not constitute Deferred Payments for purposes of clause (i) above. For purposes of this Agreement, **"Section 409A Limit"** will mean two (2) times the lesser of: (i) the Employee's annualized compensation based upon the annual rate of pay paid to the Employee during the Employee's taxable year preceding the Employee's taxable year of his or her separation from service as determined under Treasury Regulation Section 1.409A-1(b)(9)(iii)(A)(1) and any Internal Revenue Service guidance issued with respect thereto; or (ii) the maximum amount that may be taken into account under a qualified plan pursuant to Section 401(a)(17) of the Internal Revenue Code for the year in which the Employee's separation from service occurred.

(vi) The foregoing provisions are intended to comply with the requirements of Section 409A so that none of the severance payments and benefits to be provided hereunder will be subject to the additional tax imposed under Section 409A, and any ambiguities herein will be interpreted to so comply. The Company and the Employee agree to work together in good faith to consider amendments to this Agreement and to take such reasonable actions which are necessary, appropriate or desirable to avoid imposition of any additional tax or income recognition prior to actual payment to Employee under Section 409A.

(f) Cooperation. The Employee agrees to cooperate with the Company, during the Term of Employment and thereafter (including following the Employee's termination of employment for any reason), by being reasonably available to testify on behalf of the Company or any subsidiary or affiliate in any action, suit, or proceeding, whether civil, criminal, administrative, or investigative, and to assist the Company, or any subsidiary or affiliate, in any such action, suit or proceeding, by providing information and meeting and consulting with the Board or its representatives or counsel, or representatives or counsel to the Company,

or any subsidiary or affiliate, as reasonably requested. The Company agrees to reimburse the Employee for all reasonable expenses actually incurred in connection with his or her provision of testimony or assistance (including reasonable attorneys' fees incurred in connection therewith) upon submission of appropriate documentation to the Company.

(g) Remedies. The Employee agrees that any breach or threatened breach of the terms of this Section 11 would result in irreparable injury and damage to the Company for which the Company would have no adequate remedy at law; the Employee therefore also agrees that in the event of said breach or threatened breach, the Company shall be entitled to an immediate injunction and restraining order to prevent such breach and/or threatened breach and/or continued breach by the Employee. In addition to any other remedies the Company may have under this Section 11(g), the Company shall have the right and remedy to require the Employee to account for and pay over to the Company all compensation, profits, monies, accruals, increments or other benefits (collectively, "**Improper Benefits**") derived or received by the Employee as the result of any transactions constituting a breach of any of the provisions of this Section 11, and the Employee hereby agrees to account for any pay over any such Improper Benefits to the Company. The terms of this Section 11(g) shall not prevent the Company from pursuing any other available remedies for any breach or threatened breach hereof, including, but not limited to, remedies available under this Agreement and the recovery of damages. The Employee and the Company further agree that the provisions of the covenant not to compete are reasonable. Should a court or arbitrator determine, however, that any provision of the covenant not to compete is unreasonable, either in period of time, geographical area, or otherwise, the Parties hereto agree that the covenant shall be interpreted and enforced to the maximum extent which such court or arbitrator deems reasonable.

(h) Continuing Operation. The provisions of this Section 11 shall survive any termination of this Agreement and the Term of Employment, regardless of the reason for such termination, and the existence of any claim or cause of action by the Employee against the Company, whether predicated on this Agreement or otherwise, shall not constitute a defense to the enforcement by the Company of the covenants and agreements of this Section.

(i) Notice to Employer. The Employee agrees that as long as the provisions of Section 11(a) or 11(b) continue to bind the Employee, he or she will provide written notice of the terms and provisions of this Section 11 to any prospective employer.

12. Assignability; Binding Nature. This Agreement shall be binding upon and inure to the benefit of the Parties and their respective successors, heirs (in the case of the Employee) and permitted assigns. No rights or obligations of the Company under this Agreement may be assigned or transferred by the Company except that such rights or obligations may be assigned or transferred pursuant to a merger or consolidation in which the Company is not the continuing entity, or the sale or liquidation of all or substantially all of the assets of the Company, provided that the assignee or transferee is the successor to all or substantially all of the assets of the Company and such assignee or transferee assumes the liabilities, obligations and duties of the Company, as contained in this Agreement, either contractually or as a matter of law. The Company further agrees that, in the event of a sale or reorganization transaction as described in the preceding sentence, it shall take whatever action it legally can in order to cause such assignee or transferee to expressly assume the liabilities, obligations and duties of the Company hereunder. No rights or obligations of the Employee under this Agreement may be assigned or transferred by the Employee other than his or her rights to compensation and benefits, which may be transferred only by will or operation of law, except as otherwise provided herein.

13. Key Man Life Insurance. The Company may, but shall not be obligated, to obtain a "key man" life insurance policy on the life of the Employee for the sole benefit of the Company. The Employee

agrees to submit to a medical examination and otherwise to cooperate with the Company in its efforts to obtain such insurance policy.

14. Miscellaneous Provisions.

(a) This Agreement, together with the Conversion Agreement, the Purchase Agreement, the Company's 2010 Equity Incentive Plan and the Stockholder Agreements, contains the final and entire understanding and agreement between the Parties concerning the subject matter hereof and supersedes all prior representations, agreements, discussions, negotiations and undertakings, whether written or oral, between the Parties with respect thereto, including, without limitation, the Previous Service Agreement; provided, however, that the provisions of Section 11 hereof are intended to be in addition to, and shall not supersede or in any way limit, any other covenants or agreements to which the Employee is a party or by which the Employee may be bound.

(b) No provision in this Agreement may be amended unless such amendment is agreed to in writing and signed by the Employee and an officer of the Company authorized by the Board to execute such amendment. No waiver by either Party of any breach by the other Party of any condition or provision contained in this Agreement to be performed by such other Party shall be deemed a waiver of a similar or dissimilar condition or provision at the same or any prior or subsequent time. Any waiver must be in writing and signed by the Employee or an authorized officer of the Company, as the case may be.

(c) In the event that any provision or portion of this Agreement shall be determined to be invalid or unenforceable for any reason, in whole or in part, the remaining provisions of this Agreement shall be unaffected thereby and shall remain in full force and effect to the fullest extent permitted by law.

(d) The respective rights and obligations of the Parties hereunder shall survive any termination of the Employee's employment to the extent necessary to the intended preservation of such rights and obligations. Without limiting the generality of the foregoing, the provisions of Sections 9 (including Exhibit B), 10, 11, 12, 14, 15, 16, 17 and 18 shall survive any termination of this Agreement and the Employee's employment hereunder.

(e) All amounts required to be paid by the Company shall be subject to reduction in order to comply with applicable Federal, state and local tax withholding requirements, except as otherwise provided herein.

(f) The headings of the sections contained in this Agreement are for convenience only and shall not be deemed to control or affect the meaning or construction of any provision of this Agreement.

(g) This Agreement may be executed by the Parties counterparts and by facsimile, each of which shall be deemed to be an original but all of which taken together shall constitute one and the same agreement, and shall become effective when one or more counterpart has been signed by each Party and delivered to the other Party.

(h) If at any time after the date of this Agreement any further action is necessary to carry out the obligations of the Employee under this Agreement (including, without limitation, any terms of Article 9), Employee agrees to take or cause to be taken all such necessary or appropriate action in accordance with and subject to the terms of this Agreement.

15. Governing Law. This Agreement shall be governed by and construed and interpreted in accordance with the laws of the State of Washington.

16. Resolution of Disputes.

(a) Any dispute, claim or controversy arising out of or relating to this Agreement or the breach, termination, enforcement, interpretation or validity thereof, including the determination of the scope or applicability of this agreement to arbitrate, shall be determined by arbitration in or within one hundred (100) miles of Bellevue, Washington, before a single arbitrator. The arbitration shall be administered by JAMS pursuant to its Employment Arbitration Rules and Procedures (except that, to the extent that the provisions of this Section 16 conflict with such Employment Arbitration Rules and Procedures, the provisions of this Section 16 shall govern). Judgment on the Award may be entered in any court having jurisdiction. This Section 16 shall not preclude either Party from seeking provisional remedies in aid of arbitration from a court of appropriate jurisdiction. The prevailing party in any such arbitration (as determined by the Arbitrator) shall be entitled to recover its arbitration costs (including, without limitation, reasonable legal fees) from the non-prevailing party (as determined by the arbitrator). In the absence of a determination of a prevailing and non-prevailing party by the arbitrator, each party to such arbitration shall bear its own costs and expenses incurred in connection with such arbitration and the fees and expenses of the arbitrator shall be allocated equally to each of the parties to such arbitration.

(b) Notwithstanding the provisions of Section 16(a), the Company shall be entitled to seek equitable relief pursuant to Section 11(g) hereof without otherwise waiving the right to exclusive arbitration of all other disputes.

(c) NOTICE: BY EXECUTING THIS AGREEMENT, YOU ARE AGREEING TO HAVE ANY DISPUTE CONCERNING THIS AGREEMENT DECIDED BY ARBITRATION AS PROVIDED HEREIN, AND YOU ARE WAIVING ANY RIGHTS YOU MIGHT POSSESS TO HAVE A DISPUTE LITIGATED IN A COURT OR BY JURY TRIAL. BY EXECUTING THIS AGREEMENT, YOU ARE GIVING UP YOUR JUDICIAL RIGHTS TO APPEAL. ACCORDINGLY, YOU ARE AGREEING THAT THE ARBITRATION PROCEEDING PROVIDED FOR IN THIS SECTION 16 IS THE SOLE MANNER IN WHICH DISPUTES HEREUNDER MAY BE DECIDED AND DETERMINED.

17. No Conflict with Other Agreements. The Employee hereby represents and warrants that that the execution of this Agreement by the Employee, and the Employee's discharge of his or her duties and obligations hereunder and as an employee of the Company, do not and will not breach or conflict with any other contract, agreement, or understanding between the Employee and any other party or parties.

18. Notices. Any notice given to a Party shall be in writing and shall be deemed to have been given when delivered personally or sent by certified or registered mail, postage prepaid, return receipt requested, duly addressed to the Party concerned at the address indicated below or to such changed address as such Party may subsequently give such notice of:

If to the Company:

Bungie, Inc.
550 160th Avenue NE, Suite 207
Bellevue, Washington 98004
Attention: Chief Financial Officer

With a copy to:

Craig Sherman
Wilson Sonsini Goodrich & Rosati, Professional Corporation

701 Fifth Avenue, Suite 5100
Seattle, Washington 98104
Facsimile: (206) 883-2699

If to the Employee:

Martin O'Donnell
6820 142nd Ct. NE
Redmond, WA 98052

With a copy to:

[Signature Page Follows]

IN WITNESS WHEREOF, the undersigned have executed this Services Agreement as of the date first set forth above.

By the Employee's signature below, the Employee agrees that the Shares held by the Employee will be subject to and governed by the terms and conditions set forth herein, including all exhibits hereto, and in the Conversion Agreement, the Stockholders Agreements, and in the Company's certificate of incorporation and bylaws, as each may be amended from time to time. The Employee has reviewed this Agreement and the documents referred to herein and has had an opportunity to obtain the advice of counsel prior to executing this Agreement and fully understands all provisions of this Agreement and the documents referenced herein.

THE COMPANY

BUNGIE, INC.

By: _____
Name:
Title:

Employee

MARTIN O'DONNELL
Print Name:

Exhibit A

Profit Participation Plan

1. If the Employee is employed in good standing with the Company through the date that is the seventh anniversary of the Effective Date or, if prior to the date that is the seventh anniversary of the Effective Date (1) the Employee resigns for Good Reason, or (2) the Employee's employment is terminated by the Company without Cause (other than due to Disability or death), then the Employee shall be eligible to receive certain payments under the Profit Participation Plan (except as set forth in Section 1(C) below). Following the termination date of the Employee's employment with the Company (the "**Employment Termination Date**"), the Employee shall be eligible to receive a distribution under the Company's Profit Participation Plan, as adopted by the Board on April 20, 2010 (as the same may subsequently be amended from time to time pursuant thereto, the "**Profit Participation Plan**"), as follows:

A. For purposes of determining the award that the Employee is eligible to receive under the Profit Participation Plan following the Employment Termination Date, the Profit Sharing Percentage shall be based upon (1) the Employee's "Effective Tier" under the Profit Participation Plan as last determined by the Board prior to the Employment Termination Date and (2) the "Vesting Percentage Multiplier" for the Employee shall be based on the following schedule:

Full Years of Employment with the Company After the Effective Date	VPM in Fiscal Year in which Employment Was Terminated ("Termination Year")	VPM in Fiscal Year After Termination Year	VPM in Second Fiscal Year After Termination Year	VPM in Third Fiscal Year After Termination Year	VPM in Fourth Fiscal Year After Termination Year	VPM in Fifth Fiscal Year After Termination Year	VPM in Sixth Fiscal Year After Termination Year	VPM in Seven or more Fiscal Years After Termination Year
0	0%	0%	0%	0%	0%	0%	0%	0%
1	5%	0%	0%	0%	0%	0%	0%	0%
2	10%	5%	0%	0%	0%	0%	0%	0%
3	15%	10%	5%	0%	0%	0%	0%	0%
4	20%	15%	10%	5%	0%	0%	0%	0%
5	25%	20%	15%	10%	5%	0%	0%	0%
6	30%	25%	20%	15%	10%	5%	0%	0%
7+	50%	30%	25%	20%	15%	10%	5%	0%

provided, however, that if at any time the Profit Participation Plan is amended in a manner that is generally applicable to the Company's employees, following the date of this Agreement, the Company shall be permitted to amend this Exhibit A without the consent of the Employee to reflect such amendment.

B. Any payments to be made to the Employee following the Employment Termination Date under the Profit Participation Plan shall be paid on the schedule set forth in the Profit Participation Plan.

C. Notwithstanding anything in the Agreement or this Exhibit A to the contrary, all

eligibility rights under the Profit Participation Plan shall terminate automatically upon the earliest of the following to occur: (i) the Employee's termination for Cause, (ii) upon final determination by an arbitrator pursuant to Section 16 of the Agreement, it is determined that the Employee has violated the restrictive covenants set forth in Section 11 of the Agreement (whether such violation occurred before, on or after the Employee's employment by the Company) or (iii) the closing of a Change of Control. For purposes of this Agreement, **"Change of Control"** means the occurrence of any of the following events: (i) any "person" (as such term is used in Sections 13(d) and 14(d) of the Exchange Act), other than the current stockholders of the Company or any future stockholder who is an employee of the Company, becomes the "beneficial owner" (as defined in Rule 13d-3 of the Exchange Act), directly or indirectly, of securities of the Company representing fifty percent (50%) or more of the total voting power represented by the Company's then outstanding voting securities, except that any change in the beneficial ownership of the securities of the Company as a result of a private financing of the Company that is approved by the Board, shall not be deemed to be a Change of Control; (ii) the consummation of the sale or disposition by the Company of all or substantially all of the Company's assets; or (iii) the consummation of a merger or consolidation of the Company with any other corporation, other than a merger or consolidation which would result in the voting securities of the Company outstanding immediately prior thereto continuing to represent (either by remaining outstanding or by being converted into voting securities of the surviving entity or its parent) at least fifty percent (50%) of the total voting power represented by the voting securities of the Company or such surviving entity or its parent outstanding immediately after such merger or consolidation (provided that the sale by the Company of its securities for the purposes of raising additional funds shall not constitute a Change of Control hereunder).

All defined terms used and not defined herein shall have the respective meanings set forth in the Services Agreement to which this Exhibit A is attached.

* * * * *

Exhibit B

Vesting and Forfeiture Provisions

All of the Shares held by the Employee are and shall be subject to the vesting, forfeiture and other provisions set forth below. All defined terms used and not defined herein shall have the respective meanings set forth in the Services Agreement to which this Exhibit B is attached. Any certificates or other script representing the Shares may, at the discretion of the Company, bear a legend stating that such Shares are subject to the provisions hereof.

A. Forfeiture of Unvested Shares upon Termination as a Service Provider. Notwithstanding any contrary provision of this Agreement, if Employee terminates service as a Service Provider for any or no reason prior to vesting in all Shares, then, unless otherwise agreed to by the Board of Directors, the then Unvested Shares will thereupon be forfeited and automatically transferred to and reacquired by the Company at no cost to the Company upon the date of such termination and Employee will have no further rights thereunder. Employee hereby appoints the Escrow Holder (as defined below) with full power of substitution, as Employee's true and lawful attorney-in-fact with irrevocable power and authority in the name and on behalf of Employee to take any action and execute all documents and instruments, including, without limitation, stock powers which may be necessary to transfer the certificate or certificates evidencing such Unvested Shares to the Company upon such termination of service.

The Employee acknowledges that such vesting and forfeiture provisions include, among other provisions, the following provisions:

A. Vesting. The Shares held by the Employee shall vest (if at all) as follows:

(i) Milestone Vesting. All Shares held by the Employee shall initially be unvested as of the date of this Agreement. With respect to each product specified in the below table (each a **"Product"**), if such Product is delivered on or prior to the anticipated release to certification date specified in the below table opposite such Product (the **"Anticipated RTX Date"**), then the Employee's Shares shall vest in the percentage of all Shares held by the Employee specified in the below table (rounded to the nearest whole number of Shares but not to exceed the total number of Shares) with respect to the Product (the **"Vesting Percentage"**) on the date the Product is delivered (the **"RTX Date"**), in each case subject to the Employee continuing to be a Service Provider through such RTX date. If a Product is not delivered on or prior to the corresponding Anticipated RTX Date, then the Shares held by the Employee shall vest as to the Vesting Percentage with respect to such Product on the date that is one (1) year following the RTX Date for such Product, in each case subject to the Employee continuing to be a Service Provider from the date of this Agreement through such date. If the Shares are composed of multiple classes or series of the Company's capital stock, then foregoing vesting provisions shall be applied proportionately among the different classes or series of capital stock such that Employee shall be vested in the same proportion of Shares of each class or series of capital stock that comprise the Shares.

Vesting Table		
Product	**Anticipated RTX Date**	**Vesting Percentage**
Retail Release 1 of Project Tiger	September 24, 2013	20%
Retail Release 2 of Project Tiger	September 30, 2015	20%
Retail Release 3 of Project Tiger	September 30, 2017	20%
Retail Release 4 of Project Tiger	September 30, 2019	20%
Comet 4	September 30, 2020	20%

For purposes of the foregoing, **"Project Tiger"** shall refer to the Company's next project to be developed pursuant to the Software Publishing and Development Agreement between the Company and Activision Publishing, Inc., a Delaware corporation, as such may be amended from time to time (**"Activision Agreement"**), tentatively entitled **"Project Tiger"** within the Company and Destiny pursuant to the Activision Agreement, and **"Comet 4"** shall mean the largest downloadable content product following the Retail Release 4 of Project Tiger."

Any of the Shares granted under this Agreement which have not yet vested as of a given time are referred to herein as **"Unvested Shares."**

(ii) Change of Control Vesting. Any Unvested Shares held by the Employee shall accelerate and vest in full upon a Change of Control (as defined in Exhibit A to the Services Agreement).

(iii) Acceleration of Vesting. In the event that (1) the Employee resigns for Good Reason after the RTX Date of Retail Release 1 of Project Tiger or (2) the Employee's employment is terminated by the Company without Cause (other than due to Disability or death) after the RTX Date of Retail Release 1 of Project Tiger, then 50% of any then Unvested Shares held by the Employee shall accelerate and vest in full.

(iv) The Company may round up or down the number of Shares allocated to each Product by a single Share, such that the total number of Shares held by the Employee and the total number of Shares allocated to each Product is allocated a whole number of Shares.

B. Escrow of Shares.

(i) Deposit of Shares into Escrow. The stock certificates representing the Shares

will, upon execution of the Services Agreement, be delivered and deposited with an escrow holder designated by the Company ("**Escrow Holder**"), together with the Assignment Separate from Certificate (the "**Stock Assignment**") duly endorsed in blank, attached hereto as Exhibit C. The Shares and the Stock Assignment will be held by the Escrow Holder, pursuant to the Joint Escrow Instructions of the Company and Employee attached as Exhibit D hereto (the "**Joint Escrow Instructions**"), and which instructions shall also be delivered to the Escrow Holder after the issuance of the Shares.

(ii) No Liability of Escrow Holder. The Escrow Holder shall not be liable for any act it may do or omit to do with respect to holding the Shares in escrow and while acting in good faith and in the exercise of its judgment.

(iii) Transfer of Unvested Shares upon Forfeiture. Upon Employee's termination as a Service Provider for any reason, the Escrow Holder, upon receipt of written notice of such termination, will take all steps necessary to accomplish the transfer of the Unvested Shares to the Company. Employee hereby appoints the Escrow Holder with full power of substitution, as Employee's true and lawful attorney-in-fact with irrevocable power and authority in the name and on behalf of Employee to take any action and execute all documents and instruments, including, without limitation, stock powers which may be necessary to transfer the certificate or certificates evidencing such Unvested Shares to the Company upon such termination

(iv) Rights in Escrow Shares. Subject to the terms hereof and the terms of the Stockholder Agreements, the Employee shall have all the rights of a stockholder with respect to such Shares while they are held in escrow, including without limitation, the right to vote the Shares and receive any cash dividends declared thereon. In the event of any merger, reorganization, consolidation, recapitalization, separation, liquidation, stock dividend, split-up, share combination, or other change in the corporate structure of the Company affecting the Shares, the Shares shall be increased, reduced or otherwise changed, and by virtue of any such change Employee shall in his or her capacity as owner of the Unvested Shares that have been awarded to him or her be entitled to new or additional or different shares of stock, cash or securities (other than rights or warrants to purchase securities); such new or additional or different shares, cash or securities shall thereupon be considered to be "Unvested Shares" and shall be subject to all of the conditions and restrictions which were applicable to the Unvested Shares pursuant to this Agreement. If Employee receives rights or warrants with respect to any Unvested Shares, such rights or warrants may be held or exercised by Employee, provided that until such exercise any such rights or warrants and after such exercise any shares or other securities acquired by the exercise of such rights or warrants shall be considered to be Unvested Shares and shall be subject to all of the conditions and restrictions which were applicable to the Unvested Shares pursuant to this Agreement. The Board may in its absolute discretion at any time accelerate the vesting of all or any portion of such new or additional shares of stock, cash or securities, rights or warrants to purchase securities or shares or other securities acquired by the exercise of such rights or warrants.

C. Restrictive Legends and Stop-Transfer Orders.

(i) Legends. In addition to any legends that may be required pursuant to the Stockholder Agreements or other agreements between the Company and the Employee, the Employee understands and agrees that the Company shall cause the legends set forth below or legends substantially equivalent thereto, to be placed upon any certificate(s) evidencing ownership of the Shares together with any other legends that may be required by the Company or by state or federal securities laws:

THE SECURITIES REPRESENTED HEREBY HAVE NOT BEEN REGISTERED UNDER THE SECURITIES ACT OF 1933 (THE "ACT") AND MAY NOT BE OFFERED, SOLD OR OTHERWISE TRANSFERRED, PLEDGED OR HYPOTHECATED UNLESS AND

UNTIL REGISTERED UNDER THE ACT OR, IN THE OPINION OF COUNSEL SATISFACTORY TO THE ISSUER OF THESE SECURITIES, SUCH OFFER, SALE OR TRANSFER, PLEDGE OR HYPOTHECATION IS IN COMPLIANCE THEREWITH.

THE SHARES REPRESENTED BY THIS CERTIFICATE ARE SUBJECT TO CERTAIN RESTRICTIONS ON TRANSFER AND FORFEITURE RIGHTS IN FAVOR OF THE ISSUER OR ITS ASSIGNEE(S) AS SET FORTH IN THE AMENDED AND RESTATED SERVICES AGREEMENT BETWEEN THE ISSUER AND THE ORIGINAL HOLDER OF THESE SHARES, A COPY OF WHICH MAY BE OBTAINED AT THE PRINCIPAL OFFICE OF THE ISSUER. SUCH TRANSFER RESTRICTIONS AND FORFEITURE RIGHTS IN FAVOR OF THE ISSUER OR ITS ASSIGNEE(S) ARE BINDING ON TRANSFEREES OF THESE SHARES.

(ii) Stop-Transfer Notices. The Employee agrees that, in order to ensure compliance with the restrictions referred to herein, the Company may issue appropriate "stop transfer" instructions to its transfer agent, if any, and that, if the Company transfers its own securities, it may make appropriate notations to the same effect in its own records.

(iii) Refusal to Transfer. The Company shall not be required (i) to transfer on its books any Shares that have been sold or otherwise transferred in violation of any of the provisions of this Agreement or the Stockholder Agreements or (ii) to treat as owner of such Shares or to accord the right to vote or pay dividends to any purchaser or other transferee to whom such Shares shall have been so transferred.

*****

Exhibit C

STOCK POWER AND ASSIGNMENT

SEPARATE FROM CERTIFICATE

FOR VALUE RECEIVED and pursuant to that certain Amended and Restated Services Agreement, dated as of December 31, 2010, the undersigned hereby sells, assigns and transfers unto _____, _____ (_____) shares of Common Stock of Bungie, Inc., a Delaware corporation (the "Company"), standing in the undersigned's name on the books of said corporation represented by certificate number _____ delivered herewith, _____ (_____) shares of Series B-1 Preferred Stock of the Company, standing in the undersigned's name on the books of said corporation represented by certificate number _____ delivered herewith and _____ (_____) shares of Series B-2 Preferred Stock of the Company, standing in the undersigned's name on the books of said corporation represented by certificate number _____ delivered herewith. The undersigned and does hereby irrevocably constitute and appoint the appropriate attorneys and paralegals of Wilson Sonsini Goodrich & Rosati, P.C., counsel to Bungie, Inc., as attorney-in-fact, with full power of substitution, to transfer said stock on the books of Bungie, Inc..

Dated: _____

_____
(Signature)

MARTIN O'DONNELL
(Print Name)

_____
(Spouse's Signature, if any)

MARTHA J O'Donnell
(Print Name)

This Assignment Separate from Certificate was executed in conjunction with the terms of an Amended and Restated Services Agreement between the above assignor and the above corporation, dated as of December 31, 2010.

INSTRUCTIONS: Please do not fill in any blanks other than the signature line. The purpose of this assignment is to enable the Company to transfer the Unvested Shares to the Company upon the Employee's termination as a Service Provider, without requiring additional signatures on the part of the Employee.

Exhibit D

JOINT ESCROW INSTRUCTIONS

December 31, 2010

Bungie, Inc.
550 160th Avenue NE, Suite 207
Bellevue, Washington 98004
Attn: Corporate Secretary

Dear Secretary:

As Escrow Holder for both Bungie, Inc., a Delaware corporation (the "**Company**"), and the undersigned holder of stock of the Company (the "**Employee**"), you are hereby authorized and directed to hold the documents delivered to you pursuant to the terms of that certain Amended and Restated Services Agreement (the "**Agreement**"), dated as of December 31, 2010, to which a copy of these Joint Escrow Instructions is attached, in accordance with the following instructions:

1. If any Unvested Shares are forfeited pursuant to the terms of the Agreement, (A) the Company shall give to the Employee and you a written notice specifying the number of shares of stock to be forfeited by the Employee and (B) the Employee and the Company hereby irrevocably authorize and direct you to deliver the forfeited shares of stock directly to the Company in accordance with the terms of said notice, with no action required by the Employee.

2. Upon effectiveness of a forfeiture, you are directed (a) to date the stock assignments necessary for the transfer in question, (b) to fill in the number of shares being transferred, and (c) to deliver the stock assignments, together with the certificate evidencing the shares of stock to be transferred, to the Company or its assignee.

3. The Employee irrevocably authorizes the Company to deposit with you any certificates evidencing shares of stock to be held by you hereunder and any additions and substitutions to said shares as defined in the Agreement. The Employee does hereby irrevocably constitute and appoint you as his or her attorney-in-fact and agent for the term of this escrow to execute with respect to such securities all documents necessary or appropriate to make such securities negotiable and to complete any transaction herein contemplated, including but not limited to the filing with any applicable state blue sky authority of any required applications for consent to, or notice of transfer of, the securities. Subject to the provisions of this paragraph 3, the Employee shall exercise all rights and privileges of a stockholder of the Company while the stock is held by you.

4. On the date that is 95 days after the date the Employee's employment by the Company is terminated, you will deliver to the Employee a certificate or certificates representing the aggregate number of shares held or issued pursuant to the Agreement and not forfeited by the Employee.

5. If at the time of termination of this escrow you should have in your possession any documents, securities, or other property belonging to the Employee, you shall deliver all of same to the Employee and shall be discharged of all further obligations hereunder.

6. Your duties hereunder may be altered, amended, modified or revoked only by a writing signed by all of the parties hereto.

7. You shall be obligated only for the performance of such duties as are specifically set forth herein and may rely and shall be protected in relying or refraining from acting on any instrument reasonably believed by you to be genuine and to have been signed or presented by the proper party or parties. You shall not be personally liable for any act you may do or omit to do hereunder as Escrow Holder or as attorney-in-fact for the Employee while acting in good faith and in the exercise of your own good judgment, and any act done or omitted by you pursuant to the advice of your own attorneys shall be conclusive evidence of such good faith.

8. The Company and the Employee hereby jointly and severally expressly agree to indemnify and hold harmless you and your designees against any and all claims, losses, liabilities, damages, deficiencies, costs and expenses, including reasonable attorneys' fees and expenses of investigation and defense incurred or suffered by you and your designees, directly or indirectly, as a result of any of your actions or omissions or those of your designees while acting in good faith and in the exercise of your judgment under the Agreement, these Joint Escrow Instructions, exhibits hereto or written instructions from the Company or the Employee hereunder.

9. You are hereby expressly authorized to disregard any and all warnings given by any of the parties hereto or by any other person or corporation, excepting only orders or process of courts of law, and are hereby expressly authorized to comply with and obey orders, judgments or decrees of any court. In case you obey or comply with any such order, judgment or decree, you shall not be liable to any of the parties hereto or to any other person, firm or corporation by reason of such compliance, notwithstanding any such order, judgment or decree being subsequently reversed, modified, annulled, set aside, vacated or found to have been entered without jurisdiction.

10. You shall not be liable in any respect on account of the identity, authorities or rights of the parties executing or delivering or purporting to execute or deliver the Agreement or any documents or papers deposited or called for hereunder.

11. You shall not be liable for the outlawing of any rights under the applicable statute of limitations with respect to these Joint Escrow Instructions or any documents deposited with you.

12. You shall be entitled to employ such legal counsel and other experts as you may deem necessary properly to advise you in connection with your obligations hereunder, may rely upon the advice of such counsel, and may pay such counsel reasonable compensation therefor. The Company shall reimburse you for any such disbursements.

13. Your responsibilities as Escrow Holder hereunder shall terminate if you shall cease to be an officer or agent of the Company or if you shall resign by written notice to each party. In the event of any such termination, the Company shall appoint a successor Escrow Holder.

14. You are expressly authorized to delegate your duties as Escrow Holder hereunder to the law firm of Wilson Sonsini Goodrich & Rosati, P.C., or any other law firm, which delegation, if any, may change from time to time and shall survive your resignation as Escrow Holder.

15. If you reasonably require other or further instruments in connection with these Joint Escrow Instructions or obligations in respect hereto, the necessary parties hereto shall join in furnishing such instruments.

16. It is understood and agreed that should any dispute arise with respect to the delivery and/or ownership or right of possession of the securities held by you hereunder, you are authorized and directed to retain in your possession without liability to anyone all or any part of said securities until such disputes shall have been settled either by mutual written agreement of the parties concerned or by a final order, decree or judgment of a court of competent jurisdiction after the time for appeal has expired and no appeal has been perfected, but you shall be under no duty whatsoever to institute or defend any such proceedings.

17. Any notice required or permitted hereunder shall be given in writing and shall be deemed effectively given upon personal delivery or four days following deposit in the United States Post Office, by registered or certified mail with postage and fees prepaid and return receipt requested, addressed to each of the other parties thereunto entitled at the following addresses, or at such other addresses as a party may designate by written notice to each of the other parties hereto.

COMPANY:	Bungie, Inc. 550 160th Avenue NE, Suite 207 Bellevue, Washington 98004
EMPLOYEE:	Martin O'Donnell 6820 142nd Ct. NE Redmond, WA 98052
ESCROW HOLDER:	Corporate Secretary Bungie, Inc. 550 160th Avenue NE, Suite 207 Bellevue, Washington 98004

18. By signing these Joint Escrow Instructions, you become a party hereto only for the purpose of said Joint Escrow Instructions; you do not become a party to the Agreement.

19. This instrument shall be binding upon and inure to the benefit of the parties hereto, and their respective successors and permitted assigns.

These Joint Escrow Instructions shall be governed by the internal substantive laws, but not the choice of law rules, of Delaware.

[Signature page follows.]

Very truly yours,

BUNGIE, INC.

a Delaware corporation

By: _____

Print name: _____

Title: _____

EMPLOYEE:

Martin O'Donnell

_____

(Signature)

ESCROW HOLDER:

_____

Pete Parsons, Corporate Secretary

(Signature page to Joint Escrow Instructions)

Exhibit E

ELECTION UNDER SECTION 83(b) OF THE INTERNAL REVENUE CODE OF 1986

The undersigned taxpayer hereby elects, pursuant to Sections 55 and 83(b) of the Internal Revenue Code of 1986, as amended, to include in taxpayer's gross income or alternative minimum taxable income, as the case may be, for the current taxable year the amount of any compensation taxable to taxpayer in connection with taxpayer's receipt of the property described below.

1. The name, address, taxpayer identification number and taxable year of the undersigned are as follows:

NAME: _____ SPOUSE: _____

ADDRESS: _____

_____

TAXPAYER IDENTIFICATION NO.: _____ TAXABLE YEAR: _____

2. The property with respect to which the election is made is described as follows:

(i) _____ shares of Series B-1 Preferred Stock of Bungie, Inc., a Delaware corporation (the "**Company**");

(ii) _____ shares of Series B-2 Preferred Stock of the Company; and

(iii) _____ shares of Common Stock of the Company (collectively, the "**Shares**").

3. The date on which the property was transferred is: _____.

4. The property is subject to the following restrictions:

The Shares may not be transferred and are subject to forfeiture under the terms of an agreement between the taxpayer and the Company. These restrictions lapse upon the satisfaction of certain conditions contained in such agreement.

5. The Fair Market Value at the time of transfer, determined without regard to any restriction other than a restriction which by its terms shall never lapse, of such property is an aggregate of $_____ and allocated among the securities as follows:

(i) _____ shares of Series B-1 Preferred Stock of Bungie, Inc., a Delaware corporation (the "**Company**");

(ii) _____ shares of Series B-2 Preferred Stock of the Company; and

(iii) _____ shares of Common Stock of the Company (collectively, the "**Shares**").

6. The amount (if any) paid for such property is an aggregate of $_____ and allocated among the securities as follows:

(i) _____ per share for the shares of Series B-1 Preferred Stock of the Company;

(ii) _____ per share for the shares of Series B-2 Preferred Stock of the Company; and

(iii) $0.00 per share for the shares of Common Stock of the Company.

The undersigned has submitted a copy of this statement to the person for whom the services were performed in connection with the undersigned's receipt of the above-described property. The transferee of such property is the person performing the services in connection with the transfer of said property.

The undersigned understands that the foregoing election may not be revoked except with the consent of the Commissioner.

Dated: _____, ____

_____
Taxpayer