

THE HONORABLE JAMES L. ROBART

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

WIZARDS OF THE COAST LLC.

Plaintiff,

vs.

CRYPTOZOIC ENTERTAINMENT, LLC.,
and HEX ENTERTAINMENT, LLC.

Defendant.

CASE No. 2:14-CV-00719-JLR

DEFENDANT CRYPTOZOIC
ENTERTAINMENT LLC'S ANSWER
AND AFFIRMATIVE DEFENSES TO
AMENDED COMPLAINT

Defendant Cryptozoic Entertainment, LLC ("Cryptozoic") hereby answers the Amended Complaint (Dkt. No. 14-1) filed by Plaintiff Wizards of the Coast LLC ("Plaintiff" or "Wizards"), as set forth below. Cryptozoic specifically denies all allegations not expressly admitted below.

INTRODUCTION

Fearing competition in the trading card game industry, and frantic about the loss of its monopoly position due to the expiration of its patent two months ago, Wizards seeks to eliminate Hex: Shards of Fate through litigation rather than fair marketplace competition. Wizards is understandably concerned about the success and significant support Hex: Shards of Fate enjoys in a community yearning for innovation. Wizards' Amended Complaint relies, in substantial part, on the hearsay allegations of unknown bloggers. The confused, vague, and

1 egregious allegations in that Amended Complaint constitute a blatant attempt to use the legal
2 process to achieve market dominance and eliminate a competitor which is creating truly
3 competitive and innovative products.

4 Wizards' assertion of its patent is an example of its efforts to litigate a smaller competitor
5 out of business, rather than compete fairly in the marketplace. It asserted its now-expired patent
6 in an apparent attempt to intimidate Hex and Cryptozoic. Wizards knew at the time it filed its
7 original Complaint that it could never have obtained patent injunctive relief—either preliminary
8 or permanent. And, even if Wizards' patent were to be held valid over the numerous
9 affirmative defenses asserted below, even if it were held to be enforceable and infringed, and
10 even if Wizards were somehow entitled to money damages for patent infringement, such
11 damages would be much less than the cost of this litigation to Wizards in view of the brief
12 patent term involved.

13 Wizards' copyright claims are inconsistent with the very purpose underlying copyright
14 law-- the protection of an original expression and not the underlying idea. Wizards' Amended
15 Complaint is vague as to what is allegedly infringed, using ambiguous terms like "flow of
16 Magic," "circumstances," or "play sequence" in its allegations of infringement. Moreover,
17 Wizards should not be able to improperly extend its patent monopoly by asserting copyright
18 protection over functional concepts.

19 Finally, Wizards spends substantial space in its Amended Complaint on its allegations of
20 trade dress infringement but again relies on hearsay and unknown bloggers as the alleged basis
21 of infringement. While Wizards alleges that the trading card community confuses the Magic and
22 Hex games, its 34-page Amended Complaint fails to identify a single individual who has been
23 actually confused. A review of its Amended Complaint makes clear that each of the quoted,
24 unidentified, bloggers clearly knows the difference between the Magic and Hex: Shards of Fate
25 games.

1 Nothing in this Introduction constitutes, or should be interpreted as, an admission of any
2 claim or allegation in the Amended Complaint. Cryptozoic responds specifically to each and
3 every allegation of the Amended Complaint as follows:

4 **I. NATURE OF THE ACTION¹**

5 1. Cryptozoic admits that Wizards purports to bring this action alleging
6 misappropriation and infringement of Wizards' alleged intellectual property. Cryptozoic lacks
7 knowledge or information sufficient to form a belief about the truth of the allegations of
8 Paragraph 1 of the Complaint as they relate to Hex Entertainment LLC (hereinafter "Hex") and,
9 on that basis, denies them. Except as specifically admitted, Cryptozoic denies the remaining
10 allegations of Paragraph 1 of the Complaint.

11 2. Cryptozoic lacks knowledge or information sufficient to form a belief about the
12 truth of the allegations of Paragraph 2 of the Complaint and, on that basis, denies them.

13 3. Cryptozoic admits that it is involved in the development of the game Hex: Shards
14 of Fate. Cryptozoic lacks knowledge or information sufficient to form a belief about the truth of
15 the allegations of Paragraph 3 of the Complaint as they relate to Hex and, on that basis, denies
16 them. Except as specifically admitted, Cryptozoic denies the remaining allegations of
17 Paragraph 3 of the Complaint as they relate to Cryptozoic except those allegations that consist
18 of legal contentions or legal arguments to which no response is required.

19 4. Cryptozoic admits that Cory Jones is a Partner of Cryptozoic Entertainment LLC.
20 Cryptozoic lacks knowledge or information sufficient to form a belief about the truth of the
21 allegations of Paragraph 4 of the Complaint as they relate to Hex and, on that basis, denies
22 them. Cryptozoic objects to the term "professional Magic player" as indefinite and, on that
23

24 ¹Cryptozoic repeats the headings set forth in the Complaint for ease of reference and to simplify
25 comparison of the Complaint and this Answer. By doing so, Cryptozoic makes no admission regarding the
substance of the headings or any other allegation of the Complaint. To the extent that a particular heading can
be construed as an allegation, or otherwise contains a factual and/or legal characterization, Cryptozoic
specifically denies all such allegations and/or characterizations.

1 basis, denies the allegations relating to this term. Except as specifically admitted, Cryptozoic
2 denies the remaining allegations of Paragraph 4 of the Complaint as they relate to Cryptozoic
3 except those allegations that consist of legal contentions or legal arguments to which no
4 response is required.

5 5. Cryptozoic lacks knowledge or information sufficient to form a belief as to the
6 allegations of Paragraph 5 as they relate to Hex and, on that basis, denies them. Except as
7 specifically admitted, Cryptozoic denies the remaining allegations of Paragraph 5 of the
8 Complaint as they relate to Cryptozoic except those allegations that consist of legal contentions
9 or legal arguments to which no response is required.

10 6. Cryptozoic lacks knowledge or information sufficient to form a belief as to the
11 allegations of Paragraph 6 as they relate to Hex and, on that basis, denies them. Cryptozoic
12 denies the remaining allegations of Paragraph 6 of the Complaint as they relate to Cryptozoic
13 except those allegations that consist of legal contentions or legal arguments to which no
14 response is required.

15 7. Cryptozoic denies the allegations of Paragraph 7 of the Complaint except those
16 allegations that consist of legal contentions or legal arguments to which no response is required.

17 8. Cryptozoic admits that Wizards had notified Cryptozoic requesting changes to
18 Hex: Shards of Fate. Cryptozoic also admits that Cryptozoic and Wizards were negotiating
19 potential changes to Hex: Shards of Fate through counsel. Cryptozoic denies that during pre-suit
20 negotiations Wizards identified with particularity which parts of Hex: Shards of Fate allegedly
21 infringed Wizards' intellectual property. Cryptozoic lacks knowledge or information sufficient
22 to form a belief as to the allegations of Paragraph 8 as they relate to Hex and, on that basis,
23 denies them. Except as specifically admitted, Cryptozoic denies the remaining allegations of
24 Paragraph 8 of the Complaint as they relate to Cryptozoic.

25 9. Cryptozoic lacks knowledge or information sufficient to form a belief as to the

1 allegations of Paragraph 9 as they relate to Hex and, on that basis, denies them. Cryptozoic
2 denies the remaining allegations of Paragraph 9 of the Complaint except those allegations that
3 consist of legal contentions or legal arguments to which no response is required.

4 II. JURISDICTION AND VENUE

5 10. Cryptozoic admits the allegations of Paragraph 10 of the Complaint except those
6 allegations that consist of legal contentions or legal arguments to which no response is required.

7 11. Cryptozoic admits the allegations of Paragraph 11 of the Complaint except those
8 allegations that consist of legal contentions or legal arguments to which no response is required.

9 12. Cryptozoic objects to the term “Defendant” as indefinite and, on that basis, denies
10 the allegations of Paragraph 12 of the Complaint. To the extent the term “Defendant” is meant
11 to reference Cryptozoic, Cryptozoic denies the allegations of Paragraph 12 of the Complaint
12 except those allegations that consist of legal contentions or legal arguments to which no
13 response is required.

14 13. Cryptozoic lacks knowledge or information sufficient to form a belief as to the
15 allegations of Paragraph 13 as they relate to Hex and, on that basis, denies them. Except as
16 specifically admitted, Cryptozoic denies the remaining allegations of Paragraph 13 of the
17 Complaint as they relate to Cryptozoic except those allegations that consist of legal contentions
18 or legal arguments to which no response is required.

19 14. Cryptozoic lacks knowledge or information sufficient to form a belief about the
20 truth of the allegations of Paragraph 14 of the Complaint as they relate to Hex and, on that basis,
21 denies them. Cryptozoic admits that it was involved in a Kickstarter fundraising effort.
22 Cryptozoic denies the allegations of Paragraph 14 of the Complaint as they relate to Cryptozoic
23 except those allegations that consist of legal contentions or legal arguments to which no
24 response is required

25 15. Cryptozoic lacks knowledge or information sufficient to form a belief about the

1 truth of the allegations of Paragraph 15 of the Complaint as they relate to Hex and, on that basis,
2 denies them. Cryptozoic objects to the use of the term “defendant” as indefinite and therefore
3 denies all allegations relating to “defendant.” To the extent “defendant” is meant to reference
4 Cryptozoic, Cryptozoic denies the allegations of Paragraph 15 except those allegations that
5 consist of legal contentions or legal arguments to which no response is required.

6 16. Cryptozoic lacks knowledge or information sufficient to form a belief about the
7 truth of the allegations of Paragraph 16 of the Complaint as they relate to Hex and, on that basis,
8 denies them. Cryptozoic objects to the use of the term “repeated played” as indefinite and
9 therefore denies all allegations relating to this term. Cryptozoic lacks knowledge or information
10 sufficient to form a belief about the truth of the allegations of Paragraph 16 of the Complaint as
11 they relate to Magic Online servers or activities regarding Magic and, on that basis, denies
12 them. Cryptozoic denies the allegation of Paragraph 16 of the Complaint that personal
13 jurisdiction within the District is appropriate. Cryptozoic denies the remaining allegations of
14 Paragraph 16 of the Complaint as they relate to Cryptozoic except those allegations that consist
15 of legal contentions or legal arguments to which no response is required.

16 17. Cryptozoic objects to the use of the term “Defendant” as indefinite and therefore
17 denies all allegations relating to “Defendant.” To the extent the term “Defendant” is meant to
18 reference Cryptozoic, Cryptozoic denies all allegations of Paragraph 17. Cryptozoic denies the
19 remaining allegations of Paragraph 17 of the Complaint except those allegations that consist of
20 legal contentions or legal arguments to which no response is required.

21 III. THE PARTIES

22 18. Cryptozoic lacks knowledge or information sufficient to form a belief about the
23 truth of the allegations of Paragraph 18 of the Complaint and, on that basis, denies them.

24 19. Cryptozoic lacks knowledge or information sufficient to form a belief about the
25 truth of the allegations of Paragraph 19 of the Complaint as they relate to Hex and, on that basis,

1 denies them. Cryptozoic admits that Cryptozoic Entertainment LLC is a California limited
2 liability company maintaining a place of business at 25351 Commercentre Drive, Suite 250,
3 Lake Forest, CA 92630. Cryptozoic denies the remaining allegations of Paragraph 19 of the
4 Complaint.

5 20. Cryptozoic admits that it participates in the development of Hex: Shards of Fate.
6 Cryptozoic lacks knowledge or information sufficient to form a belief about the truth of the
7 allegations of Paragraph 20 of the Complaint as they relate to Hex and, on that basis, denies
8 them. Except as specifically admitted, Cryptozoic denies the remaining allegations of Paragraph
9 20 of the Complaint as they relate to Cryptozoic except those allegations that consist of legal
10 contentions or legal arguments to which no response is required.

11 IV. GENERAL ALLEGATIONS

12 21. Cryptozoic lacks knowledge or information sufficient to form a belief about the
13 truth of the allegations of Paragraph 21 of the Complaint and, on that basis, denies them.

14 22. Cryptozoic lacks knowledge or information sufficient to form a belief about the
15 truth of the allegations of Paragraph 22 of the Complaint and, on that basis, denies them.

16 23. Cryptozoic lacks knowledge or information sufficient to form a belief about the
17 truth of the allegations of Paragraph 23 of the Complaint and, on that basis, denies them.

18 24. Cryptozoic lacks knowledge or information sufficient to form a belief about the
19 truth of the allegations of Paragraph 24 of the Complaint and, on that basis, denies them.

20 25. Cryptozoic lacks knowledge or information sufficient to form a belief about the
21 truth of the allegations of Paragraph 25 of the Complaint and, on that basis, denies them.

22 26. Cryptozoic lacks knowledge or information sufficient to form a belief about the
23 truth of the allegations of Paragraph 26 of the Complaint and, on that basis, denies them.

24 27. Cryptozoic lacks knowledge or information sufficient to form a belief about the
25 truth of the allegations of Paragraph 27 of the Complaint and, on that basis, denies them.

1 28. Cryptozoic lacks knowledge or information sufficient to form a belief about the
2 truth of the allegations of Paragraph 28 of the Complaint and, on that basis, denies them.

3 29. Cryptozoic lacks knowledge or information sufficient to form a belief about the
4 truth of the allegations of Paragraph 29 of the Complaint and, on that basis, denies them.

5 30. Cryptozoic lacks knowledge or information sufficient to form a belief about the
6 truth of the allegations of Paragraph 30 of the Complaint and, on that basis, denies them.

7 31. Cryptozoic objects to the terms “intimately familiar,” “competitive Magic
8 player,” and “Organized Play” as indefinite and, on that basis, denies the allegations relating to
9 these terms. Cryptozoic lacks knowledge or information sufficient to form a belief about the
10 truth of the allegation that Mr. Jones “has been a member of the DCI since January 13, 1996”
11 and other allegations as to Mr. Jones and, on that basis, denies them. Cryptozoic denies the
12 remaining allegations of Paragraph 31 of the Complaint as they relate to Cryptozoic except
13 those allegations that consist of legal contentions or legal arguments to which no response is
14 required.

15 32. Cryptozoic lacks knowledge or information sufficient to form a belief about the
16 truth of the allegations of Paragraph 32 of the Complaint and, on that basis, denies them.

17 33. Cryptozoic lacks knowledge or information sufficient to form a belief about the
18 truth of the allegations of Paragraph 33 of the Complaint and, on that basis, denies them.

19 34. Cryptozoic lacks knowledge or information sufficient to form a belief about the
20 truth of the allegations of Paragraph 34 of the Complaint and, on that basis, denies them.

21 35. Cryptozoic lacks knowledge or information sufficient to form a belief about the
22 truth of the allegations of Paragraph 35 of the Complaint and, on that basis, denies them.

23 36. Cryptozoic admits that Appendix 1 to the Complaint includes a list of purported
24 copyrights purportedly related to the game Magic: The Gathering. Cryptozoic objects to the
25 term “prudent steps” as indefinite and, on that basis, denies the allegations relating to this term.

1 Except as specifically admitted, Cryptozoic lacks knowledge or information sufficient to form a
2 belief about the truth of the remaining allegations of Paragraph 36 of the Complaint and, on that
3 basis, denies them.

4 37. Cryptozoic admits that United States Patent No. 5,662,332 (“the ’332 patent”)
5 was issued in 1997 to Wizards and reissued as United States Patent No. RE 37,957 (“the ’957
6 Patent”) with 60 claims, including over 25 independent claims in 2003. Cryptozoic objects to
7 the term “enhanced” as indefinite and, on that basis, denies the allegations relating to this term.
8 Cryptozoic denies the remaining allegations of Paragraph 37 of the Complaint as they relate to
9 Cryptozoic.

10 38. Cryptozoic lacks knowledge or information sufficient to form a belief about the
11 truth of the allegations of Paragraph 38 of the Complaint as they relate to Hex and, on that basis,
12 denies them. Cryptozoic objects to the term “loyal” as indefinite and, on that basis, denies the
13 allegations relating to this term. Cryptozoic denies the remaining allegations of Paragraph 38 of
14 the Complaint as they relate to Cryptozoic except those allegations that consist of legal
15 contentions or legal arguments to which no response is required.

16 39. Cryptozoic lacks knowledge or information sufficient to form a belief about the
17 truth of the allegations of Paragraph 39 of the Complaint as they relate to Hex and, on that basis,
18 denies them. Cryptozoic lacks knowledge or information sufficient to form a belief about the
19 truth of the allegations of Paragraph 39 of the Complaint as they relate to Wizard’s card releases
20 and purported copyright protection efforts, and, on that basis, denies them. Cryptozoic denies
21 the remaining allegations of Paragraph 39 of the Complaint as they relate to Cryptozoic.

22 40. Cryptozoic lacks knowledge or information sufficient to form a belief about the
23 truth of the allegations of Paragraph 40 of the Complaint and, on that basis, denies them.

24 41. Cryptozoic lacks knowledge or information sufficient to form a belief about the
25 truth of the allegations of Paragraph 41 of the Complaint and, on that basis, denies them.

1 42. Cryptozoic lacks knowledge or information sufficient to form a belief about the
2 truth of the allegations of Paragraph 42 of the Complaint and, on that basis, denies them.

3 43. Cryptozoic admits that the card database for Hex: Shards of Fate contains a card
4 titled "Murder" and that the card includes the text "destroy target non-artifact troop" and "Quick
5 Action." Cryptozoic denies the allegation of Paragraph 43 of the Complaint that the
6 categorization of "Quick Action" in Hex: Shards of Fate is the same game play mechanic as
7 Wizards' Magic's "Instant." Cryptozoic lacks knowledge or information sufficient to form a
8 belief about the truth of the allegations of Paragraph 43 of the Complaint as they relate to Hex,
9 and on that basis, denies them. Except as specifically admitted, Cryptozoic denies the remaining
10 allegations of Paragraph 43 of the Complaint as they relate to Cryptozoic except those
11 allegations that consist of legal contentions or legal arguments to which no response is
12 required..

13 44. Cryptozoic lacks knowledge or information sufficient to form a belief about the
14 truth of the allegations of Paragraph 44 of the Complaint and, on that basis, denies them.

15 45. Cryptozoic admits that the card database for Hex: Shards of Fate contains a card
16 titled "Special Lotus" and that the card includes the text "artifact." Cryptozoic further admits
17 that the card database for Hex: Shards of Fate contains a card titled "Spectral Lotus Garden."
18 Cryptozoic lacks knowledge or information sufficient to form a belief about the truth of the
19 allegations of Paragraph 45 of the Complaint as they relate to any purported characterization or
20 description of Magic: The Gathering by Zvi Mowshowitz and, on that basis, denies them.
21 Cryptozoic lacks knowledge or information sufficient to form a belief about the truth of the
22 allegations of Paragraph 45 of the Complaint as they relate to Hex and, on that basis, denies
23 them. Except as specifically admitted, Cryptozoic denies the remaining allegations of Paragraph
24 45 of the Complaint as they relate to Cryptozoic.

25 46. Cryptozoic admits that Appendix 1 to the Complaint contains a purported list

1 comparing cards from Hex: Shards of Fate with cards purportedly from “Magic: The
2 Gathering.” Cryptozoic lacks knowledge or information sufficient to form a belief about the
3 truth of the allegations of Paragraph 46 of the Complaint as they relate to Hex and, on that basis,
4 denies them. Except as specifically admitted, Cryptozoic denies the remaining allegations of
5 Paragraph 46 of the Complaint as they relate to Cryptozoic.

6 47. Cryptozoic admits that Dan Clark is a game designer working on the Hex:
7 Shards of Fate game. Cryptozoic admits that the IP address 207.7.98.98 is registered to
8 Cryptozoic Entertainment, Inc. Cryptozoic lacks knowledge or information sufficient to form a
9 belief about the truth of the allegations of Paragraph 47 of the Complaint as they relate to Hex
10 and, on that basis, denies them. Cryptozoic lacks knowledge or information sufficient to form a
11 belief about the truth of the remaining allegations of Paragraph 47 of the Complaint as they
12 relate to Cryptozoic and, on that basis, denies them.

13 48. Cryptozoic admits that it participated in a Kickstarter fundraising campaign in
14 2012. Cryptozoic further admits the rules regarding Hex: Shards of Fate are set forth at
15 <https://hextcg.com/howtoplay/>. Cryptozoic further admits that the card database for the Hex:
16 Shards of Fate game contains separate cards titled “Wrath of Zakiir” and “Zombie”. Cryptozoic
17 lacks knowledge or information sufficient to form a belief about the truth of the allegations of
18 Paragraph 48 of the Complaint as they relate to Hex and, on that basis, denies them. Except as
19 specifically admitted, Cryptozoic denies the remaining allegations of Paragraph 48 of the
20 Complaint as they relate to Cryptozoic.

21 49. Cryptozoic admits that a press release issued in connection with the Kickstarter
22 campaign launch and that the press release states “Kickstarter supporters of Hex will be
23 provided with a variety of unique collectable rewards including Beta invites for early access to
24 the game. Depending on their pledge level, backers can receive exclusive cards only available
25 through the Kickstarter campaign, customizable sleeves, starter sets, booster packs, in-game

1 bonuses such as increased loot drops and special equipment, exclusive access to tournaments
2 and much more. At the highest level, ‘Producer Tier’ backers will receive executive producer
3 credit, a vanity card, and the once-in-a-lifetime opportunity to create their own
4 personalized trading card.“ Cryptozoic lacks knowledge or information sufficient to form a
5 belief about the truth of the allegations of Paragraph 49 of the Complaint as they relate to Hex
6 and, on that basis, denies them. Except as specifically admitted, Cryptozoic denies the
7 remaining allegations of Paragraph 49 of the Complaint as they relate to Cryptozoic.

8 50. Cryptozoic admits the allegations of Paragraph 50 of the Complaint.

9 51. Cryptozoic lacks knowledge or information sufficient to form a belief about the
10 truth of the allegations of Paragraph 51 of the Complaint and, on that basis, denies them.
11 Cryptozoic denies that Cryptozoic has infringed any protectable intellectual property right in the
12 Magic game.

13 52. Cryptozoic admits that the card database for Hex: Shards of Fate contains a card
14 titled “Corrupt Harvester.” Except as specifically admitted, Cryptozoic denies the allegations of
15 Paragraph 52 of the Complaint as they relate to any alleged similarity between Hex: Shards of
16 Fate “troops” cards and Wizards’ Magic “creatures” cards. Cryptozoic lacks knowledge or
17 information sufficient to form a belief about the truth of the remaining allegations of Paragraph
18 52 of the Complaint as they relate to Wizards’ “creatures” cards and their abilities and, on that
19 basis, denies them. Except as specifically admitted, Cryptozoic lacks knowledge or information
20 sufficient to form a belief about the truth of the allegations of Paragraph 52 of the Complaint as
21 they relate to any third-party comparison between Hex: Shards of Fate cards and Wizards’
22 Magic cards and, on that basis, denies them.

23 53. Cryptozoic admits that the card database for Hex: Shards of Fate contains cards
24 titled “Blessing the Fallen,” “Sapper’s Charge,” “Oracle Song,” and “Wild Growth.” Except as
25 specifically admitted, Cryptozoic lacks knowledge or information sufficient to form a belief

1 about the truth of the allegations of Paragraph 53 of the Complaint as they relate to any third-
2 party comparison between Hex: Shards of Fate card sets and Wizards' Magic card sets and, on
3 that basis, denies them. Cryptozoic denies the remaining allegations of Paragraph 53 of the
4 Complaint.

5 54. Cryptozoic admits that the card database for Hex: Shards of Fate contains a card
6 titled "Wild Shard." Except as specifically admitted, Cryptozoic lacks knowledge or
7 information sufficient to form a belief about the truth of the allegations of Paragraph 54 of the
8 Complaint as they relate to any third-party comparison between Hex: Shards of Fate card sets
9 and Wizards' Magic card sets and, on that basis, denies them. Cryptozoic denies the remaining
10 allegations of Paragraph 54 of the Complaint.

11 55. Cryptozoic lacks knowledge or information sufficient to form a belief about the
12 truth of the allegations of Paragraph 55 of the Complaint and, on that basis, denies them.
13 Cryptozoic denies the allegations of Paragraph 55 as to user confusion.

14 56. Cryptozoic lacks knowledge or information sufficient to form a belief about the
15 truth of the allegations of Paragraph 56 of the Complaint and, on that basis, denies them.
16 Cryptozoic denies the allegations of Paragraph 56 as to user confusion.

17 57. Cryptozoic admits that Paragraph 57 of the Complaint purports to show a
18 screenshot of the game Hex: Shards of Fate and a screen shot of the game "Duels of the
19 Planeswalkers 2014". Except as specifically admitted, Cryptozoic denies the remaining
20 allegations of Paragraph 57 of the Complaint.

21 58. Cryptozoic admits that the webpage at <https://hextcg.com/tell-all-your-friends>
22 contains the statement "If it ain't broke, don't fix it" but denies the truth of Plaintiff's
23 characterizations of the statement. Cryptozoic lacks knowledge or information sufficient to form
24 a belief about the truth of the allegations of Paragraph 58 of the Complaint as they relate to Hex
25 and, on that basis, denies them. Except as specifically admitted, Cryptozoic lacks knowledge or

1 information sufficient to form a belief about the truth of the remaining allegations of Paragraph
2 58 of the Complaint as they relate to Cryptozoic and, on that basis, denies them. Cryptozoic
3 denies any allegation that Hex: Shards of Fate is an “identical copy of Magic.”

4 59. Cryptozoic admits that in March of 2014, Wizards contacted Cryptozoic and
5 informed Cryptozoic of Wizards’ alleged intellectual property rights in “Magic: The
6 Gathering.” Cryptozoic lacks knowledge or information sufficient to form a belief about the
7 truth of the allegations of Paragraph 59 of the Complaint as they relate to the table included in
8 Paragraph 59 of the Complaint and which “elements Wizards found unacceptable.” Except as
9 specifically admitted, Cryptozoic denies the remaining allegations of Paragraph 59 of the
10 Complaint as they relate to Cryptozoic.

11 60. Cryptozoic lacks knowledge or information sufficient to form a belief about the
12 truth of the allegations of Paragraph 60 of the Complaint as they relate to Hex and, on that basis,
13 denies them. Cryptozoic denies the allegations of Paragraph 60 of the Complaint as they relate
14 to Cryptozoic.

15 **V. FIRST CAUSE OF ACTION**

16 **COPYRIGHT INFRINGEMENT [17 U.S.C. §§101, SEQ.]**

17 61. Cryptozoic incorporates by reference its denials and responses to Paragraphs 1-60
18 as if fully set forth herein. Cryptozoic lacks knowledge or information sufficient to form a
19 belief about the truth of the allegations of Paragraph 61 of the Complaint as they relate to Hex
20 and, on that basis, denies them. Cryptozoic lacks knowledge or information sufficient to form a
21 belief about the truth of the remaining allegations of Paragraph 61 of the Complaint as they
22 relate to Cryptozoic and, on that basis, denies them. Cryptozoic denies having access to
23 copyrighted material.

24 62. Cryptozoic lacks knowledge or information sufficient to form a belief about the
25 truth of the allegations of Paragraph 62 of the Complaint as they relate to Hex and, on that basis,

1 denies them. Cryptozoic denies the allegations of Paragraph 62 of the Complaint as they relate
2 to Cryptozoic.

3 63. Cryptozoic lacks knowledge or information sufficient to form a belief about the
4 truth of the allegations of Paragraph 63 of the Complaint as they relate to Hex and, on that basis,
5 denies them. Cryptozoic denies the allegations of Paragraph 63 of the Complaint as they relate
6 to Cryptozoic.

7 64. Cryptozoic lacks knowledge or information sufficient to form a belief about the
8 truth of the allegations of Paragraph 64 of the Complaint as they relate to Hex and, on that basis,
9 denies them. Cryptozoic denies the allegations of Paragraph 64 of the Complaint as they relate
10 to Cryptozoic.

11 65. Cryptozoic admits that the Kickstarter fundraising campaign has raised “in excess
12 of two million dollars.” Cryptozoic lacks knowledge or information sufficient to form a belief
13 about the truth of the allegations of Paragraph 65 of the Complaint as they relate to Hex and, on
14 that basis, denies them. Cryptozoic lacks knowledge or information sufficient to form a belief
15 about the truth of the remaining allegations of Paragraph 65 of the Complaint as they relate to
16 Cryptozoic and, on that basis, denies them.

17 66. Cryptozoic lacks knowledge or information sufficient to form a belief about the
18 truth of the allegations of Paragraph 66 of the Complaint as they relate to Hex and, on that basis,
19 denies them. Cryptozoic denies the allegations of Paragraph 66 of the Complaint as they relate
20 to Cryptozoic.

21 67. Cryptozoic lacks knowledge or information sufficient to form a belief about the
22 truth of the allegations of Paragraph 67 of the Complaint as they relate to Hex and, on that basis,
23 denies them. Cryptozoic denies the allegations of Paragraph 67 of the Complaint as they relate
24 to Cryptozoic.

25 68. Cryptozoic lacks knowledge or information sufficient to form a belief about the

1 truth of the allegations of Paragraph 68 of the Complaint as they relate to Hex and, on that basis,
2 denies them. Cryptozoic denies the allegations of Paragraph 68 of the Complaint as they relate
3 to Cryptozoic.

4 69. Cryptozoic lacks knowledge or information sufficient to form a belief about the
5 truth of the allegations of Paragraph 69 of the Complaint as they relate to Hex and, on that basis,
6 denies them. Cryptozoic denies the allegations of Paragraph 69 of the Complaint as they relate
7 to Cryptozoic.

8 **VI. SECOND CAUSE OF ACTION**

9 **(LANHAM ACT UNFAIR COMPETITION, FALSE ENDORSEMENT AND**
10 **FALSE DESIGNATION OF ORIGIN [15 U.S.C. 1125(A)])**

11 70. Cryptozoic incorporates by reference its denials and responses to Paragraphs 1-69
12 as if fully set forth herein.

13 71. Cryptozoic lacks knowledge or information sufficient to form a belief about the
14 truth of the allegations of Paragraph 71 of the Complaint as they relate to Hex and, on that basis,
15 denies them. Cryptozoic denies the allegations of Paragraph 71 of the Complaint as they relate
16 to Cryptozoic.

17 72. Cryptozoic denies the allegations of Paragraph 72 of the Complaint.

18 73. Cryptozoic denies the allegations of Paragraph 73 of the Complaint.

19 74. Cryptozoic lacks knowledge or information sufficient to form a belief about the
20 truth of the allegations of Paragraph 74 of the Complaint as they relate to Hex and, on that basis,
21 denies them. Cryptozoic objects to the use of the term “Defendant” as indefinite and therefore
22 denies all allegations relating to “Defendant.” To the extent the term “Defendant” is meant to
23 reference Cryptozoic, Cryptozoic denies all allegations of Paragraph 74 of the Complaint as
24 they relate to Cryptozoic.

25 75. Cryptozoic lacks knowledge or information sufficient to form a belief about the

1 truth of the allegations of Paragraph 75 of the Complaint as they relate to Hex and, on that basis,
2 denies them. Cryptozoic denies the allegations of Paragraph 75 of the Complaint as they relate
3 to Cryptozoic.

4 76. Cryptozoic lacks knowledge or information sufficient to form a belief about the
5 truth of the allegations of Paragraph 76 of the Complaint as they relate to Hex and, on that basis,
6 denies them. Cryptozoic denies the allegations of Paragraph 76 of the Complaint as they relate
7 to Cryptozoic.

8 77. Cryptozoic lacks knowledge or information sufficient to form a belief about the
9 truth of the allegations of Paragraph 77 of the Complaint as they relate to Hex and, on that basis,
10 denies them. Cryptozoic denies the allegations of Paragraph 77 of the Complaint as they relate
11 to Cryptozoic.

12 78. Cryptozoic admits that the Kickstarter fundraising campaign has raised “in excess
13 of two million dollars.” Cryptozoic lacks knowledge or information sufficient to form a belief
14 about the truth of the allegations of Paragraph 78 of the Complaint as they relate to Hex and, on
15 that basis, denies them. Cryptozoic denies the remaining allegations of Paragraph 78 of the
16 Complaint as they relate to Cryptozoic.

17 79. Cryptozoic lacks knowledge or information sufficient to form a belief about the
18 truth of the allegations of Paragraph 79 of the Complaint as they relate to Hex and, on that basis,
19 denies them. Cryptozoic denies the allegations of Paragraph 79 of the Complaint as they relate
20 to Cryptozoic.

21 **VII. THIRD CAUSE OF ACTION (LANHAM ACT UNFAIR COMPETITION,**
22 **TRADE DRESS DILUTION [15 U.S.C. 1125(C)])**

23 80. Cryptozoic incorporates by reference its denials and responses to Paragraphs 1-79
24 as if fully set forth herein.

25 81. Cryptozoic lacks knowledge or information sufficient to form a belief about the

1 truth of the allegations of Paragraph 81 of the Complaint as they relate to Hex and, on that basis,
2 denies them. Cryptozoic denies the allegations of Paragraph 81 of the Complaint as they relate
3 to Cryptozoic.

4 82. Cryptozoic lacks knowledge or information sufficient to form a belief about the
5 truth of the allegations of Paragraph 82 of the Complaint as they relate to Hex and, on that basis,
6 denies them. Cryptozoic denies the allegations of Paragraph 82 of the Complaint as they relate
7 to Cryptozoic.

8 83. Cryptozoic denies the allegations of Paragraph 83 of the Complaint.

9 84. Cryptozoic denies the allegations of Paragraph 84 of the Complaint.

10 85. Cryptozoic lacks knowledge or information sufficient to form a belief about the
11 truth of the allegations of Paragraph 85 of the Complaint as they relate to Hex and, on that basis,
12 denies them. Cryptozoic objects to the use of the term “Defendant” as indefinite and therefore
13 denies all allegations relating to “Defendant.” To the extent the term “Defendant” is meant to
14 reference Cryptozoic, Cryptozoic denies all allegations of Paragraph 74 as they relate to
15 Cryptozoic.

16 86. Cryptozoic lacks knowledge or information sufficient to form a belief about the
17 truth of the allegations of Paragraph 86 of the Complaint as they relate to Hex and, on that basis,
18 denies them. Cryptozoic denies the allegations of Paragraph 86 of the Complaint as they relate
19 to Cryptozoic.

20 87. Cryptozoic lacks knowledge or information sufficient to form a belief about the
21 truth of the allegations of Paragraph 87 of the Complaint as they relate to Hex and, on that basis,
22 denies them. Cryptozoic denies the allegations of Paragraph 87 of the Complaint as they relate
23 to Cryptozoic.

24 88. Cryptozoic admits that the Kickstarter fundraising campaign has raised “in excess
25 of two million dollars.” Cryptozoic lacks knowledge or information sufficient to form a belief

1 about the truth of the allegations of Paragraph 88 of the Complaint as they relate to Hex and, on
2 that basis, denies them. Cryptozoic denies the remaining allegations of Paragraph 88 of the
3 Complaint as they relate to Cryptozoic.

4 89. Cryptozoic lacks knowledge or information sufficient to form a belief about the
5 truth of the allegations of Paragraph 89 of the Complaint as they relate to Hex and, on that basis,
6 denies them. Cryptozoic denies the allegations of Paragraph 89 of the Complaint as they relate
7 to Cryptozoic.

8 **VIII. FOURTH CAUSE OF ACTION**

9 **(PATENT ACT – PATENT INFRINGEMENT [35 U.S.C. 271])**

10 90. Cryptozoic incorporates by reference its denials and responses to Paragraphs 1-89
11 as if fully set forth herein.

12 91. Cryptozoic lacks knowledge or information sufficient to form a belief about the
13 truth of the allegations of Paragraph 91 of the Complaint as they relate to Hex and, on that basis,
14 denies them. Cryptozoic denies the remaining allegations of Paragraph 91 of the Complaint as
15 they relate to Cryptozoic.

16 92. Cryptozoic admits that United States Patent No. 5,662,332 (“the ’332 patent”)
17 was issued with 60 claims, including over 25 independent claims in 1997 to Wizards and
18 reissued as United States Patent No. RE 37,957 (“the ’957 Patent”) with 60 claims, including
19 over 25 independent claims in 2003. Cryptozoic lacks knowledge or information sufficient to
20 form a belief about the truth of the remaining allegations of Paragraph 92 of the Complaint
21 regarding the ’332 Patent and the ’957 Patent and, on that basis, denies them. Cryptozoic
22 denies the remaining allegations on Paragraph 92 of the Complaint.

23 93. Cryptozoic lacks knowledge or information sufficient to form a belief about the
24 truth of the allegations of Paragraph 93 of the Complaint as they relate to Hex and, on that basis,
25 denies them. Cryptozoic denies the allegations of Paragraph 93 of the Complaint as they relate

1 to Cryptozoic.

2 94. Cryptozoic lacks knowledge or information sufficient to form a belief about the
3 truth of the allegations of Paragraph 94 of the Complaint as they relate to Hex and, on that basis,
4 denies them. Cryptozoic denies the allegations of Paragraph 94 of the Complaint as they relate
5 to Cryptozoic.

6 95. Cryptozoic lacks knowledge or information sufficient to form a belief about the
7 truth of the allegations of Paragraph 95 of the Complaint as they relate to Hex and, on that basis,
8 denies them. Cryptozoic denies the allegations of Paragraph 95 of the Complaint as they relate
9 to Cryptozoic.

10 **IX. RESPONSE TO PLAINTIFF'S PRAYER FOR RELIEF**

11 Cryptozoic denies that Plaintiff is entitled to any relief in this action.

12 **X. AFFIRMATIVE DEFENSES**

13 By alleging the Affirmative Defenses set forth below, Cryptozoic does not agree or
14 concede that they bear the burden of proof or the burden of persuasion on any of these issues,
15 whether in whole or in part. For their Affirmative Defenses to the Complaint, Cryptozoic
16 alleges as follows:

17 **FIRST AFFIRMATIVE DEFENSE**

18 **(Failure to State a Claim for Relief)**

19 Wizards' Complaint, on one or more claims for relief set forth therein, fails to state a
20 claim upon which relief can be granted.

21 **SECOND AFFIRMATIVE DEFENSE**

22 **(Lack of Subject Matter Jurisdiction/Failure to Register Copyright)**

23 Wizards' claims are barred for a lack of subject matter jurisdiction because it lacks valid
24 copyright registrations for the intellectual property rights asserted, or has not properly or timely
25 registered the works.

1 **THIRD AFFIRMATIVE DEFENSE**

2 **(Lack of Personal Jurisdiction)**

3 The Court cannot adjudicate Wizards' claims because it lacks personal jurisdiction over
4 Cryptozoic.

5 **FOURTH AFFIRMATIVE DEFENSE**

6 **(Improper Venue)**

7 The Court cannot adjudicate Wizards' claims because venue is improper.

8 **FIFTH AFFIRMATIVE DEFENSE**

9 **(No Basis for an Injunction)**

10 Wizards is not entitled to an injunction because (1) it is not likely to prevail on the merits,
11 (2) Wizards has not suffered and will not suffer irreparable harm because of any conduct by
12 Cryptozoic, and (3) Wizards has an adequate remedy at law for its alleged injury.

13 **SIXTH AFFIRMATIVE DEFENSE**

14 **(No Willful Infringement)**

15 Wizards' claims for enhanced damages and an award of fees and costs against the
16 Cryptozoic have no basis in fact or law and should be denied.

17 **SEVENTH AFFIRMATIVE DEFENSE**

18 **(No Damage)**

19 Without admitting that the Complaint states a claim, there has been no damage in any
20 amount, manner or at all by reason of any act alleged in the Complaint as to Cryptozoic, and the
21 relief prayed for in the Complaint therefore cannot be granted.

22 **EIGHTH AFFIRMATIVE DEFENSE**

23 **(Non-Infringement of the Patent-In-Suit)**

24 Cryptozoic has not engaged in any act that constitutes direct or indirect infringement of
25 any valid claim of the '957 patent, either literally or under the doctrine of equivalents.

1 **NINTH AFFIRMATIVE DEFENSE**

2 **(Invalidity of the Patent-In-Suit)**

3 The claims of the '957 patent are invalid for failure to comply with one or more of the
4 requirements of Title 35, United States Code including, without limitation, §§ 101, 102, 103,
5 and/or 112.

6 **TENTH AFFIRMATIVE DEFENSE**

7 **(Estoppel)**

8 Plaintiff is estopped from construing any valid claim of the '957 Patent to be infringed or
9 to have been infringed, either literally or by application of the doctrine of equivalents, by any
10 product made, used, imported, sold, or offered for sale by Cryptozoic in view of prior art and/or
11 because of admissions, representations, and/or statements made to the United States Patent and
12 Trademark Office during prosecution or reexamination of any application leading to the
13 issuance of the '957 Patent and any related patents, because of disclosure or language in the
14 specification of the patents-in-suit and any related patent, and/or because of limitations in the
15 claims of the '957 Patent.

16 **ELEVENTH AFFIRMATIVE DEFENSE**

17 **(Limitation on Patent Damages)**

18 Pursuant to 35 U.S.C. § 286, Plaintiff may not recover damages for any alleged
19 infringement of the '957 Patent committed more than six years prior to the filing of the
20 Complaint.

21 **TWELFTH AFFIRMATIVE DEFENSE**

22 **(Non-Infringement of Copyright)**

23 Cryptozoic has not engaged in any act that constitutes infringement of any valid Wizards
24 copyright.

1 **THIRTEENTH AFFIRMATIVE DEFENSE**

2 **(Invalid or Unenforceable Copyrights)**

3 Wizards' copyrights are invalid and/or unenforceable, including by reason of lack of
4 originality and lack of copyrightable subject matter.

5 **FOURTEENTH AFFIRMATIVE DEFENSE**

6 **(Copyright Functionality)**

7 The alleged violations of Plaintiffs' copyrights by Cryptozoic are barred, in whole or in
8 part, on the basis that the alleged copyrights at issue are functional.

9 **FIFTEENTH AFFIRMATIVE DEFENSE**

10 **(Copyright Misuse)**

11 Wizards' claims are barred pursuant to the doctrine of copyright misuse.

12 **SIXTEENTH AFFIRMATIVE DEFENSE**

13 **(Copyright Fair Use)**

14 The alleged violations of Wizards' copyrights by Cryptozoic are *de minimis*, nominative,
15 and fair uses permitted under law.

16 **SEVENTEENTH AFFIRMATIVE DEFENSE**

17 **(Non-Infringement of Trade Dress)**

18 Cryptozoic has not engaged in any act that constitutes infringement of any valid Wizards
19 trade dress.

20 **EIGHTEENTH AFFIRMATIVE DEFENSE**

21 **(Invalid or Unenforceable Trade Dress)**

22 Wizards' trade dress is invalid and/or unenforceable, including by reason of lack of
23 distinctiveness and lack of likelihood of confusion, deception, or mistake.

1 **NINETEENTH AFFIRMATIVE DEFENSE**

2 **(Lack of Secondary Meaning and/or Distinctiveness)**

3 The claims made in the Complaint and the relief sought therein are barred, in whole or in
4 part, on the basis that the alleged trade dress at issue is generic or lacks distinctiveness,
5 including, without limitation, secondary meaning.

6 **TWENTIETH AFFIRMATIVE DEFENSE**

7 **(Trade Dress Functionality)**

8 The alleged violations of Wizards' trade dress by Cryptozoic are barred, in whole or in
9 part, on the basis that the alleged trade dress at issue is functional.

10 **TWENTYFIRST AFFIRMATIVE DEFENSE**

11 **(Trade Dress Fair Use)**

12 The alleged violations of Wizards' trade dress by Cryptozoic are *de minimis*, nominative,
13 and fair uses permitted under law.

14 **TWENTYSECOND AFFIRMATIVE DEFENSE**

15 **(Trade Dress Misuse)**

16 Wizards' claims are barred by the doctrine of misuse of trade dress.

17 **TWENTYTHIRD AFFIRMATIVE DEFENSE**

18 **(No Dilution of Trade Dress)**

19 Cryptozoic has not engaged in any act that has caused, or is likely to cause, dilution
20 through blurring, tarnishment, or otherwise of any valid Wizards trade dress.

21 **TWENTYFOURTH AFFIRMATIVE DEFENSE**

22 **(Reservation of Defenses)**

23 Cryptozoic reserves the right to supplement or amend this answer, including through the
24 addition of further affirmative defenses, based upon the course of discovery and proceedings in
25 this action, including but not limited to, equitable defenses such as laches, waiver, acquiescence,

1 and unclean hands.

2 **PRAYER FOR RELIEF**

3 For all of the above reasons, Cryptozoic prays that:

4 (1) Wizard's Complaint be dismissed with prejudice;

5 (2) Wizard take nothing by its Complaint;

6 (3) The Court declare this case to be exceptional under Section 285 of the Patent Act and
7 award reasonable attorneys fees to Cryptozoic;

8 (4) The Court award Cryptozoic the cost of suit; and

9 (5) Cryptozoic be awarded with such other and further relief to which it may be justly
10 entitled.

11 **DEMAND FOR JURY TRIAL**

12 Cryptozoic hereby demands a trial by jury on all issues so triable.

13
14 DATED this 29th day of August, 2014

15 DORSEY & WHITNEY LLP

16 BY: S/ PAUL T. MEIKLEJOHN

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ATTORNEYS FOR DEFENDANTS
CRYPTOZOIC ENTERTAINMENT, LLC
AND HEX ENTERTAINMENT, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of August, 2014, a true and correct copy of the foregoing Answer was electronically filed with the Clerk of the Court by using the CM/ECF system, which will serve a Notice of Filing on all counsel of record.

By: s/ Paul T. Meiklejohn

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