UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 3

BLIZZARD ENTERTAINMENT, INC.,	:	
Respondent,	:	
-and-	:	03-RC-299607
COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,	:	
Petitioner.	:	

PETITIONER'S POST-HEARING BRIEF

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PRELIMINARY STATEMENT

Petitioner Communications Workers of America petitioned to represent all full-time and regular part-time Associate Test Analysts ("ATA") and Test Analysts ("TA") employed by Blizzard Entertainment, Inc., ("Employer") reporting to its Albany, New York location, including those working remotely. The Employer's roster lists these titles, and no others, as comprising the Quality Assurance Department (PX-1; Tr. at 359). The petitioned-for unit excludes managers, professional employees, guards, and supervisors (BX-2, ¶¶ 7-8).

The Employer contends that employees in its Art (which includes animation and audio (Tr. at 411-412), Design, Production, and Engineering Departments must be included as well in order for the petitioned-for unit to be an appropriate unit. The Employer does not advocate for the inclusion of its Information Technology Department, even though that department is also located in Albany and employees within it are assigned to work on the Diablo franchise (BX-5 (Amended RSOP does not include the IT department)); PX-1 (IT Department employees are located in Albany and assigned to Diablo).

The Employees in the Engineering Department, included in the Employer's list of titles necessary to complete the smallest appropriate unit, are 2(12) professionals and must be excluded as such. The Employer stipulated that employees in the title Senior Software Engineer I and Senior Software Engineer II are professionals and thus excluded (Tr. at 586). The titles remaining in controversy under 2(12) are Associate Software Engineer; Associate Software Engineer, Gameplay; Software Engineer; Software Engineer Co-op.

Under the Boeing analysis, the petitioned-for unit of ATAs and TAs is appropriate because its members share a community of interests with each other that is sufficiently distinct from the interests of employees in the Employer's other departments. Region 18 has recently

found a unit almost identical to the petitioned-for unit to be an appropriate unit. The only relevant distinction between the facts underlying the Region 18 DDE and the instant case is that in Region 18, the ATAs and TAs were "embedded," or reassigned from the QA department to other departments. Here, ATAs remain in the QA department and, when in person, the ATAs have their own room where no other employees are assigned to work (Tr. at 156). Thus, the facts here more compellingly support an appropriate, separate unit for the QA department in Albany.

The Petitioner respectfully requests that the Regional Director approve the petitioned-for unit and direct a mail ballot election conducted as soon as practicable.

Employer Operations and Organization

The Employer, Blizzard Entertainment, is a subsidiary of Activision Blizzard. The Employer makes video games. Previously, the Employer's Albany office was a subsidiary of Activision-Blizzard known as Vicarious Visions, which was merged with Blizzard in January 2022 (Tr. at 70-71.) Its Albany office is dedicated to the Diablo franchise, developing and testing two games: Diablo II Resurrected ("D2R") and Diablo IV ("D4") (Tr. at 72.) Five ATAs are assigned to D2R and fifteen are assigned to D4 (Tr. at 73.) There is at least one QA employee in Albany who does not work on the Diablo franchise – Patrick Horaczek, a TA who works on World of Warcraft. (Tr. at pp. 42-43).

The Employer organizes its Diablo workers into six departments:[11] (A) Engineering; (B) Art; (C) Production; (D) Design; (E) Operations; and (F) Quality Assurance (PX-3; Tr. at 53-54.)

[11]The Employer attempted to argue that employees fell into "disciplines" not departments, but witnesses repeatedly referred to department, illustrating that the employees understand that to be the structure. While Animation and Audio are sometimes referred to stand alone departments (see PX-2), testimony established that they are nested under Art.

The Engineering, Art, Production, and Design departments create the game (Tr. at 76); the QA department tests the game and its components. Employees in Engineering, Art, Production, and Design are considered "developers" or "devs" (Tr. at 76); the QA department does not develop the game and are not considered developers. ATAs test the functionality of that which has been developed. The Employer's organizational chart illustrates how wholly separate the Quality Assurance department is from the rest of the Employer's operation. The employees in that department answer to no less a personage than the Employer's CEO. The chart shows that quality assurance at no point in the structure combines with the other departments under the CEO (PX-3).

The Employer's production of video games can be broken down into phases: concept, pre-production, production, alpha, beta, launch, and post-release. Right now, Diablo II Resurrected is post-release and Diablo IV is being beta tested (Tr. at 507). Because ATAs test a game and its components, they do not work on a video game until a feature or version of the game is completed. Their "role and responsibilities are to . . . test the game . . . [by] finding bugs or defects, problems, issues within the game" (Tr. at 73). A separate department, not QA, fixes the bugs. At the Employer, all ATAs and TAs were temporary employees on contracts of limited duration prior to July 1, 2022 when they were converted to regular full-time (Tr. at 57, 65). The other departments have their heaviest workload as the game in development approaches a milestone like friends and family testing. The QA department gets its greatest caseload when that development is completed (Tr. at 507-508).

Petitioned-for Employees: Quality Assurance Department

Unlike developer titles, employees in the Quality Assurance department play the games

that are developed by the other departments. They identify and document problems, or bugs, that need to be fixed in order for the game to work properly. Test Lead Razzano refers to the ATAs as "testers" (e.g., Tr. at 75, 153) not developers, the generic name for all other titles. This important distinction was reinforced by multiple witnesses. At the time of this hearing, all of the non-supervisory employees in the Quality Assurance department at the Albany location hold the ATA title (EX-1).

The QA department is headed by Manager Shannon Johnson and Test Lead Razzano.[22] ATAs are not required to have any specialized education; managers can hire ATAs with no more than a high school diploma (Tr. at 147), though a bachelor's degree and some experience is preferred. (EX-2, pp. 1-2.)

The ATAs receive on-the-job training that is distinct from the "onboarding," or initial training, received by other employees. In that training, management explains to the new employee what quality assurance is, what is required by the QA department, and about D4 (Tr. at 148). The training is QA-specific and can last "anywhere from a few days to a week." (Tr. at 148). Manager Johnson explained that employees "who are not in QA would not receive QA-specific training . . .they wouldn't go through the same process we do" (Tr. at 148). Unlike developers who are paid to develop not to check the gaming experience, QA training consists mainly of playing the game (Tr. at 105).

ATAs and Team Lead Razzano report to Johnson, but no other worker outside the Albany QA team reports to her (Tr. at 149). Johnson reports to QA Department Test Director Kevin

[22]The Employer's organizational chart lists Johnson as the manager to whom all of the ATAs report and Razzano as reporting to Johnson but having no one who reports to him.

Hoiland, who is not based in Albany but at Blizzard headquarters in Irvine, California. (Tr. at 149). Hoiland reports to the Vice President of QA, Wladia Summers. Summers reports directly to the CEO of Blizzard (Tr. at 149-150). Beneath the CEO, the QA lines of supervision do not cross with any other department. All development departments, unlike QA, report to the Franchise General Manager, Diablo, before reporting to the CEO (PX-3).

The primary duty of the ATA is use the JIRA program to find and report bugs in D2R and D4. ATAs are assigned to teams focusing on particular aspects of the game. They do not get involved until the production stage (Tr. at 94). Certain ATAs are appointed as Subject Matter Experts ("SME") who lead the team of ATAs working on a particular feature of a specific game (Tr. at 105, 118, 512). Other ATAs are assigned to support an SME. However, all ATAs including the SMEs help out the ATAs on other teams as needed (Tr. at 118).

ATAs get their work assignments through a communication platform known as "Slack." Slack has "channels," which permit a business to create groups whose members can message and share files with one another (Tr. at 82-83). Each ATA's workday starts with checking Slack and emails when they arrive. The Quality Assurance Department then has a morning "scrum" or meeting where "the QA members gather and review any pertinent information that needs to be shared across the team, any updates, any requests . . ." or anything blocking the performance of their work. Only members of the QA department attend the daily scrum. Then, SMEs may move on to scrums or standups (another meeting) with developers. These are held less frequently (e.g,, Tr. at 500.) The only reason the SME ATAs participate in these meetings is "to hear . . . any information . . . they might need for their day-to-day tasks" (Tr. at 154). Support ATAs rarely interact outside the QA department.

Next, the SMEs and ATAs go on to test, "the main focus of their responsibilities" (Tr. at 154). They perform tasks aimed at finding bugs in the game and writing up the bugs so that devs can resolve them. HR Manager Nadine Folkman, who is responsible for Diablo human resources for all teams except QA (Tr. at 39), listed the three methods of testing that ATAs perform. First, ATAs do verification testing which takes documentation, or test cases, provided to QA by the developers to check if the game is working properly, especially around milestones (Tr. at 496). Test cases are stored in management software called TestRail or in Excel (Tr. at 77). Second, ATAs use confirmation testing to determine whether bugs fixed by the developers are actually fixed (Tr. at 77). ATAs also check whether a bug fix has caused additional issues, or halo testing (Tr. at 78). The third method of testing ATAs engage in is ad hoc or exploratory testing. ATAs play the game to see if any issues arise and determine whether the game is operating as intended (Tr. at 78, 493). The ATAs also address any requests for testing that arise during the day. Any requests an ATA has for assistance goes through the team SME or Razzano or Johnson (Tr. at 155). ATA daily work remains the same as it did prior to the transition from temporary contract worker to full-time employee (Tr. at 490).

ATAs are responsible for writing up bug reports in JIRA. These reports, when written by an ATA, have detailed reproduction steps on how to recreate any issue discovered through testing. ATAs attach data and send the report to "relevant developers . . . it is [the developer's] job to determine how to fix it" (Tr. at 493). JIRA is the software used for ATAs to report bugs (Tr. at 73); if developers have occasion to report a bug, they use a different in-game bug reporter than do the ATAs (Tr. at 493).

SMEs have the same responsibilities as other ATAs with the addition of being the main

point of contact with the subject matter area (e.g., Audio), creating and maintaining the necessary documentation related to testing performed by the ATAs in the subject matter area (Tr. at 495-496). SMEs develop the tests to be performed on game aspects around milestones (Tr. at 496). All ATAs use computer programs Confluence, Miro and Microsoft Word for these tasks (Tr. at 496).

ATAs cannot substitute for and perform the job of any other title. ATAs will volunteer without pay to assist another department in order to gain experience in the area, as ATA Amanda Laven did in Audio (Tr. at 562, 575). Temporary transfers are extremely rare. The Employer cited the case of Ryan Claudy who recently volunteered to perform work in the production department. He was paid as an ATA during that time (Tr. at 162). Claudy's collaboration with production, however, was limited to "attend[ing] meetings that he was mostly already in" and "he took notes" (Tr. at 161). The Employer had no other example of anyone other than Claudy who only did this recently. Razzano, employed since 2013, could only name himself as someone who had temporarily transferred from QA to another department. His transfer was so long ago that he could not remember the year (Tr. at 291-292, 340). Other than Razzano, transfers do not occur and ATAs must apply anew, as would anyone from the street, if they want to move out of the QA department (Tr. at 54-55).

The only thing that ATAs really share with other Blizzard employees is the same benefit package (EX-3; Tr. at 41). In every other way, the ATAs are treated as a distinct and inferior group. Historically (prior to July 1, 2022), they were contractors who had no job security or benefits. Now, they are paid on an hourly basis, and as a group, are by far the lowest paid employees in the Albany location. According to Johnson, all ATAs (whether SMEs or support

ATAs) are paid $20.19 an hour (Tr. at 162-163). Each and every full-time ATA employee earns a paltry $41,995.20 per year compared to the lowest paid of the other titles, the Associate Narrative Designer and the Production Coordinator, who earn a minimum of $48,600 and as much as $77,850 (PX-4). Salaried titles, comprising 24 of the 57 titles the Employer argues should be packed into the smallest appropriate unit, can earn as much as $224,100 per year (Principal Artist 1) and no less than $90,900.00 (all senior salaried titles)(PX-4). All ATAs, whether or not they serve as SMEs, earn $20.19 per hour. Other titles, like designer titles, are broken down into associates (the lowest paid) up to seniors, enabling different pay rates to reflect seniority, merit, or other value to the Employer.

The QA department is a separate, distinct group with its own community of interests and is treated as such by the Employer.

Excluded Departments and Classifications

The Employer argues that the only appropriate unit must consist of all Albany employees who work on the Diablo franchise. As previously noted, the Employer is not arguing for a facility-wide unit, as there are several Albany-based employees working on games other than Diablo (Tr. at 42-43; 409) and the IT department. Further, the Employer seeks to exclude employees in the Information Technology department, even though those employees are based in Albany and support the Diablo franchise.

The titles the Employer seeks to include are all developers in the Engineering, Art, Design, and Production departments. Unlike the employees in these four departments, QA ATAs are not considered "developers," and one of management's witnesses acknowledged that there is a "stigma" around being in QA (Tr. at 397, 403-04).

Most titles in the developer departments have three levels – the entry level position is designated "associate," and the most advanced level is designated as "senior." For example, there is an associate game designer, game designer, and senior game designer. Below is a brief description of the four developer departments and some of the job titles in each.

Design Department

The Design Department designs the game, including the concept, rules, and systems of the game. "The Design Department is responsible for setting up the systems, the game mechanics, the way [] the combat works, [] how the characters function" (Tr. at 427-28). This includes audio design (Tr. at 428). For example, with respect to character design, "the designers may be creating systems that are for the powers [which] are used to deal damage in the game or create some kind of interaction with the game…" (Tr. at 429).

Game Designer

The job of the Game Designer (including "associate" and "senior" game designers) is to make up the rules of the game (Tr. at 222). Various types of game designers work on different aspects of the game such as "Store," "Quest," "Tech," "Encounters," "World Design," and "Event." The Associate Game Designer earns between $56,250 and $90,000 annually (PX-4). The various types of Senior Game Designer can garner up to $175,050 annually (PX-4).

Sound Designer

The Sound Designer "will create sound effects and implement them into the game" (Tr. at 229). For example, if a character swings a sword, the Sound Designer implements the sound the sword makes. The Sound Designer records the sound, masters it, and then inputs it into the game (Tr. at 229). Sound Designers may also implement voiceover lines, such as dialogue between

different characters, including dialogue triggers and specific sounds effects (Tr. at 229). Senior Sound Designers make between $90,900 and $175,050 annually (PX-4).

Narrative Designer

A Narrative Designer creates the story that occurs within the context of the game and implements text, providing "flavor" to the story. Descriptions of items that the character encounters is written by narrative designers as is dialogue between different characters (Tr. at 233). The Senior Narrative Designer earns between $90,900 and 145,350 annually (PX-4).

Writer

The Writer is specifically tasked with creating content (Tr. at 242). According to Razzano, the Writer does not interact with the ATAs. The closest intersection is when an ATA writes a bug that addresses the storyline. Even then, the Writer has no direct communication with any ATA (Tr. at 242-243). The Writer's job requires artistic abilities and training, not the technical skills of the ATA. QA Manager Razzano does not know the Writer's name and has never worked with him, illustrating the limit of contact between the titles (301). In his near decade with Blizzard and its predecessors, Razzano only worked with the Writer one time and that was at least six years before he testified in this proceeding (Tr. at 328). The Writer is paid hourly, with an annual total of 62,780.00 - 100,440.00 or between 149% and 239% more than the ATAs earn.

Senior Systems Designer

Systems Designers create the method of gameplay for a character (Tr. at 237). This includes the method of character progression and the interactions between the character and the environment. Systems Designers determine how to measure a player's score. "[E]ssentially,

they're designing the score and progression and combat systems, the way that the character may receive… in-game currency and then be able to spend that in-game currency, the rates at which they receive these rewards and the penalties that they may experience for failing at a game objective" (Tr. at 237). The Senior Systems Designer earns between $90,900 and 145,350 annually (PX-4).

Art Department

The Art Department is responsible for "anything that's visual" (Tr. at 428). This includes "creating the models for the characters and objects" and "animating the environment, the characters, [and] the user interface" (Tr. at 428). For example, with respect to character art, "the artists would be making the effects so that they read well or they read as the power is intended, and so if the power is to cast a fireball, the artists are the ones that are creating the fireball that is casted" (Tr. at 429). The Art Department includes Animators, who enable the art assets to move through the environment of the game.

Character Artist

A Character Artist creates the individual 3D models of the characters themselves (Tr. at 252). A Character Artist earns between $69,750 and $111,600 annually; a Senior Character Artist earns between $90,900 and $145,350.

Technical Rigger

The Technical Rigger implements the way in which "a 3D model will move depending on the inputs of an animator" (Tr. at 241). "[I]f you imagine a character on the game screen with arms and legs, the rigger will be making digital connections between the elbow and the wrist and the hand and the fingers in order to let the [] animators move [] those pieces of the model around

in an animated way to provide that kind of animation that is needed to communicate to a player what's happening in a game" (Tr. at 241). The Technical Rigger earns between $69,750 and $111,600 annually (PX-4).

Senior Animator II, Gameplay

Animators take the 3D models created by the Character Artists and rigged by the Technical Riggers and create the movement of those 3D models within the game. For example, "if a character needs to walk over to something, an animator will move the legs to walk them" (Tr. at 248). Once the movement has been recorded, "it can be played [] in any context the designer might want" (Tr. at 248). The salary range for the "Senior Animator II, Gameplay" title can be as high as $175,050. (PX-4).

Cinematics Layout Artist

A Cinematics Layout Artist "provides the broad strokes of what should happen during a particular cinematic." (Tr. at 263) The product of the work is like that of a film storyboard artist. The Cinematics Layout Artist creates a drawing showing the broad strokes of what is supposed to happen in the cinematic. The drawing is then spliced into an "animatic," which is a timed sequence of images and sound. This provides a rough draft of the actual cinematic that ultimately will be produced by the cinematics team (Tr. at 263-64). A Cinematics Layout Artist earns between $69,750 and $111,600 annually.

Senior Technical Artist I, Character

Technical Artists make tools and other assets for the artists. Technical Artists assist in creating processes and rendering platforms and can also help come up with solutions for optimization of characters in-game. Technical Artist develops other ways to present the art and

implement it in game causing less of a drag on game performance (Tr. at 272). The only Technical Artist working in the Albany Diablo franchise is a "Senior Technical Artist I, Character." This title earns between $90,900 and $145,350 annually.

Engineering Department

The Engineering Department implements the art assets and design features created by the Art and Design Departments by translating them into computer code in the game engine. Engineers "build[] the engine we use" and "the exact features and functionality at a technical level." They "write the software [] that powers our games" (Tr. at 455). This work requires advanced computer language skills. Employees in the Engineering Department are 2(12) professionals. Whereas "designers create the design [,] the engineers [] write the code in order to make that design function" (Tr. at 429). Many art department products, including "visual simulations, rendering, the way that your asset actually is put into the game, all those things usually have some set amount of code that interacts with those assets" (Tr. at 431). The Engineering Department writes that code (Tr. at 431).

The job function of ***all*** of the employees in the Engineering Department consists of "writing software" (Tr. at 473). The delineation between the various engineering titles simply comes down to "the complexity of the code that we're expecting somebody to write and the area in which they focus" (Tr. at 473).

Software Engineers

An Associate Software Engineer is the junior title and they "primarily work[] on smaller areas of the code in the game, and they're going to be typically taking more direction from a more senior person on the team…" (Tr. at 468-69). The salary range for this title is $60,750 to

$112,500. The salary range for the more advanced title "Software Engineer" is $87,190 to $139,500 (PX-4).

Production Department

The Production Department's role is project management or ensuring that the other departments complete their tasks on schedule. It "support[s] the flow of work and ensur[es] that [all the other departments are] able to get work done without barriers" (Tr. at 456). Employees in the Production Department "mak[e] sure that we are keeping the project on schedule and [] manag[e] all of the developers" (Tr. at 409). Barry Morales, a Principle Game Producer and one of the leaders of the Albany Production Department, testified that he really only works with the three other developer departments: "When I say developers, as far as for who we manage, I'm talking about [the] Art department, Engineering department, [and] Design department" Tr. at 410). He emphasized, "by every department, I mean, design, engineering [] and art (Tr. at 411).

The entry level position in the Production Department is the Production Coordinator (Tr. at 422). Above the Production Coordinator is the Associate Producer, and then the Game Producer (Tr. at 422). The Support Technician is also in the Production Department (PX-2).

Game Producer

The Game Producer helps identify and schedule the work necessary to create different features of the video game and eventually the game in full (Tr. at 274-75). The salary range for an Associate Game Producer is $56,250 to $90,000; for the Game Producer, it is $69,750 to $111,600 (PX-4).

Production Coordinator

The Production Coordinator "assists with the role of production by being a

communication facilitator and [] an organization helper" (Tr. at 276). "A production coordinator will help to schedule work by setting up meetings, by taking notes during meetings, by being knowledgeable about which members of the team are engaged in which tasks, and by helping to communicate the direction of the producers, and coordinating between the different teams with regard to providing dependencies, helping identify dependencies, and making requests of other teams to provide assets for dependency work that needs to occur" (Tr. at 276). The Production Coordinator earns between $48,600 and $77,850 per year (PX-4).

Support Technician

The Support Technician handles hardware for Blizzard. The Support Technician is a "facilitator[] of . . . all things IT" (Tr. at 240). The job description places this job in the Production Department (PX-1; EX-2, Bates 085-086), although testimonial evidence indicated that the job responsibilities are more like those of the excluded IT department. He is the worker who places computer monitors on desks and runs cable to connect networks in the Albany office (239-240). No specific testimony was elicited to indicate that he worked on software in any way. He does not write bugs or work on computer games. He moves furniture (300) and sets up computers for new employees (478). He interacts so rarely with the QA department that First Line Manager Razzano does not even know the Support Technician's name (300). The Support Technician is paid hourly, with an annual total of $80,210.00 - 128,340.00 or between 191% and 305.61% than the ATAs earn.

ARGUMENT

1. The Petitioned-For Unit is an Appropriate Unit.

To determine whether a proposed unit is appropriate, the Board first considers if the petitioned-for employees share a community of interest. The Boeing Co., 368 NLRB No. 67 (2019). If the petitioned-for unit is appropriate, then the Board's inquiry is complete and no other possible unit need be considered. Id., slip op. at 3; see also R & D Trucking, 327 NLRB 531, 533 (1999) (the Board generally favors the smallest appropriate unit that encompasses the petitioned-for employees).

To determine whether the petitioned-for unit has shared interests, the Board assesses whether the employees in the unit (i) are organized into a separate department; (ii) have distinct skills and training; (iii) have distinct job functions and perform distinct work; (iv) are functionally integrated with other employees; (v) have frequent contact with other employees; (vi) interchange with other employees; (vii) have distinct terms and conditions of employment; and (viii) are separately supervised. Id. (citing United Operations, 338 NLRB 123 (2002); see also Wheeling Island Gaming, Inc., 355 NLRB 637, 637 fn. 2 (2010)). No single factor is controlling; the Board considers all factors together. Airco, Inc., 274 NLRB 348 (1984).

Next, the Board next considers whether employees excluded from the petitioned-for unit "have meaningfully distinct interests in the context of collective bargaining that outweigh similarities with unit members." Boeing citing PCC Structurals, Inc., 365 NLRB No. 160 (2017).

Finally, the Board considers any industry specific guidelines, which do not exist in the gaming industry. Activision Publ'g, Inc., No. 18-RC-289570, 2022 NLRB Reg.Dir.Dec. LEXIS

74, Slip Op. 22-23 (2022).

Under the test articulated by the NLRB in Boeing and in PCC Structurals, the petitioned-for unit is appropriate. Region 18 has already directed an election under almost identical facts in Activision Publ'g,, 18-RC-289570. Here as there, the ATAs share a community of interests with one another that is distinct from that of other employees of the Employer.

A. Shared Interests Within the Petitioned-For Unit

All ATAs have the same basic skill set. They have the same training which is distinct from the training of any other title. The ATA's main function is to test the game, identify and record bugs in a specific manner in JIRA, and validate bug fixes implemented by developers. ATAs have their own daily meeting and communicate with one another through a dedicated Slack channel. They cover each other's work as necessary. They all report up the same line of supervisors, who do not supervise any other title under the CEO level.

When working in-person, ATAs have their own physical space that is distinct from the physical space of other employees. They substitute for each other but not for any other title. The Employer had to scramble for even one example of an ATA being temporarily assigned work of another title, and he could detail only note taking as distinct from the work the ATA did when he attended meetings as an ATA.

ATAs all earn the same hourly pay, which is at least $6,604.80 annually lower than the lowest possible pay for any other title (PX-4). No other employee of the Employer earns the ATA's $20.19. Therefore, the ATAs share an internal community of interest and the first prong in the Boeing analysis has been sufficiently met.

B. Distinct Interests Between ATAs and Other Classifications

(1) Departmental Organization

In Activision Publishing, Region 18 observed that "[a]n important consideration in any unit determination is whether the proposed unit conforms to an administrative function or grouping of an employer's operation" 18-RC-289570, p. 17, citing Buckhorn, Inc., 343 nLRB 201, 202 (2004); American Cyanamid Co., 131 NLRB 909 (1961). Here, ATAs remain in a physically and operationally separate department tasked only with the job of quality testing the Employer's games. ATAs, unlike the other job titles, do not create content. ATAs do not have a dual reporting structure as in the Wisconsin case. Clearly, the petitioned-for employees comprise a distinct grouping within the Employer's Albany operation.

(2) Distinct Skills and Training

Employees in the petitioned-for unit can be distinguished from excluded employees by their duties and skills. Specifically, to support the conclusion that the petitioned-for employees have a similarity of skills, they must "meet similar requirements to obtain employment, [] have similar job descriptions, [] receive similar employer training, or use similar equipment" to perform their jobs. Activision citing Casino Aztar, 349 NLRB 603, 604-05 (2007).

Here, the ATAs all have the same position which means they have the same requirements for obtaining employment and the same job description. As explained by Manager Johnson, they receive the same training that is tailored to the individual ATA's need but distinct from the training given any other title. Positions within all other departments require significantly more experience than ATAs. For example, associate titles (the least experienced employee in a job title (Tr. at 342) of any other position must come with greater qualifications. The Associate Game

Designer, World must have "2+ years of experience in game design or related development experience; working with visual and test-based scripting languages to author game content; and blocking out or prototyping in 3D game space" (EX-2, Bates 13-14). The Associate Dungeon Artist requires a portfolio demonstrating their artistic skills (EX-2, Bates 10). The Associate Game Producer needs two years of game production experience and familiarity with game development processes and pipelines (EX-2, Bates 18-19). The Engineering Department is looking for engineers; even the Associate Software Engineer must be fluent in at least one computer language and preferably have a degree in computer science (EX-2, Bates 25-27.) According to Engineer Bukowski, the only person in his department who does not have an engineering degree is a Senior Software Engineer, who has been removed from the Employer's proposed unit by stipulation (Tr. at 482-483; 585). To be an ATA, one does not need any college degree and may never have done QA work before (Tr. at 148). The Employer does not require a portfolio as in the Art Department (EX-2) or any experience with computer languages or scripting as do the other departments. Therefore, the QA department has distinct skills and training.

(3) Distinct Job Functions

The petitioned-for unit can be distinguished from the employees to be excluded based upon job functions. The ATAs do not perform the same duties and there is little overlap in duties betweem the petitioned-for employees and those excluded and ATAs do not substitute for employees in other job titles. Developers and ATAs do not work together as a crew. Instead, ATAs operate more like technical janitors, who clean up details when the highly compensated developers are done. However, they are not even tasked with the cleaning up do the cleaning up;

they simply mark the spills.

The distinction between ATA function and developer function is fundamental. The developers create the game and the ATAs test what is created. ATAs work up testing protocols, test, write up bugs in the specific way instructed, and verify that fixes implemented actually fix the problem without causing additional problems. Only ATAs work by playing the game (ad hoc testing). ATA work occurs after the developers develop something and only continues after the developers alter creations. The overlap is nothing more than a handoff with an explanation. As observed in Activision, "QA testers' work does not regularly overlap with those of other classifications" (Slip Op. at 19). Yet another factor of community of interest analysis favors an election in the petitioned-for unit.

(4) Functional Integration

Employees are functionally integrated when they "work together on the same matters, have frequent contact with one another, and perform similar functions" (Activision at 19, citing Transerv Systems, 311 NLRB 766, 766 (1993)). For probative value, functional integration must involve contact among the employees in the disputed unit. Here, the ATAs are fully functionally integrated with each other in the Quality Assurance department. The ATAs are only nominally integrated with development department employees and therefore do not share a community of interests.

As the QA testers in Activision, ATAs here are only integrated in "the broadest sense" because they, like developers, are involved in the "overall process of producing video games." Id. However, again like Activision QA Testers, the ATAs perform the separate and distinct function of testing, not of developing. ATAs work together to test. They communicate with the

development departments but the procedure is essentially a passing off of the product for a different process not a collaboration on a particular function. ATAs do all the serious testing of the game and none of the developing of the game, which is the task of the other departments. Manager Razzano, who testified that ATAs worked with the developers, could not, in many cases, name those developers with whom he supposedly worked or relate any specific incident of interaction (e.g., Tr. at 307-308). The ATA's job is functionally distinct because it occurs in a different space from that of developers – after development. Functional integration is limited.

(5) Frequency of Contact Among Employees

Determining the frequency of work-related contact among employees looks for the amount of interaction between the employees in the petitioned-for unit and those excluded. Casino Aztar, 349 NLRB 603, 605-606 (2007). Most ATAs work with their SME and with other ATAs to identify and write up bugs and to verify bug fixes. ATA Amanda Laven, who is assigned SME responsibilities, is the QA contact for the audio team of developers. SMEs have more contact outside the ATA group than do other ATAs. Laven has a weekly meeting with the developers who work on audio and another weekly meeting with all the employees who work on D4 (Tr. at 497, 501). Her daily meetings are with QA, in and out of the Albany office (Tr. at 497, 499, 501). Most of her day, like that of all the ATAs, is spent testing the game. Although the bugs she enters into JIRA are forwarded to a developer, that process does not regularly require actual contact between the ATA and the developer. Most ATAs have even less contact than Laven.

According to former ATA and current developer Chris Mullin, QA employees are "mostly kept . . . to your own room and . . . it's hard to get out and communicate with others" (Tr. at 399). ATAs in Albany and beyond have organized into a group called Shift Left to bring ATAs

"into the conversation" (Tr. at 399-400). Other than stating that the Employer was "responsive," Mullin gave no specifics of how ATAs had become more involved with game development (Tr. at 401.) In fact, the only frequent contact between the groups that Mullin described was that ATAs wrote up bugs in JIRA and those write ups were sent on by the computer system to developers who fix the bugs (Tr. at 390-391). Thus, ATAs work with ATAs, showing a community of interest even greater than that of QA Testers in the Activision Wisconsin DDE.

(6) Interchange

When temporary work assignments or transfers occur between departments, those employees are considered interchangeable. "Frequent interchange 'may suggest blurred departmental lines and a truly fluid workforce with roughly comparable skills." Activision quoting Hilton Hotel Corp., 287 NLRB 359, 360 (1987). Scant interchange between petitioned-for and excluded employees indicates that the petitioned-for unit is appropriate; frequent interchange points in the other direction.

Here, the Employer was able to unearth only two examples of interchange. One occurred for a month in Razzano's distant past, the dates of which are lost in his memory. The second was more recent, but appears to have the ATA who temporarily worked with the Production Department doing no more than taking notes for the team. It is likely that after losing the Region 18 case, the Employer scrambled to create the appearance of interchange in Albany following the filing of the instant petition. It failed to do so. This is not the type of interchange that indicates the petitioned-for unit is not an appropriate unit.

On a daily basis, ATAs perform ATA work only. They do not even get involved in a project until the developers have a program, however elementary, up and running. They test

quality. They document bugs for others to fix but do not ever fix bugs themselves. The ATAs are kept separate and do not perform the work of developers. The QA department is kept so separate from the developers that the QA employees created their own industry group in the hopes of being brought "into the conversation" (Tr. at 399).

The Employer listed only four employees who permanently moved from other departments to the QA department (EX-4). Each of the four "went through the standard process of applying and interviews" as if they were hired from the street (Tr. at 120-121). Being an ATA is far from being a direct pathway to a developer's job. Laven testified that she had applied for an audio design position on the Diablo IV team but did not get the job (Tr. at 535). Thus, when an ATA moves to another position at the Employer, it is treated not as a transfer but as a new hire (Tr. at 59).

Although ATAs are occasionally hired for other jobs at the Employer, that movement leads in only one direction: out of the QA Department. As stated in Activision, citing Lehigh Valley Hospital, 367 NLRB No. 100, slip op. at 8 (1989), "[t]he Board does not find evidence of one-way or permanent interchange particularly persuasive." Twenty-seven year Blizzard Human Resources veteran Nadine Folkman did not know of even one transfer from any other position to the QA Department (Tr. at 63).

Thus, the interchange factor favors a separate unit for ATAs.

(7) Terms and Conditions of Employment

This factor of the community of interests test looks at similarity in wages and method of payment (hourly or salary), benefits, work rules, hours of work, and employee handbook. The Activision DDE cited Overnite Transportation, 322 NLRB 347 (1996), for the principle that

common benefits, work rules, and wage ranges do not lead to the conclusion that a community of interest exists between a petitioned-for unit and other employees when they "are separately supervised, do not have sufficient interchange, or work in physically separate area[s]." Activision at 21.

As in Activision, the ATAs here share the same policies, benefits and common core schedule with the developers. However, the petitioned-for group here is paid significantly less than any other title. Unlike the other titles, ATAs do not have a pay range. Each and every ATA makes $20.19 per hour or $41,995.20 per year. The lowest annual pay range for any other employee is $48,600, or $6,604.80 more than the ATAs earn. ATAs are all hourly; 41% of the excluded titles are salaried. For the terms of employment that matter, ATAs are in a different universe than the excluded titles.

(8) Common Supervision

The supervision of ATAs could not be more distinct from that of other employees and have both groups still work for the same employer. The organizational chart shows that the QA reports do not merge with the development department at any point beneath the CEO (PX-3; Tr. at 38-39). Human Resources even assigns a different manager to oversee the QA Department (Tr. at 39). This factor, as the others, weighs in favor of treating ATAs in the QA department as distinct from other employees of the Employer.

2. Employees in the Engineering Department are §2(12) Professionals and Must be Excluded.

Employees in the Engineering Department not only do not share a community of interests with the petitioned-for titles but also they are professionals as defined by §2(12) of the Act. Section 9(b)(1) establishes that "[t]he board shall not . . . decide that any unit is appropriate . . . if

such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such a unit[.] See also Leedom v. Kyne, 249 F.2d 490, 492 aff'd 358 U.S. 184 (1958). The unit advocated for by the Employer runs afoul of this rule.

Under Section 2(12), professional employees include:

> (a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; or
>
> (b) any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).

All of the Engineering Department employees meet this definition. The Employer has agreed that employees holding the title Senior Software Engineer I and II are excluded (Tr. at 585). The remaining titles at issue here are Associate Software Engineer, Associate Software Engineer Gameplay, Software Engineer, and Software Engineer Co-op.

The Software Engineer Co-op is the lowest ranking of the engineering title and receives a correspondingly lower pay (PX-4). This title is designed for students "[c]urrently enrolled in a Bachelors or Master's program in C[omputer] S[cience], Game Development or related field at a college" (BX-6, p. 10). The job description shows that the Employer's training position requires an advanced degree in a specialized area of learning. Thus, the Co-op and, by inference the titles

directly superior to the Co-op, are professional positions. It further places the Co-op directly within (2)(12)(b)(ii), because the Co-op is so employed in order to qualify as an engineer.

The job descriptions of the Associate and Software Engineers reinforce this conclusion. The Associate must be "a graphics programmer (graphics shaders, scene management with a heavy focus on 3D math)," a profession that requires knowledge of an advanced type acquired by a prolonged course of specialized intellectual instruction. The Associate must have a "strong mathematics background (logic, linear algebra, geometry, statistics and probability, etc.)" (BX-7). One picks these skills up in a course of specialized intellectual instruction, not by playing video games in the basement.

The Software Engineer requires even more specialized instruction than does the associate (BX-7; Tr. at 470). All are at least college graduates, except one of the Senior Engineers, a title the Employer agreed was properly excluded. Hence, the positions in the Engineering Department are all professional positions. As such, they are properly excluded from the petitioned-for unit of non-professionals.

CONCLUSION

The petitioned-for employees in the QA department have a community of interest among themselves which is sufficiently distinct from those of employees in the excluded classifications. ATAs constitute a distinct administrative grouping within the Employer's operation, perform an essentially different and separate function, and have minimal interchange with developers in other departments. Additionally, they are paid significantly less, have lower entry requirements, and are given unique training by the Employer that is not provided to other titles. Developers develop; ATAs test. The petitioned-for unit is a distinct group with its own internal interests to

address in collective bargaining.

The Engineering Department must be excluded because all of the employees within that department are statutory professionals.

For these reasons, the Regional Director should find the petitioned-for unit to be appropriate and direct an election therein.

Respectfully Submitted,

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 03

BLIZZARD ENTERTAINMENT, INC.,	)	
Employer,	)	
and	)	**Case No. 03-RC-299607**
COMMUNICATION WORKERS OF AMERICA, AFL-CIO	)	
Petitioner.	)	

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I. INTRODUCTION

This case presents the issue of whether the vast majority of employees who work on a completely integrated gameworld can be excluded from the bargaining unit working on that gameworld—and thus disenfranchised for the relevant union election—merely because those employees lack a "Quality Assurance" job title. The answer is clearly "no" under, both the law and the facts.

On July 19, 2022, the Communication Workers of America ("CWA," or "Petitioner") filed a petition to represent "[a]ll full time and regular part time employees of the Employer's Blizzard Albany Quality Assurance division . . . including QA Testers, QA Functional Testers, and Associate Test Analysts." The CWA's petition covers only 20 of the more than 170 Blizzard Entertainment, Inc. ("Blizzard" or the "Employer") employees working on the Diablo franchise team in Albany, which includes other disciplines such as Art, Design, Production, Engineering, Audio, and Animation. The petitioned-for unit is inappropriate under the Board's controlling precedent of *The Boeing Company*, 368 NLRB No. 67 (2019), because the shared interests of the petitioned-for and excluded Blizzard Albany employees working on the Diablo franchise team far outweigh their distinctions. To successfully create a Diablo franchise video game, which incorporates a narrative story, continuous character development, and an intricate, integrated gameworld reactive to each player's choices[1] each Diablo franchise employee necessarily supports and interacts with employees in all disciplines. Simply stated, the iterative process of creating the Diablo video game—specifically the constant creating, testing, and adjusting of even the smallest features to meet established milestones—demonstrates the

[1] See Transcript ("Tr.") at 27:11-28:4 (showing a visual presentation of the game at https://www.youtube.com/watch?v=sAgxtg3FgvY&t=252s)

exceptional integration across all development job classifications on the Diablo franchise team at Blizzard Albany.

The many excluded employees should have the right to vote in this election. Here, the petitioned-for unit excludes other Blizzard Albany employees who work on the Diablo franchise and are functionally integrated with the Test Analysts.[2] All Blizzard Albany employees perform testing as part of their job duties, and employees in the disciplines outside of Quality Assurance ("QA") regularly provide feedback to and receive feedback from Test Analysts regarding the quality and progress of video game development.

Blizzard Albany's operation relies on functional integration, rather than the formal discipline structure, to accomplish its core purpose on the Diablo game. Blizzard Albany employees are organized into multi-disciplinary "feature groups"—which include Test Analysts and other developers from different disciplines —that focus on developing specific assets for the game. All developers in the same feature groups are in constant communication and working integrally to get their specific feature or asset in final form.

Second, Test Analysts can and do transfer to positions across the various disciplines. Because of the significant contact and functional integration between Blizzard Albany employees, Test Analysts have temporarily stepped into a position in a different discipline on an as-needed basis to assist with other development tasks. And, Test Analysts have also permanently transferred to positions within other disciplines as well.

The Petitioner failed to satisfy its burden to show that the distinct interests of employees outside the proposed bargaining unit outweigh their shared interests with Test Analysts, *Boeing*, 368 NLRB No. 67, slip op. at 6. The evidence shows **exactly the opposite**. Employees in the

[2] As used herein, the term Test Analysts encompasses both Associate Test Analysts and Test Analysts.

Art, Animation, Audio, Design, Engineering, and Production disciplines "would largely have the same interests" as Test Analysts in the context of collective-bargaining, and their common interests with the Test Analysts indeed overwhelmingly outweigh any interests that might be distinct. Failing to include all Blizzard Albany employees in the unit would create an impermissible fractured bargaining-unit under the test set forth in *PCC Structurals, Inc.*, 365 NLRB No. 160 (2017), and clarified in *Boeing*. Such fractured units are ill-suited for collective bargaining and deprive the excluded employees their rights to bargain, particularly in the creation of a massive and integrated game like Diablo, where employees work closely together to create the game environment and thus the impacts on one group of employees will affect all others.

Blizzard anticipates that the Petitioner will attempt to equate this case and the Regional Director's Decision and Direction of Election in *Activision Publishing, Inc.*, Case No. 18-RC-289570 (Apr. 22, 2022) (the "Raven Case"), where the Regional Director of Region 18 found that a group of QA Testers at a video game studio in Wisconsin shared a sufficiently distinct community-of-interest with the studio's other development employees. Not only is the Raven Case not controlling, but it should be afforded little, if any, weight. The facts here are markedly different from the Raven Case, most notably:

- The Diablo franchise team at Blizzard Albany, unlike in the Raven Case, relies on multi-discipline feature groups to work on the Diablo games;
- The Diablo titles utilize a single world and one unifying set of plotlines throughout this world, requiring far greater continuity and collaboration from all development employees; and

- The levels of contact and interchange between the Diablo franchise employees at Blizzard Albany present here far exceed those present in the Raven Case.

Even under the now-defunct legal standard of *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011), enfd. sub nom. *Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013), the Petitioner's petitioned-for unit is still inappropriate, because the excluded Blizzard Albany employees on the Diablo franchise team share an overwhelming community of interest with the petitioned-for Test Analysts.

For the reasons above, as described more fully below, the Regional Director should determine that the appropriate unit in this case must include all of the development the classifications included in the Employer's Amended Statement of Position (with the exception of those withdrawn by the Employer at the end of the hearing) because excluding these employees would run afoul of *PCC Structurals* and *Boeing*.[3] This is the only unit that appropriately protects the rights of employees on the Diablo franchise team at Blizzard Albany to choose whether they want to be represented by a union. If the petition remains supported by a sufficient showing of interest, the Regional Director should direct a mail election accordingly. If not, the petition should be dismissed.

II. STATEMENT OF FACTS

A. The Company

Blizzard is a video game developer and publishing company, that produces high quality video games.

[3] As the Petitioner's only witness conceded, Test Analysts, along with employees across all other divisions, can be collectively considered "developers," although they do not typically create original content (Tr. 546:21-23). *See also* Blizzard Albany's Principal Game Producer, Barry Morales, who testified that he would consider the Test Analyst position, as it is currently constructed, to be a developer (Tr. 410:8–10).

Blizzard maintains three main employee "hubs": Austin, TX, Irvine, CA, and Albany, NY, although it also has employees working remotely throughout the world (Tr. 65:12-15).[4] Before January 2022, the Albany, NY facility operated as a separate studio, Vicarious Visions (Tr. 70:25-71:4). Vicarious Visions merged with Blizzard in January 2022 and the location became known as "Blizzard Albany." *Id*. Unlike the studio in the Raven Case, Blizzard Albany is no longer a separate studio, but part of the larger whole of the Blizzard employee group that makes the Diablo game, as described below (Tr. 71:2-4).

Blizzard employees are assigned to work on specific franchises, which support specific game titles (Tr. 64:13-16). There are three main franchises at Blizzard: World of Warcraft, Overwatch, and Diablo (Tr. 64:17-25). The Diablo franchise consists of several individual games including: Diablo IV (or "D4") the latest Diablo Franchise game in development; Diablo II Resurrected (or "D2R"); and Diablo Immortal (Tr. 72:16-21, 73:5-7). Employees assigned to the Diablo franchise team at Blizzard Albany work on D4 or D2R, with the majority working on D4 (Tr. 73:1-4). Further, generally, employees work exclusively on the game title teams to which they are assigned to. (Tr. 317: 20-25, 318: 1-5, 319: 1-4). For example, Blizzard Albany employees working on the Diablo franchise customarily work on either D4 or D2R; they do not fluidly transition between game titles. (Tr. 318: 6-16). Moreover, each game title has its own separate systems used by the teams supporting each game title. (Tr. 318: 17-24)

B. <u>Blizzard Albany Game Development and Operational Structure</u>

As discussed in detail below, the process of creating a video game is, in many ways, the opposite of the traditional production processes in which the Board's precedent has been

[4] References to the Hearing testimony are in the form of "Tr. [Page]:[Line], references to the Employer's Exhibits admitted at the hearing are in the form of "R. Ex. __," and references to the Petitioner's Exhibits admitted at the hearing are in the form of "P. Ex. __."

developed. Blizzard Albany does not produce a large number of products by repeatedly following a series of steps. Instead, a single Diablo video game is developed over an extended period of time—often many years in the making—in which all of the employees on the franchise team work collaboratively.

Rather than a factory mass-producing large numbers of identical (or similar) goods progressing from the hands of one employee to another, one might think of a team of skilled artisans working together to shape a single, massive sculpture. The concept of "milestones" at Blizzard Albany symbolizes this highly collaborative, and iterative, nature of video game production. A milestone represents a point in the development process where the team must produce a deliverable (e.g., complete a feature) (Tr. 506:21-507:3). When milestones approach, developers across all disciplines ramp up creation, testing, and collaboration to meet the established deadline (Tr. 449:5-8, 507:11-12). Once a milestone is reached, the development team, including Test Analysts, moves on to another aspect of the game that requires development and testing (Tr. 565:3-9).

The Diablo franchise team at Blizzard Albany, for example, is currently working on only two video games: D2R and D4. As shown at the hearing, Diablo titles, and D4 in particular, utilize a completely "open world," meaning players can complete the game in any number of ways (Tr. 27:20, visual presentation at 4:41-4:49)[5]. "[T]he journey that you take throughout

[5] Consistent with Federal Rule of Evidence 201, the Regional Director should take judicial notice of the video presentation describing D4, the newest game in the Diablo franchise. Rule 201(b) permits the taking of judicial notice of facts that can be "accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Recognizing Rule 201, "[t]he Board supports the taking of judicial notice." *Midwest Division--MMC, LLC*, 362 NLRB 1746, 1759 fn. 9 (2015) (citing *Mimbres Memorial Hospital & Nursing Home*, 342 NLRB 398, 403 fn. 14 (2004)). Indeed, the Board, Administrative Law Judges ("ALJs"), and federal courts have taken judicial notice of facts from a wide range of publicly available sources. *See, e.g., MCPc, Inc.*, 367 NLRB No. 137, slip op. at 1 fn. 5 (2019) (taking judicial notice of archived website); *Lucky Cab Co.*, 366 NLRB No. 56, slip op. at 2 fn. 1 (2018) (taking judicial notice of U.S. Bureau of Labor Statistics unemployment rate data); *United States Postal Serv.*, 365 NLRB No. 51, slip op. at 2 fn. 5 (2017) (taking judicial notice of employer's "administrative structure as

Diablo IV is your own. There's no linear path that you have to follow." (*Id.*). This "open world" structure differs from games like Call of Duty, the video game created by the studio in the Raven Case, which have more defined narrative arcs where players can explore only a limited number of areas while completing the game's main story. Diablo requires an immense amount of collaboration from the entire development team to coordinate the innumerable plotlines into one, unified story.

Employees on the Diablo franchise are assigned to specific disciplines within the following disciplines: Design, Engineering, Art, Production and QA (Tr. 411:23–24). There is also the Animation discipline, which rolls up under Art, and the Audio discipline, which rolls up under Design (Tr. 412:6–8). All Blizzard Albany employees, including Test Analysts, are assigned to feature groups, also referred to as "pods" (Tr. 193:8-11, 14-16). Feature groups are a multi-disciplinary team of developers, *including* Test Analysts, that are assigned to develop a specific feature of the game (Tr. 414:6–19). Feature groups usually have every type of discipline represented, including QA (Tr. 337:19–21, 414:14–15). For example, the Diablo IV Complex

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set forth on its website") (*citing Doron Precision Sys., Inc. v. FAAC, Inc.*, 423 F.Supp. 2d 173, 179 fn.8 (S.D.N.Y. 2006) ("a court may take judicial notice of information publicly announced on a party's website, as long as the website's authenticity is not in dispute and it's capable of accurate and ready determination."); *Branch 4779, Nat'l Ass'n of Letter Carriers (Postal Service)*, 364 NLRB No. 57, slip op. at 2 fn. 5 (2016) (taking judicial notice of New York Times article depicting wrestler's "fictional persona") (*citing United States v. Saccoccia*, 58 F.3d 754, 776, n. 16 (1st Cir. 1995) (taking judicial notice of fictional character in coffee advertisements)); *Westgate Las Vegas*, 363 NLRB 1633, 1634 fn. 5 (2016) (taking judicial notice of images on Google maps page); *Red Rock Casino Resort Spa*, Cases 28-CA-244484, 2022 WL 1104974, fn. 108 (N.L.R.B. Div. of Judges 2022) (taking judicial notice of article in Las Vegas Journal-Review because it was "information was in the public realm at the time.") (*quoting Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 960 (9th Cir. 2010)). Like these sources, the D4 video's authenticity cannot be disputed. The video—which provides an overview of D4, one of the games being developed by the employees at-issue in this case—is posted on a certified YouTube page and the same section of the video that was played during the Employer's opening statement can also be found on the certified Diablo YouTube page maintained by Blizzard. *See* https://www.youtube.com/watch?v=94wQxtv_sAc&t=18s (last accessed Aug. 24, 2022). As such, just as the Board, ALJs, and courts have taken judicial notice of facts on publicly available and/or employer-maintained sources, the Regional Director should take notice of the D4 video presentation. *See MCPc, Inc.*, 367 NLRB No. 137, slip op. at 1 fn. 5; *United States Postal Serv.*, 365 NLRB No. 51, slip op. at 2 fn. 5; *Branch 4779, Nat'l Ass'n of Letter Carriers (Postal Service)*, 364 NLRB No. 57, slip op. at 2 fn. 5; *Red Rock Casino Resort Spa*, Cases 28-CA-244484, 2022 WL 1104974, fn. 108. Judicial notice is especially appropriate here because D4 is a game in development, not a final game that Blizzard could move into evidence as an exhibit. Blizzard reserves all rights to do so later, should there be a final publicly available game product.

Conversation feature group, is responsible for developing the cinematic complex conversations feature and includes key members of the development team from QA, Animation, and Production (Tr. 207:1–19; R. Exh. 16). A separate, confidential feature group includes employees from Production, Design, Engineering, Art, and QA (Tr. 378:2–380:7; R. Exh. 17). Within these feature groups or pods, Test Analysts and employees from all disciplines work together to develop the assigned feature and execute the tests created in the test plans (Tr. 197:12-16, 198:1-9, 204:7-8, 432:16-19).

Because of this feature group organization, all employees working on the Diablo franchise team at Blizzard Albany engage in extensive and regular interaction from the outset of the process. From the moment that a new game feature is identified, Test Analysts begin working with other developers across all disciplines to establish the testing structure and plan through the development process (Tr. 94:4-11).

C. Community of Interest Factors

1. *Similar Skills*

Blizzard Albany actively encourages all employees to play, and therefore test, the Diablo games that the franchise team is working on (Tr. 143:7-11). All employees on the Diablo franchise team at Blizzard Albany, regardless of position, can identify bugs and issues in the game—not just Test Analysts (*Id*., 505:17-506:12, 541:11-13; R. Exh. E-8). All employees have access to and use Jira—Blizzard's bug reporting software program—to identify, discuss, and address bugs in the games (Tr. 73:17-20, 89:12-14, 107:15-22, 143:15-22, 439:13-14, 463:18-464:5, 505:17-506:12, 535:19-25; R. Exh. E-8). And all developers, Test Analysts and employees in other disciplines, routinely open bugs in Jira and, as discussed below, regularly and continuously collaborate in fixing those bugs through the Jira system (Tr. 143:2-14, 217:1, 439:21-23, 466:11-24, 505:17-506:12).

All Diablo employees are also expected to test the game as part of their job duties (Tr. 278:4-6). When an artist creates a vase to go into the game, the artist should render the vase in the game and personally test it to ensure it meets their approval (Tr. 278:6-10). Similarly, when an engineer creates a piece of code, they are expected to personally test that piece of code before checking it into the game (Tr. 278:10-13).

Besides Jira, Test Analysts and other developers use similar tools. For example, Test Analysts and other developers have access to and/or use:

- Maya (an application used for rigging in animation);
- OBS (a design product)
- Wwise (an application used to implement audio designs);
- REAPER (an audio software platform to create sound effects);
- Miro (a collaborative application for idea and information sharing);
- Photoshop (an editing application);
- Confluence (the department's file management system);
- Slack (a communications system);
- Zoom (a communications system); and
- Outlook (a communications system)

(Tr. 168:13-169:1, 169:8-24, 198:13–16, 439:8-12, 448:6-9, 521:13-522:4, 522:25-523:5). This functional integration between Test Analysts and the other developers on the Diablo franchise team is critical to the successful operation of the game.

2. *Common Terms and Conditions of Employment*

All Blizzard Albany employees are subject to the same workplace policies and procedures as set forth in the Blizzard Handbook (Tr. 361:23-25; P. Exh. 5). All full-time

employees working on the Diablo franchise team at Blizzard Albany, including Test Analysts, participate in the same annual performance evaluation process (Tr. 49:6-18). All non-supervisory employees on the Diablo franchise team at Blizzard Albany, again including Test Analysts, also work the same core business hours (Tr. 49:19-22, 144:1-3, 420:23-421:6, 439:24-440:4, 467:7-10).

Test Analysts participate in the same profit-sharing bonus program, consisting of twice annual bonuses based on performance and profitability, as all other Blizzard Albany employees assigned to the Diablo franchise team (Tr. 46:9-47:1). Additionally, all full-time Blizzard Albany employees working on the Diablo franchise, including Test Analysts, receive the same benefits options, including medical, vision, dental, and life insurance, along with a 401(k) with Company matching, compassion leave, a health savings account, up to $20,000 for reproductive health services, and even pet insurance (Tr. 45:10-46:1, 55:10-20, 352:24-353:24; R. Exh. E-3). Test Analysts, like all other employees working on the Diablo franchise at Blizzard Albany, are also eligible for "service awards" in recognition for their tenure at Blizzard (Tr. 47:2-13).

3. ***Frequent Contact and Interchange***

Throughout the game development process, "there's a lot of overlap . . . [and] dependencies between departments" on the Diablo franchise team (Tr. 129:11-15) (testimony of QA Manager Shannon Johnson)). While Test Analysts work with all disciplines to test the games and identify and address bugs, all other development disciplines also collaborate and work with each other (Tr. 129:19-20). Indeed, depending on the stage of development and the team, Test Analysts may spend as much as 30% of their day communicating with developers in other disciplines (Tr. 518:14-18).

a. Shared Communications Systems

Test Analysts are encouraged to, and do, reach out to employees in other disciplines that they work with to discuss issues in the games or other questions (Tr. 88:23-89:4; R. Exh. E-6). All Blizzard Albany employees working on the Diablo franchise team utilize email, Zoom, Slack, and Jira to communicate with each other (Tr. 129:22-25, 130:5, 200:4-10, 217:6-9, 435:3-14, 462:22-463:17, 535:19-25). Utilizing Slack, Test Analysts and other developers regularly send instant messages directly to one another, communicate in a broader group with other employees, and participate in video meetings, called "huddles" (Tr. 81:7-21, 129:22-130:4, 516:22-517:10; R. Exh. E-24). The D2R team, for example, has a dedicated Slack channel where employees in the Engineering, Design, and Production disciplines interact directly with Test Analysts to discuss and address bugs in the game (Tr. 81:7-21; R. Exh. E-5). The D4 team also has a private Slack channel, which all employees, including Test Analysts, use to communicate directly on any issues in the game (Tr. 543:15-544:9; R. Exh. E-24). Test Analysts also regularly interact with Diablo employees in other disciplines through Jira, in which Test Analysts are expected to write up any bugs after discussing the issue with a developer (Tr. 89:5-14; R. Exh. E-6). Employees across disciplines then communicate back and forth through Jira to identify and address bugs (Tr. 108:15-17, 130:7-10, 463:18-464:5, 535:19-25; R. Exh. E-8). Specifically, once a bug is identified, a developer in another discipline will attempt to fix the issue (Tr. 494:5-11). From there, the Test Analyst will test the game again to verify that the issue has been fixed and, if not, the Test Analyst will follow up with the employee again to work on another solution (Tr. 494:12-25). In fact, as Blizzard Albany's Technical Director Michael Bukowski testified, most bugs require input and collaboration across multiple disciplines to address:

3 Q So a single bug may be addressed and -- and call for the
4 involvement of multiple positions in multiple disciplines?
5 A Oh yeah, absolutely. I would say, like, most bugs filter
6 through a variety of positions. They very rarely go from, say,
7 a QA member directly to an engineer or an artist or a designer
8 and stop there. They're going to go through, you know -- many
9 times, they get shuffled around for more expertise.
10 So a graphics bug, for example, you know, it -- my example
11 of, like, hair being the wrong color or something would likely
12 go from QA to a tech artist, maybe even to a character artist,
13 then to an engineer, maybe back. It's very common for -- for
14 those types of things to move around and people to add their
15 own thoughts or expertise on -- on what the right solution is
16 to the issue.

(Tr. 465:3-16). For example, shortly before the hearing in this case, a Test Analyst and other developers from the Design and Production disciplines used Jira to discuss and address a specific audio problem in D4 (Tr. 109:25-110:23, 113:16-17; R. Exh. E-8). After the Design developer fixed the specific bug, the Test Analyst tested the feature again to confirm that the bug had been fixed (Tr. 111:15-20; R. Exh. E-8).

Within the feature groups, Diablo employees, including Test Analysts, also communicate on a daily basis through "Miro," which is akin to a virtual whiteboard. QA Test Lead Matthew Razzano described Miro as a "collaborative space for members of a team to post information for each other, organize information, and . . . provide ideas and concepts to each other." (Tr. 198:13–16, 24–25). Employees assigned to feature groups also have private Slack channels where they communicate and collaborate regularly (Tr. 435:3-8).

Through these various mediums, Test Analysts communicate with employees across all disciplines on a daily basis, often multiple times per day (Tr. 156:6-11).

b. Test Plans

When the Diablo franchise team identifies a new concept to be developed, Diablo team employees across all disciplines, including Test Analysts, work collaboratively to create test plans for each feature of the new concept (Tr. 94:12-95:4; 99:23-100:11; R. Exh. E-7, E-16). The features that must be developed and tested can range from clothing, weapons, armor, and jewelry worn or used by characters in the world, to music and other audio sounds, to how the characters move through the game (R. Exh. E-7, E-16). *Notably, the QA employees in the Raven Case neither created test plans nor utilized such a high degree of collaboration to identify and plan testing procedures.*

For each feature, a specific Test Analyst is designated as a subject matter expert, or "SME." (Tr. 191:4–9, 495:4-6). *The Raven Case did not involve any QA employees who were designated as subject matter experts in other development disciplines*. Although developers in other disciplines can talk to any Test Analyst about the game development and testing process, Shannon Johnson, Blizzard Albany's Test Manager I, testified that the subject matter expert is expected to "own" the feature:

> "[their] primary responsibility is to be a point of contact for that feature that they were assigned to. And it's in an effort to have somebody that, you know, their counterparts on the development team know who to go to."

(Tr. 94:20-23, 104:4-9, 191:19–22, 495:22-496:7, 512:4-8).

When creating test plans, QA department employees, including the subject matter expert, work directly with developers in other disciplines via Slack, calls, and email "to identify the aspects of the feature, what disciplines it encompasses, the intended design and functionality, how it should work" (Tr. 94:24-95:3, 95:11-18, 434:10-17). From there, subject matter experts and other Test Analysts will work with employees from all disciplines—including, for example, Art, Design, and Engineering—to draft, review, and revise the test plan (Tr. 96:7-13, 459:20-

460:14, 525:23-526:5; R. Exh. E-7, E-16). Among other things, Art, Design, and Engineering employees discuss internal milestones or deadlines with Test Analysts and how various aspects of the feature will interact with one another, allowing Test Analysts to establish accurate testing protocols that align with projected deadlines for other disciplines (Tr. 203:13-24). Other developers expect Test Analysts to lead them through the creation of the test plan and explain how the team will verify the feature, what additional software or support is needed, and how to efficiently run the testing (Tr. 460:1-12). Because test plans can be developed over months and updated repeatedly (because the test plan is "an ever-evolving document"), Test Analysts continuously communicate with other developers and receive substantial guidance and direction from them on a recurring basis with respect to the test plans (Tr. 95:19-23, 204:4-10, 460:23-461:1, 526:12-527:1).

c. Multi-Disciplinary Feature Groups & Pods

Diablo employees across all disciplines at Blizzard Albany, including Test Analysts, are assigned to feature groups, or "pods" (Tr. 193:8-11, 14-16), an important organizational concept that was absent in the Raven case. While features are being tested, Test Analysts communicate with other developers in the multi-disciplinary feature group on a daily basis, seeking guidance and feedback on how the feature is expected to operate and what aspects to test (Tr. 106:9-25).

Within pods, developers, including Test Analysts, attend daily or bi-weekly meetings, participate in weekly or bi-weekly tests and will "be interacting the entire time over Slack, email, or meetups over Zoom in order to continue to develop that content" (Tr. 432:20-433:2, 433:6-8). Associate Game Director Brent Gibson further testified that all employees within the pods must be "really . . . close together and working really smoothly in order to make [the feature] successful." (Tr. 433:3-5).

All employees of a feature group provide input on "Pass/Fail Criteria," the set of variables that need verification through testing in order to determine whether a feature is working as intended (Tr. 200:20-25, 201:6-9). After each cycle of testing, feature group members from various disciplines provide feedback to Test Analysts on gaps in testing, parts that do not require testing due to overlap, and other related matters (Tr. 201:9-13). The cycles repeat until the feature group agrees on a Pass/Fail Criteria that meets the needs of the development (Tr. 201:19-21). Feature group members also inform Test Analysts of the nuances of the features so that Test Analysts understand how to efficiently test (Tr. 201:14-16).

d. Collaboration and Feedback

As discussed above, Blizzard employees are assigned to work on specific franchises and game titles, and all Blizzard Albany game development employees, including Test Analysts, working on the Diablo franchise work on either D2R or D4 (Tr. 64:13-16, 73:1-4).

Although all Test Analysts report to Johnson, developers and managers in other disciplines can direct Test Analysts to test specific features or areas of the game (Tr. 80:13-18). Johnson encourages other developers and Test Analysts to communicate directly regarding specific test requests because, although requests can be filtered through Johnson, she "prefer[s] to not have that bottleneck" (Tr. 80:18-23). Non-managerial employees also can, and do, provide feedback voluntarily (or at Johnson's request) on Test Analysts' performance (Tr. 87:10-17). For example, in March 2022, Johnson asked a Production producer on the Diablo team for feedback on a Test Analyst's performance (Tr. 88:1-11; R. Exh. E-6). In response, the producer stated that the Test Analyst "reached out to him personally" with questions, used studio tools available to all developers, and was "[e]asy to talk to, friendly, [and a] team player" (R. Exh. E-6).

When developing test plans or test specifications, employees of all disciplines regularly provide feedback to Test Analysts (Tr. 210:22–211:3). Developers in other disciplines may identify gaps in the testing, (Tr. 201:7-10), inform Test Analysts on the functionality of features to assist with test plan checklist, (Tr. 201:22-211), or inform Test Analysts of "optimal test strategies." (Tr. 201:7-10, 201:22-211:3, 223:10-12). Other developers can also direct Test Analysts to write up specific bugs or test specific areas of a feature (Tr. 436:23-437:12).

Similarly, once a test is completed, Test Analysts provide feedback to employees on the quality of their work (i.e., how their content meets or fails the tests) during feedback sessions (Tr. 75:8-18, 254:22-23). During these feedback sessions, Test Analysts inform developers in other disciplines of any bugs found in the asset and any other creative advice that would help the final product (Tr. 223:17-19, 236:16-19, 239:12-14, 244:11-14). As the Petitioner's sole witness, Associate Test Analyst Amanda Laven, testified, this feedback from Test Analysts to other developers provides "valuable information" that is "very important to the game development process" (Tr. 547:6-9, 548:2-5). Developers in other disciplines also provide considerable feedback to Test Analysts and help them enhance both their testing and development skills (Tr. 540:3-19; R. Exh. E-21).

e. Meetings

Diablo employees have frequent contact through recurring meetings. Feature groups hold "standup" meetings anywhere from daily to several times per week (Tr. 283:21-22). Test Analysts also participate in other "standup" meetings with other developers across all disciplines, which take place as-needed, as often as daily, depending on the topic of discussion, and occur for both the D2R and D4 teams (Tr. 130:12-19, 131:21-132:8, 134:12-23, 135:11-22, 461:23-462:21, 484:4-14, 501:13-20; R. Exh. E-10, E-11, E-12). For example, the D2R team, including Test Analysts and developers from the Production and Engineering disciplines, participates in at

least one regular standup meeting Monday through Thursday, where the team discusses recent accomplishments and current assignments and projects (Tr. 139:22-140:24; R. Exh. E-14, E-15). Test Analysts may also participate in broader "brainstorming" meetings with other developers (Tr. 438:20-25, 450:23-24).

All developers, including Test Analysts, also participate in "triage meetings," where the group discusses and assesses various bugs to determine their severity, impact on game development, and the priority in which they should be addressed (Tr. 137:24-138:6, 10-21, 283:22-25, 284:3-6; R. Exh. E-13). These triage meetings take place on a weekly basis, at minimum, but can occur as often as four times per week (Tr. 138-25, 139:3).

f. Interchange

Employees working on the Diablo franchise at Blizzard Albany permanently transfer between positions and disciplines (Tr. 47:15-48:6; R. Exh. E-4). In the last three months alone, three Test Analysts on the Diablo team have transferred into other positions in other disciplines (namely, Production and Design) (Tr. 48:3-6, 120:2-18; R. Exh. E-4, E-9). Another employee transferred from QA into an associate game producer role in Production in April 2022. *Id*. Developers also transfer to other disciplines (Tr. 435:21-24). This is far more significant transfer than occurred in the Raven case.

Test Analysts can also temporarily transfer by temporarily covering for developers in other disciplines (Tr. 160:19-21). Shortly before the hearing in this case, a Test Analyst covered for a developer in Production for three days while the employee was on vacation (Tr. 160:23-161:18). Other developers will also temporarily transfer to different disciplines, such as engineers moving to the Design division for a month or two to provide additional support on particular features (Tr. 436:6-22). Razzano testified at the hearing that when he was a Test Analyst (at the time the Tester position), he temporarily transferred to the position of User

Interface Artist to assist with creating in-game assets (Tr. 291:16-22). He transferred back to QA once that work was complete (*Id.*). *By contrast, no QA employees temporarily transferred to other disciplines in the Raven Case.*

Other developers outside of QA also assume testing responsibilities, whereby they test the game features before contacting Test Analysts for further review (Tr. 278:4-6-13, 541:11-13). As QA Test Lead Matt Razzano testified, all employees in all positions are expected to complete testing on features that they are developing. (Tr. 278: 4-20).

D. The Work of the Diablo Franchise Team[6]

1. *QA Discipline Generally*

On July 1, 2022, all Test Analysts at Blizzard Albany—along with other QA employees throughout Blizzard—were converted from temporary to full-time employees (Tr. 40:10-18; R. Exh. E-1). Currently, there are 20 total Test Analysts on the Diablo franchise team at Blizzard Albany: 5 supporting D2R and 15 supporting D4 (Tr. 73:8-12; R. Exh. E-9). There is no fluid transition between the titles: Diablo employees assigned to either D2R or D4, including Test Analysts, work exclusively on that title because each title requires a different set of hardware and computer permissions (Tr. 317:25-318:17). Further, each title has its own Jira systems and Slack workspaces (Tr. 83:13-16, 381:18-319:5).

Test Analysts are tasked with testing all aspects of the Diablo games, looking for any "bugs or defects, problems, [or] issues within the game" (Tr. 73:13-17 (testimony of QA Manager Shannon Johnson); R. Exh. E-2, p. 001-02). "Bugs" are "defects in the code or in an art asset or a function or a feature of the product" (Tr. 74:1-2). To do this, Test Analysts "play

[6] At the hearing on August 11, 2022, the Employer withdrew the following positions from its proposed unit: Senior Manager Game Design, Senior Principal Game Designer I, Senior Software Engineer I, and Senior Software Engineer II (Tr. 585:21-23).

the game as an end user would" (Tr. 75:11-12). Test Analysts utilize four main types of testing: (1) verification testing—testing specific aspects of the game to make sure that the feature is operating as the developer intended; (2) confirmation testing—reviewing bugs that developers have fixed and verify that the bug has been addressed; (3) halo testing—ensuring that the fix applied to a bug does not create new bugs; and (4) exploratory testing—deciding how to test a specific feature using steps that may be different than the developers intended (Tr. 76:10-18, 22-25, 77:4-11).

Test Analysts are assigned to support particular disciplines or specializations (Tr. 118:12-13, 192:12-16; R. Exh. E-9). On the D4 team, there are numerous Test Analysts specifically assigned to support the Design and Audio disciplines (R. Exh. E-9). Test Analysts will execute tests and assist with information gathering related to their specific discipline (Tr. 192:16–19). Regardless of whether they are assigned to support a specific department, Test Analysts are knowledgeable about the work of other disciplines because it helps to inform their testing (Tr. 118:12-15, 257:7-257:20). The designated subject matter experts are considered experts in their particular discipline, such as Art or Design, and serve as the point person within QA for related content questions from the development team (Tr. 191:6-9, 15-22).

a. Interaction with Other Disciplines

Test Analysts interact with other developers across all disciplines on the Diablo franchise team at Blizzard Albany. For example:

- **Design**: Here, "there's a really incredibly tight collaboration between the [QA and design disciplines]" (Tr. 430:12-13 (testimony of Associate Game Director Brent Gibson)). Test Analysts work with Design developers to determine the intent of various designs and audio features and offer feedback on the implementation (Tr.

127:24-128:3, 128:23-129:7). Employees in the QA department are also responsible for creating all of the test plans to test design-related elements of the games—meaning Test Analysts must understand "where some of the risky areas are [and] how to test those risky areas." (Tr. 430:1-9 (testimony of Associate Game Director Brent Gibson)).

- **Art**: Test Analysts work with developers in Art to discuss requests for game testing and address questions around art and animation-specific issues, including lighting, cinematics, and where art and animation assets are expected to be placed within the game (Tr. 128:7-15, 129:8-10, 431:7-17). From there, Test Analysts also provide feedback on specific art and animation implementation (Tr. 128:14-15).
- **Engineering**: Similar to the other disciplines, Test Analysts work with engineers on a daily basis to address testing questions and how the assets are being implemented, as well as providing feedback on the engineering aspects of the game (Tr. 128:16-22, 458:16-20). Test Analysts and engineers collaborate—through Jira, for example—to identify and reproduce any issues with the game's engineering functions and ensure that those problems are addressed (Tr. 458:21-459:15).

2. *Art Discipline*

The Art discipline is responsible for all visual aspects of the game, such as creating models for characters and objects, the environment, and the user interface (Tr. 428:14-21). Animation functions and responsibilities fall under Art (Tr. 427:10-12). The Art discipline,

including animation developers, regularly collaborates with employees from all other disciplines, including Design, Production, and Engineering (Tr. 428:22-429:8, 430:14-431:6).

a. Character Artist

(1) ***Job Duties***

Character Artists are responsible for creating the individual 3D models of the characters within the game (Tr. 252:7-8). Job classifications include Character Artist and Senior Character Artist I (Tr. 251:25; R. Exh. E-2, p. 032-033, 053-54).

(2) ***Interaction with Other Employees***

Because characters are in all aspects of the video game, Character Artists frequently work with all other disciplines (Tr. 253:16-19). Character Artists work with Test Analysts throughout the bug writing process related to 3D models, such as necessary textures or parts that are not showing up in the game (Tr. 252:11-13). Test Analysts and Character Artists also collaborate when, after testing, Test Analysts provide feedback on the quality of the 3D model or when they contribute to the test plan or spec addressing modeling and textures (Tr. 252:13-17). Further Character Artists work with other disciplines to ensure the appropriate character is being created for the specific story or quest purposes (Tr. 253:7-13).

b. Dungeon Artist

(1) ***Job Duties***

Dungeon Artists are responsible for creating 3D models of environments that involve a dungeon and provide those models to the World Building team to implement the related design objects (Tr. 254:8-13). Job classifications include Associate Dungeon Artist and Dungeon Artist (Tr. 253:1, 258:24-259:1; R. Exh. E-2, p. 010, 036).

(2) ***Interaction with Other Employees***

Once Dungeon Artists receive feedback from Test Analysts on the quality of the dungeons they create, Dungeon Artists work with Test Analysts to fix any bugs (Tr. 254:16-18, 22-25). Dungeon Artists also assist with test planning by providing background information as to the type of dungeons in the game, and when they receive feedback from Test Analysts on the quality of the dungeons (Tr. 254:16-25). Dungeon Artists work with the Design, Art, Audio, and Production disciplines to ensure there is enough space in the dungeons for characters to move around and the proper light to provide the right ambiance (Tr. 255:10-21).

c. Environment Artist

(1) ***Job Duties***

Similar to Dungeon Artists, Environment Artists create the 3D assets of the environment in which the game takes place (Tr. 256:9-14). Job classifications include Associate Environment Artist and Senior Environment Artist I (Tr. 258:7-18; R. Exh. E-2, p. 011-12, 058-59).

(2) ***Interaction with Other Employees***

Environment Artists collaborate with Test Analysts to optimize the testing process. Specifically, Environment Artists inform Test Analysts as to the number and types of environments that will appear in the video game, any special transitions or aspects related to a specific environment, and flag any areas where an environment is likely to experience defects (Tr. 256:22-257:4). Environment Artists also work with designers to develop the necessary environments, the narrative team to provide context to the story, and the audio team to provide ambiance for the environments (Tr. 257:23-258:6).

d. Lighting Artist

(1) *Job Duties*

Lighting Artists create all the light sources in the 3D space of the game to ensure the lighting matches the emotional context of particular scenes (Tr. 259:1-15). Job classifications include Associate Lighting Artist and Senior Lighting Artist I (Tr. 258:25, 260:21-261:7; R. Exh. E-2, p. 020-19, 070-71).

(2) *Interaction with Other Employees*

Lighting Artists work with Test Analysts to test whether players can see everything in the game on screen (Tr. 259:18-20). Lighting Artists and Test Analysts collaborate with Environment Artists to create test plans and test specs to perfect the lighting stages to be implemented (Tr. 260:1-6). In addition, Lighting Artists work with the cinematics, quest, and story teams to understand where light is needed throughout the game (Tr. 260:15-20).

e. VFX Artist

(1) *Job Duties*

The Visual Effects Artist, also referred to the VFX Artist, creates animating effects in the game such as explosions, burning flames, a splash of water, or puff of smoke (Tr. 261:17-23). Job classifications include Associate VFX Artist, VFX Artist, and Senior VFX Artist I (Tr. 261:8, 262:24-263:7; R. Exh. E-2, p. 082, 089).

(2) *Interaction with Other Employees*

VFX Artists collaborate with all disciplines because all aspects of the game involve visual effects (Tr. 262:19-21). VFX Artists work with Test Analysts to inform them on how to effectively test the large quantity of effects in the game (Tr. 262:1-8). In addition, VFX Artists work with Environment Artists, Character Artists, the Animation team, and the Cinematics team as all visuals on the screen could require VFX support (Tr. 262:17-21).

f. Cinematics Layout Artist

(1) *Job Duties*

Cinematics Layout Artists provide the broad strokes of what should happen in the game during a particular cinematic in a similar way that a film storyboard artist creates a drawing of a cinematic of a movie (Tr. 263:17-22). Job classifications include Layout Artists and Senior Cinematics Layout Artist I (Tr. 263:8-9, 265:9-12; R. Exh. E-2, p. 034-35, 054-55).

(2) *Interaction with Other Employees*

Although less frequent than other job classifications, Cinematics Layout Artists work with Test Analysts whenever there are bugs within the cinematic layout (Tr. 264:4-8). Cinematics Layout Artists also work with other disciplines, particularly the Animation and Narrative teams, to understand the goal of the cinematic layout (Tr. 264:22-265:5).

g. Props and Interactives Artist

(1) *Job Duties*

Props and Interactives Artists sculpt and create the 3D models of various objects that the game's characters interact with or use during the game (Tr. 265:21-266:3). Job classifications include Props and Interactives Artist, Senior Props and Interactives Artist I, and Senior Props and Interactives Artist II (Tr. 265:13, 267:8-17; R. Exh. E-2, p. 048–49, 073–74, 094–95).

(2) *Interaction with Other Employees*

Props and Interactives Artists work with Test Analysts in both receiving bugs about defects with their work and providing Test Analysts with information to create test plans (Tr. 266:6-15). Props and Interactives Artists also work with other disciplines to provide the props and interactives through the game (Tr. 266:23-267:4).

h. Principal Artist I

(1) *Job Duties*

The Principal Artist I is brought in to create specific art for the game, such as to set a tone or visual style for a scene (Tr. 268:1-7; R. Exh. E-2, p. 044-45).

(2) *Interaction with Other Employees*

The Principal Artist I provides information about what to expect of the visuals to the Test Analysts to assist with executing tests (Tr. 268:16-23). Test Analysts then create bugs related to the art created by the Principal Artist I (Tr. 268:10-13). The Principal Artist I also works with any other discipline that touch arts to advise on what the art should look like (Tr. 269:6-15).

i. Associate Outsource Artist

(1) *Job Duties*

Associate Outsource Artists are external artists that create whatever art assets are needed for the game (Tr. 270:10-12; R. Exh. E-2, p. 024). Associate Outsource Artists could be artists of any specialty (Tr. 270:12-14).

(2) *Interaction with Other Employees*

Associate Outsource Artists work with both Test Analysts and other disciplines indirectly through the Art team (Tr. 270:19-21, 271:3-5). However, due to their nature as an external position, the collaboration is slightly more limited (*Id.*).

j. Senior Concept Artist II

(1) *Job Duties*

The Senior Concept Artist II creates 2D, conceptual visualizations of the various worlds to determine was the world and characters should look like (Tr. 441:8-16).

(2) ***Interaction with Other Employees***

Because the nature of this position's work is limited to 2D work, the Senior Concept Artist's interactions with other Diablo development employees is limited (Tr. 441:19-22).

k. Senior Technical Artist I

(1) ***Job Duties***

The Senior Technical Artist I[7] aids with the creation of tools and other assets for the artists to utilize (Tr. 272:1-7; R. Exh. E-2, p. 78-79). Specifically, they deal with the technical aspects of art, including rigging for simulating movement (Tr. 442:5-12).

(2) ***Interaction with Other Employees***

The Senior Technical Artist I collaborates with Test Analysts to diagnose issues such as a character not showing up properly in the game (Tr. 272:10-15, 442:13-17). The Senior Technical Artist I is a "very cross collaborative" role that works with other disciplines, particularly the Character Art and Engineering teams (Tr. 273:1-3, 442:18-443:7).

l. Technical Rigger

(1) ***Job Duties***

The Technical Rigger's job duties are related to the way in which a 3D model moves based on the inputs of an animator—or the "skeletal systems" of the characters or features (Tr. 241:4-5, 443:8-16; R. Exh. E-2, p. 087). For instance, a game character with arms and legs needs the Technical Rigger to make digital connections between the character's elbow, wrist, hand and fingers so that the model moves in the appropriate animated way (Tr. 241:5-12).

[7] This job classification is listed as "Senior Technical Artist I, Characters" in the Employer's Amended Statement of Position.

(2) ***Interaction with Other Employees***

Technical Riggers primarily support the Animation team, and their interactions with other disciplines arise from that work (Tr. 242:3-6), but also work with the design and engineering disciplines as well (Tr. 444:7-10). Technical Riggers work with Test Analysts to perform "a ton of testing" around rendering issues and address any aspect of how a character moves (Tr. 443:20-6). Technical Riggers further provide Test Analysts with an understanding of animation for the test plan (Tr. 241:15-25).

m. Animator

(1) ***Job Duties***

Once a 3D model is created by the Character Artist and rigged by the Technical Rigger, Animators creates the movement of those 3D models in the game, from pose-to-pose (Tr. 248:1-4). For example, if a character needs to walk to something in the game, the Animator will create that movement, and such movement can then be used in any context in the game the designer may choose (Tr. 248:5–10). Job classifications include Associate Animator, In-Game Cinematics, Senior Animator I, In-Game Cinematics, and Senior Animator II, Gameplay (Tr. 247:19, 250:13 – 7; R. Exh. E-2, p. 050–51, 052, 066–67).

(2) ***Interaction with Other Employees***

Animators work with Test Analysts to write bugs about animation that is play incorrectly in the game (Tr. 248:24-25). Animators will also inform Test Analysts of the specifics of the animation—whether looping or one-time animations—to aid with the testing process (Tr. 248:17-23). Animators work with other disciplines to understand what should happen in a particular scene of the game to fully implement the desires of the narrative team (Tr. 249:17-21).

3. ***Design Discipline***

The Design discipline is responsible for setting up "the rules and the fun factor of the game," including establishing the game mechanics, how the characters operate, and how the combat functions (Tr. 427:21-428:2). Further, developers in the audio discipline—which rolls up to Design—are the creators and visionaries for any sounds that players hear in the video game (Tr. 356:23-24). Design works with developers from other disciplines, including Art, Production, and Engineering (Tr. 428:22-25).

a. Game Designer

(1) *Job Duties*

Game Designers are essentially responsible for making the rules of the game by designing elements of a game and implementing those elements into the software to create a cohesive game (Tr. 222:4-7). Game Designers are assigned to a particular component of game development, such as gameplay—a feature team focused on what players can do to play the game—creating enemies that players face during gameplay, or designing the story elements a character will go through (Tr. 224:17-25).

Job classifications include Assistant Game Designer, Quest, Associate Game Designer, Associate Game Designer, World, Game Designer, Senior Game Designer I, BP/Store, Senior Game Designer I, Tech, Senior Game Designer II, Quest, Senior Game Designer II, Encounters, Senior Game Designer II, World Design, Senior Game Designer, Event (Tr. 225:3-4, 20-25, 226:24-227:1, 227:6-8, 228:7-9, 12-14, 17-19).

(2) *Interaction with Other Employees*

Game Designers work with all disciplines (Tr. 223:24-25). Game Designers provide guidance to Test Analysts on optimal test strategies or insight on areas in the game where a defect is likely to occur (Tr. 223:8-14). Post-test, Test Analysts provide feedback to the Game

Designer on bugs and defects found (Tr. 223:17-21). The Production team assists Game Designers with scheduling and identifying work, while the Art team provides in-game assets that help Game Designers with the implementation of their designs (Tr. 223:25-224:4).

b. Sound Designer

(1) ***Job Duties***

Sound Designers create and implement the game's sound effects, including voiceover lines (Tr. 229:7-10, 14, 440:14-20). For example, the Sound Designer would be responsible for creating and implementing the "whoosh" sound that plays when a character swings that character's sword (Tr. 229:10-13). Job classifications include Associate Sound Designer, Sound Designer, and Senior Sound Designer I, and Senior Sound Designer II (Tr. 228:22, 232:1-4, 8-9; R. Exh. E-2, p. 028-29, 097-98, 099-100).

(2) ***Interaction with Other Employees***

Sound Designers have a direct dependency on all disciplines because "they can't implement a sound for an item that does not exist." (Tr. 231:11-12). Accordingly, Sound Designers work with other disciplines to provide the required sound effects for the various aspects of the game (Tr. 231:8-10). For example, if an aspect of the game includes dripping water, the water must be created before the Sound Designer can create the corresponding sound (Tr. 231:12-15). Once created, Sound Designers work with Test Analysts to inform on best testing methods to ensure that the artistic effects from the sounds are as intended (Tr. 229:22-230:3, 440:21-441:1).

c. Narrative Designer

(1) ***Job Duties***

The Narrative Designer is responsible for creating the story that occurs within the context of the game and to implement any text that is required to provide flavor to the game's story (Tr.

233:5-8). For example, text for descriptions of items a character may encounter during the game or dialog between characters that appears on the screen would be written and implemented by the Narrative Designer (Tr. 233:8–12). Job classifications include Associate Narrative Designer, Narrative Designer, and Senior Narrative Designer I (Tr. 233:20, 234:19-235:1; R. Exh. 2, p. 022-23, 072).

(2) ***Interaction with Other Employees***

Narrative Designers and Test Analysts collaborate to identify and resolve inconsistencies within the narrative or dialog or problems with aspects triggering at the wrong time in the game (Tr. 233:19-234:5). Test Analysts also provide feedback to Narrative Designers on the emotional impact of the story (Tr. 234:10-15). Narrative Designers work with other disciplines to ensure the entire story is consistent (Tr. 235:8-12).

d. Associate Camera Designer

(1) ***Job Duties***

The Associate Camera Designer is responsible for implementing a point of view within the 3D space of the digital game in order to show the player what's happening to and around their character (Tr. 236:4-10; R. Exh. 2, p. 008-09).

(2) ***Interaction with Other Employees***

Associate Camera Designers work with Test Analysts by receiving and discussing bugs regarding whether the camera is in the wrong place or moving in a way that could cause the player of the game to have motion sickness (Tr. 236:13-19). Associate Camera Designers also work with other development disciplines to implement real-time cinematic content and cut scenes (R. Exh. 2, p. 008).

e. Senior Systems Designer I

(1) *Job Duties*

The Senior Systems Designer I is responsible for implementing the method of gameplay for a character in the game, such as the interactions between the character and the surrounding environment (Tr. 327:12-21; R. Exh. 2, p. 077).

(2) *Interaction with Other Employees*

The Senior Systems Designer I works with Test Analysts during the QA testing process to discuss any ambiguities and identify as either a bug or an intentional occurrence (Tr. 238:8-14). The Senior Systems Designer I also collaborates on creating the test plans and test design (Tr. 238:3-7). In addition, the Senior Systems Designer I works with other disciplines to ensure the systems are interacting properly with the created content (Tr. 238:21-239:2).

f. Writer

(1) *Job Duties*

Writers create the broad stroke narrative elements and content which the Narrative Designer implements (Tr. 242:14, 16-19). Writers also author the dialog between characters and descriptions of assets in the game (Tr. 242:15-16).

(2) *Interaction with Other Employees*

Writers work with Test Analysts during the bug writing process. For instance, a Test Analyst will write bugs concerning the narrative or find inconsistencies within the text of the story during testing (Tr. 243:24-25). Test Analysts will then share their findings with the Writer to make a decision on, and the Narrative Designer will implement those decisions (Tr. 242:25-243:2). Writers also work with other disciplines to understand how to create and implement the story those positions intend to create (Tr. 243:10-13).

a. User Interface Artist

(1) *Job Duties*

User Interface Artists, or UI Artists, create the visual aspects of the way the game presents to users and allows the manipulation of the information by the user (Tr. 273:11-21). Job classifications include UI Artist, Senior UI Artist I, and Senior UI Artist II (R. Exh. E-2, p. 080-81, 088, 101-02).

(2) *Interaction with Other Employees*

UI Artists interface with all disciplines because they need to touch all aspects of the video game (Tr. 274:14-16). During testing, as asset created by the UI Artist may be misplaced, and they will work with Test Analysts to resolve those bugs and provide information for informed testing (Tr. 273:24-274:4). UI Artists also interact with Audio, Gameplay, Levels, Animation, and VFX teams (Tr. 274:16-17).

4. ***Production Discipline***

The Production discipline is involved from the inception of the game's development (Tr. 409:10-11). Production works closely with the development teams to determine the schedules for creating the games from the concept phase through shipping the game (Tr. 409:11–15). Production also works with publishing first-parties such as Microsoft and Sony on tasks that are needed to finalize the game (Tr. 409:20–24). The Production team communicates with developers, including Test Analysts, "every minute of every day" to properly schedule the game development (Tr. 412:16–24 (testimony of Principal Game Producer Barry Morales).

a. Game Producer

(1) *Job Duties*

Game Producers help identify and schedule the work necessary in order to create different features of the video game (Tr. 274:25-275:2). Job classifications include Associate Game Producer and Game Producer (Tr. 274:18, 276:7-11; R. Exh. E-2, p. 018-19, 040-41).

(2) *Interaction with Other Employees*

Game Producers necessarily work with all disciplines because their job is to organize the disciplines (Tr. 275:24-276:3). Game Producers work with Test Analysts to schedule test work, during the bug writing process, and to facilitate communication with developers for the creation of test plans and test specs (Tr. 275:5-11).

b. Production Coordinator

(1) *Job Duties*

The Production Coordinator assists with the overall role of production by being a communication facilitator and helps with organization (Tr. 276:18-20; R. Exh. E-2, p. 046-47). Specifically, the Production Coordinator performs tasks such as coordination between development teams with regard to dependencies and making requests of other teams (Tr. 276:20-277:3).

(2) *Interaction with Other Employees*

In its coordinator role, the Production Coordinator works with Test Analysts to schedule and facilitate stand-up meetings (Tr. 277:6-16). The Production Coordinator similarly works with other disciplines to facilitate communication, implement schedules, and set meetings (Tr. 277:19-22).

5. ***Engineering Discipline***

Michael Bukowski, Blizzard Albany's Technical Director, testified that the Engineering discipline builds "the software that . . . powers our games." (Tr. 455:8-15). This includes creating the engines and writing the software to ensure that the characters, features, and environments function properly (*Id.*). Non-supervisory employees in Engineering are not required to have a college degree, much less a degree in computer science (Tr. 468:2-14, 481:10-13). At least one current employee in Engineering does not have a computer science-related degree and has ascended to a senior Software Engineer position (Tr. 481:14-21).

Engineering does not work alone: for the discipline to function properly, "[i]t's essential that we have all disciplines, our design, QA, everybody working together." (Tr. 455:16-20 (testimony of Technical Director Michael Bukowski). Developers in Engineering , for example, work with Art and Design daily—through daily standup meetings, Slack, or email—to make sure that the artists', animators', and designers' creations function properly in the game (Tr. 455:21-456:17, 457:4-16-458:2, 458:3-15). Engineering also works with Production daily to support the flow of work and ensure that tasks are completed without barriers (Tr. 456:18-457:3).

a. Software Engineer

(1) ***Job Duties***

Software Engineers are responsible for creating the software and the code that serves as the framework for the game (Tr. 244:1-2, 468:19-469:2). For instance, if a designer would like the player to have the ability to do a certain task during gameplay, the Software Engineers writes the code within the game engine in order to provide the means to do that task (Tr. 244:2-5). Job classifications include Associate Software Engineer, Associate Software Engineer, Gameplay,

Software Engineer, Software Engineer, Gameplay, and Software Engineering, Co-op[8] (Tr. 243:17-18, 245:10-12, 246:1–247:4, 11-13, 247:2-4, 10-11; R. Exh. E-2, p. 025-27, 083-84).

(2) ***Interaction with Other Employees***

Software Engineers will collaborate with Test Analysts when there are bugs from major defects in the game code, such as resets, game crashes, or stutters (Tr. 244:8-12). Test Analysts also provide feedback to Software Engineers on the behaviors of software items (Tr. 244:12-14). Software Engineers work with all other disciplines on a daily basis to providing software solutions for anything employees would like to create or do in the game (Tr. 245:5-7, 469:3-470:6).

b. Support Technician

(1) ***Job Duties***

Support Technicians are the facilitators of all things related to Information Technology and are the "first line of defense" for any developer who is having problems with their tools (Tr. 240:7, 477:14-23). For example, Support Technicians assist with internet connections so that teams are able to download game assets, help with gaming consoles, and provide assistance with security and passwords (Tr. 239:23-240:7; R. Exh. E-2, p. 085-86).

(2) ***Interaction with Other Employees***

Due to the customer service nature of the role, Support Technicians work with Diablo employees throughout all disciplines because Support Technicians are responsible for facilitating

[8] The employees in the "Software Engineering, Co-op" classification are college students working for a limited duration (Tr. 476:8-24). Although Blizzard is arguing that this classification should be included in the unit because individuals typically hold the position for approximately eight (8) months (R. Exh. E-2, p. 084), Blizzard acknowledges that the Regional Director may exclude this classification based on the transitory nature of student workers.

the cross-discipline collaboration necessary to address any computer issues (Tr. 240:17-21, 477:12-478:24).

III. ARGUMENT

A. Applicable Legal Standard

1. *Under PCC/Boeing, the Petitioner Must Show That Distinct Interests Among Test Analysts Outweigh Shared Interests With Employees Outside This Group.*

When a party asserts that the smallest appropriate unit must include employees excluded from the petitioned-for unit, the Board must determine whether "the petitioned-for employees share a community of interest sufficiently distinct from employees excluded from the proposed unit to warrant a separate appropriate unit." *Boeing*, 368 NLRB No. 67, slip op. at 2 (quoting *PCC Structurals, Inc.*, 365 NLRB No. 160, slip op. at 7 (2017)). In *PCC Structurals*, the Board returned to the traditional community-of-interest test, which considers whether the employees (1) are organized into a separate department; (2) have distinct skills and training; (3) have distinct job functions and perform distinct work; (4) are functionally integrated with other employees; (5) have frequent contact with other employees; (6) interchange with other employees; (7) have distinct terms and conditions of employment; and (8) are separately supervised. *Boeing*, 368 NLRB No. 67, slip op. at 2 (quoting *PCC Structurals, Inc.*, 365 NLRB No. 160, slip op. at 5). No single factor is dispositive. *See Publix Super Markets, Inc.*, 343 NLRB 1023, 1027 (2004) (finding no separate community of interest between two groups of employees because, inter alia, the groups evidenced "substantial functional integration").

In *Boeing*, the Board further clarified that *PCC Structurals* contemplates a three-step process for determining unit appropriateness:

> First, the proposed unit must share an internal community of interest. Second, the interests of those within the proposed unit and the shared and distinct interests of

> those excluded from that unit must be comparatively analyzed and weighed. Third, consideration must be given to the Board's decisions on appropriate units in the particular industry involved.

Boeing, 368 NLRB No. 67, slip op. at 3. At the second step, the Board must determine whether the employees excluded from the unit "have meaningfully distinct interests in the context of collective bargaining that outweigh similarities with unit members." *Id.* at 4. The unit is inappropriate unless those distinct interests of excluded employees "outweigh the similarities" with included employees. *Id.* In other words, to justify certification of a unit consisting only of Test Analysts under *PCC Structurals/Boeing*, the Petitioner bears the burden to prove that distinct interests among Test Analysts outweigh their shared interests with employees outside this group. *Boeing*, 368 NLRB No. 67, slip op. at 2 (quoting *PCC Structurals*, 365 NLRB No. 160, slip op. at 7).

Under *PCC Structurals*, the employer does not bear the burden of showing overwhelming similarity. The Board "may find that the exclusion of certain employees renders the petitioned-for unit inappropriate even when excluded employees do not share an 'overwhelming' community of interest with employees in the petitioned-for unit." 365 NLRB No. 160, slip. op at 7. The Board will determine that a petitioned-for bargaining unit is appropriate, and that excluded employees should remain excluded, only if "the petitioned-for employees share a community of interest **sufficiently distinct** from employees excluded from the proposed unit to warrant a separate appropriate unit." *Id.* (emphasis added). "[A]t no point does the burden shift to the employer to show that any additional employees it seeks to include share an *overwhelming* community of interest with employees in the petitioned-for unit." *Id.* at 11 (emphasis in original).

B. **The Petitioned-For Test Analysts Do Not Share An Internal Community of Interest.**

The Petitioner's petitioned-for unit of Test Analysts working on the Diablo franchise lacks an internal community of interest—the first prong under *Boeing*. First, although there are 20 total Test Analysts working on the Diablo franchise generally, they do not all support the same game. Instead, the Test Analysts are divided into specific games, with 5 working on D2R and 15 working on D4 (Tr. 543:5-14; R. Exh. 9). There is no fluid transition between the titles: Diablo employees assigned to either D2R or D4, including Test Analysts, work exclusively on that title and utilize their own dedicated Jira and Slack workspaces (Tr. 83:13-16, 317:25-318:17 381:18-319:5).

Second, even within the D4 team, Test Analysts are generally assigned to specific disciplines and features groups (Tr. 118:12-13, 192:12–16; R. Exh. E-9). Specifically, Test Analysts may not even work on the same feature or specialize in the same discipline, and Test Analysts would need to "know the details of that [specialized] feature, how to debug it, [and] what's intended." (Tr. 553:6-15). Blizzard Albany also utilizes subject matter experts ("SMEs")—or Test Analysts who have advanced knowledge relating to their assigned discipline or feature—who serve as the point of contact for developers in that specific area (Tr. 191:6-9, 15-22; R. Exh. E-9). For example, Petitioner's witness, Amanda Laven, testified that she has additional duties as an audio SME beyond those of a non-SME Test Analyst assigned to the audio discipline, including "being the main point of contact between QA and audio", being "responsible for creating and maintaining documentations related to related to audio testing" and "direct[ing] testing for the audio pod." (Tr. 495:21-496:6, 559:16-18).

Finally, Test Analysts are under-inclusive of employees who have quality control duties and involvement. Various other employees with non-QA job titles perform quality control work as well. *See* Section III(C)(3), below.

C. **Test Analysts in the Petitioned-for Unit Are Not Sufficiently Distinct from the Excluded Employees on the Diablo Franchise Team in Albany.**

The second step of *Boeing* requires considering whether employees excluded from the proposed unit—the rest of the Diablo franchise team in Albany—have "meaningfully distinct interests in the context of collective bargaining that outweigh similarities with unit members." *Id.* at 4.

Applying the traditional community of interest test affirmed in *PCC Structurals* and *Boeing*, the only appropriate unit in this case must include all game development employees who work on the Diablo franchise at Blizzard Albany. This is because all employees in game development on the Diablo franchise operate as one integrated, cohesive unit. Diablo, unlike Call of Duty in the Raven Case, utilizes an "open world" concept, making it extremely narrative driven and requiring a substantial degree of collaboration throughout the development process (Tr. 27:20). The employees the Petitioner has excluded from its proposed unit—employees in the Art, Design, Engineering, and Production disciplines—have a high degree of functional integration with Test Analysts. The factors that distinguish Test Analysts from these other game development employees are "relatively insignificant in the context of collective bargaining." *PCC Structurals*, 365 NLRB No. 160, slip op. at 5. The Petitioner has not demonstrated, as it must, both that any distinct interests of other game development employees outweigh their many similarities with Test Analysts, nor that the Test Analysts' interests are "sufficiently distinct." *Id*. at 11; *Boeing*, 368 NLRB No. 67, slip op. at 4.

1. ***Test Analysts Are Functionally Integrated Into, and an Essential Part of, the Game Development Process.***

The iterative process of creating the Diablo video game—specifically the constant creating, testing, and adjusting of even the smallest features to meet established milestones—demonstrates the exceptional integration across all development job classifications on the Diablo franchise team at Blizzard Albany (Tr. 506:21-507:3, 11-12, 563:3-9). As Bukowski made clear, "[i]t's essential that we have all disciplines, our design, QA, everybody working together" because, according to Gibson, game development requires "a really incredibly tight collaboration between [QA and other disciplines]." (Tr. 430:12-13, 455:16-20). The Board has highlighted two independent scenarios—both present here—that demonstrate functional integration: (1) employees in the petitioned-for unit work on different phases of the same product with excluded employees, see *Transerv Sys., Inc.*, 311 NLRB 766, 766 (1993), and (2) included and excluded employees take part in the same "production work flow" and where the work "has a shared purpose," see *Northrop Grumman Shipbuilding, Inc.*, 357 NLRB 2015, 2017 (2011), enf. denied on other grounds sub nom. *NLRB v. Enterprise Leasing Co. Southeast LLC*, 722 F.3d 609 (4th Cir. 2013). The record demonstrates that Test Analysts are functionally integrated into the development process under both of these scenarios.

First, it is undisputed that Test Analysts become involved in the game development process from the outset and remain involved throughout the development process (Tr. 94:3-11). Indeed, once a concept is identified, Test Analysts immediately begin working together with developers across all disciplines to create test plans that will be used to test any features that the developers create (Tr. 95:11-18; R. Exh. E-7). The test planning process can take months and is "ever evolving" given that Test Analysts continuously seek feedback from other developers and revise and update the test plans accordingly (Tr. 95:19-96:13). No matter what stage of

development the game is in, Test Analysts are constantly testing, collaborating with other developers to identify and fix bugs, and then testing the developers' work to make sure that the bug has been fixed (Tr. 76:10-77:20).

Second, Test Analysts participate alongside game development employees from all disciplines for the shared purpose of creating and updating video games. Indeed, Test Analysts are not focused on a separate product, they are an integral part of the game development process for a single, story-driven product—wherein employees across all disciplines share the responsibility for creating the same video game. While not every classification has daily interaction with all other positions, there is a high level of regular and consistent collaboration between all tester and game development positions to prepare a video game product for launch and to ensure it continues to perform as expected even after its release. Feature groups epitomize the highly integrated and collaborative structure on the Diablo franchise team—where all employees are working toward the same "shared purpose." These multi-disciplinary teams of developers, including Test Analysts, are assigned to develop a specific feature of the game (Tr. 414:6–19). Within the feature groups, Test Analysts and developers from many disciplines work together to develop their assigned feature and execute the jointly-created test plans (Tr. 197:12-16, 198:1-9, 204:7-8, 432:16-19).

Test plans further demonstrate that all developers, including Test Analysts, work closely together. For example, Gibson explained that Design developers rely on Test Analysts to create and carry out the test plans to test design and audio-related elements of the games, leading to "really incredibly tight collaboration between the [QA and Design disciplines]" (Tr. 128:23-129:7, 430:1-9, 12-13). Art developers work with Test Analysts to test and address art and animation-specific issues, including lighting, cinematics, and where art and animation assets are

expected to be placed within the game (Tr. 128:7-15, 129:8-10, 431:7-17). Engineering developers work with Test Analysts daily to identify, test, and reproduce any issues with the game's engineering functions and ensure that those problems are addressed (Tr. 128:16-22, 458:16-459:15).

As part of the collaborative effort, developers in all disciplines provide guidance and direction to the Test Analysts. (Tr. 417:23-418:15, 460:15-25). Developers outside of QA can direct Test Analysts to test specific features or areas of the game (Tr. 80:13-18). As an example, D2R has a dedicated Slack channel for the "development team to put their requests in the Slack channel so that QA can -- the QA members, that is, directly can interface and, you know, address their requests as needed." (Tr. 81:3-13, R. Exh. E-5). In addition to directing Test Analysts to test something specific, employees in other disciplines also provide guidance to Test Analysts regarding questions about bugs and provide direction for resolving bugs. (Tr. 542:20-25, 543: 15-25, R. Exh. E-23). What is more, employees outside of QA also can, and do, provide feedback voluntarily (or at Johnson's request) on Test Analysts' performance (Tr. 87:10-17). For example, in March 2022, Johnson asked a producer on the Diablo team for feedback on a Test Analyst's performance (Tr. 88:1-11; R. Exh. E-6). In response, the producer stated that the Test Analyst "reached out to him personally" with questions, used studio tools available to all developers, and was "[e]asy to talk to, friendly, [and a] team player" (R. Exh. E-6). Importantly, all of the cross-disciplinary collaboration between Test Analysts and other developers is in furtherance of the same shared goal: creating a high quality, fun video game for players.

This high level of cross-disciplinary collaboration and integration stands in stark contrast to the more formalistic, siloed department structure in the Raven Case. Although the QA employees were embedded into specific departments in the Raven Case, the studio in that case

broke up game development work into departments. Here, however, the game creation, testing, fixing, and overall collaboration is performed by feature groups that include developers from all disciplines, including Test Analysts. Further, when creating test plans, Test Analysts at Blizzard Albany seek, obtain, and rely on input from employees across all other disciplines (Tr. 95:13-24, 96:4-22, 99:23-25, 100:1-5, 198:1-8).

Under similar facts, the Board has found that employees working together towards a common employer goal are functionally integrated and share a community of interest. In *Transerv Systems*, the Board held that the union's petitioned-for unit of bicycle messengers, excluding driver messengers, was not an appropriate unit. 311 NLRB 766, 767 (1993). In reaching this conclusion, the Board relied on the high level of functional integration based on the fact that most deliveries involve both a bicycle messenger and a driver, as well as evidence of frequent contact and the fact that both classifications perform similar functions of picking up or delivering packages. *Id*. at 766. The Board held that differences in immediate supervision and "the relatively few number of transfers between classifications" did not outweigh the evidence supporting a community of interest finding. *Id*. Similarly, here, feature groups, which include employees from all development disciplines, including Test Analysts, work on every aspect or feature of the game and collaborate throughout the development process. Indeed, the uncontroverted record demonstrates that all development employees, including Test Analysts, create, test and fix features to complete internal milestones in the development process, before moving on to other features in furtherance of creating a single, complete video game. *See e.g.*, *Terex*, 360 NLRB 1252 (2014) (fractured unit of only undercarriage employees found inappropriate where employees assembled bottom of trucks and assembly employees installed the tops of trucks, and minimal difference of undercarriage employees' duties did not undercut

evidence of integration). *See also Boeing*, 368 NLRB No. 67, slip op. at 5-6 (employees, including quality control inspectors, with a high degree of functional integration with a production process, were not a separate appropriate unit).

Indeed, the Board has repeatedly found that quality assurance and/or quality control employees should be included in bargaining units with production employees due to the vital role that QA plays in the broader production operation. This is even more true where, as here, the process of developing the Diablo titles is highly iterative, requiring constant development, testing, and reassessment. Blizzard Albany's reliance on cross-discipline feature groups to develop test plans and create game features—*as opposed to the siloed departmental structure in the Raven Case*—demonstrates that Test Analysts here are functionally integrated. For example, in *Keller Crescent Co., Inc.*, 326 NLRB 1158 (1998), the Board held that "the testing and sampling work of the quality assurance monitors is functionally integrated into the Employer's production operations" because, in part, quality testing "is a vital part of the production process." *Id*. at 1159; *see also Bennett Indus.*, 313 NLRB at 1364 (holding quality control employees shared community of interest with production employees because quality control "is an extension of and integrated with the manufacturing process."); *Hogan Mfg.*, 305 NLRB 806, 807 (1991) (holding quality control testers shared a community of interest with production unit employees because "quality control is a vital part of the production process."); *Blue Grass*, 287 NLRB at 299 (same because "quality control inspectors [are] a vital part of the production of the plant . . . Employees who ensure that production is of a uniform high quality are an integral part of the overall manufacturing process."); *W.R. Grace*, 202 NLRB at 789 (same because "quality control employees have more numerous contacts with production and maintenance employees and the quality control operation constitutes an integral part of the Employer's entire operation."); *Air*

Liquide, Case 04-RC-266637, slip op. at 22, 25 (Apr. 14, 2021) (same because quality control technicians work alongside production employees when testing samples, resulting in "significant functional integration and contact among all of classifications"); *Allan Bros., Inc.*, Case 19-RC-265331 (Nov. 10, 2020) (rejecting petitioned-for unit of production employees and ordering election for plant-wide unit, including quality control employees, because, among other things they were "involved in several steps of the process" and worked directly with several different production classifications).

Thus, all other disciplines, including Art, Design, Production, and Engineering, hold interests that are not distinct, but, instead, completely intertwined with those of the Test Analysts. Through feature groups and creating test plans, it cannot be disputed that all developers on the Diablo franchise work in concert to develop the Diablo titles. As Bukowski and Gibson testified, "[i]t's essential that we have all disciplines, our design, QA, everybody working together" because game development requires "a really incredibly tight collaboration between [QA and other disciplines]." (Tr. 430:12-13, 455:16-20). The Petitioner's sole witness, Associate Test Analyst Amanda Laven, even reiterated this point, making clear that producing Diablo titles would not be possible without Test Analysts working with other developers.

> 3 games without dedicated QA. Could you produce a game on the
> 4 scale and prestige of Diablo IV without associate test
> 5 analysts? I don't think that would be very doable, no.

(Tr. 547:3-5).

Excluding these employees from the bargaining unit, therefore, would impermissibly fracture the operation of developing Diablo video games. Unlike the Raven Case, where employees still worked in separate departments, the fracturing here would result in some employees within the same feature group becoming part of a bargaining unit, while others are

not, despite the high level of collaboration throughout the group. It defies common sense to divide Test Analysts from other game development employees when *the other game development employees are creating and improving the very content that the Test Analysts work on,* before, during, and after the time that the petitioned-for Test Analysts make their contributions. Test Analysts are certainly "assuring the quality of" *something*, and that something is the various types of content from Art, Design, Production, and Engineering. The test plans created by Test Analysts and the quality fixes proposed and verified by Test Analysts cannot—and do not—happen without extensive communication, interaction, and integration with these employees, ensuring they all have the same community of interest in their day-to-day work conditions and issues.

Excluding these other game development employees would be arbitrary, would not effectuate the purposes of the Act, would cause disharmony among the workforce at Blizzard Albany, and would not provide adequate consideration to the Section 7 interests of the excluded workers. The Board in *Boeing* expressly rejected such an outcome, holding that it is "particularly inappropriate to carve out a disproportionately small portion of a large, functionally integrated facility as a separate unit." *Boeing*, 368 NLRB No. 67, slip op. at 5, quoting *Publix Super Markets, Inc.*, 343 NLRB 1023, 1027 (2004). Therefore, all game development employees in the Art, Design, Production, and Engineering disciplines in Albany working on the Diablo franchise must be included in a bargaining unit with Test Analysts.

It could hardly be otherwise. As just one basic, obvious example, the integration caused by the back-and-forth nature of work passing back and forth between QA employees and each of the Art, Design, Production, and Engineering employees means that these' employees' schedules

are also integrated. Nothing could fragment a unit more than having a collective bargaining agreement for QA—and for each segment—setting up a different work schedule.

2. ***QA Testers Have Extensive, Often Daily Contact with Other Disciplines Throughout the Development Process.***

Because game development requires "a really incredibly tight collaboration between [QA and other disciplines]," as emphasized by Gibson, Test Analysts interact extensively with excluded employees, using multiple platforms, across all other disciplines on the Diablo franchise team (Tr. 430:12-13, 455:16-20). First, all employees on the Diablo franchise team, including Test Analysts, communicate with each other—often daily—through email, Zoom, Slack, and Jira (Tr. 129:22-25, 130:5, 200:4-10, 217:6-9, 435:3-14, 462:22-463:17). On Slack, for example, Test Analysts and developers send instant messages directly to one another, communicate in a broader group with other employees, or participate in video meetings, called "huddles" (Tr. 129:22-130:4). Employees, including Test Analysts, use Jira to create reports on bugs in the video game and communicate with one another to identify and address the issue (Tr. 108:15-17, 130:7-10, 463:18-464:5; R. Exh. E-8).

Test Analysts also participate in numerous meetings with developers from other disciplines on the Diablo franchise team. Feature groups, which include Test Analysts, hold regular standup meetings to discuss ongoing projects involving the feature (Tr. 283:21-22). Test Analysts also participate in both brainstorming and triage meetings, where the group discusses and assesses various bugs to determine their severity, impact on the game development, and the priority in which they should be addressed (Tr. 137:24-138:21, 283:22-25, 284:3-6, 438:20-25, 450:23-24; R. Exh. E-13). These meetings take place on a weekly basis, at minimum, but can occur as often as four times per week (Tr. 138-25, 139:3). Finally, Test Analysts will participate

in game-specific (Tr. 135:11-22; R. Exhs. E-10, E-11, E-12) or other meetings as needed (Tr. 130:12-19, 131:21-132:8, 134:12-23, 461:23-462:21, 484:4-14; R. Exh. E-10).

These substantial, daily contacts between Test Analysts and developers are well beyond the monthly meetings that the Board in *W.R. Grace & Company*, 202 NLRB 788 (1973) found demonstrated a sufficient community of interest between quality assurance and production employees. *Id*. at 789.

3. ***Test Analysts Have Both Temporary and Permanent Interchange With the Excluded Disciplines***

The record further demonstrates several examples of employee interchange, both temporary and permanent. The Board's standard for interchange is easy to satisfy. In *Howard Johnson*, the Board noted that there was merely "some employee interchange" and provided relatively minor examples of a restaurant waitresses working in the banquet area when needed about "once or twice a month on average." 236 NLRB at 1206 (emphasis added); *Hotel Servs. Grp., Inc.*, 328 NLRB 116, 117 (1999) (finding sufficient employee interchange where about a quarter of the employees in the proposed unit also performed the work of employees excluded from that unit).

The uncontroverted evidence establishes that—unlike the QA employees in the Raven Case, who did not temporarily transfer to other departments—Test Analysts have temporarily stepped into game development roles in other disciplines to cover for employees. For example, shortly before the hearing a Test Analyst covered job duties in Production for three days while a developer was on vacation (Tr. 160:23-161:18). Razzano also testified that, when working as a Test Analyst, he transferred into a UI Artist role in Art (Tr. 291:16-22). This was a temporary assignment and Razzano transferred back to QA once the work was completed (*Id*.). What is more, all developers on the Diablo franchise team, not just Test Analysts, test the game (Tr.

278:4-6, 541:11-13). For example, when an artist creates a vase to go into the game, the artist renders the vase in the game and tests it to ensure it meets their approval (Tr. 278:6-10). Similarly, when an engineer creates a piece of code, they are expected to test that piece of code before checking it into the game (Tr. 278:10-13). The Petitioner's witness, Associate Test Analyst Amanda Laven, likewise acknowledged that developers in other disciplines test their work before reaching out to Test Analysts for further review (Tr. 278:4-13, 541:11-13). These temporary transfers should be afforded significant weight. *See Red Lobster*, 300 NLRB 908, 911 (1990) (evidence of temporary interchange afforded more weight than evidence of permanent interchange).

There is also evidence of permanent interchange between Test Analysts (and broader QA employees) and other developers. In the last three months alone, three Test Analysts have transferred to Design and Production (Tr. 48:3-6, 120:2-18; R. Exh. E-4, E-9). One additional QA employee transferred to a role in Production in April 2022 (*Id.*). These cross-discipline transfers demonstrate that Test Analysts share a community of interest with excluded developers. *See Casino Aztar*, 349 NLRB 603, 607 (2007) (holding several permanent transfers to other departments over five years demonstrated that excluded employees in other departments did not have distinct interests to petitioned-for unit). Although the record demonstrates that Test Analysts temporarily transfer to other roles as well, the Board has found that permanent transfers alone support a community of interest showing—especially given, among other things, the highly integrated game development process and similar terms and conditions of employment throughout the petitioned-for and excluded units. *See, e.g.*, *Boeing Co.*, 337 NLRB 152, 153 (2001) (overturning petitioned-for unit made up of small subset of production employees and holding that appropriate unit consisted of all production and maintenance, including QA

employees, even though "[QA] employees are separately supervised, attend separate employee meetings, work in a separate area . . . and never temporarily transfer into the [production] groups. These distinctions, however, are offset by the highly integrated work force . . . and the comparable terms and conditions of employment among all [] groups.").

4. ***All Developers, Including Test Analysts, Are Subject to the Same Terms and Conditions of Employment and Receive the Same Benefits.***

Not only are Test Analysts functionally integrated, and have extensive contact and interchange, with the excluded employees on the Diablo franchise team, they are also subject to the same terms and conditions of employment. For example, all Blizzard Albany employees work the same core business hours and are subject to the same Company Handbook, which sets forth the applicable workplace policies and procedures (Tr. 49:19-22, 144:1-3, 361:23-25, 420:23-421:6, 439:24-440:4, 467:7-10; P. Exh. 5). Further, Test Analysts and the excluded employees also participate in the same performance review processes (Tr. 49:6-18).

Test Analysts receive the same health and welfare benefits as all other developers on the Diablo franchise team, including medical, vision, and dental, life insurance, 401(k), a health savings account, and even pet insurance (Tr. 45:10-46:1, 55:10-20, 352:24-353:24; R. Exh. E-3). All full-time employees on the Diablo franchise team, including Test Analysts, also participate in the same bonus program and are eligible for other benefits, such as "service awards" (Tr. 46:9-47:13). The Board has held that these types of overlapping benefits and terms and conditions of employment demonstrate a community of interest necessitating that all game development employees and Test Analysts must be in one unit. *See, e.g.*, *W.R. Grace*, 202 NLRB at 789 (holding quality control employees share community of interest with broader production unit because, in part, "[l]ike production and maintenance employees, they punch a timeclock, and

both groups enjoy the same fringe benefits such as paid vacations, paid holidays, insurance, pensions, and overtime.”).

Blizzard anticipates that the Petitioner may argue that Test Analysts lack a community of interest with developers because Test Analysts have lower hourly wage rates than most other classifications. The fact that some game development employees may receive higher wages than others is not determinative. *See, e.g.*, *TDK Ferrites*, 342 NLRB at 1009(holding production and maintenance employees shared community of interest even though maintenance employees received higher wages); *see also Air Liquide*, Case 04-RC-266637, slip op. at 25 (holding small unit including QA employees inappropriate and must include broader production employees because they all shared community of interest “[e]ven though most of the excluded classifications earn higher wages than the petitioned-for classifications, that fact alone is not dispositive.”). The Petitioner cannot rely on these wage-related differences, alone, to satisfy its evidentiary burden that the distinctions outweigh the substantial shared interests among Test Analysts and excluded game development employees. *See Boeing*, 368 NLRB No. 67, slip op. at 6; *PCC Structurals*, 365 NLRB No. 160, slip. op at 11.

D. <u>The Limited History of Unionization In The Video Game Industry Is Not Determinative.</u>

Until recently, video game industry employees historically have not been unionized. No Board decision has addressed the appropriate unit scope for a video game studio.

The Raven Case is distinguishable to the instant case. The Diablo franchise structure, titles developed, game development processes, and levels of contact and interchange present here are completely different from that which was established in the Raven case.

The overall organization of Blizzard Albany varies greatly from Raven studio. As detailed above, Diablo employees, including Test Analysts, are assigned to the multi-disciplinary

feature groups or "pods" to facilitate the development of specific features and aspects of the game (Tr. 193:8-11, 14-16). Further, Diablo employees work exclusively on either D2R or D4, both of which have their own equipment and communication channels (Tr. 317:25-318:6). Blizzard Albany's structure is far more complex than Raven studio's organization solely along departmental lines.

Diablo titles differ from Raven studio's Call of Duty titles in that the development of Diablo titles is more of an artistic, iterative process. Unlike Call of Duty, which has a more defined narrative, Diablo provides players with an "open world" where they can take innumerable paths in order to complete the game (Tr. 27:20). This "open world," therefore, mandates that all developers, include Test Analysts, function together to bring the countless plotlines into one, unified story.

Developers, including Test Analysts, also continuously work towards reaching specific milestones within Diablo (Tr. 449:5-8, 507:11-12). Once the milestone is complete, the game it not finished but, rather, the development team simply moves on to another aspect of the game (Tr. 565:3-9). Paired with the nature of feature groups, Test Analysts interact with classifications outside of QA on a much more frequent basis and wider scope than "just departmental meetings and Slack" as found in the Raven Case. *Activision Publishing*, Case No. 18-RC-289570, at p. 20. Test Analysts substantively interact with employees from other disciplines on the feature group for each round of testing and provide feedback on the quality of the features tested.

The novel issues presented here and the lack of substantial precedent in the video game industry dictates that the decision in the Raven Case is not determinative. Moreover, the

significant differences between the organization and work performed at Blizzard Albany as compared to the studio in the Raven Case render that case inapplicable to the present case.

E. **<u>The Excluded Employees Share an Overwhelming Community of Interest with the Employees in the Petitioned-for Unit.</u>**

Not only has the Petitioner failed to meet its burden to show that the distinct interests of Test Analysts outweigh their shared interests with excluded game development employees under *PCC Structurals* and *Boeing*, but even under the Board's prior standard for determining whether a petitioned-for unit is appropriate, *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011), enfd. sub nom. *Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013), the petitioned-for unit is inappropriate. Under this test, the Board analyzed whether the petitioned-for employees share a community of interest using the traditional, eight factors, as is the analysis under *PCC Structurals*. Where a party asserts that the smallest appropriate unit must contain additional employees, the Board required that the proponent "demonstrate that the excluded employees share an overwhelming community of interest with the included employees." *Specialty Healthcare*, 357 NLRB at 934.

The excluded game development employees on the Diablo franchise team at Blizzard Albany share an overwhelming community of interest with the employees included in the Union's proposed unit. As established in detail above, the community of interest factors weigh in favor of finding that the smallest appropriate unit must include all employees on the Diablo franchise team at Blizzard Albany. Indeed, Test Analysts, among other things: (i) work in feature groups alongside other developers across all disciplines, (ii) develop test plans with input from other developers, which then constantly evolve based on the testing needs of the given feature, and (iii) communicate with other developers on a daily basis through email, Slack, Jira, and various team and ad-hoc meetings. Established Board precedent, even under the *Specialty*

Healthcare standard, expressly disapproves of a "fractured unit." *Id*. at 946 (citing *Seaboard Marine*, 327 NLRB 556, 556 (1999) ("'[T]he Board does not approve fractured units, i.e., combinations of employees that are too narrow in scope or that have no rational basis.'"). The Board has found that fractured units exist where the petitioned-for unit does not, among other things, track functional lines drawn by the employer and represents "an arbitrary segment" of an appropriate unit. *Odwalla, Inc.*, 357 NLRB 1608, 1612 (2011) (quoting *Specialty Healthcare*, 357 NLRB at 946). *See also K&N Eng'g, Inc.*, 365 NLRB No. 141, slip op. at 3-4 (2017) (rejecting petitioned-for unit of production and janitorial employees because unit was not drawn along departmental, functional, or supervisory lines); *Future Env't Inc.*, Case 13-RC-124781 (Apr. 30, 2014) (same for petitioned-for unit consisting of only certain laborer classifications).

Accordingly, the petitioned-for unit is inappropriate even under the *Specialty Healthcare* standard because the excluded development employees share an overwhelming community of interest with the employees in the petitioned-for unit.

F. <u>The Disputed Software Engineer Classifications Are Not Statutory Professionals Under Section 2(12).</u>

The Petitioner has challenged the inclusion of various software-engineering job classifications[9] in the bargaining unit proposed by Blizzard, but it has failed to carry its burden to prove that these employees constitute "professionals" under Section 2(12).

As the party asserting that these employees fall within the professional exception, the Petitioner bears the burden to prove that the exception applies. The Supreme Court held that the Act placed the burden of proving supervisory status—another exception—on the party asserting it:

[9] Associate Software Engineer, Gameplay; Software Engineer Senior Software Engineer I; Senior Software Engineer II; Software Engineer Co-op. Board Ex. 7. This brief refers to all of these classification as "software engineers."

> Supervisors would fall within the class of employees, were they not expressly excepted from it. The burden of proving the applicability of the supervisory exception, under *Morton Salt*, should thus fall on the party asserting it.

NLRB v. Kentucky River Cmty. Care, Inc., 532 U.S. 706, 711 (2001) (deferring to the Board's allocation of the burden to the party asserting it because the allocation is "consistent with the Act"). This reasoning applies directly. Like supervisors, professionals would fall within the class of employees, were they not expressly excepted. The burden of proving the applicability of the exception thus falls on the party asserting it. *See Greenhorne & O'Mara, Inc.*, 326 NLRB 514, 517 (1998) (placing the burden on an employer who asserted professional status). Here, the Petitioner, as the challenging party, bears the burden of proving that the subject soft-ware engineering job classifications constitute "professional employees" under the Act, under which the term is defined as follows:

> (a) any employee engaged in work
>
> > (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work;
> >
> > (ii) involving the consistent exercise of discretion and judgment in its performance;
> >
> > (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time;
> >
> > (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; or
>
> (b) any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a profession.

Section 2(12). In determining whether employees constitute professionals, "it is the work and not individual qualifications which is controlling." *W. Elec. Co.*, 126 NLRB 1346, 1348 (1960).

In analyzing the work, however, the background of individuals within the disputed group is relevant. *Id*.

The evidence on this record is that a college degree is not "required to work at any of the nonsupervisory positions in the engineering department." (Tr. 468:2-4). To the contrary, the company "really tr[ies] not to say that . . . a computer science or a four-year degree is absolutely required for the position." (Tr. 468:11-13.). And, further to the contrary, knowledge of computer programming and computer languages can be "self-taught." (Tr. 482:1). Blizzard currently has one individual in the engineering department without a degree in computer science or a related field and has had more in the past, and, underscoring this point, that individual is in a senior software engineering position. (Tr; 481:14-21).

Boiled down, the Petitioner's contention is based solely on the fact that the subject software-engineering job classifications engage in computer programming activities. However, prior determinations in other cases make clear that mere reliance on knowledge of programming languages is insufficient to qualify the individual as a "professional employee" as defined under the Act. *See, e.g.*, *Samaritan Health Services, Inc.*, 238 NLRB 629, 639 (1978) (concluding that "programmers II and I are not professionals within the meaning of the Act" and further stating that "their jobs do not require college degrees or any specialized education at an institute of higher learning"); *Safeway Stores, Inc.*, 174 NLRB 1274, 1276 (1969) ("We find that a prolonged course of specialized intellectual instruction and study is not required of these programmers[.]"); *Greyhound Lines, Inc.*, 235 NLRB 1100, 1106 (1978) ("The computer programmers and programmer analysts would not be classified by the Board as either professional or technical employees."); *see also VectorCSP, LLC,* Decision and Direction of Election, Case 28-RC-239541, at 15, 2019 NLRB Reg. Dir. Dec. Lexis 52, at *38-39 (May 20,

2019); *Storycorps, Inc.*, Decision and Direction of Election, Case 29-RC-199631, at 11, 2019 NLRB Reg. Dir. Dec. 124, at *26-27 (Aug. 8, 2017).

As in these other cases, the Petitioner has failed to demonstrate that the knowledge of programming languages applied by software engineers is "of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning." Section 2(12)(iv).

In addition, the Petitioner failed to provide sufficient evidence to support a finding that the work of these employees "involv[es] the consistent exercise of discretion and judgment in its performance" or that "the output produced or the result accomplished cannot be standardized in relation to a given period of time." Section 2(12). A single question in which a witness was asked whether a particular software engineer "use[s] discretion in doing his job," (Tr. 305:21-22), falls far short of carrying the Petitioner's burden.

On this record, the Petitioner has failed to carry its burden to show that these software engineers qualify as "professionals" within the meaning of Section 2(12).

G. <u>The Hearing Officer Failed to Properly Remedy the Impermissible Digital Picketing That Occurred During The Hearing.</u>

During the first day of the hearing in this matter, approximately 30 individuals joined the virtual hearing with banners reading "ABK Stop Union Busting" (Tr. 122:25-123:5). All participants in the hearing, most importantly the witnesses, could clearly see the banners (Tr. 123:5-8). These banners constituted nothing short of a digital picket and created an intimidating environment for Blizzard's witnesses (Tr. 123:9-13, 595:13-15). Counsel for Blizzard contemporaneously objected to the digital protest, but the Hearing Officer failed to remedy the inappropriate conduct (Tr. 124:12-18).

Representation case hearings are intended to be non-adversarial. *See* National Labor Relations Board Hearing Officer's Guide in NLRB Representation and Section 10(k) Proceedings, Section II(C)(4) (Sept. 2003) (*citing Fall River Savings Bank*, 246 NLRB 831 fn. 4 (1979). The participants' conduct disregarded the nature of hearing and overtly assailed Blizzard's legal position and any witnesses called to offer evidence for that position.

NLRB Rules and Regulations §102.177(b) states that "[m]isconduct by any person at any hearing before an Administrative Law Judge, Hearing Officer, or the Board may be grounds for summary exclusion from the hearing." Despite counsel for Blizzard's objection to the participant's misconduct, the Hearing Officer ignored §102.177(b), stating instead that she would not "stop anyone from using whatever the profile picture is" (Tr. 124:16-17). When Blizzard's counsel reiterated the objection prior to the close of the hearing, the Hearing Officer again denied the objection again, stating that "[i]f they showed up wearing a shirt that says whatever it says, we [would not] ask them to change shirts." (Tr. 598:2-3). The Hearing Officer's comparison to shirts is inaccurate, however. The anti-Blizzard banners displayed by approximately 30 participants during the hearing are akin to 30 individuals filing into a hearing room at Region 3's offices with large billboards displaying anti-employer messages—conduct that the Region surely would not allow, the Board would not allow at an oral argument, and no court would ever allow. The Hearing Officer's failure to remove the individuals engaging in the on-premises digital picket, consistent with §102.177(b), impermissibly tainted the hearing. The remedy should be reconstituting the hearing and allowing Blizzard to submit or resubmit any witnesses whom it would have called (or kept on the stand) and evidence that it would have submitted through those witnesses. Short of a complete do-over of the entire hearing, which Blizzard does not advocate, this result would remedy the effects of the misconduct at the hearing.

H. The Petitioner's Arguments Lack Merit.

1. *The Petitioner's Contention that Test Analysts Do Not have Frequent Contact and Interaction with Other Employees Fails.*

The Petitioner contends that "the stand-alone QA department in this case is even more separate and distinct than the embedded QA department in the Raven Case, and in that case, the Region directed an election of QA employees only." (Tr. 20:13-16.). However, the Petitioner's sole witness testified that Test Analysts do, in fact, have frequent contact and interchange with other employees throughout Blizzard Albany.

- The Petitioner's only witness testified that she met once a week with the audio team, (Tr. 498:17-21) which includes "sound designers, the audio director, the audio programmer, a member of the developer experience team, the audio producer . . . the composers . . . and the music composers. (Tr. 501:15-20).
- The Petitioner's witness, as well as all Test Analysts, attend a weekly call with the entire D4 team. (Tr. 498:22-23).
- Test Analysts assign bugs to specific people or to specific disciplines like audio or development. (Tr. 503:18-22).
- Test Analysts share access to Jira, Zoom, Slack, OBS, Confluence, and Microsoft Outlook with all Blizzard Albany employees. (Tr. 514:9-21)
- Depending on the stage of development and the team, Test Analysts may spend as much as 30% of their day communicating with developers in other disciplines (Tr. 518:14-18).

- The Petitioner's witness also testified that sound designers at Blizzard Albany provided her with a lot of feedback, taught her a lot of techniques and with the use of certain tools used in her job. (Tr. 540:8-19, 558:1-4).
- The Petitioner's only witness admitted that, as a Test Analyst, she has worked extensively with developers across all disciplines to "learn[] everything [she] can about other disciplines in the entire game development pipeline." (Tr. 542:5-12; R. Exh. E-22). The Petitioner's witness admitted that she did not think it was possible to "produce a game on the scale and prestige of Diablo IV" without test analysts and did not "think that would be very doable." (Tr. 547:3-5).
- The Petitioner's witness testified that analysts must understand what other disciplines are doing "in order to know who is responsible for the issues you might be finding, who to ask questions about." (Tr. 553:19-21).

2. *The CWA's Argument that QA Work Requires Less Skill and Education Than Other Disciplines Lacks Merit.*

The Petitioner also contends that the work performed by QA "does not require the same level of experience, skill, or education as the other departments." (Tr. 23:18-20). However, the Petitioner's only witness came into her role with an advanced degree in fine arts and music (Tr. 555:23-25) and testified that "while a coordinator or QA tester may not be producing sound or music for a game, they still must have a solid understanding of game audio, including tools, terminology, and workflow." (Tr. 545:8-11). While the need for particular skills upon hire may be limited for the entry-level QA positions, the fact remains that Test Analysts are, in fact, highly skilled at game play, bug identification, and creativity and many Test Analysts enter the Employer with a background in relevant fields. Further, when asked whether there was more to

being an analyst than simply playing a video game the Petitioner's witness responded "Absolutely." (Tr. 550:14-17). When asked about the skill required to perform the Analyst role and whether there's a certain degree of specialized skill involved, the Petitioner's witness replied "Yes" (Tr. 550:18-20). She similarly responded when asked whether the work involved a good deal of thinking stating "Yes, there is a lot of problem solving and creatively thinking." (Tr. 550:23-25, 551:1), and finally she testified that to perform the work there was a "certain degree of independent judgment that you have to exercise." (Tr. 551:5-6).

IV. CONCLUSION

For all the aforementioned reasons, any unit found appropriate in this case must include all game development employees working on the Diablo franchise at Blizzard Albany.

Respectfully submitted,

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Dated: August 25, 2022

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the Employer's Post-Hearing Brief was e-filed with the Regional Director, Region 03, via the Board's electronic filing system on August 25, 2022 and served by email, on the same date, upon the following:

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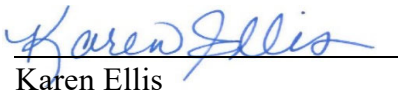

Karen Ellis

Dated: August 25, 2022