APPENDIX "A" - REPLY TO FACTS SECTION OF ARAS SUBMISSIONS

The following reproduces the submissions of ARAS in grey font, with MS's reply, where applicable, provided in black font. MS's silence with respect to any particular statement of fact should not be taken as agreement with the facts stated.

I OVERVIEW

1. This proceeding concerns a joint software integration project pursuant to an agreement (the "Agreement") between ARAS 360 Incorporated ("ARAS") and McHenry Software Inc. ("MS"). While the evidence was detailed and in some respects quite complex, it is submitted that the case is disarmingly simple – did MS have the right to terminate the contract, as it purported to do? The answer to that is clearly – "no". Did ARAS suffer damages from the wrongful termination of the contract – and the other wrongful conduct of MS? The answer to that is clearly – "Yes" and those damages are to be assessed.

2. The evidence establishes that the parties planned to work together in a start-up collaborative venture, contemplated to be a long term arrangement – initially for 5 years, but a longer relationship was envisaged.

> This statement is irrelevant and mischaracterizes the nature of the relationship. The dealings between the parties were contractual as defined in the Agreement.

3. By its nature the relationship, and as made clear from the evidence, the project required a collaborative team approach over the course of the process.

> This statement is incorrect to the extent that it purports to assert legal obligations. The obligations of the parties to contribute to the software development project are defined in section 3 and 4 of the Agreement.

4. Between them, the goal was to create something that had never been done before or available before in the accident reconstruction industry. The resulting product would be sold to the industry. While, in the interim, advance pre-payments on account of royalties – or MS's share of sale proceeds generated by ARAS – would be made to assist MS with its cash flow requirements, it is beyond dispute that both parties knew that it was the sale of this product or products, which, once completed and in final form, would generate the revenues to ARAS from which the royalty payments to MS would come and those advanced previously would be recouped.

> This statement is incorrect in three respects. Prepayments were related to royalties, but were not on account of royalties. This is addressed in McHenry's submission at paras. 311 to 316. Prepayments were to provide cash flow to MS as well as for the "non-transferable worldwide exclusive license to market, use and distribute the MSA-Software during the term of the agreement" provided by MS to ARAS. Finally, prepayments were due to MS irrespective of sales - they were guaranteed minimums.

5. Accordingly, both parties knew that the key to their success of their venture over the long term was to get the product or products fully integrated, fully tested and fully validated, i.e. delivered and completed, on the market – so that revenues could come in and generate royalties and allow ARAS to recoup in whole or in part the sum of its advance repayments – any deficit not recouped from actual sales to be carried over into the next period to be recouped from actual sales in that period or a subsequent period.

This statement is incorrect to the extent it purports to assert legal obligations. In particular, the parties never reached agreement on the validation process as admitted by Mr. Kennedy during cross examination.

Cross-examination of Michael Kennedy, November 19, 2013 (Day 6), p. 126, Q/A 387

6. Of course, an arrangement whereby ARAS prepays MS for royalties which will not in fact be earned until sometime in the future from the sale of a product or products to be created by them both but not yet in existence places ARAS in jeopardy if MS has a carte blanche termination right for any breach of the agreement which MS claims has occurred.

This is a misstatement of the termination rights in the Agreement. Termination rights were not *carte blanche*. Termination rights are in the agreement under item 7.

7. If that were the case, ARAS, which had already paid a considerable sum – $200,000.00 – clearly a sum far greater than anyone thought that ARAS would have to advance before revenues had set-off the payments – might find the contract terminated before it had had the opportunity not only to recoup all of those monies by the sale of a fully marketable and complete product, but also its entire investment to date and its prospective long term earnings from the project – and MS, which terminated the contract, would not only have the money and the work product but would also be able to prevent the ARAS from making any sales thereafter to recover its money, its investment and pofits. The height of irony is where, as here, the purported termination appears solely to be based on ARAS not paying even more money to MS than it had already done.

The responsibility for the absence of revenues lies with ARAS, not with MS, as it was ARAS's one year delay, and decision to not market Collide when it was ready in February of 2011. It is due no sympathy for the circumstances it caused. The Agreement could only be terminated for breach, therefore the scenario painted by ARAS could only come about if it was in breach, as was the case. Additionally, this submission ignores the facts that led to the termination of the Agreement: see MS submission paras. 165 to 177, particularly a series of promises of payment to McHenry after the product release that were not kept by ARAS.

8. If valid, such a scenario would be a real windfall to MS – it would have got monies representing sales which would take place only after the product had been completed – which never happened – it would have the work product – paid for by ARAS – which it could then copyright and exploit with another partner – and it could prevent ARAS from any further sales of what products did exist and also sue for the non-payment of funds representing an advance against royalties from sales it had itself made impossible to generate.

The point being made by ARAS is not entirely clear. Nevertheless, as with the preceding paragraph, ARAS ignores the facts leading up to the termination of the License. Additionally, payment obligations are as set out in the Agreement, not as described above. Further, ARAS ignores the substantial amount of revenue generated by sales of the McHenry product which required additional sales of the ARAS 360 product, all which benefitted ARAS in excess of $3,725,000 in total revenue for 2011 and 2012:

Exhibit E, Tab 4 (2011 revenue $2,127,859) and Exhibit E, Tab 5 (2012 revenue $1,597,501).

9. If valid, such a scenario would be a disaster for ARAS – it would have already paid a great deal of money before it had been recouped in full and before the product had ever been finished – it would suffer enormous damage by be deprived of the means both to recoup those monies and to make earnings into the future. Its entire investment – not only of the monies paid but also of the time, effort and expense to get to that stage – would be completely lost. It would have nothing to market, while MS would now be free to be or link up with a competitor to exploit the work product that ARAS had paid for. ARAS would find itself sued for monies representing prepayment of royalties from sales which MS had made it impossible for ARAS to make

The scenario painted above by ARAS ignores the facts and is incorrect in several ways. As above, ARAS's delay and decision to not market the Collide product created the circumstances. In any event, the revenue figures from Exhibit E, Tabs 4 & 5, demonstrate more than sufficient revenue to have paid McHenry per the agreement, and that in fact revenue was being generated by the MS software during these times. Further, prior to entering into the Agreement ARAS assured MS that funds were in place. As well delays in development of the product lay at the feet of ARAS for its failure to follow proper project management practices of the sort set out in the report of Mr. Stedman. Finally, it is incorrect to say that ARAS made no sales; the record demonstrates many sales were made prior to termination of the License and prior to release of the product: see Exhibit 7, and Exhibit E, Tabs 4 and 5 which show many sales of the MS Software, and associated revenue, through 2010, 2011 and 2012.

10. Fortunately, commercial contracts will seldom, if ever, be interpreted in a manner so as to create a windfall for one party and a disaster for the other.

11. However, there is no need not resort to any principle of interpretation in this case, for by the very words used by the parties in the contract such a scenario is precluded by the express delineation in clause 7.2 of the Agreement of those specific types of breach of the agreement upon which, and only upon which, a unilateral termination by MS could be based. Non-payment or non- pre-payment of any sort is not one of them. So even if breach of a payment obligation could be established in this case – and, of course, we say that the evidence is to the contrary – such a breach could not justify termination by MS, but would fall to be dealt with under clause 7.1, which mandates formal notice by any party of a breach by the other and a 30 days grace period in which to allow the defaulting party to rectify the breach before termination can take place.

12. This is not controversial. MS accepts that its right to terminate the agreement unilaterally is limited to such breaches as are expressly spelled out in clause 7.2 of the Agreement. It was well aware that it could not terminate "guillotine-style" – that is without affording ARAS a 30 day window of opportunity to remedy any breach or make a payment even if not legally required to do so in order to defuse the situation – unless one of the specific grounds set out in 7.2 could be relied upon. It should be remembered that ARAS never, ever stated that it would pay no more money to MS. It simply wanted MS to do its part – provide the validation papers that it had promised so that ARAS could be in the best position to make sales and get money to pay itself

and to further pay MS – before the next new payment to MS was made. This was perfectly reasonable and, in the circumstances was not a ground for breach, let alone termination.

There was nothing reasonable about ARAS requiring MS to provide the validation papers in order to get paid because the Agreement did not require this of MS. Further, ARAS' response of its position at the time of the termination is inconsistent with the evidence, in particular that it made a series of promises to pay funds to MS after the product was released, and then reneged on those promises and unilaterally imposed a new condition precedent to payment - that MS provide a validation paper. The refusal to pay the promised past due $100,000 in early November 2011 reduced the belivability of the new promise of payment after McHenry put in additional time and effort to complete the validation paper. How was Mchenry to know that after the completion of the validation paper ARAS would not simply add a new condition for the past due payment?

13. So why didn't MS just give ARAS the 30 days' notice?

14. In our submission the truth is obvious. It didn't want to give ARAS any opportunity to rectify. ARAS should be taught a lesson about who needed who. MS had all it needed to register the copyright. It had all the marbles. Quite frankly, it now didn't need ARAS and wanted to be rid of ARAS. It thought that a unilateral termination, leaving ARAS well out of pocket and facing claims for more money and unable to make any more sales, would shut down or destroy ARAS.

This proposition was never put to any of the witnesses for MS. Further, it is at odds with the evidence. MS supported ARAS well beyond its obligations in the contract and did not withdraw services, and ultimately terminate the Agreement, until after ARAS unilaterally imposed the provision of the validation papers as a new condition precedent to payment and stated it had already found someone else to work with. McHenry provided more than the required 5 day notice of Termination under clause 7.2, in order to provide ARAS a chance to rectify the past due payment situation. ARAS did not try to make the payment or avoid the termination in any way.

15. So MS deliberately set itself to the legally impossible task of trying to fit a very distinct square peg – non-payment of a sum of money – which is not remotely hinted at as a ground for immediate termination under 7.2 – into very distinct and wholly different round hole – namely, s.7.2.4 – "If Reseller fails to meet sales minimums over a 12 month period".

16. There are no "sales minimums in a 12 month period" which ARAS failed to meet. This clause is perfectly clear and utterly free from any hint of ambiguity. Now, the fact is that it happens to be meaningless in the context of this contract. However, that doesn't mean that this tribunal can say – well, it must mean "annual prepayments" – any more than it could say – "apples" mean "oranges". That would simply be re-writing the contract and imposing a contract upon ARAS which it did not and would not ever have agreed to.

It is at odds with principles of contract interpretation to say that a provision is "perfectly clear and utterly free from any hint of ambiguity" yet "meaningless in the context of this contract". The tribunal must follow the interpretive process to determine the intent of the parties at the time they executed the Agreement.

17. Of course that was a bogus reason – the real reason was that MS wanted to get more money from ARAS before it would deliver the final product to ARAS – which had to include validation papers. Its demands for more money in November, 2011 had no legal foundation. It had no right to down tools and walk away, as it did – using "the big stick" – thereby causing enormous loss to ARAS. They then purported to forbid ARAS from even making the sales which would have been necessary to allow ARAS just to recover the monies they had paid to MS.

This submission is not faithful to the Agreement or to the facts. By the terms of the Agreement and the admissions and promises of Mr. Kennedy funds were due to MS, as has been addressed above.

18. No grounds existed for the purported termination. Even if there were scheduled dates for making prepayments – which there were not – and even if time were of the essence – which it was not – any scheduled dates for making prepayments were clearly waived and adequate notice would have had to be given to ARAS 360 setting a new date for making prepayment well before any termination on that basis could be made. In the meantime, of course, they would have had to deliver the necessary validation papers.

Similarly in this submission, ARAS ignores the series of promises made by ARAS to MS regarding the annual prepayment.

19. The contract mandates that disputes be negotiated or mediated – and, if not resolved, then arbitrated. It clearly contemplated that, even if disputes arose between the parties to the long term contract, every effort should be made to work them out. MS made it clear that it wasn't interested in a serious mediation. And instead of following up on arbitration, specifically mandated by the contract, MS sued ARAS in its own jurisdiction of North Carolina.

20. The final attack was the campaign of vilification, which included denigrating ARAS's product because it did not have the necessary validation – something MS wrongfully failed to produce – and doing everything to destroy ARAS's reputation by a smear campaign of defamation and false statements. ARAS had to get the North Carolina Court to compel them to adhere to the dispute resolution provisions of the agreement, but was made subject to a protective injunction in so doing.

The US action was specifically undertaken to stop ARAS from continuing to market and sell the McHenry product. An injunction was obtained for that purpose which ARAS proceeded to violate, and for which it was found in contempt of court and ordered to pay MS's legal fees in the amount of $43,000.

II FACTS

21. Much of the non-controversial background facts have already been canvassed in MS's final argument. As such, ARAS will highlight those facts relevant to the issues raised in this proceeding.

A. Background

22. Mike Kennedy, principal of ARAS, has been in the accident reconstruction industry for 25 years, and has been involved in the development of accident reconstructions software.

Examination in Chief of Mike Kennedy, Day 2, pp. 7-8

23. Ponnuchamy Varatharaj – or "Chamy", as the parties refer to him – is a programmer based in India and is an independent contractor of ARAS. He, along with Mr. McHenry and Mr. Hetherington, worked on the ARAS-MS joint integration project.

24. In 2010, Mr. Kennedy created ARAS to develop a prototype of a 3D accident reconstruction product. Mr. Kennedy was been working with Chamy on development of this product.

Examination in Chief of Mike Kennedy Day 2, pp. 14-15.

25. Paul Hetherington has been an employee of ARAS 360 since August, 2010. Prior to joining ARAS, Mr. Hetherington worked with Mr. Kennedy at Visual Statement. Paul Hetherington joined ARAS in August, 2010, having previously worked with Mr. Kennedy at Visual Statement. Mr. Hetherington has worked on a number of software component integration projects during his career, including one project with Mr. McHenry. Notably, he has worked on both the vendor/supplier side and the client/host software side. He was the only member of the ARAS-MS integration team, and was the only witness at the arbitration, who had done so.

Examination in Chief of Paul Hetherington, Day 7, pp. 117-127.

It is important to keep in mind that Mr. Heatherington was not put forward as or qualified as an expert witnesses. His evidence was tendered as and for fact evidence only.

26. On the other side of the transaction was Brian McHenry's company, MS. In Raymond McHenry's words, MS at times bordered on being a non-profit organization. Of course, and a matter of some factual and legal significance, MS has refused to produce any financial records in this proceeding by which the Arbitrator could assess its financial status – historical or current – which, for example, would allow us to test MS's unproven allegations of loss of earnings, "cash crunch", etc.

Cross-Examination of Raymond McHenry, Day 1, p. 8211. 13-16.

Examination in Chief of Brian McHenry, Day 2, p. 53 1. 17.

This is a collateral attack on the earlier ruling regarding documents and as such is improper. It must be ignored.

B. Project at Visual Statement

27. Mr. Kennedy and Mr. McHenry first met while the former was working at a company named Visual Statement. There, Mr. McHenry and Mr. Hetherington worked on an integration project whereby Mr. McHenry's 2D simulation component would be integrated into Visual

Statement's "FX" software. In that project, a prototype was working within a few days and the product was released in one month.

Examination in Chief of Mike Kennedy, Day 5, p. 8 1. 25 to p. 10 1. 24.

Examination in Chief of Paul Hetherington, Day 7, p. 119 1. 9 to p. 120 1. 25.

28. Mr. Hetherington explained why the Visual Statement project completed so quickly: The Visual Statement product was already completed and on the market, and the McHenry component was already and established, marketable product.

Examination in Chief of Paul Hetherington, Day 7, p. 12111. 9-20.

29. At the time that Mr. McHenry and Mr. Hetherington worked on their integration project, Visual Statement used license keys (or "DRM") system. As Mr. Hetherington, the license key system is the most common DRM method and "is the generally preferred one".

Examination in Chief of Mike Kennedy, Day 2, p. 11 1. 16 to p. 12 1. 11.

Examination in Chief of Paul Hetherington, Day 7, p. 185, 11. 2-14, p. 191, 11. 2-20, p. 193 1. 21 to p. 194 1. 10.

30. Mr. Hetherington also explained that DRM is a balancing act – on the one hand, a software provider must take steps to prevent piracy; on the other, it does not want to upset legitimate customers who are unable to use their software "or having to jump through too many hoops to do so." There is perhaps no greater fallacy advanced by MS in this case than is characterization of a license key as a "sale". It is nothing of the sort and ARAS's treatment of the license keys as incidents of an individual basis license accorded with the contract and entirely with what had been done with the McHenry product which had been integrated at VS visual.

Examination in Chief of Paul Hetherington, Day 7, p. 190 1. 12 to p. 191 1. 1.

ARAS' submission in the guise of evidence from Mr. Heatherington demonstrates a misstatement or misunderstanding of the position of MS regarding the license keys. The issuances of additional license keys is a copyright infringement.

C. Agreement with MS

31. In February, 2010, the parties executed the Agreement. MS received an immediate $40,000 payment from ARAS. This recognized the development period required by MS for its tasks.

32. The integration project with ARAS was a welcome development to Mr. McHenry. He and his father had been hoping to move away from litigation consulting and spend more time on research and development.

Examination in Chief of Brian McHenry, Day 2, p. 16, 11. 10-22.

Cross-Examination of Brian McHenry, Day 4, p. 110 11. 15-21.

33. The goal of the joint project with ARAS was to create something that had never been done before in the accident reconstruction industry.

Cross-Examination of Raymond McHenry, Day 1, p. 9111. 14-18.

34. The integration of MS software into ARAS software was envisioned to be a collaborative venture over a long term. In Raymond McHenry's words, the integration project was a "joint development". In his eyes, ARAS was a "joint investor" or a "joint developer".

Cross-Examination of Raymond McHenry, Day 1, p. 80 11. 14-22, p. 8111. 6-8, p. 89 11. 11-14

The obligations of the parties are set out in the Agreement.

35. Mr. Hetherington explained his experience with payments from his experience as a component vendor. In his experience, payment was only made when the customer was able to verify delivery of the component. This could weeks or months – in one case, over one year. ARAS's agreement to provide "prepayments" was therefore an unusual one.

Examination in Chief of Paul Hetherington, Day 7, p. 128 1. 4 to p. 129 L 14.

As noted above, Mr. Heatherington is not qualified to provide opinion evidence, and his opinion on when payments should be made for other software products is irrelevant. Matters of payment were dealt with in the Agreement.

36. ARAS bore a great deal of risk in the arrangement. It agreed to make up-front payments for a product that it could not yet deliver to customers. The only way ARAS could earn money to recoup the advance pre-payments was by selling its software in the marketplace.

Cross-Examination of Raymond McHenry, Day 1, p. 1011. 16 to p. 1021. 5.

37. Clauses 7.1 and 7.2 of the Agreement address the rights of the parties to terminate. Mr. Kennedy explained his business purpose behind requiring 30 days' notice for termination under section 7.1: ARAS did not want payment to be a reason for immediate termination, as that could leave ARAS "in the lurch" – in other words, it would destroy ARAS's business and leave MS to walk away with a product. As it turns out, that is exactly what MS seeks to do.

Examination in Chief of Mike Kennedy, Day 6, p. 6111. 15-22, p. 621. 13 to p. 63 1. 6.

Yet ARAS refused to pay MS the money that MS was owed in response to the December 9, 2011 termination letter regarding MS's intention to terminate the Agreement. ARAS had 12 days to try to remedy the situation that gave rise to MS's right to terminate. The referral to section 7.1 and the ability to cure breaches by ARAS is disingenuous. ARAS was not left "in the lurch" as the financials of Exhibit E tabs 4 & 5 demonstrate. ARAS made in excess of $3,500,000 dollars during 20011 & 2012, a good portion of which was

on account of MS's work. McHenry on the other hand was only paid $40,000 for 2011 and nothing for 2012.

38. Despite what Mr. McHenry urged in his testimony, there was no reasonable basis MS to believe that ARAS would be ready on its end for integration immediately after execution. ARAS was a brand new company that – unlike the Visual Statement project – did not have a product on the market

This statement contradicts the language of the Agreement itself, most notably 10.2, that envisions the integration process will begin in February of 2010. There is no reasonable basis for suggesting that Mr. McHenry's evidence was not reasonable.

D. Integration process

39. It should be noted that MS's attempt in this arbitration to ascribe all of the task of integration as the responsibility of ARAS is without foundation. Their original pleading set it out quite clearly and accurately as, in large part, an MS responsibility. That was subsequently amended, but the North Carolina Verified Complaint, sworn under oath by Brian McHenry, and accepting MS's measure of responsibility in this area was not. Further reference to this document is made below.

The division of labour is set out in sections 3 and 4 of the Agreement itself, not in the pleadings.

40. After executing the Agreement, ARAS continued to develop its software. At the same time, Mr. McHenry was getting MS's programs ready for the upcoming integration.

Exhibit "A", tab 10.

41. In April, 2010, Mr. Kennedy wrote to Mr. McHenry to apologize for the delays. Mr. McHenry, in his response, gave no indication he was concerned about delays. Rather, he responded with an update on the coding he was doing in anticipation of the project.

Exhibit "C", tab 1.

42. At the same time as developing its software, ARAS marketed the anticipated product.

Exhibit "A", tab 13.

ARAS was not just marketing the product. It began pre-selling the Collide product in May of 2010. See Exhibit A, Tab 46. ARAS also benefitted from additional revenues beyond the revenue from the sale of collide since Collide required the ARAS 360 product to function and so each sale of Collide included a sale of ARAS 360 graphical environment.

43. As might be expected from a software startup, things continued to progress slowly but steadily on ARAS's side.

Parties are expected to live up to their legal obligations. Being a startup venture does not relieve ARAS of its contractual obligations. ARAS does not account for its one year delay in having a product ready for the integration of the MS products.

44. In January, 2011, a meeting took place in Singapore between Mr. McHenry, Mr. Hetherington and Chamy, the purpose of which was to discuss how the integration would proceed.

45. Mr. McHenry summarized how the integration process would work:

> Q. So your work was going to be limited to work you would do on your own simulation tools?
>
> A. Work on my own simulation *and working with their programmer to make the two* programs *work*. (italics added)
>
> **Examination in Chief of Brian McHenry, Day 2, p. 43 1. 25 to p. 441. 5.**

46. MS's software had to be adapted – "custom fitted" – by MS for the ARAS software.

> **Cross-Examination of Raymond McHenry, Day 1, p. 87 11. 17-20, p. 88 11. 6-8,**

47. It is therefore understandable that, in MS's verified complaint ultimately filed in the North Carolina proceeding, that Mr. McHenry swore as follows:

> In 2010, McHenry Software entered into an exclusive Software Licensing and Development Agreement ("Agreement" with ARAS 360, wherein *McHenry Software agreed to incorporate its proprietary software into ARAS 360's existing software products and graphical environment*. (italics added)
>
> **Exhibit "B", tab 5, para. 2.**

If ARAS is suggesting that this is an admission of responsibility for undertaking integration work, it is not. It reflects the agreement to license the MS products for incorporation into the ARAS products. ARAS cannot point to the pleadings to escape its responsibilities as set out in the Agreement. That is the defining document.

48. As touched upon above, MS's original Statement of Claim in this proceeding, prior to being amended, contained similar admissions.

This is to the same effect; the issues in dispute must be decided on the basis of the Agreement between the parties as set out in the Agreement. While the pleadings are essential to understand the issues to be decided, they cannot be relied upon to determine the agreement between the parties.

Indeed, nowhere in its submission does ARAS address the obligations of the parties as set out in the Agreement. Presumably it has chosen to ignore this fundamental document as it establishes that the primary responsibility for integration belonged to ARAS. This is

made clear be section 3.0 which reads, in part: "MS may make suggestions for incorporation of the software into the ARAS 360 software, **however, the final decisions as to how the MSA-Software is to be incorporated into the ARAS 360 software is the sole responsibility of ARAS 360**". [Emphasis added.]

49. Even Mr. McHenry, in his evidence in chief, referred to the fact that "McHenry Software was going to integrate seven of our simulation programs into the ARAS 360 environment." That arrangement – and those obligations – are simply a fact of the integration process.

Examination in Chief of Brian McHenry, Day 2, p. 40 11. 17-19.

50. Mr. Kennedy elaborated on why the integration was not merely "every man for himself', but was rather a team effort:

> Q. Well, I'm going to suggest that it is and it's Mr. McHenry helping to troubleshoot problems for ARAS so that he can get on with his work. Do you agree with that?
>
> A. Let me finish reading the whole thing.
>
> Q. You bet.
>
> A. Okay.
>
> (Record read back).
>
> A. No, I don't agree. Mr. McHenry's part of a team. And the team is trying to resolve these issues. His responsibility as a team member is to work with the other programmers and determine what the issues are, whether on his side or on the input dialogue side, or in between.

Cross-Examination of Mike Kennedy, Day 6, p. 187 1. 16 to p. 188 1. 5.

This excerpt demonstrates that Mr. Kennedy is not a responsive witness. He is asked to agree that Mr. McHenry was helping to troubleshoot problems for ARAS. He then denies that and preaches the importance of teamwork.

51. Mt. Hetherington's description of the process was similarly team-focused:

> Q. So when everybody's got their roles, if we can call them that, do they just stick to their own roles and everybody does their own thing?
>
> A. No, it's, it's -- any integration project is really a collaboration amongst the team. They need to work back and forth. Any changes made on one end need to be communicated to the others. And many times the others need to be updated to be able to make use of these changes.

Examination in Chief of Paul Hetherington, Day 7, p. 141 11. 3-13.

52. Mr. Hetherington later described how the integration project proceeded:

> In any integration process, there's going to be delays on all fronts. In this case, we actually had three different components trying to integrate and talk. And it's like the whole "more chefs in the kitchen" issue, kind of thing.
>
> Software in general is notorious for poor time lines. It's unfortunately a fact of the business. Very few softwares actually meet their deadlines. It's the way it is. Anything that's -- and the more complex things get, the more fuzzy those time lines become.
>
> And in this case, there was portions in all three components that were causing issues. And sometimes it was communication issues amongst the team members. Sometimes it was specific issues in the way things were done.
>
> **Questions from the Arbitrator for Paul Hetherington, Day 8, p. 59. 1. 10 to p. 60 1. 5.**

53. Mr. McHenry also explained why integrations can take time:

> So there's things, as part of integration, that's why integration takes six months, is that it takes you time to work out all the bugs, because you're talking two, two programs are talking to each other, and they are having issues. So we were resolving them. We were moving along, but still weren't ready for release.
>
> **Examination in Chief of Brian McHenry, Day 2, p. 91 1. 21 to p. 92 1. 4.**

54. Ultimately, integration proceeded slowly after the Singapore meeting. Nobody was pleased with the pace of the development, and it appears that all parties were working diligently. (Although Mr. Hetherington was also working on ARAS HD, he explained – an explanation that went unchallenged on cross-examination – that he had sufficient time to work on both projects.)

55. At the end of the day, despite any views on the shortcomings of others in connection with the integration, it is clear that there is room of a "blame game" scenario here - no one person or party was to blame for the delays after the January, 2011 meeting in Singapore.

> ARAS seeks to avoid its contractual obligations and to avoid assigning responsibility for failure of the project, which are attributable to ARAS. ARAS was also fully aware that delays occur during integration as Hetherington stated in response to a question by the arbitrator (Hetherington, Day 8, Nov 22, 2013, p. 58-59):
>
> > "In any integration process, there's going to be delays on all fronts. In this case, we actually had three different components trying to integrate and talk. And it's like the whole "more chefs in the kitchen" issue, kind of thing. Software in general is notorious for poor time lines. It's unfortunately a fact of the business. Very few softwares actually meet their deadlines. It's the way it is. Anything that's -- and the more complex things get, the more fuzzy those time lines become. And in this case, there was portions in all three components that were causing issues.

And sometimes it was communication issues amongst the team members. Sometimes it was specific issues in the way things were done."

E. ARAS uses license keys

56. Like Visual Statement, ARAS used license keys as its DRIVE system.

Examination in Chief of Mike Kennedy, Day 2, p. 12 1. 12 to p. 13 1. 7.

57. As Mr. Hetherington explained, license keys are the preferred DRIVE system, a system that strikes the balance between prevention of piracy and permitted clients to use their software. It was the same DRM system that was employed at Visual Statement – and there is no evidence that Mr. McHenry or MS commenced proceedings against Visual Statement for copyright infringement. Mt. McHenry never expressed any displeasure with that system.

This is completely irrelevant to this proceeding.

58. One of the limitations of a license key system is that there is no control over what the customers do with the DVDs they receive. It is possible for customers to install copies on more than one machine. However, the customer is prevented from using the software unless it has a license key.

Yes, and ARAS's evidence is that they would give customers however many license keys they asked for on the basis of the "honour system".

59. It must be remembered that the MS component was delivered to ARAS in a .dll file – which, as Dr. Faheem Ahmed explains in his report – operates as a black box, preventing the recipient from viewing the source code. As a result, any customer of ARAS copying the ARAS software without a license key is left with a copy of software they cannot use, and the code underlying which they cannot see.

Exhibit 18, pp. 3-4, 10.

Dr. Ahmed's report is inadmissible for the reasons described in Appendix "B".

60. Mr. Kennedy testified as to the additional license key regime at ARAS. Essentially, additional license keys were provided to individual customers who wished to use the ARAS software on a different machine. Such an approach is consistent with the DRM balancing act Mr. Hetherington discussed in his evidence, allowing legitimate customers to use an additional computer on the "honour system", while deterring piracy with the need for a license key. There is simply nothing wrong with reliance on an "honour system".

Examination in Chief of Mr. Kennedy, Day 6, pp. 119-121

This belies a fundamental misunderstanding of copyright law. ARAS was only entitled to "copy" the MS software, or to enable others to "copy" the MS software, to the extent permitted to do so by MS. Providing multiple license keys encourages copying of the MS software to multiple locations without the permission of MS is copyright infringement. There is nothing honourable about doing so.

61. Importantly, there was no evidence nor even suggestion – in chief or in cross – that any of these customers would have been willing to pay full price – or any price at all – for an additional license. As Mr. Kennedy explained, he would charge as much as he could in this niche market The only evidence is that Mr. Kennedy charged as much as he could and was consonant with the underlying individual bases of licensing – nothing.

Exhibit "A", tab 21.

This again belies a misunderstanding of copyright law. Nothing in the above paragraph constitutes a defence to copyright infringement.

F. Agreement to discount

62. In March, 2011, Mr. Kennedy wrote to Mr. McHenry to ensure he knew that ARAS would be offering discounts to its customers. Mr. McHenry's response was "I will be reasonable and flexible with our agreement and as such will defer decisions on pricing changes/etc to you." By reply, Mr. Kennedy assured Mr. McHenry that "I am going to charge as much as I can in this niche market".

Exhibit "A", tab 21.

The agreement required as follows:

> 10.3 This fee shall not change unless otherwise agreed to in writing by both parties to this Agreement.

And further states:

> 17.1 This Agreement constitutes the entire understanding of the parties with respect to the subject matter hereof and supersedes any and all prior or contemporaneous oral or written agreements with respect to such subject matter. The Agreement may be amended only by a written instrument executed by both parties.

There was never any agreement to discount. ARAS never provided MS with any written agreement regarding price changes.

Cross-examination of Mike Kennedy, November 19, 2013 (Day 6), p. 64, Q/A 143

63. Mr. McHenry clearly knew that ARAS continued to provide discounts to its advance customers. After all, ARAS had no product to sell them – only the promise of a product to be delivered in the future. In June, 2011, in a Skype chat with Mr. McHenry, Mr. Kennedy mentioned an unhappy customer to whom he was going to send a refund. In response, Mr. McHenry wrote:

> hmmm let me guess...hey issue a refund...then when it comes out and you jack up the price...he'll pay MORE!!

don't they understand that the discount is because you have to wait a while?

Exhibit "B", tab 1.

64. At the arbitration, Mr. Kennedy elaborated on the alignment of their interests in this regard:

> A. At this point in time, we didn't have any monetary problems between us that I was aware of. And I guess, you know, what was really important to me going forward was that Brian understanding that we're going to charge as much as we possibly can for the products. It would never serve our interest to price these products less than what they're worth. Because he understood that, that's why he said that he deferred his -- well, I don't know why. That's what I thought he meant when he deferred his decisions about pricing over to me. He knew that, on the business side, I was going to do the best I could for both of us.
>
> Q. And that's what you say in your e-mail at the top?
>
> A. Yes. I say, trust me, I'm going to charge as much as I can in this niche market.

Examination in Chief of Mike Kennedy, Day 5, p. 100 1. 2 to p. 101 1. 6.

65. In his evidence in chief, Mr. McHenry alleged that there was "no rhyme or reason" to what ARAS charged its customers. However, as Mr. Kennedy explained, there very much was a strategy to the pricing:

> Q. Mr. McHenry stated that there was no rhyme or reason to the ARAS prices and that you expected McHenry to accept whatever you randomly charged for the program. What do you have to say about that?
>
> A. Well, there was always a rhyme and a reason to all of our pricing. We had pre-release specials to start selling the product and get revenue coming in. We were late in getting the product out, so we provided some discounting. And in the end, we charged more for the product than our contract even specified. We charged $4,495 for Collide 3D, which was only supposed to be sold for $3,000. So there was always a rhyme and a reason to it. And in the end, I think it all worked out.

Examination in Chief of Mike Kennedy, Day 6, p. 56 1. 14 to p. 57 1. 5.

G. Payments

66. Under clause 10.2 of the Agreement, ARAS agreed to pre-purchase 100 licenses of MMIS and Collide for a total of $160,000:

(a) $40,000 upon execution;

(b) $40,000 after delivery of alpha versions of MMIS and Collide; and

(c) $80,000 upon delivery of MMIS and Collide in "ready for final version" faun.

Exhibit "A", tab 9.

ARAS' summary of the provisions of 10.2 of the Agreement is incomplete. Most notably the final tranche of $80,000 was to be paid as indicated above, "on July 15, 2010 whichever is sooner." Thus the entire $160,000 prepayment was to be paid to MS by no later than July 15, 2010.

67. Regardless of the fact that ARAS had still not released its product – meaning that ARAS had no product to sell, other than what it could "pre-sell" – Mr. McHenry wrote to Mr. Kennedy various times asking for advances. There was no suggestion by Mr. McHenry that ARAS was contractually obliged to make payments by a given deadline – rather, Mr. McHenry made requests for advances.

Exhibit "A", tab 14.

Exhibit "C", tab 2.

This is false. In an email dated January 6, 2011, Mr. Kennedy referred to making the next annual prepayment in June of that year, a clear reference to the obligations in the Agreement: Exhibit A, Tab 16 (1.00047/1).

He also referred to these obligations in emails during the fall of 2011, as described in MS's Final Submissions at paras. 263 to 269.

Mr. McHenry's requests for advances were most certainly made in the context of the Agreement, as Mr. Kennedy acknowledged.

68. From February, 2010 to January, 2011, ARAS made payments in the total sum of $160,000 to MS:

(a) $40,000 upon execution of the Agreement;

(b) $40,000 in September, 2010 at Mr. McHenry's request;

(c) $40,000 in December, 2010 at Mr. McHenry's request; and

(d) a further $40,000 in January, 2011 at Mr. McHenry's request.

69. Mr. Kennedy did not believe he was required by the Agreement to continue to make the advances requested by Mr. McHenry due to the fact the product was not yet completed and, as a result, ARAS could not complete sales. As he had explained to Mr. McHenry in January, 2011, his view was that all payments go toward pre-purchase of licenses – with which Mr. McHenry agreed.

Exhibit "C", tab 3, pp. /1 and /2.

This refers to Mr. Kennedy's subjective interpretation of the Agreement and is inadmissible for the purpose of contract interpretation. Further, the Agreement cannot be amended in this manner.

70. In Mr. Kennedy's view, no further payments were required. Nevertheless, in order to ensure the project continued to move forward, Mr. Kennedy agreed to make further advance payments to Mr. McHenry.

Examination in Chief of Mike Kennedy, p. 6111. 6-8, p. 63 1. 18 to p. 65 1. 1, p.

Again, Mr. Kennedy's subjective interpretation of the Agreement is inadmissible for the purpose of contract interpretation.

71. In June, 2011, ARAS made a further payment of $40,000, at Mr. McHenry's request.

Exhibit "A", tab 31.

Exhibit "C", tabs 2 and 3.

72. In September, 2011, Ricci Krizmanich wrote to Mr. McHenry regarding payments to date. She set out the sales made to date, and explained that, under the agreement, MS was owed $98,400 in royalties. Given the payments that had been made in excess of that amount, this resulted in a net credit position to ARAS.

Exhibit "A", tab 46.

For the reasons explained in para. 302 of MS's Final Submissions, as of September 15, 2011, ARAS owed MS royalties in excess of the $200,000 that it has already paid MS. This is why Mr. McHenry was so concerned about Ms. Krizmanich's email.

H. MS working on validation

73. Over the course of the integration, Mr. McHenry advised that he was working on the validation, which he said he would provide:

[In April, 2011:]

And Mike I will send out a validation discussion in the next hour or so (if you're checking emails tonight)

Exhibit "C", tab 6, p. /1.

[In June, 2011:]

As far as validation, the 12 RICSAC test look good, some issues with detailed positioning are being worked out ... I have baseline validation runs set up and in good shape.

Exhibit "C", tab 10, p. /1.

[In September, 2011:]

I am hopeful that we are in the minor tweak range but until i complete the validation tests over and over agina [sic] (meaning each day i am running, testing, checking, tweaking and until i go a number of days without having to change anything, without finding any issues, i will not declare it 'release ready' because i want folks to have a stable, consistent tool...and we are getting close..very close...but ya never know until stable testing is complete...

Exhibit "C", tab 13, p. /175.

(See also **Exhibit "C", tabs 15 and 16** for emails from Mr. McHenry in October and November, 2011, respectively, outlining his progress with validation.)

74. Even Raymond McHenry had performed "many validation runs" – which he concedes were never provided to ARAS.

Exhibit 1, para. 29.

Cross-Examination of Raymond McHenry, Day 1, p. 133 1. 16 to p. 134 1. 5.

75. At no time did Mr. McHenry write to say "MS is not required to perform validation tests" or "MS will only perform these tests if we execute a signed amendment to the Agreement". Rather, it was apparent that the parties had reached agreement - MS would perform validation testing and provide validation papers to ARAS – an agreement contemplated by of clause 4.4 as their Agreement as a responsibility of MS.

ARAS' assertion is untenable. Failure to refute an obligation does not create an obligation. The evidence establishes that the parties never reached agreement on the obligation to deliver validation documents.

I. Importance of Validation

76. Many of the witnesses gave evidence on the importance of validation.

77. Raymond McHenry emphasized it cardinal role. He agreed that reliability was the keystone to a software product – and that if there is no validation, there is no reliability. The only way ARAS could avoid criticism of its product was to have validation papers. Once ARAS had the validation papers and the products were marketed, ARAS could maximize sales revenue – i.e. ARAS would be able to recover from actual sales what it had paid in advance to MS. That was the key to success in this joint development – get the product fully integrated, fully tested, fully validated and on the market.

Cross Examination of Raymond McHenry, Day 1, p. 100, 1. 19 to p. 101 1. 8, p. 109 1. 9 to p. 110 1. 1, p. 127 11. 11-15.

ARAS' submission is not faithful to the terms of the Agreement, which does not create a link between the obligation to make payments to MS and the delivery of validation papers.

78. But, as Mr. Kennedy explained, there are two types of validation: the validation of the product for the marketplace, and also validation – or verification – to ARAS that all of the promised features had been delivered.

Re-Examination of Mike Kennedy, Day 7, p. 1131. 1 to p. 1141. 2.

79. This is consistent with the expert testimony of Dr Ahmed, who explained that, in a project such as this, the client – here, ARAS, – must, before delivery can be confirmed, be able to verify that the component has all of the promised features.

Expert Report of Dr. Ahmed, Exhibit 18, pp. 8-11.

For reasons set out in Appendix "B", the Ahmed Report is inadmissible in its entirety. Additionally, even accepting Dr. Ahmed's evidence, common practices cannot change the terms of the Agreement.

80. ARAS was never able to verify that the components promised by MS were actually contained in the component he provided – despite his untested and non-validated assurances that all the necessary code was present. Mr. Hetherington explained that what ARAS 360 received included "partial ARAS Collide and partial Collide 3D. And partial MMIS. There's portions of each of those that I don't -- that did not make that release."

Examination in Chief of Mike Kennedy, Day 2, p. 50 1. 16 to p. 57 1. 5.

Questions from the Arbitrator for Paul Hetherington, Day 7, p. 57 1. 21 to p. 58 I. 21.

The uncontradicted evidence is that MS provided ARAS with ARAS MMIS, ARAS Collide 3D and ARAS Collide. Mr. Kennedy admitted that all of these items were in the code provided by MS.

Cross-examination of Michael Kennedy, November 21, 2013 (Day 7), p. 51, Q/A 166

J. MS foresaw difficulties for ARAS if it could not sell its product

81. Before entering into the Agreement, MS was aware of the risk to ARAS in the arrangement, and the risk that ARAS would not be able to pay MS if it did not have a product to sell. As Raymond McHenry agreed, the only way ARAS could recoup the advance payments was through sales of product.

Examination in Chief of Raymond McHenry, Day 1, p. 101 1. 16 to p. 102 I. 1. 18.

82. On October 15, 2011, Mr. McHenry envisioned a product that would "rock the accident reconstruction world" and, once officially released, would "bring a lot of orders in the next month or so".

Exhibit "A", tab 50.

83. In Mr. McHenry's mind, these imminent sales would enable ARAS to pay MS the money he said it was owed:

> Q. Is that when the money would be rolling in?
>
> A. Well, I was hoping that -- Mr. Kennedy he promised me at release I was going to get a large payment to get me in line with the annual prepayment that was due for 2011.
>
> So yes, I had thought that t hose orders would make him able to pay me. Because part of his responses all during 2011 was that he was having financial problems. So that is why I would say the big orders would bring more money and then he could pay me.
>
> Q. So the answer to my question "yes"?
>
> A. Yes.

Cross-Examination of Brian McHenry, Day 4, p. 67 ll. 4-18.

84. In other words, the forecast had come true – without sales, ARAS would have difficulty making advance payments. And MS held – or, in this case, withheld – the validation papers which would unlock the sales.

K. ARAS 360 released, but still no validation

85. On October <@>, 2011, ARAS announced the release of ARAS Collide.

86. In his evidence, Raymond McHenry explained that MS's work was not complete upon the release date:

> Q. That the product was ready to be released around the end of October 2001 (sic), subject to validation papers, it could have been sold at that point? 2011.
>
> A. It was nearly complete. It did not have many of the functionalities activated because of shortcomings in the user interface. But all of the functionality was in the code. It had to be evaluated against experiment, against reality, and we had done a large portion of that with the unreleased version, which had to be repeated to produce a valid, a legitimate validation, we would have to take final release product and demonstrate all of the functionality that was in it and show that it agreed with experiment. (Emphasis added)

Cross-Examination of Raymond McHenry, Day 1, p. 112 1. 15 to p. 113 1. 6.

As stated above, nothing about this makes payment conditional on provision of validation documents.

87. At no time did Mr. McHenry say "the Agreement doesn't require me to perfoun validations" or "I'll only deliver validation papers if we execute a written agreement to that effect". Rather, it was apparently clear to everyone that Mr. McHenry was to perfoilu validation of his component in the ARAS software environment.

88. Notwithstanding the absence of validation documents, ARAS released its product. As Mr. Kennedy explained, ARAS was selling its software and conveying Mr. McHenry's promise that validation papers would be coming soon.

Examination in Chief of Mike Kennedy, Day 5, p. 125 11. 11-24.

This is inconsistent with the documentary record which shows ARAS as not telling customers that validation documents were coming, but that the product was fully validated.

Exhibit E, Tab 3A, ARAS Doc. No. 1.1087/1

L. MS refuses to provide validation

89. However, on November 1, 20-11 – for the first time – Mr. McHenry indicated that validation papers would be provided "once funds are transferred".

Exhibit "C", tab 16.

It is important to note the timing of this statement by MS; it was made following delivery of the final product by MS. McHenry advised ARAS the validation papers would probably be completed around mid-November, which was within the 30 day window McHenry stated was required to prepare the validation papers. Then ARAS made a series of specific promises in early November 2011 that more funds would be immediately paid to MS. When MS subsequently inquired why the funds were not wired ARAS added the stipulation of the 'validation papers' prior to payment. MS responded that the promised past due payment were required for MS to continue working with ARAS.

90. Given Mr. Kennedy's concerns, it is understandable that, in early November, he continued to follow up with Mr. McHenry on the status of the validation papers.

Exhibit "A", tabs 53 and 54.

91. ARAS was faced with a difficult decision – Mr. Kennedy did not believe that ARAS owed money to MS, but the concern was that if they didn't pay more to Mr. McHenry, he try and terminate the Agreement. They considered making the payment, but finally decided that they needed to first get the validation documents – which, according to Raymond McHenry, would be available shortly.

Examination in Chief of Mike Kennedy, Day 5, p. 128 1. 8 to p. 129 1. 9.

Exhibit "A", tab 55.

92. In his response, Mr. McHenry advised that "[w]ork has stopped". MS, of course, had no right whatsoever to stop work.

ARAS had no right to refuse to pay MS money that was due and owing under the Agreement. ARAS does not point to any provision of the Agreement in support of its claim that MS had not right to stop work. In fact, at this time MS had provided ARAS with MMIS, Collide 3D and Collide, and there was no agreement on the provision of validation papers, as Mr. Kennedy admitted during cross-examination.

Cross-examination of Mike Kennedy, November 19, 2013 (Day 6), p. 67, Q/A 156

93. He suggested that they schedule "binding arbitration", which would lead one to believe that the notice provisions and the dispute resolution mechanisms would then kick in, i.e. no right to terminate claimed

Exhibit "A", tab 56.

94. But that is not what happened.

M. Wrongful termination

95. On December 9, 2011, counsel for MS wrote to ARAS advising that the Agreement was terminated pursuant to clause 7.2.4 – explicitly on the basis of failing "to meet annual sales minimums".

Exhibit "A", tab 57.

The complete statement from the December 9, 2011, letter reads: "In particular, ARAS 360 has been notified on multiple occasions that it has failed to meet the minimum annual sales and to remit the minimum annual license fees required under section 10.2 of the Agreement".

96. According to Raymond McHenry, MS could have had the validation papers prepared within 30 days of release – at least two weeks prior to its purported termination – but that instead of providing those papers it stopped all work on the project and terminated the Agreement.

Cross-Examination of Raymond McHenry, Day 1, p. 113 1. 21 to p. 114 1. 6, p. 118 1. 15 to p. 119 1. 8, p. 120 1. 8 to p. 121 1. 4.

MS would not provide the papers because ARAS was refusing to pay MS money owing under the Agreement. To prepare the completion of the papers would require additional work by McHenry and given ARAS had not paid per the prior promises of $100,000 there was no assurance that had McHenry put in the time and effort to prepare the validation paper that ARAS would pay the promised past due amounts.

97. It was not simply a case where ARAS was left with an incomplete, non-validated product that it could no longer sell and had lost all of its investment to date and all of its future profits. In addition to that, MS was able to develop its software which it had developed on ARAS's dime, and upon termination it had all the tools it needed to forge a new partnership – and none of the obligations of a contract with ARAS.

ARAS created this situation by refusing to pay MS.

98. Ultimately, on February 6, 2012, ARAS, through counsel, advised MS that its wrongful repudiation of the Agreement was accepted with the result that ARAS was free to pursue damages for wrongful termination and for other wrongs committed by MS which were then emerging.

Exhibit 2.

N. <u>Impact of termination</u>

99. In his examination in chief, Mr. Kennedy explained the impact of the termination on ARAS:

Oh well, then I thought we'd -- if that happened, we would just be left in the lurch with an incomplete product, not validated, and having paid out $200,000 that we can't recover.

Examination in Chief of Mike Kennedy, Day 5, p. 130, 11. 14-18.

The evidence, and this submission, ignores that 260 copies of the Collide product were sold at random pricing established by ARAS and each sale included additional sales of the ARAS 360 environment which was required to run Collide. See Exhibit 7. ARAS had not lost their "investment". It had in excess of $3,725,000 in total revenue for 2011 and 2012: see Exhibit E, Tabs 4 and 5.

100. MS recognized that ARAS could expect to make sales had the Agreement not been terminated – but that those sales were put to an end by the purported termination – and that it would represent a lost investment for ARAS.

Cross-Examination of Raymond McHenry, Day 1, p. 102 11. 10-18, p. 122 11. 8-19.

This is not true. ARAS made 27 illegal sales after termination: see Exhibit 7.

101. This loss is precisely what occurred.

102. Mr. Kennedy outlined ARAS's typical sales closing rate. On average, 60% of customers who viewed a demonstration of the software would ultimately purchase the product from ARAS. However, of those customers who actively sought a quotation – or "order fom" – from ARAS, 90% purchased product.

Examination in Chief of Mike Kennedy, Day 5, p. 142 1. 21 to p. 143 1. 22.

103. For its ARAS Collide product – incorporating the MS component – sent out 132 order forms to customers who did not purchase the Collide product. ARAS made about 210 sales during this period – which, when considering alongside the unfilled order forms, is drastically below its typical sales closing rate. Mr. Kennedy spoke with various of ARAS's current customers seeking refunds and also potential customers deciding not to purchase. They advised Mr. Kennedy of two concerns: that the ARAS product was not validated, and also that they had learned of ARAS's dispute with MS.

Examination in Chief of Mike Kennedy, Day 5, p. 143 1. 23 to p. 148 1. 5.

Exhibit "C", tab 34.

This is hearsay.

104. For example, Mr. McHenry spoke with Wesley Vandiver, a member of the Orange County District Attorney's office. Mr. Vandiver advised Mr. Kennedy that he had seen MS's posting about ARAS on INCR.

Examination in Chief of Mike Kennedy, Day 6, p. 19 1. 24 to p. 211. 20.

Exhibit "C", tab 30.

O. ARAS scrambles to create alternative

105. In the wake of the termination, ARAS pushed on to find an alternative to the MS component.

106. In early 2012, Chamy began working on a new simulation component – the "ICATS" component – based on the original SMAC Fortran code. However, it took Chamy about a year – at ARAS's further expense – to complete, leaving ARAS without a simulation component to sell in the meantime.

Examination in Chief of Paul Hetherington, Day 7, p. 177 1. 2 to p. 178 1. 4, p. 180 11. 11-17, p. 183 11. 14-16.

ARAS seeks to blame MS when it is the author of its own misfortune, created by refusing to make promised payments.

P. MS perfectly placed to find a new partner

107. Meanwhile, in March, 2012, MS announced to the world that it had been talking to new software companies, and that it would have a product out in 3 to 6 months. MS also doctored articles posted on its website – as if its previous agreement with ARAS had never existed – while suggesting to readers that they were reading the originally published article.

Exhibit "B", tabs 4, 7 and 8.

108. In April, 2012, MS filed for copyright protection in the United States. In cross-examination, Mr. McHenry explained that, prior to his work with ARAS, the MS component had

never been commercially released – it was a prototype, to which he performed various refinements. In 2010 and 2011, these refinements had been accomplished while being paid by ARAS. In his copyright filing, Mr. McHenry described the code as "new and revised", and indicated a publication date of October 1, 2011.

Cross-Examination of Brian McHenry, Day 4, p. 44 l. 21 to p. 46 l. 3. Exhibit "A", tab 2.

Q. <u>Publications by MS</u>

109. Having positioned itself to move on, MS began its campaign against ARAS. MS published various statements about ARAS in a portion of its website set up explicitly for that purpose, available for the world to see. Mr. McHenry admits that members of the crash reconstruction industry visit MS's website.

Exhibit "C", tabs 21, 22, 23 and 25.

(See also Exhibit 21 and Cross-Examination of Brian McHenry, Day 8, p. 118 l. 13 to p. 120 l. 1.)

110. Beyond this admission, it is evident that members of the public, including those in the crash reconstruction industry, took notice of MS's postings about ARAS:

(a) Mr. McHenry exchanged emails with Wesley Vandiver, a member of the Orange County District Attorney's office. Mr. Vandiver also telephoned ARAS and spoke to Mr. Kennedy. Mr. Vandiver advised Mr. Kennedy that he had seen MS's posting about ARAS on INCR.

Exhibit "C", tab 30.

Examination in Chief of Mike Kennedy, Day 6, p. 19 l. 24 to p. 211. 20.

(b) Even now, more than one year since the earliest of these postings was made, these comments continue to be viewed hundreds of times.

Exhibit "C", tabs 31 and 32.

111. As if these internet postings were not enough, Mr. McHenry also wrote emails to various of ARAS's current and potential customers, as well as other unrelated parties, in which Mr. McHenry made a number of allegations, both explicit and implicit, against ARAS.

Exhibit "C", tabs 24, 26, 27, 28, 29 and 30.

(See also Exhibit 21 and Cross-Examination of Brian McHenry, Day 8, p. 120 l. 2 to p. 121 l. 14.)

R. MS commences proceeding in North Carolina

112. It is not disputed that the parties agreed to arbitrate their disputes under the Agreement. However – and despite that Mr. McHenry indicated on November 6, 2011 that arbitration should be scheduled – Mr. McHenry commenced civil proceedings against ARAS in North Carolina.

Exhibit "A", tab 56.

113. To commence those proceedings, MS filed a "Certified Complaint" Mr. McHenry swore that he had read the contents and that they were true.

Exhibit "B", tab 5.

114. Quite appropriately, ARAS sought a stay of the North Carolina proceeding so that the parties could proceed to arbitration in British Columbia On October 3, 2012, in the course of the North Carolina proceeding, MS sought and was awarded an interim injunction. On October 31, 2012, Judge Terrence W. Boyle of the North Carolina District Court granted the stay sought by ARAS, finding that not only did the arbitration clause in the Agreement apply, but also that the clause was broad enough to require that "all of plaintiffs claims must now be submitted to arbitration".

ARAS violated Judge Boyle's injunction and was found in contempt: see Exhibit A, Tab 62.

Exhibit "A", tab 61, pp. /401-405.

S. Integration of ICATS component

115. Meanwhile, despite the campaign against it, ARAS continued to develop its ICATS component. Upon completion, Chamy and Mr. Hetherington worked on integrating ICATS into another ARAS product, ARAS HD. This integration project – involving two of the three members of the ARAS-MS project – was completed in one or two months.

Examination in Chief of Paul Hetherington, Day 7, p. 181 1. 19 to p. 182 1. 12.

T. Arbitration commenced

116. On November 15, 2012, MS commenced this arbitration.

U. Motion in North Carolina for "continued contempt"

117. In the course of his evidence, Mr. McHenry advised the Arbitrator that MS had filed motions in the North Carolina proceeding for "continued contempt", but that the motions had not yet been addressed.

Examination in Chief of Brian McHenry, Day 2, p. 23811. 12-25.

118. On December 13, 2013, that motion was heard by Judge Terrence W. Boyle, and his order pronounced on December 20, 2013.

> ***McHenry Software, Inc. v. ARAS 360 Technologies, Inc.***, Case No. 5:12-CV-277-BO, N.C. Dist. Ct. Order, dated December 20, 2013.

119. At page 2 of his order, Judge Boyle set out the bases on which MS sought a finding of contempt: failure to provide MS a complete list of sales, and continued use of MS's property, the latter of which was concerned only with four "discrete events". MS sought fines of $111,000 – $1,000 per day since the initial order was made.

120. At page 3 of his order, Judge Boyle dismissed MS's first allegation of contempt:

> First, plaintiff has alleged that the defendant violated the preliminary injunction by failing to provide McHenry with a complete list of sales of the Collide software product. It is apparent to this Court that, although there were a few bookkeeping errors, ARAS did in fact provide McHenry with a list of sales of the Collide software in a manner that satisfied the contempt order. Although the parties may dispute exactly when all of the miscommunications were ironed out, by the time of the hearing in this matter McHenry had the sales information it wanted and there was no continuing violation of the contempt order. Further, as communications between the parties allowed McHenry to identify further allegations of the preliminary injunction, it is not apparent that there was actual injury caused by the alleged errors in the sales reports provided to McHenry. Therefore, plaintiff has not met its standard of showing by clear and convincing evidence that defendant violated the contempt order by failing to provide a complete list of all sales of the Collide software.

121. At pages 3-4 of his order, Judge Boyle found that the four "discrete events" of license reset – all of which were admitted by ARAS – were in breach of his earlier order. However, at pages 5-6, Judge Boyle also made the following findings

> It is also clear to this Court, however, that since the filing of plaintiff's show cause motions, defendant has engaged in a good faith effort to stop its violation of the Court's orders. Defendant has stopped its practice of resetting license keys and has informed all of its customers that it will supply them with an ARAS product that does not contain the Collide software. Within five months, no ARAS customer will be using Collide. [DE 49]. Therefore, it is apparent to this Court that there is no ongoing violation of any of its orders.

122. Judge Boyle ultimately agreed with ARAS's submission that a fine be limited to $4,000 – $1,000 per discrete event. It should be noted that Judge Boyle specifically referred to a breach of his Order – not a breach of the Agreement.

123. At page 5, in refusing to award "attorney's fees" to MS, Judge Boyle made the following further findings:

However, the maxim "he who seeks equity must do equity" applies here. This dispute has been acrimonious and lengthy. Arbitration is currently proceeding apace in British Columbia, Canada. The parties have been unable to cooperate and resolve relatively simple matters without this Court's involvement. Plaintiffr repeated refusals to work with the defendant and efforts to involve the Court are not to be rewarded nor encouraged As such, the Court will not award attorney's fees. (Emphasis added)