

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

In the Matter of

MACHINIMA, INC.,
a corporation

File No. 1423090

AGREEMENT CONTAINING
CONSENT ORDER

The Federal Trade Commission has conducted an investigation of certain acts and practices of Machinima, Inc., a corporation (“Proposed Respondent”). Proposed Respondent, having been represented by counsel, is willing to enter into an agreement containing a consent order resolving the allegations contained in the attached draft complaint. Therefore,

IT IS HEREBY AGREED by and between Machinima, Inc., by its duly authorized officers, and counsel for the Federal Trade Commission that:

1. Proposed Respondent Machinima, Inc., is a Delaware corporation with its principal office or place of business at 8441 Santa Monica Blvd, West Hollywood, CA 90069.
2. Proposed Respondent neither admits nor denies any of the allegations in the draft complaint, except as specifically stated herein. Only for purposes of this action, Proposed Respondent admits the facts necessary to establish jurisdiction.
3. Proposed Respondent waives:
 - a. Any further procedural steps;
 - b. The requirement that the Commission’s decision contain a statement of findings of fact and conclusions of law; and
 - c. All rights to seek judicial review or otherwise to challenge or contest the validity of the order entered pursuant to this agreement.
4. This agreement shall not become part of the public record of the proceeding unless and until it is accepted by the Commission. If this agreement is accepted by the Commission, it, together with the draft complaint, will be placed on the public record for a period of thirty (30) days and information about it publicly released. The Commission thereafter may either withdraw its acceptance of this agreement and so notify Proposed Respondent,

in which event it will take such action as it may consider appropriate, or issue and serve its complaint (in such form as the circumstances may require) and decision in disposition of the proceeding.

5. This agreement contemplates that, if it is accepted by the Commission, and if such acceptance is not subsequently withdrawn by the Commission pursuant to the provisions of Section 2.34 of the Commission's Rules, the Commission may, without further notice to Proposed Respondent, (1) issue its complaint corresponding in form and substance with the attached draft complaint and its decision containing the following order in disposition of the proceeding, and (2) make information about it public. When so entered, the order shall have the same force and effect and may be altered, modified, or set aside in the same manner and within the same time provided by statute for other orders. The order shall become final upon service. Delivery of the complaint and the decision and order to Proposed Respondent's address as stated in this agreement by any means specified in Section 4.4(a) of the Commission's Rules shall constitute service. Proposed Respondent waives any right it may have to any other manner of service. The complaint may be used in construing the terms of the order. No agreement, understanding, representation, or interpretation not contained in the order or in the agreement may be used to vary or contradict the terms of the order.
6. Proposed Respondent has read the draft complaint and consent order. It understands that it may be liable for civil penalties in the amount provided by law and other appropriate relief for each violation of the order after it becomes final.

ORDER DEFINITIONS

For purposes of this order, the following definitions shall apply:

1. Unless otherwise specified, "Respondent" shall mean Machinima, Inc., a corporation, its successors and assigns, and its officers, agents, representatives, and employees.
2. "Commerce" shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.
3. "Clearly and prominently" shall mean as follows:
 - a. In textual communications (e.g., printed publications or words displayed on the screen of a computer), the required disclosures are of a type, size, and location sufficiently noticeable for an ordinary consumer to read and comprehend them, in print that contrasts with the background on which they appear;

- b. In communications disseminated orally or through audible means (e.g., radio or streaming audio), the required disclosures are delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend them;
 - c. In communications disseminated through video means (e.g., television or streaming video), the required disclosures are in writing in a form consistent with subparagraph (a) of this definition and shall appear on the screen for a duration sufficient for an ordinary consumer to read and comprehend them.
 - d. In communications made through interactive media, such as the Internet, online services, and software, the required disclosures are unavoidable and presented in a form consistent with subparagraph (a) of this definition, in addition to any audio or video presentation of them; and
 - e. In all instances, the required disclosures are presented in an understandable language and syntax, in the same language as the predominant language that is used in the communication, and with nothing contrary to, inconsistent with, or in mitigation of the disclosures used in any communication of them.
- 4. “Endorsement” means any advertising message (including verbal statements, demonstrations, or depictions of the name, signature, likeness, or other identifying personal characteristics of an individual or the name or seal of an organization) that consumers are likely to believe reflects the opinions, beliefs, findings, or experiences of a party other than the sponsoring advertiser, even if the views expressed by that party are identical to those of the sponsoring advertiser.
 - 5. “Endorser” means an individual or organization that provides an Endorsement.
 - 6. “Influencer Campaign” means any arrangement whereby, in connection with the advertising, promotion, offering for sale, sale, or distribution of any product or service, Respondent engages an Endorser (also known as an Influencer) to create, publish, or otherwise disseminate an online Endorsement for which the Influencer is to receive compensation from either Respondent, the advertiser for whom Respondent conducts the campaign, or anyone else acting on their behalf.
 - 7. “Material connection” means any relationship that materially affects the weight or credibility of any endorsement and that would not be reasonably expected by consumers.
 - 8. The term “including” in this order means “without limitation.”

I.

IT IS ORDERED that Respondent, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, in connection with the advertising, labeling, promotion, offering for sale, sale, or distribution of any product or service, in or affecting

commerce, shall not in any Influencer Campaign misrepresent, in any manner, expressly or by implication, that an Endorser of such product is an independent user or ordinary consumer of the product or service.

II.

IT IS FURTHER ORDERED that Respondent, directly or through any corporation, partnership, subsidiary, division, or other device, in connection with the advertising, labeling, promotion, offering for sale, sale, or distribution of any product or service, in or affecting commerce, by means of an Endorsement of such product or service, shall in any Influencer Campaign clearly and prominently disclose a material connection, if one exists, between the Endorser and the advertiser whose product is being endorsed.

III.

IT IS FURTHER ORDERED that Respondent, directly or through any corporation, partnership, subsidiary, division, or other device, in connection with the advertising, labeling, promotion, offering for sale, sale, or distribution of any product or service, in or affecting commerce, shall take reasonable steps to ensure that its Influencer Campaigns comply with Parts I and II of this order. Such steps shall include, at a minimum:

- A. Establishing, implementing, and thereafter maintaining a system to monitor and review its Influencers' representations and disclosures to ensure compliance with Parts I and II of this order. As part of this system:
 1. Respondent shall provide each Influencer with a statement of his or her responsibility to disclose clearly and prominently, in any online video, social media posting, or other communication for which the Influencer is to receive compensation, the Influencer's material connection to the advertiser for whom Respondent is conducting the Influencer Campaign. The statement shall also inform the Influencer that Respondent will monitor for compliance. The statement may be included as part of any Influencer agreement, but the statement shall be on a separate page by itself, and written in a manner reasonably calculated to be easily understood by the Influencer. Respondent shall obtain from each Influencer a signed and dated acknowledgment that the Influencer has received the statement and expressly agrees to comply with it. Any electronic signature that Respondent obtains pursuant to this Part shall comply with the signature requirements of the Electronic Signatures in Global and National Commerce, 15 U.S.C. §§ 7001 *et seq.*
 2. Prior to compensating any Influencer for an online video Endorsement, Respondent shall conduct an initial review of that Endorsement. If the video Endorsement fails to clearly and prominently disclose any material connection between the Influencer and the advertiser for whom

Respondent is conducting the Influencer Campaign, then Respondent shall notify the Influencer of the failure to disclose, refrain from compensating the Influencer for the Campaign, and disqualify the Influencer from participating in future Influencer Campaigns until the video Endorsement contains the required disclosure. *Provided, however,* Respondent may compensate an Influencer in advance for an online video Endorsement if the video Endorsement is not uploaded to the Internet, publicly disseminated, or otherwise made publicly accessible until after Respondent has reviewed it and verified that it clearly and prominently discloses any material connection between the Influencer and the advertiser for whom Respondent is conducting the Influencer Campaign.

3. After an Influencer's video Endorsement has been uploaded to the Internet, publicly disseminated, or otherwise made publicly accessible, Respondent shall continue to monitor the online video Endorsement by conducting another review of it within ninety days of the date of the Influencer's final compensation, but not before two weeks after that date. The timing of this second review must not be disclosed in advance to the Influencer, and the manner of the review must be reasonably calculated not to disclose the source of the monitoring activity at the time it is being conducted. If the online video Endorsement is no longer publicly accessible nor reasonably accessible to Respondent at the time Respondent attempts the review required by this subparagraph 3, Respondent need not conduct the review of the online video.
4. If, after conducting the review described in the preceding subparagraph, or if at any other time subsequent to compensating an Influencer, Respondent reasonably concludes that the Influencer
 - a. has misrepresented, in any manner, the status of the Influencer, including but not limited to, the misrepresentation that such Influencer is an independent user or ordinary consumer; or
 - b. has failed to disclose, clearly and prominently, a material connection, when one exists, between such Influencer and the advertiser for whom Respondent is conducting the Influencer Campaign;

then Respondent shall immediately suspend the Influencer from, and withhold payments to the Influencer for, any Influencer Campaigns, until the Influencer cures such misrepresentation or discloses, clearly and prominently, such material connection. Respondent shall immediately terminate and disqualify the Influencer from future Influencer Campaigns upon a repeat incident;

- B. Creating, and thereafter maintaining, reports sufficient to show the results of the monitoring required by subpart A of this Part of the order.

IV.

IT IS FURTHER ORDERED that Respondent shall, for five (5) years after the last date of dissemination of any Endorsement or other representation covered by this order, maintain and upon reasonable notice make available to the Federal Trade Commission for inspection and copying, any documents that:

- A. Are reasonably necessary to demonstrate full compliance with each provision of this order, including but not limited to, all documents obtained, created, generated, or which in any way relate to the requirements, provisions, terms of this order, and all reports submitted to the Commission pursuant to this order;
- B. Contradict, qualify, or call into questions Respondent's compliance with this order;
- C. Comprise or relate to complaints or inquiries, whether received directly, indirectly, or through any third party, concerning any endorsement made by Respondent, and any responses to those complaints or inquiries; and
- D. All acknowledgments of receipt of this order obtained pursuant Part V.

V.

IT IS FURTHER ORDERED that Respondent and its successors and assigns shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondent shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

VI.

IT IS FURTHER ORDERED that Respondent and its successors and assigns shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. *Provided, however*, that, with respect to any proposed change in the corporation about which Respondent learn less than thirty (30) days prior to the date such action is to take place, Respondent shall notify the Commission as soon as is practicable after

obtaining such knowledge. All notices required by this Part shall be sent by overnight courier (not the U.S. Postal Service) to the Associate Director of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580, with the subject line: In the Matter of Machinima, Inc., FTC File Number 1423090. Provided, however, that, in lieu of overnight courier, notices may be sent by first-class mail, but only if an electronic version of such notices is contemporaneously sent to the Commission at DEbrief@ftc.gov.

VII.

IT IS FURTHER ORDERED that Respondent and its successors and assigns shall, within ninety (90) days after the date of service of this order, file with the Commission a true and accurate report, in writing, setting forth in detail the manner and form of its own compliance with this order. Within ten (10) days of receipt of written notice from a representative of the Commission, Respondent shall submit additional true and accurate written reports.

VIII.

This order will terminate twenty (20) years from the date of its issuance, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

- A. Any Part in this order that terminates in less than twenty (20) years;
- B. This order's application to any respondent that is not named as a defendant in such complaint; and
- C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided, further, that if such complaint is dismissed or a federal court rules that the Respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

Machinima, Inc.,
By:

President Date

Linda A. Goldstein Date
Manatt, Phelps & Phillips, LLP
Counsel for Respondent

Richard McKewen Date
Counsel for the Federal Trade Commission

APPROVED:

Charles A. Harwood, Director
FTC Northwest Regional Office