SUPERIOR COURT OF NEW JERSEY
PASSAIC VICINAGE

Margaret Mary McVeigh, PJ.Ch.
Presiding Judge, General Equity

COURTHOUSE
PATERSON, NEW JERSEY 07505 -2018

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RE: Toys R.Us.Com.LLC vs. Amazon.com
Docket No.: C-96-04

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In May of 2004 internationally known toy seller Toysrus.com, LLC, Toysrus.com, Inc., Toys "R" Us, Inc., and Geoffrey, Inc. (collectively "TRUCC") filed a Complaint with an Order to Show Cause alleging breach of an agreement it had entered into in August of 2000 with

internet retailer AMAZON.com, Inc. and Amazon.com Kids, Inc. (collectively "AMAZON"). In the fifteen (15) months since that original complaint was filed, the parties have filed an answer and a counterclaim, an amended complaint, and amended answer and counterclaim, and numerous motions. There were two applications for preliminary injunctions filed by the plaintiff against the defendant, resulting in two separate orders. There have been miscellaneous motions for enforcement, for discovery, for the admission of counsel Pro Hac Vice, partial Summary Judgment Motions and two appeals.

In January of 2005, this Court appointed a Special Discovery Master, Justice Gary Stein, retired, who has provided respite for the trial court with regard to the multitude of discovery disputes that arose in this matter.

The Court, at the request of the parties, adjourned two previously established trial dates, one in May of 2005 and the other in June of 2005. The Court was unwilling to adjourn a pre-emptory September trial date due to the emergent nature of the parties' requested relief, as well as the age of the case and recognition through discussions with the Discovery Master that all good faith attempts at discovery had been exhausted. In fact, once the trial began an additional issue was sent back to the Discovery Master. A request was made for a finding as to whether or not the defendants had properly complied with the Discovery Master's Order to provide data to the plaintiff. The Discovery Master issued findings on September 29, 2005. Simply put, the Discovery Master found:

> . . . Amazon had a duty to maintain its data in a format that would permit it to provide historical sales data for the sales of all products that allegedly should be classified as exclusive products, and Amazon did not maintain its data in a manner that would permit it to provide that information to Toys . . . [therefore,] Toys was not provided with the data necessary for it to prove its claim if its legal contention is determined to be correct.

[(Letter from Justice Stein to Judge McVeigh of 9/29/05, at 9-12.)]

The disputes in this matter arise from the Strategic Alliance Agreement, P1[1], (the "Agreement"), dated August 9, 2000, between the parties, including subsequent amendments, and the parties conduct. More specifically, the issues in this matter focus on Sections 12.1.1 and 12.1.2 of the Agreement with the additional attention on Section 5.1, and 8.2. Finally, the Court must consider the impact on Section 12.1.2 of the definitions embodied in the Agreement.

The defendant, AMAZON.com filed a counterclaim, arguing that this Court will additionally need to address the plaintiff's "chronic failure" to meets its contractual obligations to: "(1) Select for sale through Amazon.com the top 1,000 Toys and Games and the top 500 Baby Products; and (2) Maintain sufficient stock of such top-selling products to avoid disappointing Amazon.com customers who want to buy those products online, especially during the crucial holiday season." (Amazon.com Answer and Separate Defenses to Plaintiff's Amended Verified Complaint of 6/6/05, at 2.)

Both parties in their own way seek a determination of disengagement from the relationship and to collect damages.

The Courts initial grant of injunctive relief with regard to "1x1 Graphic User Interface", its launch on the site and its status as a Programmatic Selling Initiative was vacated by the Appellate Division in an April 2005 decision. A second preliminary injunction, issued in December of 2004, restrained sales by third parties known as Merchant@sellers and specifically TARGET.com, of Selective Exclusive Products as defined by the Agreement. Defendant's application to vacate the second preliminary injunction, in light of the Appellate Division's April 2005 decision, was denied by the Appellate Division just before the start of trial.

[1] Documents referenced as P__ or D__ are exhibits that were admitted into evidence pursuant to trial rulings.

A case that has been gleefully referred to as a "simple breach of contract litigation" has blossomed into a full scale evaluation of the use of language, definitions of terms outside the normal lexicon of the general usage and the emerging growth of technology. These issues have impacted this long term partnership agreement.

TRUCC raised questions about the enforceability of the Agreement, in this changing world. Where there is no adequate remedy at law, this Court would be required to grant permanent injunctive relief with reference to: 1) 1x1 Graphic User Interface, 2) the existence of third party sellers on the Amazon website, and 3) the use of sponsored links on the AMAZON website. Alternatively, TRUCC asks this Court to grant recession, or termination, with an award of damages[2].

AMAZON asks this Court to: 1) maintain the Agreement as contained in the Strategic Alliance Agreement, 2) compel TRUCC to comply with that Agreement, and 3) to award damages for TRUCC alleged violations and breach thereof.

Pursuant to a Pre-Trial Order, the parties submitted a Stipulation of Facts to serve as the Courts basic framework for rendering a decision in this matter. The stipulated facts[3] are as follows:

> 1. Toysrus.com, LLC is a Delaware limited liability company; Toys "R" Us, Inc., is a Delaware corporation and the parent holding company of TRUCC, Toysrus.com, Inc. and Geoffrey, Inc. (collectively, "TOYS").
> 2. TOYS is a domestic and international retailer of toys, games and baby products.
> 3. Amazon.com Kids Inc., formerly known as Rockbound, Inc., is a Delaware corporation and a subsidiary of Amazon.com, Inc. (collectively, "Amazon.com").
> 4. Amazon.com's website can be found at www.amazon.com. Although Amazon.com initially started as an on-line book store, by

[2] There is a reference in the Complaint for relief in the form of an Order voiding the agreement. Such relief can be addressed in Plaintiff's claims for rescission or termination.
[3] It is noted that these stipulated facts were more than amply addressed by various witnesses at trial.

2000, Amazon.com had expanded the range of products sold to include videos, music, consumer products and toys.

5. In 1999 and 2000, Amazon.com employed its own buyers and planners who were responsible for identifying and purchasing toy products and creating relationships with toy manufacturers and vendors. Amazon.com also had a specialty toy product line known as Back to Basics.

6. In January 2000, TOYS inquired of Amazon.com whether it would be interested in discussing an alliance. TOYS proposed that Amazon.com would provide web-hosting, order fulfillment, customer service and other functions for TOYS' on-line business.

7. Several months later, in May of 2000, executives from TOYS and Amazon.com met at an industry conference. Not long thereafter, TOYS and Amazon.com began to explore, once again, a strategic alliance in which Amazon.com would provide web-hosting, order fulfillment, customer service, and other functions for TOYS' online business.

8. Amazon.com and TOYS initially disagreed as to the scope of exclusivity provisions for the proposed alliance.

9. On August 9, 2000, Amazon.com Kids, Inc., then known as Rock-Bound, Inc., and Toysrus.com, LLC, entered into the Strategic Alliance Agreement ("the Agreement"). The Agreement formed a ten year alliance for, among other things, the joint development of Co-Branded Stores on the Amazon.com website.

10. Amazon.com, Inc. Toys "R" Us, Inc. Toysrus.com, Inc. and Geoffrey, Inc., became bound by provisions of the Agreement through execution of a Supplemental Agreement, also dated August 9, 2000.

11. Toysrus.com, LLC and Amazon.com Kids, Inc., entered into Amendment No.1 to the Agreement on April 17, 2002. Amazon.com, Inc. and Toysrus.com, Inc., Toys "R" Us, Inc., and Geoffrey, Inc., entered into a Consent and a release effective April 17, 2002.

12. Toysrus.com, LLC and Amazon.com Kids, Inc., entered into Amendment No.2 to the Agreement on August 6, 2003. Amazon.com, Inc. and Toysrus.com, Inc., Toys "R" Us, Inc., and Geoffrey, Inc., entered into Consent to Amendment No.2 dated August 6, 2003.

13. Toysrus.com, LLC and Amazon.com Kids, Inc., entered into Amendment No.3 to the Agreement on March 5, 2004. Amazon.com, Inc. and Toysrus.com, Inc., Toys "R" Us, Inc., and Geoffrey, Inc., entered into Consent to Amendment No.3, dated March 5, 2004.

14. TOYS has made all required payments of the annual base fees, all revenue sharing payments and transaction fulfillment fees under the Agreement.

15. The Agreement created a virtual online toy store and a baby product store on the Amazon.com website.

16. When Amazon.com and TOYS entered into the Agreement, Amazon.com maintained tabs on its website for the purpose of, among

other things, identifying product categories and to allow for site navigation.

17. Under the Agreement, the parties intended that TOYS would give up its website and migrate to the Amazon.com website. TOYS migrated to the Amazon.com website in September 2000.

18. Since the launch of both Co-Branded Stores, an internet user that enters the URL www.toysrus.com or www.babiesrus.com is taken directly to the Amazon.com website.

19. When TOYS and Amazon.com launched the Co-Branded Toy and Video Game Store, a tab on Amazon.com's home page was labeled "Toys & Games." When an Amazon.com site visitor clicked on the "Toys & Games" tab, the visitor was directed to the Co-Branded Toy and Video Game Store Home Page.

20. The parties defined various terms in the Agreement. A "Selected Exclusive Product" is any "Exclusive Product" that TOYS elects to offer for sale through the Amazon.com website pursuant to Section 5.1.1.of the Agreement.

21. Amazon.com's contracts with third party Merchants@ sellers before September 2004 generally contained provisions restricting the sale of all toys, games and baby products. At times, Amazon.com would discuss the nature and scope of this restriction with third party merchants.

22. Amazon.com has amended certain of its Merchants@ contacts that were executed prior to September 2004.

23. Amazon.com entered into Merchants@ agreement with eToys Direct that was signed on September 27, 2004 and countersigned by Amazon.com on November 5, 2004.

24. In 2003, Amazon.com discussed with TOYS the addition of a merchant to the Amazon website that sold skateboards and accessories. Amazon.com offered a revenue share to TOYS for the sales of the skateboards and accessories.

25. Amazon.com prepared a memorandum regarding its 3.5% analysis and containing underlying sales data in November 2004, and supplemented this 3.5% analysis and underlying sales data in April 2005.

26. Exhibit B to Robert Brunner's June 24, 2005 Expert Report is entitled "Sources of Information Relied Upon." Mr. Brunner specifically lists an April 29, 2005 "Email from Zahraa Wilkinson regarding detailed info re alleged SEPs" in Exhibit B as one of the "Sources of Information Relied Upon."

27. Mr. Brunner listed both the November 2004 and April 2005 3.5% analyses and underlying sales data in Exhibit B of his Expert Report, which lists all "Sources of Information Relief Upon."

28. Amazon.com introduced Sponsored Links onto its website in 2003. Sponsored Links are paid advertisements on the ACT Site that consist of one or more links to separate, third party web sites.

29. Amazon.com received a fee for visitors who "click through" Sponsored Links.

30. If a user types in "Bruce Springsteen" into a search box and searches all of Amazon.com website, for example, then the page that appears after hitting the "Go" button includes not only products on the Amazon.com website relating to Bruce Springsteen, but also some Sponsored Links that relate in some way to the keywords "Bruce Springsteen."

31. Sponsored Links on the Amazon.com website are followed by a brief statement describing the link and a URL.

32. Sponsored Links are currently displayed on the Amazon.com website in only three situations. First, Sponsored Links may appear when a user performs an "all products" type search of the ACT Site. An "all products" type search of the ACT Site is performed when the user types in specific keywords and instead of searching a particular category, searches "Amazon.com." Depending on the keywords searched, a list of results are returned that may include Sponsored Links. Second, Sponsored Links may appear when a user reaches certain nonfiction book detail pages. Third, Sponsored Links may appear when a user reaches certain music detail pages.

33. Sponsored Links are not displayed in search results when a user simply searches within a particular product category.

34. Amazon.com receives Sponsored Links from Google's AdWords service pursuant to a contract with Google (www.google.com).

35. Amazon.com is paid a percentage of the gross revenue that Google collects from advertisers for each click on a Sponsored Link that is displayed on the Amazon.com website.

36. Amazon.com receives an aggregate accounting of the total number of clicks on a monthly basis, the click percentage (conversion) rate, and the total revenue during that same time period.

37. Google does not provide Amazon.com with any information regarding the number of clicks on any particular link or the identity of advertisers.

38. Amazon.com has no direct contracts with individual third parties for the display of Sponsored Links on the ACT Site.

39. As a general matter, Google, not Amazon.com, controls which third party web sites are advertised as Sponsored Links on the ACT site in response to a given set of keywords. Amazon.com can, at its discretion, request that Google block specific domain names (URLs) from appearing as Sponsored Links on the Amazon.com website. In the past, Amazon.com has blocked specific domain names related to sellers of toys, games, and baby products.

40. Craig Jacoby was a member of the team of attorneys representing TOYS in negotiating the Agreement.

41. 1x1 GUI is a technology that allows third parties to create product detail pages for the Amazon.com catalog. Detail pages provide customers with product information and can contain images, narrative descriptions, technical specifications, customer reviews, prices availability and identification numbers.

42. Product detail pages created by 1x1 GUI may appear in search results pages.

43. Amazon.com sets the monthly fee that it charges 1x1 GUI sellers and the amount paid by sellers has changed over time.

44. At the time TOYS originally filed this lawsuit, Amazon.com had not officially launched its 1x1 GUI technology for the sale of toys, game and baby products.

45. On October 27, 2004, Amazon.com implemented 1x1 GUI for third party sellers in the toys, games and baby products categories.

46. 1x1 GUI was developed as a technology tool at Amazon.com to provide another means by which third party sellers could add items to the Amazon.com catalog.

47. Thousands of Exclusive Products have been added to the Amazon.com website since the litigation began because Amazon.com officially launched 1x1 GUI in the toys and babies categories.

48. Section 9.1.2 of Amendment No.1 to the Agreement affords TOYS certain rights to have products drop shipped to customers.

49. Amendment No.3 to the Agreement further modified the use of drop shipments.

50. Pursuant to Amendment No.1 and Amendment No.3, TOYS has the right to have certain products drop shipped directly from manufacturers to the purchasing customers.

51. Over the course of the more than five years since TOYS and Amazon.com entered into the Agreement, the parties have developed a standard procedure for making products "receive ready," – that is, ready to receive in the Amazon.com Distribution Centers.

52. Both TOYS and Amazon.com have to take steps to make products "receive ready." Some of these steps have to be coordinated or sequenced for the process to work properly.

53. The "receive ready" process generally begins with TOYS identifying an item that it elects to offer for sale on the Amazon.com website. TOYS then agrees on terms with the manufacturer for the sale of the item. Next, TOYS signs an agreement with the manufacturer and acquires a "quote sheet" of pricing terms.

54. When TOYS sends product information to Amazon.com, an ASIN (Amazon Standard Identification Number) is assigned. ASINs are unique to Amazon.com.

55. Amazon.com's Certified Sample Center measures the incoming sample product and collects other information about the product (from the packaging or the sample) to confirm that information TOYS

> initially submitted matches the actual product that will be offered for sale on the Amazon.com website.
>
> 56. TOYS and Amazon.com have a process for designating the distribution center to which inventory should be shipped.
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> 57. In one or more of its analyses, Amazon.com has used Detail Page View as a metric to measure the out-of-stock levels of TOYS' inventory. The Detail Page View metric created by Amazon.com measures the frequency with which customers clicking on a detail page are informed that the product in question is out-of-stock.
>
> 58. In one or more of its analyses, Amazon.com has included as out-of-stock seasonal items, such as Halloween costumes and Easter baskets, even after the relevant season is over.
>
> 59. Over time, Amazon.com has used a variety of methods to measure TOYS' out-of-stock levels, including SKNs, ASINs and detail page views.
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> [Stipulations of Fact at Trial, at 1-8.]

On September 6, 2005, the trial began with the Court entertaining argument and rendering decisions with regard to what will undoubtedly be the major issues in evaluating this Court's decision. The first of the Court's evidentiary decisions involved the use of extrinsic evidence in understanding the Agreement.

The Court will apply Delaware law as is required by the Strategic Alliance Agreement. The Court has looked both to New Jersey and Delaware law for guidance on the issues of admissibility of evidence and procedural matters. New Jersey has recognized such provisions "[o]rdinarily when parties to a contract have agreed to be governed by the laws of a particular state, New Jersey courts will uphold the contractual choice if it does not violate New Jersey's public policy". North Bergen Rex Transport, Inc. v. Trailer Leasing Co., 158 N.J. 561, 568, (1999); citing Instructional Sys. v. Computer Curriculum Corp., 130 N.J. 324, 341 (1992).

The issue of the use of extrinsic evidence is an old one. In 1949, the Supreme Court of New Jersey held that:

> The admission of evidence of extrinsic facts is not for the purpose of changing the writing but to secure light by which to measure its actual

> significance. Such evidence is adducible only for the purpose of interpreting the writing – not for the purpose of modifying or enlarging or curtailing its terms, but to aid in determining the meaning of what has been said.
>
> [Casriel et al. v. King et al., 2 N.J. 45, 50-51 (1949).]

During that same period of time the Supreme Court of New Jersey also explained that the fundamental rule is that where a written contract is clear and unambiguous and the attention of the parties unmistakable it is considered a final and exclusive memorial of their intentions and parole evidence is not admissible to explain, alter or vary its terms. See Central Hanover Bank & Trust Co. et al. v. Herbert et al. and Central Hanover Bank & Trust Co. et al. v. Griscom et al., 1 N.J. 426 (1949)(two cases).

> The rule is that parole evidence is admissible to explain an ambiguity in writing, or when the intent of the [parties] is not clear. But where the language employed has an ordinary meaning or where the meaning is plain and unambiguous on its face, there is no ground for the application of the above rule and parole or extrinsic evidence is inadmissible.
>
> [Id. at 429.]

This Court ruled that Plaintiff would be permitted to introduce extrinsic evidence in pursuit of its claim. Evidence permitted would focus on the drafting of the Agreement and definition of terms.

The Court introduced extrinsic evidence in order to establish the understanding of Programmatic Selling Initiatives. During pre-trial, this issue took on a life of its own. A Programmatic Selling Initiative is defined in the Strategic Alliance Agreement as:

> **"Programmatic Selling Initiative"** means any area, feature or service of the ACT Site through which Third Parties may sell products or services on terms available to the general public (or, in the case of "sothebys.amazon.com", to define a class of dealers (including, without limitation, the existing "Auctions," "zShops,"

> "sothebys.amazon.com," and "Amazon.com Advantage" areas and services of the ACT Site).
>
> [(Strategic Alliance Agreement, Exhibit B, at 86)]

TRUCC argues that by the inclusion of the types of stores such as zShops, Sothebys, and Amazon Advantage, the parties were indicating a type or a classification of selling that would make up what a Programmatic Selling Initiative is. Amazon argued to this Court that the definition of a Programmatic Selling Initiative was clear and these stores in the definition were simply examples of existing Programmatic Selling Initiatives. Further, Amazon alleged that both parties knew that Amazon would be looking to expand its technology in order to sell and purchase products to the general public whereby not being limited to any specific type or classification of selling through that technology.

Certifications and affidavits of the parties presented to this Court Pre-Trial, clearly show a difference in the understanding of "Programmatic Selling Initiatives". Each word taken by itself has a distinct meaning in the ordinary and normal course of usage but put together in this agreement, it creates an ambiguity as to the parties understandings. In order to render a fair and reasonable decision, this Court needed to understand how the parties used the terms and what was intended by that use. See Eagle Industries, Inc. v. DeVilbiss Health Care, Inc., 702 A.2d 1228, 1232 (Del. 1997).

> In a perfect world, integrated contracts would always reflect plainly and accurately the compromises and allocation of risk that the parties intend. The reality is that the contractual language defining rights and obligations of the parties is sometimes ambiguous. It is a court's duty to preserve to the extent feasible the expectations that form the basis of a contractual relationship. When, as in the instant case, the meaning and application of contract terms are uncertain, a court fulfills this duty by considering extrinsic evidence.

[Id. at 1233-34.]

Before trial, the Court found that not only was the definition of Programmatic Selling Initiatives unclear, but also unclear was whether or not Programmatic Selling Initiatives should be included as part of the 3.5% Safe Harbor (as it has been called) as set forth in Section 12.1.2 of the Agreement, which states:

> TRUCC acknowledges and agrees that nothing in this Agreement will prevent or otherwise restrict: (a) any sales of products or services occurring in connection with Programmatic Selling Initiatives; … (c) ACT and its Affiliates from selling, and permitting Third Parties to sell, Exclusive Products through the ACT Site (other than through the Co-Branded Stores), provided that such sales by ACT and its Affiliates, or any such Third Party . . . do not constitute more than three and one-half percent (3.5%) of the Exclusive Product Revenues for any Year . . . .
>
> [(Strategic Alliance Agreement, Section 12.1.2, at 45.)]

More troubling was exactly what the 3.5% Safe Harbor was intended to encompass as the partnership of TRUCC and Amazon moved forward. This Court ruled that extrinsic evidence may be introduced regarding whether or not a Programmatic Selling Initiative sale is part the 3.5 % Safe Harbor provision.

Perhaps, most importantly, this Court agreed to hear from witnesses and accept evidence presented by Plaintiffs and Defendants as to the parties' basic understanding of what "exclusivity" meant in this Agreement. The Court needed to understand what the parties intended in 2000. Did "exclusivity" mean that there would be no competition with TRUCC on the Amazon website in the sale of toys, games and baby products, and whether these products were all Exclusive Products or merely products selected exclusively by TRUCC for sale, i.e. a Selected Exclusive Product. TOYS' position is that it bargained and paid Amazon for total

"Exclusivity"[4] as part of the contract base fee, which is currently set at fifty million dollars annually.[5]

The defendant's counterclaim focused this Court's attention on TRUCC ability to maintain a 90% minimum level inventory on all selected products. What did the parties mean by "commercially reasonable efforts in maintaining" that inventory pursuant to Section 8.2[6] of the Strategic Alliance Agreement. (See Strategic Alliance Agreement, Section 8.2, at 31.) Additionally, the Court needed to look at Amazon's expectations of what TOYS would provide by way of selection.

While the words utilized are common words in ordinary speech, it is clear this dispute goes beyond a simple disagreement over definitions. Rather, there is ambiguity in the use of language that has allowed the drafters of this agreement and the parties themselves to develop different views of critical sections of the Strategic Alliance Agreement. These differences go to the heart of the relationship envisioned in the Strategic Alliance Agreement and this Court's

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[4] Section 12.1.1 "General" of the Agreement states: "Subject to Section 12.1.2, neither ACT nor any of its Affiliates will, on or after the Co-Branded Toy and Video Game Store Launch Date: (a) sell or permit any Third Party to sell any Selected Exclusive Products through the ACT Site; or (b) sell any Selected Non-Exclusive Products through the ACT Site (provided, however, that ACT and its Affiliates may permit Third Parties to sell Selected Non-Exclusive Products through the ACT Site without restriction, including, without limitation, under circumstances where ACT or one of its Affiliates is selling such Selected Non-Exclusive Products and remitting substantially all of the proceeds therefrom directly to a Third Party in a manner similar to that contemplated by this Agreement for payments by ACT to TRUCC during Year 2000).

[5] The base fee is fifty million dollars for 2001 through 2004. "The Co-Branded Stores Base Fees . . . for each of Years 2005, 2006, 2007, 2008, 2009, and 2010 shall be the same as specified for Year 2004, provided, however, that the Co-Branded Stores Base Fees . . . shall be adjusted, in each case, pursuant to Section 13.1.5." (Strategic Alliance Agreement, Amendment No. 1, Exhibit D, at 19.) "The fees specified . . . for each Year after 2004 will each be adjusted on an annual basis . . . by a percentage equal to the percentage change in the value of the CPI Index for November of the preceding Year . . . ." (Strategic Alliance Agreement, Amendment No. 1, Section 13.1.5, at 14.)

[6] Section 8.2 "Minimum Inventory" of the Agreement states: "TRUCC will use commercially reasonable efforts to ensure that ACT has at all times a supply of each Selected Product sufficient to meet the anticipated demand in an applicable Quarter as set forth in the Selected Product Unit Forecast for such Quarter. Without limiting the generality of the foregoing, TRUCC will: (a) use commercially reasonable efforts to ensure that at least ninety percent (90%) of all Top Baby Product SKUs and ninety percent (90%) of all Top Toy and Video Game Product SKUs are at all times in inventory at one or more ACT Distribution Centers; and (b) ensure that at least ninety percent (90%) of all Selected Product SKUs are at all times in inventory at any ACT Distribution Center designated by ACT. (Strategic Alliance Agreement, Section 8.2, at 31.)

decision. As the Court indicated in Motorola, Inc. v. Amkor Technology, Inc., 849 A.2d 931, 938 (Del. 2004), "As a general rule, whenever it is possible, a court must preserve the reasonable expectations that form the basis of the parties' contractual relationship. In Motorola, the Delaware court refused to enforce the literal language of the agreement that would have held the parties to an unintended result. Both parties understanding of the language and its operation is reasonable. Because they are both reasonable, this Court found that extrinsic evidence would be permitted during the course of this trial. By permitting the parties to introduce evidence with regard to the creation of this Agreement, this Court was not attempting to rewrite the parties' agreement but merely to understand what went on when the Strategic Alliance Agreement was negotiated in 2000 and again as the Agreement was modified in 2001.

The second evidentiary issue is related to the use of e-mails produced during the course of discovery. Amazon maintained a running objection before this Court that the use of e-mail evidence lacked foundation, relevance, and included hearsay. On occasion, the documents proffered as evidence by the plaintiff were resplendent in their inclusion of hearsay statements by parties. As the trier of fact with years of experience, this Court used its ability to overlook certain portions of the included hearsay in e-mails that were admitted into evidence.

The Court refused to make a broad ruling with regard to the use of e-mails. Rather, each e-mail proffered had to withstand the scrutiny of whether or not it would be admissible. Did it have reliability and relevance. Generally, this Court pointed out that the use of internal e-mails as the preferred means of communication and recordkeeping has become a burgeoning issue in our law. This Court is very aware of the fact that the internet technology, both as a means of communication and storing of important information is an area that has perhaps outpaced our existing decisional law.

Amazon's objection to complete and incomplete e-mail exhibits, in general, relied on some very early cases from the late 1980's and early 1990's. While relevant to legal decisions at that time, the cases no longer provide this Court with guidance in its understanding of the use of these types of documents. The Court instead relied, in part, on a series of cases out of the Southern District of New York involving employment litigation. See Zubulake v. UBS Warburg LLC, 220 F.R.D. 212 (S.D.N.Y. 2003)[7] More importantly, under the Federal Rules of Evidence, Courts of competent jurisdiction have been allowing the use of e-mails in trials to establish facts on a regular basis. As indicated by the United Stated District Court of Iowa:

> . . . in a case involving an industry where e-mail and internet communication are a fact of life, these technical deficiencies must go to the weight of such evidence, rather than to their admissibility.
>
> [Microwave Systems Corp. v. Apple Computer, Inc., 126 F.Supp.2d 1207, 1211 (S.D. Iowa 2000)]

In 2002, the 9th Circuit Court of Appeals discussed the admissibility of e-mails. See Sea-Land Service Inc. v. Lozen International, LLC., 285 F.3d 808 (9th Cir. 2002). The Court in Sea-Land Service Inc. relied on the Federal Rules of Evidence dealing with admissions against interest and records that are kept in the normal course of business. See Id. at 821. For an e-mail to be admissible, the individual must be an employee, an agent or servant of a corporation who either authors the e-mail or receives the e-mail. This Court additionally reviewed the 2004 decision of United States District Court of California, Western Division, In re Homestore.com, Inc. Securities Litigation, 347 F.Supp.2d 769 (C.D. Cal. 2004), for guidance on authentication of e-mails and admissibility under the Fed. R. Evid. 801(d)(2).

[7] There were five (5) Discovery motions that discussed these decisions establishing the area of responsibility for counsel in corporations to maintain such documents so that they could be retrieved, reviewed and used as evidence at trial.

It is incomprehensible to this Court that a corporation dealing primarily in internet commerce finds internet communications to lack reliability. As discussed in the Zubulake case, internet communications are made at the time discussions occur or disputes arise and are the modern equivalent of a memo to a file or a memo to a superior. These communications contain, if not party admissions, at least a color and flavor of the parties' discussions at a specific time. At the start of trial and through the last day of testimony, this Court ruled that e-mails that met certain standards were admissible.

On September 7, 2005, the plaintiff opened to this Court with its first witness, John H. Eyler, who was the CEO of Toys.com from January 2000 until July 2005. John Eyler is the toy marketer. His retention by Toys in 1999 to provide new leadership was the realization of a life long ambition. He was the CEO of a Fortune 500 company whose brand was in the same category as Coca Cola and Disney.

Mr. Eyler told this Court that TRUCC had always provided an overwhelming assortment of products at minimum prices to customers. He felt there was a need to change. His goal was to evolve an environmental change at TRUCC to narrow the assortment of products offered, raise the level of the brick and mortar stores, and finally to bring the online business to success. Clearly, this is a man who understood the toy industry and what went into making a toy store successful. To Mr. Eyler, the toy business is all about "what goes on in December". Mr. Eyler's philosophy was that if you build up your reputation as having the safest and best high quality toys, you earn the ability to offer consumers the best products as opposed to the largest assortment of products.

Mr. Eyler's assessment of TRUCC failure in its 1999 foray into the online business was that TOYS did better than it planned in sales but could not deliver the product. He found the

volume of orders was much too high and TOYS.COM did not have the facilities to fulfill these orders. His initial step to fix that problem was to convince the Board it needed to invest a hundred million dollars ($100,000,000.00) to increase fulfillment capacity. TRUCC also needed to upgrade its website. This lead (Toys) to initiate discussions with Amazon. The initial discussions did not involve Mr. Eyler. Rather, Ray Arthur and Jonathan Foster of TRUCC lead discussions with AMAZON, bringing Mr. Eyler into conference once there was an interest in discussing a deal.

Mr. Eyler's testimony made it very clear that in their discussions with Amazon, exclusivity was not just a concept, but a necessary condition for any deal. If TRUCC had not been promised exclusivity of all toys, games and baby products it would not have signed onto the deal with AMAZON at all. This was to be a partnership, clear and simple for both parties TRUCC and AMAZON would launch a co-branded toy store on the internet.

Once the discussions with Amazon got off the ground, Mr. Eyler's role was supervisory. However, Mr. Eyler did meet with Jeff Bezos to explain the philosophy of the toy industry. Mr. Eyler understood Amazon's success was based in its ability to offer a high volume of assorted books and other items. He explained to Mr. Bezos, toys are a much different market than books. In the toy market, you have to buy products six to eight months out, without any assurances the products will sell. It is an instinctive reaction to where the marketplace is going based upon experience.

In selling books there is no inventory risk. Toys is another story. Publishers will take back books, toy manufacturers will not. To be profitable, the assortment of toys needs to be limited to top selling toys and you had to have the inventory. Mr. Eyler believed Mr. Bezos and he had an understanding, Jeff Bezos understood and accepted TRUCC's model. Conceptually,

Mr. Eyler had no problem with Amazon or its affiliates selling toys that TRUCC did not select to sell because there was a partnership in place. Mr. Eyler had no memory of there being any discussion about third parties being permitted to sell on the site. He was cognizant that what worked for brick and mortar stores would be different for the internet stores and would work with Amazon technology.

It was clear from Mr. Eyler's testimony, observing his demeanor and listening to his answers to questions, that he had and has a very clear understanding of the toy retail marketing. Mr. Eyler's testimony set the tone for future witnesses' presentations of what was called a virtual mall and the understanding of what Programmatic Selling Initiatives were. The conceptual understanding of the virtual mall on the Amazon site, the Court finds, is where the parties' differences in view of this arrangement began.

In describing P301[8], Mr. Eyler as well as all of TRUCC's witnesses during the entire trial, spoke about the Amazon site as a virtual mall as a mall with an anchor store and smaller boutique type shops. Programmatic Selling Initiatives, such as zShops and AMAZON Advantage, could be found in the parking lot of the virtual mall as a type of flea market. Mr. Eyler never saw any of the Programmatic Sellers as being retail sellers within the same virtual mall as TRUCC, but rather as sellers or products in a market place, flea market, or auction type setting. As became evident later during trial, this was not Amazon's view of what the site represented. The parties were using the same language and the same words to describe the site, but the concept and vision behind those words were entirely different things.

The proposed agreement provided a wonderful opportunity for the parties, but the negotiations needed to be completed within a specific timeframe. If the deal was to be struck, it would have to be done during the months of July and August so that the parties could launch this

[8] Diagram of the AMAZON Virtual Mall, Exhibit P301, herein attached to this Opinion as Exhibit 1.

site no later than September. Each and every witness involved in the negotiations indicated to this Court that if the deal was not made and the site was not up and running in September there was no purpose in making the deal.

The economics of the deal made sense. TRUCC would own any inventory that it chose to provide on Amazon.com. TRUCC would: (1) pay a base fee, (2) a price per piece and (3) a percentage of the value of a transaction. TRUCC position remained consistent throughout the trial, the base fee contained a premium paid by TRUCC for exclusivity.

Mr. Eyler testified the premium was never discussed nor was it calculated during negotiations. This testimony provided one of the keys to the undoing of this part of Plaintiffs' claim. The parties never identified premium paid for exclusivity.

TRUCC negotiated for a partnership with Amazon and gave up its ability to sell on any other online site, including abandoning its own independent URL. TRUCC only position on-line was and is on the Amazon site. The parties negotiated the carve outs of 12.1.2 but failed to ever give a separate value to exclusivity.

In 2001, the bubble burst in the dot-com industry. Income and business growth did not meet anyone's expectation. TRUCC learned AMAZON and TARGET were signing an agreement. The parties held a meeting in Aspen in the fall of 2001. The meeting focused on the economics of the agreement. Mr. Eyler testified that roll backs were not possible but the economic reality required a compromise on fees paid. TARGET coming on-site raised a major concern for TRUCC. Even with the assurances that TARGET had its own site and would not sell toys on AMAZON.com, TRUCC saw a problem. Once again Jeff Bezos and John Eyler discussed philosophy and left the negotiations to Ray Arthur (TOYSRUS.com) and Jorrit Van der Meulen (AMAZON.com). (See Exhibit P20, E-mail from Miller to Jenson, Van der Meulen,

Kalmbach, Broussard, Britto and "cc" to Curry, Risher, Bezos of 9/6/01.) An agreement was reached, the partnership agreement was amended to cap the base fee at fifty million dollars, which is through the end of 2004 and for years 2005 through 2010 the fifty million dollars is adjusted pursuant to the CPI Index, instead of escalating the base fee as previously written into the Agreement. (See Strategic Alliance Agreement, Amendment No. 1, at 11.) Further, TRUCC agreed to waive any claims resulting from AMAZON's deal with TARGET and the parties moved forward. (See Consent and Release of 4/17/02, at 1.)

John Eyler was the first of many witnesses to testify that the period between 2001 and 2003 was the partnership at its best. Moving into 2003 however, John Eyler testified other merchant products began showing up on the site and another meeting was called for. This meeting has been referred to as "the Time Square Meeting". It became apparent at that meeting that Jeff Bezos was not on board with TRUCC's business model of limiting product assortment and AMAZON wanted to place other sellers on its website. TRUCC feared loss of control, and although the parties seemed far apart, they sent the negotiators back to work once again. However, this time there was no resolution reached. The parties found themselves on the road that led to this lawsuit. Mr. Eyler testified the people at TRUCC, have no trust in AMAZON. The agreement has been breached in a manner that has rendered their differences irreconcilable.

Even on his cross examination, Mr. Eyler was consistent in testifying there had never been any discussion or consideration of third party selling on the AMAZON site. He was consistent in his recognition that Jeff Bezos's acceptance of a business model was critical to the parties dealing with each other. The toy merchandiser took the position, that the top 7,500 toys represented 97% of the business. (See 3T416-18 to 19.) If a business offers the consumer a limited assortment of the best top toys then the business excels.

John Eyler and all other TRUCC's witnesses never once hid the fact that in 1999, prior to partnering with AMAZON, TRUCC's on-line business, Toys R Us.com, was a disaster. The foray into e-commerce had them identified as "the poster child of malfeasance". Someone else referred to them as "e-commerce road kill". It was critical for TRUCC to find a way to provide a viable presence on the internet.

Mr. Eyler never attempted to convince this Court in his testimony that he could identify a percentage or a number in any of the fees paid that represents a number TRUCC paid for "exclusivity". AMAZON provided TRUCC with what it needed, site maintenance fulfillment and customer service. TRUCC provided AMAZON with what it did not have, an organization that knew the toy industry, had good vendor relationships and would be able to provide the type of toy experience AMAZON was looking for. Mr. Eyler was emphatic that those skills and connections were what made exclusivity critical for TRUCC. He felt that even absent a clearly defined percentage of the fee paid to AMAZON representing TRUCC's exclusivity; TRUCC had sacrificed to be the exclusive toy seller on the AMAZON site.

Mr. Eyler said TRUCC no longer has a primary presence on the AMAZON site. It is difficult to find the store and it is difficult to even buy from the store. He is concerned about customer confusion, including the fact that once a customer goes to the site they may find themselves buying from a seller other than TRUCC. While always expecting AMAZON would continue to be "state of the art", and exceed any other sites, he never imagined that the TRUCC prominence at that site would be diminished in the fashion he has witnessed today. He now realizes the Time Square Meeting was not to resolve differences, but was rather Jeff Bezos' attempt to change the agreement and pursue Mr. Bezos' expansive assortment of products from various retailers to the detriment of TRUCC's toy store. Mr. Eyler admitted and was very candid

about the fact that, at the time agreement was signed, TRUCC was not the first or even the second highest toy seller online. Those positions were held by E-Toys and AMAZON. Mr. Bezos would later candidly testify that TRUCC and AMAZON had done extremely well in the five years the Agreement has been in place and in 2004 was more than profitable. Mr. Bezos was equally clear this was not a one sided agreement. In 1999 AMAZON was left with a terrible inventory problem because it did not have any idea as to the appropriate way to market toys. This partnership was intended to pull the best of both companies into play and make them a dynamic force in e-commerce.

John Eyler's focus on the spirit of the agreement was consistent with his role as the overseer or responsible party between the negotiators and the TRUCC Board to make the deal work. Just before the end of his testimony, Mr. Eyler suggested in the beginning of negotiations it was AMAZON who feared site leakage more than TRUCC. The AMAZON site required the co-branded stores limit access or even reference to the other sites. He asked since TRUCC was required to restrict access to other sites through its the co-branded stores, why would TRUCC agree to allow AMAZON the right to create easy access from the AMAZON site to other toy stores that directly completed with TRUCC.

Mr. Eyler's testimony was very carefully placed to establish the general sense and spirit of the Agreement. Mr. Eyler was not the negotiator and was not involved with the specific terms of the Agreement. Mr. Eyler understood the agreement while unable to testify about details, conceptually he knew his territory. Jeff Bezos, called to testify by TRUCC next was a different story.

Mr. Bezos presented a very complex appearance to this Court. He attempted to convey to this Court, that as the CEO of AMAZON he had a general overview of the Agreement but was

not involved in the intimate details of neither the negotiations nor the terms or the language of the Agreement. Mr. Bezos preferred to refer this Court to Rudy Gadre, the in-house lawyer who worked on the Agreement with the key negotiators. However, this Court has no doubt his knowledge and understanding went much deeper than revealed.

In stark contrast to John Eyler's testimony, Jeff Bezos testified AMAZON would not have made the deal if it had not retained the ability to bring third parties on AMAZON's site to sell products TRUCC did not select to offer for sale on the site. The goal of AMAZON and one of its core values is, the more selection the better. Assortment and selection are the keys to AMAZON's identity. Mr.Bezos testified there were certain things he did not remember, or had no independent information about. Yet when pushed, certain information "just came back to him." Through his answers and demeanor, it is very clear that Jeff Bezos had definite information regarding AMAZON's conduct during the negotiations and AMAZON's goals of the Strategic Alliance Agreement.

His first recollection of any dealing with TOYS was sometime in 1999. Harrison Miller and Mark Britto, AMAZON employees brought to Mr. Bezos' attention a deal with TRUCC could potentially answer some of AMAZON's toy marketing problems. Harrison Miller was in charge of the toy business for AMAZON and Mark Britto ran the general business function for the company.

The move to include TRUCC in the AMAZON platform was one way to continue to evolve its site. Evolution of the site is another core value of AMAZON. Evolution of the site would ensure AMAZON that it would become a leader in e-commerce.

Mr. Bezos testimony assisted the Court in a number of ways. First, despite his lack of memory with regard to particular issues, his general recollection of what went on during the

negotiating phase provided a basis for the Court to see AMAZON's direction and destination. Increased selection was Jeff Bezos' primary motivating principle and the people working for him were acutely aware they could not undercut the concept of unlimited selection. Secondly, Mr.Bezos and his staff were and are very good at the use of words. There is an entirely separate lexicon at play within AMAZON. Tabs, functionality, zShops, Programmatic Selling Initiatives, even exclusivity or competition, for that matter, can be used in very different ways depending upon context.

Mr. Bezos testified the Agreement gave TRUCC the right to select exclusive products for sale and no one else could sell these products except however, Programmatic Sellers. AMAZON did reserve the right for them and for third parties to sell toys that were not selected by TRUCC for sale in the co-branded store. (See Strategic Alliance Agreement, Section 12.1.2, at 45.)

During cross examination, Mr. Bezos was confronted with Exhibit P20, an e-mail circulated between the major players regarding the TARGET agreement. (See Exhibit P20, E-mail from Miller to Jenson, Van der Meulen, Kalmbach, Broussard, Britto and "cc" to Curry, Risher, Bezos of 9/6/01.) He seemed shocked and a little surprised by this e-mail. This e-mail appeared to acknowledge TRUCC exclusivity and would encourage TRUCC to believe that AMAZON acknowledged that position. Mr. Bezos told the Court that he did not understand this particular e-mail because this document is a direct contradiction of the Agreement as he understood it. Mr.Bezos testified the only reason Merchants@sellers or other third party sellers were not engaged in selling toys, prior to the years of 2003, 2004, was because the technology had not been developed which would block the sale of selected exclusive products. He left no doubt the only thing that stopped AMAZON from going forward with third party sellers on the site before was because of undeveloped technology. In a rather child like fashion, he tried to

convince this Court he was unaware there was a problem between the parties about Merchants@sellers, selling toys until he be became aware of the restraining order entered in this case.

According to Mr. Bezos, the purpose of the April 2003 meeting in New York was to explain to TRUCC the reality of going forward with third party sellers to address selection inventory and out of stock issues. These third parties would supplement TRUCC selected exclusive products, which were out of stock, and AMAZON offered TRUCC some type of revenue share in bringing these third parties onto the site. He was even more convinced that the larger the selection on the site, the better the business would be for all the parties. Mr. Bezos even went so far as to indicate that John Eyler agreed with the plan to allow other sellers of toys on the site with revenue share to TRUCC. The problem, Mr. Bezos said, was with Ray Arthur of TRUCC and his unwillingness to take that next step for growth.

Then plaintiff's case moved from the philosophy of the agreement to the negotiations. This Court heard from the negotiators, Mark Britto, Harrison Miller, Raymond Arthur and then from the people involved in the day to day business. Also, the Court heard from Donald Nitschke from TARGET, Jorrit Van der Meulen from AMAZON, John Sullivan and Ghalia Bhatty from TRUCC. The majority of this testimony was presented on videotape because of the witnesses' unavailability.

In a case where credibility was so crucial to this Court's decision making, viewing these witnesses and only selected portions of depositions preserved on videotape, was very difficult. This Court permitted the parties to designate portions of the testimony of witnesses each felt was most relevant to the issues to be decided. The Court then allowed counter-presentations of designated portions of the videotape as though the parties were providing cross examinations.

This was not the ideal way to provide testimony to this Court. The Court recognized, the parties have a right to provide a case in a manner they deem reasonable. There were some witnesses produced by AMAZON by transcript only with no videotape testimony. The transcript testimony had been agreed to by the parties and allowed the Court the opportunity to consider them at its leisure.

However, an issue arose with regard to producing a witness live after having already presented the witness via videotape. This Court ruled, if the witness had been within the control of one of the parties, they were obligated, in the best interest of justice and fairness, to present that witness live. The Court further indicated, if they were produced live, after an adversary had provided video, and a party proffered cross designations the witness would not be able to comment on the testimony presented via videotape. The sudden availability of a witness to appear live was unfair to the Court as well as to the parties. The only witness presented live after having testified by videotape was Jorrit Van der Meulen.

Warren Jensen was produced by Toys on a very short video clip. His testified in 1999 AMAZON recorded a loss of thirty nine million ($39,000,000.00) dollars due to the unsold inventory of toys. He testified AMAZON went through a period of rapid expansion and was unable to forecast the demand related to the toy industry. He said no one had any idea about what to do with toys. In a very limited fashion, he testified about a presentation given to the AMAZON Board regarding a deal with TRUCC. The information presented to the Board projected an improvement in AMAZON's internet business situation.

AMAZON's cross designation videotape of Mr. Jensen's testimony focused on the issue of fees and whether or not there was any designation in the base fee for exclusivity. His testimony provided this Court with another witness' statement the parties never discussed nor

contemplated that any part of the base fee would be designated as a premium paid by TRUCC for exclusivity. The entire base fee was based upon necessary costs for site maintenance, fulfillment and customer service.

There were five people critical in the negotiating phase of the Strategic Alliance Agreement. These five people possessed the understanding of how this agreement was crafted and what the parties' intentions were in 2000. The key negotiators were Mark Britto and Harrison Miller for AMAZON, Ray Arthur and Jonathan Foster for TOYS and in a very interesting fashion Rudy Gadre who was in-house counsel for AMAZON until May 2005. Mr. Gadre has been identified by key AMAZON witnesses as the person with the most knowledge as to what was the intent of the parties, what went on during negotiations and what the actual deal was. But the four main negotiators do not give his role any significance.

Generally speaking, this Court's observation of the witnesses including Mr. Bezos was that they have extremely selective memories. While it is understandable, a significant period of time has passed since August 2000 and memories will not be the best, this Court was struck by the numerous "I don't recall, I'm not certain, I don't have any memory of that" about some details. In sharp contrast, there were very distinct and vivid memories about other details. Mr. Britto's testimony, for instance, was marked by cautiousness that did not seem to fit his personality.

Mark Britto previously owned a dot-com start up company. The company was sold and he moved to AMAZON in or about mid 1999. He remained there until 2002 and now works with Ingenio, Incorporated in San Francisco. Mr. Britto was involved in the negotiations of many of the AMAZON deals during that timeframe including the TARGET agreement in 2001.

All of the witnesses involved in the negotiations were consistent in their testimony about the initial meeting held at O'Hare Airport in June 2000. Everyone saw the potential of the deal. This deal would leverage the strength of each of the companies to become more powerful as a partnership. The goal was to create the great toy store at AMAZON.com.

Mr. Britto acknowledged the TRUCC's vision "was to have AMAZON exit the toy business in their favor and yet provide the fulfillment and customer service that is hallmark of our identification." He testified exclusivity was important to TOYS, while at the initial meeting, AMAZON generally acknowledged it understood TOYS' position. The AMAZON negotiators felt it was important to speak with Jeff Bezos and made no promises at the meeting particularly with regard to exclusivity. Mr. Britto indicated Jeff Bezos he was not ready to concede his position of "complete selection", and that AMAZON be permitted to continue its marketplace activities such as zShops.

Mr. Britto was less clear in his testimony about what Programmatic Selling Initiatives were and when that discussion took place. Mr. Bezos had testified that a Programmatic Selling Initiative was defined term in the Agreement. Mr. Britto only saw and was only familiar with Programmatic Selling Initiatives being used in terms of the zShops, auctions, and single detailed pages. 1x1 GUI technology was developed subsequent to Mr. Britto's departure from AMAZON in 2002 and he could not comment about its role on site.

On the crucial issue of the 3.5% Safe Harbor provision in Section 12.1.2, Mr. Britto defined it as a "fudge factor", a "safe harbor", a "creep factor" of incidental sale of toys by AMAZON and partners, other than TOYS. The parties developed a percentage of revenue sales that would not precipitate a fight between the partners.

AMAZON provided counter designations of Mr. Britto's testimony. In that testimony, Mr. Britto confirmed John Eyler was involved by telephone while the deal was actually being negotiated in late July or early August. He admitted there was extensive discussion with regard to exclusivity and TRUCC's desire for an entire toy tab on the AMAZON website. He told this Court exclusivity was an important component of any transaction that TRUCC would do. Mr. Britto also told this court, as every witness including Mr. Bezos did that for Jeff Bezos selection was and would be imperative. Mr. Bezos understanding of the exclusivity granted to TRUCC would not be any different than what Jeff Bezos wished exclusivity to be. If TRUCC did not select a toy for sale, the carve outs in the Agreement made it fair game. "We could sell it," he said. When asked who could sell the product, Mr. Britto did not specifically recall the set up, but understood AMAZON would be able to sell toys that TRUCC did not select. Mr. Britto testified AMAZON not only had to "rev up" the brick and mortar fulfillment centers in order to accommodate TRUCC, but they had to "rev up" the technology side as well. It was his understanding the costs to accomplish this were a part of the base fee negotiated.

Mr. Britto is the only person to provide this Court with testimony that AMAZON was not 100% ready at the beginning of the Agreement to accommodate all that TRUCC would bring to the AMAZON site.

Harrison Miller, the other major negotiator for AMAZON, appeared next by videotape. Again, Mr. Miller was one of the individuals who came on board in that critical 1999 sales year for AMAZON. He also left AMAZON in late 2002 early 2003 just before all the difficulties began between AMAZON and TRUCC. Mr. Miller had made it clear to this Court that neither one of these parties had ever done a partnership deal of the type embodied in the Strategic Alliance Agreement. It became increasingly clear as testimony continued that AMAZON would

never again enter into an agreement similar to that which became the Strategic Alliance Agreement between AMAZON and TRUCC.

Mr. Miller testified this agreement was to be something more than just a partnership. There was nothing like it before or since. It was a unique Agreement, envisioned to be the agreement to rock the e-commerce toy business. The plan was not only to change the way the toy industry operated in e-commerce, but to show that they, AMAZON and TRUCC, could accelerate profitability as had never been accomplished before.

As AMAZON considered approaching TRUCC (or when TRUCC approached them,) Mr. Miller said Jeff Bezos had not been bothered by AMAZON's 1999 loss connected to toys inventory. Although it was a precipitous loss, he just wanted to make sure that AMAZON had a large selection of toys. AMAZON had some vendors who provided product for that 1999 season, but had been unable to move any of the hot toys. The philosophy was as long as the selection was large AMAZON would continue to get better.

Mr. Miller also provided another one of the keys to unlocking the dispute between the parties. In listening to his testimony, it was clear that it was the negotiators who wanted this deal to work. They needed to structure the deal in such a way that both corporate boards and the executives, who set the philosophy, felt they each got what they wanted. The negotiator needed to define certain areas of the Agreement in such a way that both sides felt that they had accomplished their goals.

Jeff Bezos and John Eyler never abandoned their end goals and visions.

Mr. Eyler and his negotiators believed they were the exclusive toy seller on AMAZON's website. However, Jeff Bezos never intended to abandon his position on selection. If TRUCC was not going to do it the way AMAZON wanted it done, he would find a way to do it anyway.

It was Harrison Miller who explained to this Court that words were used in the outside world in one way and internally they were used in another way. It was Mr. Miller who helped this Court see that in this definition of exclusivity, TOYS was required to be exclusive with AMAZON, but it was not clear how exclusive the AMAZON site would be to TRUCC. It was Mr. Miller who said it was important when they negotiated the Target deal, that TRUCC be onboard and not troubled by the deal. (See Exhibit P20, E-mail from Miller to Jenson, Van der Meulen, Kalmbach, Broussard, Britto and "cc" to Curry, Risher, Bezos of 9/6/01.) He testified he knew TRUCC would be concerned about the navigation issues and the tab structure as AMAZON joined with Target because a tab on the AMAZON site had status. It was Mr. Miller who told this Court that the economics were clearly understood by both parties and that testimony has not been contradicted.

Both sides saw the base fees, the fixed costs and expected them to grow as business grew. It was only logical. AMAZON estimated its fixed costs to provide fulfillment centers, customer service and website service would be forty million dollars. Mr. Miller also testified there was no specific discussion by the parties as to what Programmatic Selling Initiatives were, how they would operate or how they would impact upon the words and exclusivity of agreement. Mr. Miller was very careful in his use of language while testifying. He testified everyone understood that during negotiations the parties negotiated away the right of third party sellers to sell toys not selected by TRUCC[9]. Then, while never specifically identifying a particular section or area, Mr. Miller testified there were other ways in the Agreement AMAZON could increase selection and offer toys that were not selected by TRUCC depending on how one read those sections. He very carefully testified that AMAZON was happy with the Agreement

[9] References to the changes in the Strategic Alliance Agreement drafts of Section 5.1.

because they had in fact provided themselves with a way to supplement selection. Mr. Miller testified:

> Q. At the time that the Strategic Alliance Agreement was signed, what was your understanding with respect to whether or not a third party could sell a product which Toys "R" Us did not select for sale?
> A. My understanding was that we had negotiated caveats or exceptions, or, you know, fall-back, you know, options to the exclusivity, in sort of two buckets. This idea that there was a nonexclusive product, excuse me, there was an exclusive product that was not a selected exclusive product, that that was, you know, open to selling on the site. And then of course this very important exception for the – I'm sorry, the term again for the –
> Q. Programmatic selling initiatives?
> A. Programmatic selling initiatives as well.
> Q. I want to address something you said. You testified that the first bucket was the notion that if Toys "R" Us didn't select a product, it was open to selling. Certainly the – there is language that we saw that said if Toys "R" Us didn't select a product, that AMAZON could sell the product.
> My question is, did you have an understanding one way or the other as to whether third parties could also sell products that Toys "R" Us didn't select?
> A. Yes. I think we had room to make that happen under this agreement.
> Q. That was your understanding?
> A. That was my understanding.
> Q. And do you recall discussing that understanding with anybody at Toys "R" Us?
> A. You know, again, we discussed all of this extensively. I cannot tell you specific conversations.
>
> [(Miller VDT194-6 to VDT195-16 (3/2/05).)[10]]

Mr. Miller tried to move away from many questions that would produce answers saying there was an intention for third party sellers coming onsite to sell in direct competition with TRUCC. It was suggested these third party competitors could be moved into the category of programmatic selling initiatives because it was "possible as an option in the future". (Miller VDT194 to VDT197-9 to 10 (3/2/05).)

[10] Hereinafter Video Deposition Testimony will be cited as: "(Party's Last Name VDT(page number)-(line number) to (line number) (date).)" or "(Party's Last Name VDT(page number)-(line number) to VDT(page number)-(line number) (date).)".

Mr. Miller as one of the major negotiators for AMAZON explained the Agreement never said third parties could sell exclusive products on the AMAZON website. However, it is inferential from the "complicated language" that AMAZON could find other ways to get products sold. There is ambivalence in the Agreement that allowed AMAZON to do what Jeff Bezos originally wanted to do. This reading of the Agreement language was never discussed with the Toys negotiators. It was never explained to TOYS this was the view that AMAZON had of Section 12.1.2. Every other section of the Agreement that made reference to third parties ability to sell on the AMAZON site had been removed from the Agreement. AMAZON during the negotiations, continued to convey to TOYS the impression that they were the only exclusive seller of toys on AMAZON site. This continued after signing the Agreement as AMAZON moved into the Agreement with TARGET corporation.

Mr. Millers testimony is subtle, but clear, AMAZON's business with TOYS was doing well and it did not want to rock the boat as it moved forward with the TARGET agreement. AMAZON even went as far as to allow TARGET its own individual web site maintained by AMAZON, as a way to allow TARGET to continue to sell toys. Those toys were relegated to an independent site so as not to rock the boat with TOYS. Mr. Miller testified:

> Q. And that prohibition was something that AMAZON insisted on, correct?
> A.Yeah. We thought it was important.
> Q. And is that because of the rights that Toys "R"Us had under its Strategic Alliance Agreement with Amazon?
> A. Yes and no. The way that I saw the Target situation, and others -- well, really the whole thing.
>
> You'll recall, if you don't mind me explaining the thinking behind this, that we started with these two organizations, Amazon and Toy's "R" Us, with Amazon at no exclusivity, no way. You have to be able to do it, whatever. We have to be able to have any toy, at any time, complete selection. Toys "R" Us insisting on complete exclusivity and no positive requirement to sell anything.

> And we ended up with an agreement that, in my mind, made – you know, the main plan is that we're going to work together and create Earth's greatest toy store. But we told them from the very beginning we could not sign a deal that did not give Amazon, especially when signing on for ten years, the ability, if it came to it, to offer broader selection if they were not keeping things in stock, if they were not having a broad selection.
>
> So at least during my interactions with Target and others, my assumption was we were doing fine, we had a good toy store, Toys "R" Us was working it. And, you know, we had issues with in-stock, et cetera.
>
> So we were -- we didn't want to go there, even though we believe – I believe we negotiated an ability to, quote, unquote, "go there" if we had to, or if other changes on the sites got us there. So at least my understanding and philosophy was, why pick a fight with a great, big partner when we don't need to? And Target had other ways of selling toys online.
>
> [(Miller VDT206-19 to VDT208-9 (3/2/05).)]

Mr. Miller was then shown Exhibit P28, an e-mail prepared on September 6, 2001. This e-mail was the substance of the representations that were made to TOYS with regard to the TARGET agreement. (See Miller VDT215-23 to VDT220-13.) Mr. Miller was asked a series of questions about why this memo was prepared. It shows AMAZON was determined to convince TRUCC that its status online and on the AMAZON site was not going to be threatened by the agreement with TARGET. After all, TRUCC had the exclusive right to sell toys and baby products on the AMAZON site. All the while internally, and not in writing, every critical AMAZON representative believed, it had the right to permit other third party sellers to come on board to sell exclusive products. However, Amazon did not want to tell TRUCC this was what it was doing. Again, these answers came directly from the AMAZON negotiator and were provided for this Court's review by both the plaintiff and the defendant.

Mr. Miller saw the 3.5% Safe Harbor provision number embodied in Section 12.1.2 as "being sort of the friction reducing or fudge factor on the edge of some of the categories in dispute about what was what." It was understood by all parties to encompass incidental sales.

This language was drafted to prevent problems for the partners because these sales would be minor in relationship to the larger deal. This "Haven" was not an open ended area for third parties to sell exclusive products.

Mr. Miller's testified there was not a lot of discussion about Programmatic Selling Initiatives, they were seen as the greatest way to expand selection in an E-BAY type style sales model. The E-BAY style does not include major retailers competing for marketplace position in there so called "Virtual Mall". Rather, it is a business model that envisions small individual sellers marketing individual products.

The last two points in Mr. Miller's testimony, with relevance to the Court's decision involve the discussion of the technology structure and the time frame of the Agreement. In this regard, this Court finds Mr. Miller's testimony compelling. Mr. Miller testified everyone understood it was AMAZON'S platform, it was AMAZON'S technology, and it was AMAZON's to control. Mr. Miller said if TRUCC wanted to come on AMAZON'S site, it would have to understand that it was AMAZON's site and AMAZON would control the technology. In entering into this Agreement, TRUCC agreed to that idea of AMAZON's control. TRUCC may not have fully appreciated what that meant, however that is what it agreed to.

Lastly, there is no question that AMAZON did not want this to be a ten year deal. Rather, AMAZON wanted a five year Strategic Alliance Agreement and it was at TRUCC insistence the deal was set for ten years.

The Court was confused by the testimony of Mr. Miller with regard to the costs that TRUCC wanted to limit and fix those during years five to ten. It appears he understood those costs could be renegotiated, although he talked about those costs being an issue whether or not

the partnership would be renewed. This Court is unaware of any provision for the parties to renegotiate the agreement at the end of five years.

TRUCC followed Mr. Miller's testimony with the live testimony of Raymond Arthur. Mr. Arthur is currently the Chief Financial Officer for TOYS R US Inc., and has been since April 2004. In January of 1999, he began as the Corporate Controller for Toys R. Us Inc. In January 2000, he moved to TOYS R US.com as Vice President of Finance and became the Chief Financial Officer and then the President of TOYS R US.com in 2002. After the execution of the Strategic Alliance Agreement he continued in his role at TOYS R US.com but also as the initial account manager for TOYS R US under the Strategic Alliance Agreement.

Mr. Arthur and Jonathan Foster, were the direct negotiators with AMAZON, accompanied by their attorney Craig Jacoby. These gentlemen were responsible to report to John Eyler, the CEO of TOYS R US, Inc. and John Barber, the CEO of TOYS R. US.com. Mr. Arthur testified he was only the negotiator; he had no authority to close the deal. The final decisions were made at the Board level for TOYS R US.com and TOYS R. US, Inc.

Early on in his testimony Mr. Arthur reconfirmed for this Court the atmosphere of the negotiations of the Strategic Alliance Agreement. Echoing Mark Britto, Harrison Miller and John Eyler, Mr. Arthur testified that this agreement happened "very very quickly". He saw this venture as the way to make the best toy store in the world. TRUCC brought the merchandising and marketing skills as well as the vendor connections to the agreement while AMAZON brought technology, fulfillment and customer service.

AMAZON wanted the biggest store, but TRUCC convinced them, from Mr. Arthur's viewpoint, that it needed to be the best store. He took this Court through each and every draft of the Strategic Alliance Agreement. TRUCC went into this negotiation with the view "that there

was never any intention for there to be another toy seller in the mall". He saw no exceptions to that plan. He freely admitted the "marketplace" would continue without change[11]. The 3.5% Safe Harbor provision exception was for overlapping products inadvertently or incidentally sold by another partner and or AMAZON.

Mr. Arthur provided this Court with the best understanding of the toy business of any witness that testified. He was very familiarity with the negotiations and the various issues that came up during negotiations. Out of respect to AMAZON's core philosophy of offering everything, Mr. Arthur said TRUCC gave AMAZON the ability to increase the selection but at its own risk. If AMAZON wanted selection of toys TRUCC.com did not select, it could offer these toys for sale themselves and assume the inventory risk. Or, it could allow toys to be sold in the marketplace by individual sellers. The marketplace meaning "mom and pop sellers" selling obscure or (used) products and collectable items. Those sites, in Mr. Arthur's mind, became the Programmatic Selling Initiatives carved out as an exception. Mr. Arthur never backed off from the position that there was never an intention to allow any toy seller to sell toys on the AMAZON site.

Mr. Arthur testified about the definition of terms and the development of sections in the Strategic Alliance Agreement. He identified the co-branded store and how it would operate. Mr. Arthur also explained his view of the tab structure and why having a TOYS R US tab was so critical. TRUCC and AMAZON believed the look and fee of the co-branded store was also going to be critical. The top 75% of the page you open up would be TRUCC and all of TRUCC's products, the bottom 25% was the area from which AMAZON could sell those toys that TRUCC had not selected BUT AMAZON felt were important to sell.

[11] Mr. Arthur's reference to marketplace was his view of the status of Programmatic Selling Initiatives.

Initially, in Section 5.1.3[12] (currently 5.1.4), AMAZON proposed language that permitted both AMAZON and third parties to sell toys 25% of the page not selected in the area by TRUCC. TRUCC vehemently rejected that proposal and specifically negotiated it out of the agreement. (See Draft 2.0 of Strategic Alliance Agreement of 7/27/00, at 11.)

TRUCC was agreeing to give up their independent URL, its only presence on the internet, to be the TRUCC/AMAZON co-branded store. TRUCC gave up its independence to become part of the AMAZON store (site, platform, virtual mall). As such, the categories of toys identified in the Agreement and the categories of baby products would become exclusive for TRUCC.com. (See Strategic Alliance Agreement, at 89.) The parties negotiated the number of items or SKU's[13], which would be offered for sale based on the business model discussed first by John Eyler and then by Ray Arthur. The Top SKU represents 97% of the market. Out of respect for its partner, Section 5.1.4 was crafted in such a way as to allow AMAZON to sell products not offered by TRUCC. If AMAZON proved to Toys the product AMAZON selected was profitable, TRUCC had the ability to recapture this product for sale and become responsible for this inventory. However, it was a working relationship that in no way contemplated third parties participating.

Mr. Arthur's strong direct testimony was countered by some uncertainty during cross examination. His testimony became less clear as to whether or not Programmatic Selling Initiative sales were to be included in the 3.5% Safe Harbor provision established in 12.1.2. Nor was he clear on whether or not third parties were permitted to sell Selective Exclusive Products

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[12] Draft 2.0 of Strategic Alliance Agreement stated: "5.1.4 ~~3~~ ACT Right to Offer TRUC Products. To the extent that TRUC fails to offer any TRUC Product for sale on the ACT Site following a request by ACT to include such TRUC Product on the ACT Site following a request by ACT to include such TRUC Product on the ACT Site, ACT and/or one of its Affiliates may offer ~~or permit third parties to offer~~ any such TRUC Product on the ACT Site (including, without limitation, through the Co-Branded Toy and Video Game Store and/or Co-Branded Baby Store, as applicable.)" (Draft 2.0 of Strategic Alliance Agreement of 7/27/00 at 11.)

[13] TOYS refers to them as SKNs and AMAZON refers to them as ASIN.

by way of a Programmatic Selling Initiative. Although he took the position third parties were not permitted to do so, he was unable to provide this Court with any particular reference to ground this opinion in either the documents or the negotiations. He also could not point out to this Court any language in the agreement or any definitive negotiations that said the base fee included a premium paid by TOYS for exclusivity. The Agreement is also silent on the status of 1x1 GUI technology. It was not a technology discussed because it did not exist at the time, but is it a Programmatic Selling Initiative? Ray Arthur says no.

The testimony does support the fact that the technology that now supports the Programmatic Selling Initiatives was originally the technology that supported the marketplace type programs identified as examples of Programmatic Selling Initiatives. The marketplace offerings were not accessible from the toy store and were available on terms that were generally available to the public. The merging of the identities of marketplace and Programmatic Selling Initiatives led Mr. Arthur to believe PSI's would operate in the same fashion and be the vehicle used to supplement categories and products, away from the toy store.

Mr. Arthur testified the issue of the TARGET agreement was the first serious problem the partnership faced. Despite assurances from AMAZON in various memos and e-mails, TRUCC was aware that AMAZON was co-mingling product in the distribution centers. The September 2001 meeting and subsequent amendment to the Strategic Alliance Agreement was prompted by TARGET coming on board and its product being co-mingled in distribution centers. On cross examination, however, Mr. Arthur had to admit finances were an issue in negotiating the amendment. TRUCC was experiencing in financial issues because growth did not meet forecast. The base fee was not reduced but the parties agreed to delay its escalation. There was

no connection in factor writing that linked this freezing of the base fee with the TARGET agreement.

After the 2001 amendment, the parties seemed to enjoy one of the best periods in the relationship. However, sometime in 2002 into 2003 the parties began to experience problems. Mr. Arthur had been approached by Mr. Van der Meulen about a deal with skateboard.com. TRUCC sold some skateboards, but it was not a major product. The parties began a negotiation to allow skateboard.com to sell skateboards on the AMAZON site with some type of revenue sharing, after costs, with AMAZON and TRUCC. The deal appeared to be made when TRUCC was approached to discuss Nascar.com, selling cars, and the NBA selling action figures. This resulted in the infamous Time Square Meeting in New York.

AMAZON maintains the New York meeting was prompted by out of stock issues. Mr. Arthur said that the meeting came about as a result of the requests to allow third party merchants to begin selling not only exclusive products, but selective exclusive products through AMAZON's website. Mr. Arthur said he really did not believe that Jeff Bezos understood the impact of the requests being made of TRUCC. Jeff Bezos and John Eyler met, they reiterated their positions and their philosophies on sales, then sent Ray Arthur and Jorrit Van der Meulen to negotiate. TRUCC was unwilling to give up its recapture rights and any possible deal making fell apart. (See Strategic Alliance Agreement, Section 5, at 17). Further complicating negotiations, was Jeff Bezos' statement that:

> I should go work with Jorrit to hammer out an agreement, and if we didn't have an agreement hammered out within a certain period of time, he would introduce a different selection on the toy store whether we came to a conclusion or not.
> Q. Did you have a reaction to that statement by Mr. Bezos?
> A. I did. I said, "Jeff, please don't back me into a corner."
> Q. What, if anything, did he or anyone else from Amazon say in response to your statement?
> A. There was no response.

[(8T1110-8-19.)]

It was clear whether or not they reached an agreement, or whether or not they felt that they complied with the strategic alliance agreement he was going to do whatever he felt he needed. A month later, Mr. Arthur forwarded exhibit D106 to David Schwartz indicating the seriousness of the problem. (See Exhibit D106, E-mail from Arthur to Schwartz of 10/28/03.)

Mr. Arthur stated AMAZON has done a very good job with shipping and site functionality. The technical people have worked together. Yes sales are up, profitability is up, and yes bonuses at TRUCC were excellent. In spite of all that, the deal is broken. There is no trust. The location of the toy store as envisioned in the original agreement no longer exists. The navigation and the search functions are totally out of control. Not only are third parties selling on the AMAZON site, but third parties are selling on TOYS' co-branded store's pages. There is the ability for the customer to purchase third party products on the site and to actually leave the site to go to the third party websites identified with that seller. Additionally, the presence of sponsored links on the TRUCC co-branded store deprives TRUCC of the right to control its toy store sponsored link which allowed and encouraged leakage onto other sites. There is no way to confirm or calculate sales of toys once a consumer clicks off the TRUCC's site onto these other toy sites. These activities violate the agreement in such a way that it cannot continue to exist. The above is how TRUCC sees the site environment. As a final blow, Mr. Arthur testified the change in the tab structure from a "Toy's, Game and Baby product" tab to "Toys" tab listing completely violated the agreement and minimized TOYS' position on the AMAZON website.

Mr. Arthur was very truthful, both in the strength of his testimony and in the weakness of his testimony. He is heart and soul of TOYS and was a real team player. Whether the Court

agrees or disagrees with Mr. Arthur's view of the facts, this Court found Mr. Arthur to be both sincere and credible.

The next witness to appear before this Court was Dale Nitschke by videotape. Mr. Nitschke, the President of TARGET.com, was involved in negotiating the agreement between TARGET.com and AMAZON.com. Mr. Nitschke's testimony plainly said that from the very beginning TARGET was aware that it was not permitted to sell what was called "excluded categories," which included toys, games and baby products. Mr. Nitschke testified this was because everyone was aware that the AMAZON agreement with TOYS precluded TARGET from being able to sell toys, games and baby products through its site on the AMAZON website. For this reason, TARGET retained a separate internet site maintained by AMAZON where it could sell anything it wanted. His testimony could not have been more definite that TRUCC had exclusivity in these categories of toys, games and baby products. (See Nitschke VDT34-16 to VDT35-23.)

Mr. Nitschke also testified about Programmatic Selling Initiatives. Programmatic Selling Initiatives are a defined term in the TARGET agreement as well as in the TRUCC's Agreement. However, the definition is somewhat different. A Programmatic Selling Initiative pursuant to Exhibit A, Definitions, of the October 24, 2002 Strategic Alliance Agreement between TARGET and AMAZON is:

> **"Programmatic Selling Initiative"** means ACI's or its Affiliates' programmatic selling initiatives (e.g. the "zShops", "Auctions", or "Amazon.com Advantage" areas and/or functions of the ACI Site) that are available on standard terms to Third Parties generally.
>
> [(Strategic Alliance Agreement between Target and Amazon of 10/14/02, Exhibit A, at 103.)]

A Programmatic Selling Initiative pursuant to Exhibit B, Definitions, of the August 9, 2000 Strategic Alliance Agreement between TRUCC and AMAZON as:

> **"Programmatic Selling Initiative"** means any area, feature or service of the ACT Site through which Third Parties may sell products or services on terms available to the general public (or, in the case of "sothebys.amazon.com", to define a class of dealers (including, without limitation, the existing "Auctions," "zShops," "sothebys.amazon.com," and "Amazon.com Advantage" areas and services of the ACT Site).
>
> [(Strategic Alliance Agreement, Exhibit B, at 86.)]

Mr. Nitschke's understanding of this particular term is interesting in assisting this Court in determining how the term Programmatic Selling Initiative was used internally by AMAZON, with TOYS.com and used with other sellers such as TARGET. The easiest way for this Court to make the record of its finding about this understanding is simply to reference the transcript:

> Q. (By Mr. Hoffman) Going back to the Strategic Alliance Agreement, Section 4.3, which is on page 14 – let me see if I get this right. Oh, yes. The language we had talked about earlier under "Limitations," it says that Target will not offer for sale or promote any Excluded Products on the ACI site other than a Programmatic Selling Initiative.
>
> Could you have an understanding as to what they exception – what Programmatic Selling Initiatives were?
>
> A. No. I'm sure I did at that point but…
>
> Q. Do you have any – specific recollection of negotiations or discussions about that selling – that exception?
>
> A. I vaguely recollect around some type of seasonal merchandising initiative and, potentially, there might be some greyly – defined product that we would want to sell.
>
> Q. And to be fair, I will tell you that there is a definition. I don't know –
>
> A. Okay.
>
> Q. -- if it will help you --
>
> A. Well, that might help.
>
> Q. – but I'm happy to point it out. Programmatic selling initiatives are defined on page 96 of the agreement, if you want to take a moment and look at that, and I'll ask you again if that jogs your memory as to any discussions, you may have had about that subject?
>
> A. (Perusing.) Well.—
>
> Mr. Ponto: Does that jog your memory?

> The Witness: I believe so. I think it just helped – helped to clarify around the zShops and auctions.
> Q. (By Mr. Hoffman) And what do you mean by clarified around zShops and auctions? How did that – what did – what was your understanding with respect to how those impacted the definition of programmatic selling initiatives?
> A. I believe people had the right to sell those types of categories through zShops and auctions.
> Q. Okay. The – going back to Section 4.3, as I read, it seems to indicate that Target could sell excluded products as long as they went through programmatic selling initiatives.
> I don't know if that's consistent with your reading, but my – my question really is do you recall ever having any discussions about Target selling excluded products as part of a programmatic selling initiative?
> A. I think the believe was there was potentially an interest in auctioning some products for charities and other similar types of community type of efforts, and that's what we were interested in the ability to do.
>
> [(Nitschke VDT51-8 to VDT53-9 (5/31/05).)]

It is very evident from this exchange that Mr. Nitschke's understanding of Programmatic Selling Initiatives is strikingly similar to those espoused by TRUCC representatives. Programmatic Selling Initiatives are not terribly well defined.

Mr. Nitschke testified that on or about November 24, 2004, TARGET, either received a letter from AMAZON.com or had a conversation with Cayce Roy indicating that as of that date it is acceptable for TARGET to sell and market toys that were not selected for sale by TOYS R US OR BABY'S R US on the joint AMAZON/TARGET website.

The issue of TARGET and the TARGETS strategic alliance agreement was a critical issue before this Court. As the record reflects, the Court permitted discussion of the TARGET agreement and its terms and conditions as extrinsic evidence in order to attempt to assist the Court in understanding: 1) the issue of the base fee and any charges for exclusivity, 2) the existence of any exclusivity, and 3) the use of the term "Programmatic Selling Initiative". AMAZON argues these are totally different agreements, negotiated a full year apart, with

services and pricing understandable only within the context of the individual agreements. AMAZON contends it was inappropriate for this Court to consider this agreement in rendering its decision.

A completely integrated agreement is one where the writing is intended to be final and complete. See Concord Mall, LLC v. Best Buy Stores, L.P., 2004 Del. Super. LEXIS 215, at *15, (Del. Super. 2004); see also Taylor v. Jones, 2002 Del. Ch. LEXIS 152, at *11 (Del. Ch. 2002). However, a court may use extrinsic evidence to interpret integrated agreement because it too must be interpreted. See Monsanto Co. v. International Ins. Co., 652 A.2d 36, 39 (Del. 1994). This extrinsic evidence must not be used to vary or contradict the terms of the agreement. Id.; see also Taylor, 2002 Del. Ch. LEXIS 152, at *11. Rather, a court will use parol evidence when the agreement's language is ambiguous. See Id. When there are doubts or uncertainty regarding the understanding of language, a court will use evidence which may include "antecedent agreements, communications and other factors which bear on the issues." Klair v. Reese, 531 A.2d 219, 223 (Del. 1987). The Court may also look at "trade usage or course of dealing." Eagle Industries, Inc. v. DeVilbiss Health Care, Inc., 702 A.2d 1228, 1233 (Del. 1997); see also Klair 531 A.2d at 223; see also City Investing Co. Liquidating Trust v. Continental Casualty Co., 1992 Del. Ch. LEXIS 78, at *26 (Del. Ch. 1992); Ibach v. Dolle's Candyland, Inc., 1991 Del. Ch. LEXIS 12, at *21 (Del. Ch. 1991). "While a [c]ourt is not free to exclude extrinsic evidence, it may rely on a contract's 'plain meaning' when its language has a general prevailing meaning and there is no evidence that the parties intended the language to have any other meaning." Ibach, 1991 Del. Ch. LEXIS 12, at *21; see Klair, 531 A.2d at 223.

This Court finds as a matter of fact and a matter of law the Strategic Alliance Agreement entered into between AMAZON.com and TRUCC and the amendment dated September 2001 is

a unique agreement. However, the existence of ambiguity in the terms formally referenced permits this Court to look at the TARGET agreement to determine how AMAZON used certain terms and applied certain costs in the business context in order to determine its meaning in the TOYS-AMAZON partnership agreement. Square footage is square footage. Charging Party A one price and Party B a second price is acceptable but there must be a rationale both from a business perspective and a legal perspective.

A Programmatic Selling Initiative is a unique phrase. Prior to this litigation, this Court had never heard of the concept of a Programmatic Selling Initiative. It is a concept none of the parties to and of these agreements had heard before or utilized. Programmatic Selling Initiatives cannot mean one thing to TARGET and another thing to AMAZON and yet a third thing to TRUCC. If it is utilized in the business context, it must have the same meaning for every party that it pertains to. To vary that meaning is duplicitous and intentionally misleading. It is a term of art proffered by AMAZON.com to its partners, its business associates and now this Court. For those reasons, this Court sought to gain assistance from a review of the TARGET agreement.

This ended the portion of Toys case with regard to the negotiation of the agreement. TRUCC also called representatives of TRUCC who worked on the agreement on a day to day basis, John Sullivan and Ghalia Bhatty.

As part of AMAZON's case it called Jonathan Foster[14], TRUCC's primary negotiator by videotape. Mr. Foster is first and last an investment banker who is not humble. His credentials were all impeccable. He graduated from Emory University and received a Master's degree in accounting and finance from the London School of Economics. He worked for Pricewaterhouse, Morgan Grenfell, Lazard, and joined TRUCC, and when he left there, he became the Senior

[14] Even though Jonathan Foster was offered by the defendants as part of its case it is important for the continuity of this decision for his testimony to be described here.

Managing Director and ran a large part of mergers and acquisitions at Bear Sterns. At the time of his video deposition testimony he had been a managing director and member of the investment committee at Cypress, ". . . which is a three and a half million dollar private equity firm". (Foster VDT6-9 to 10 (4/19/05).) Mr. Foster was brought on board by John Barber, then CEO of TOYSRUS.com, with the goal to put TOYS R US.com into the spotlight on the internet.

The 1999 Christmas season was a debacle for TOYS R US. He said the TOYS R US brand was a dominant force in the toy industry worldwide. He jumped at the opportunity to make TOYS.com one of the most spectacular E-Commerce locations on the internet.

Mr. Foster recruited Ray Arthur from TOYS R US Inc. After a nationwide search, Ray Arthur was still the individual with the most skill and talent necessary to run the financial end of the dot-com business. Foster's title was both Chief Operating Officer and Chief Financial Officer. He testified Ray Arthur was his shadow CFO, and with him in place, Foster was able to concentrate on those key areas of fulfillment and customer service he felt were necessary to grow the business. From his first word to the last word, it is clear that this was an opportunity for Mr. Foster to make a name for himself. It was an opportunity to excel and to be creative. He was responsible for hiring people in customer service and fulfillment, two major problems arose for Toys at that point in time.

With a keen understanding and appreciation of the fact "you can't postpone Christmas", Jonathan Foster set out to make TOYS R US presence in e-commerce for Christmas 2000 spectacular. Even before Mr. Foster got to his testimony about negotiating the Strategic Alliance Agreement, it was clear that his style was more akin to the individuals who negotiated for AMAZON than the individuals that this Court had an opportunity to meet and observe on the TRUCC side. In a long build up to the ultimate TOYS/AMAZON deal, Jonathan Foster detailed

the need to adapt TRUCC well established, profitable business model for the toy business in the brick and mortar world to the model of e-commerce business. He told this Court, that TRUCC and needed to attract young inventive computer knowledgeable employees. The company had to address the inadequacy of its fulfillment centers before Christmas. He testified TRUCC was moving forward with this plan even as the AMAZON deal was being negotiated. TRUCC finished the retro fitting of its fulfillment centers in Memphis, Tennessee and was ready to go independently. This Court notes that it has learned more about shipping, storing and fulfilling customer orders in the interested business world than one judge needs to know.

Mr. Foster echoed the testimony of Ray Arthur and John Eyler in his words TRUCC was "maniacally focused" on the top fifteen hundred SKU's in the toy business. TOYS R US.com was selling eight to ten thousand SKU's but there was a tremendous focus on having in stock those top fifteen hundred SKU's. The business model Mr. Foster bought into at the time was: "you had to have the hot products in stock." The hot products pulled in the business. You had to meet that demand, and then sell the other things. Mr. Foster testified that in e-commerce, the most important issues are site, fulfillment and customer service, everything else flows from there. The site needs to be attractive; it needs to have good pictures. It needs to catch peoples attention. The site needs to show off the product. There was a need to re-design TRUCC. Mr. Foster estimated that Toys.com would have needed two new fulfillment centers to prepare for the 2000 Christmas season. TOYS spent fifty seven million dollars on two new buildings and a retrofitted Memphis fulfillment center before AMAZON came into the picture. Mr. Foster testified functionality was a key to site improvement. This banker described functionality as: how the product looked, how its described, how the search works, and how fast the search would work. Functionality is everything except hosting the website. The Toys.com website in 1999 in

his words “had a long way to go compared to AMAZON.” AMAZON had the look and AMAZON had the ability to “be cool”.

Mr. Foster was no stranger to Jeff Bezos. He had been with him at a conference in March of 2000. The e-commerce world and internet action was changing rapidly in March and April of 2000. Mr. Foster saw that TOYS.COM was not doing as well as E-Toys on the internet.

TRUCC had brand recognition, but Mr. Foster wanted TRUCC to be profitable. He wanted a site that was not just a seasonal stop for consumers at Christmas. So, in 2000, he went to the TRUCC Board with various propositions. He suggested a deal with AMAZON, or a deal with E-Toys. The other alternative was to go it alone and attract sellers of different seasonal businesses, for example, Weber Grill who has a summer business as opposed to a Christmas business.

Jonathan Foster was very impressed with what AMAZON had done in the 1999 Christmas season. Its toy gross sales were sixty five million dollars and it had never sold toys before. However, and a big however, was AMAZON was writing off approximately thirty five million dollars in unsold inventory. While their initial success was impressive, Mr. Foster said AMAZON could not continue to do business in that fashion and Mr. Foster’s knowledge told him that Jeff Bezos would not allow that to continue. Foster had the insight to see there was potential for a great opportunity. AMAZON did not know toys and TRUCC needed help with fulfillment and site management.

The Strategic Alliance Agreement between TRUCC and AMAZON started with a telephone call sometime in May of 2000. Mr. Foster and John Barber called Jeff Bezos. They told him they had been thinking about the strengths and weakness of both companies vis-à-vis the toy internet business and thought they should talk. Mr. Bezos suggested the next time they

were in Seattle to stop by so they could talk. Less than a week later a meeting occurred between John Barber, Jonathan Foster, Jeff Bezos and Harrison Miller.

Mr. Foster felt Jeff Bezos was impressed with their presentation at the meeting, so much so that Bezos suggested there be a meeting between Jonathan Foster and Harrison Miller. Perhaps they should get together, and spend some time together, talking to see what might happen. The next meeting was at O'Hare Airport where Harrison Miller was joined by Mark Britto and Jonathan Foster was joined by Ray Arthur. Their ideas began to take on some structure.

Mr. Foster's view of what went on during those early meetings and the ideas that came out of the meeting at O'Hare provided this Court with a good insight as to what happened. Foster, the investment banker, admitted feeling a little bit overwhelmed at times. Ray Arthur and he, still focusing on Christmas 2000, met with what he classified as "this army of bodies" from AMAZON. They were all struck by this "kind of a clever idea". A clever idea they needed to pursue. He described the AMAZON people as delightful and bright for the most part". He remembers the tempo picking up rapidly after the meeting in O'Hare Airport. There were memorandums of understanding flowing back and forth. Then, ultimately, a document took form which became the Strategic Alliance Agreement.

Mr. Foster was the point person in all of these negotiations. "Ray Arthur was a terrifically valuable deputy. John Barber had a lot of toy knowledge that others on our team probably didn't have. John Eyler is the CEO of TOYS R US, Inc. and was to some extent the ultimate arbiter on our side. Mike Goldstein the Chairman, as a director of TOYS R US.com also had some influence." Impacting on all of these negotiations were the investment people, Rex Golding and Steve Murray from Soft Bank.

On AMAZON's side it was Harrison Miller and Mark Britto. Mr. Foster makes a very important comment:

> But it was very clear from my handful of meetings – let me say it differently. It was certainly my perception that nothing major happened at AMAZON without Jeff Bezos's approval, but I don't know that for a fact.
>
> [(Foster VDT90-14 to 18 (4/19/05).]

Mr. Foster's went onto identify the key issues in this negotiation; AMAZON would handle site fulfillment and customer service. TRUCC would handle inventory and marketing and would also play a role in monitoring AMAZON's performance. Some issues were more important and harder to resolve, particularly product pricing. AMAZON wanted to keep products at the lowest price possible while TOYS position was willing to post high prices to preserve availability. The parties also had differences as to how to handle the Christmas catalog, known as "The Big Book". It contains coupons and offers that would be difficult to translate to the internet site. Then came the issue of assortment, "Amazon wants to have a big assortment, Toys "R" Us more of the view that it's about the major SKUs." (Foster VDT92-24 to 25 (4/19/05).) On the issue of drafting the agreement of course, there were the lawyers. It was Mr. Foster's perception it was AMAZON's internet legal department that did most of the drafting work with the assistance of outside counsel.

At some point, Mr. Foster said he and Harrison Miller, the primary forces behind these meetings, felt it was important to involve the CEO's, Jeff Bezos and John Eyler. They had to make sure that "the CEO's were in the tent". Mr. Foster said that John Eyler and Jeff Bezos were totally different personalities with very different business philosophies and the two had "a rather intense but friendly conversation between John and Jeff on pricing philosophy."

AMAZON felt that being the lowest price was absolutely critical. Whereas, TRUCC who had been competing with the Targets and the Wal-Marts felt that while pricing was important, it was not the key to success. TOYS focus again was on the top SKU's, keeping them available and knowing what those hot top selling SKU's were going to be. Mr. Foster pointed out, that it is not that you make the most money on the top selling products, but "you're going to sell the most." The top seller produces the highest volume so you have to have the most in stock.

The toy business has to be six months ahead of the season, so your selection has to be right. AMAZON's answer to this was to offer everything you could stock. The issue of selection came up early in the negotiations, but Mr. Foster indicated or inferred in his testimony the issue was never fully resolved. The assortment issues did not come up every day, but were always there in the background. The parties knew it needed to be resolved and Foster said that they tried to make it fit into part of the deal. (See Foster VDT103-4 to VDT107-16.)

When asked about third parties and programmatic sellers, Mr. Foster flippantly said "I'm not up on my AMAZON words" but talked about the growth of zShops on the AMAZON site. He casually discussed AMAZON'S deal with Drug Store.com and incidental toy sales, but then he moved away from the issue. Without ever quite clarifying that issue, Mr. Foster's testimony moved to discussion of fees and costs. Mr. Foster's testimony was clear that there was no discussion that exclusivity played a role in any of the pricing structure that was reached between the parties.

> Yes as I can recollect it, the base fee was meant to be -- and I want to say this as clearly as I can -- was meant to be essentially a proxy for capital expenditures/opportunity costs, meaning that if Amazon was to use this Georgia building for Toys it couldn't use it for books.
> Q. Right.

> A. So the base fee was meant to be in general a proxy for the fixed costs, either acquired, or that it was unable to use in other parts of its business.
>
> [(Foster VDT113-22 to VDT114-6.)]

The deal requires AMAZON provide enough fulfillment space for the toy business. Mr. Foster stated the payments and the fees revolved around basic expenses, and exclusivity was never discussed in the pricing.

When asked about exclusivity and the fact that TOYS was going to be the only seller of Toys, Mr. Foster moved into the philosophic area. He testified exclusivity was not in his words "a hugely contentious negotiated issue". TRUCC was aware of AMAZON's focus on selection. AMAZON was aware of TRUCC focus on hot SKU's and the parties tried to get to an agreement that everyone was comfortable with. While not recalling a specific discussion about the toy market he did know that TRUCC gave up on certain categories in videos, electronics and certainly on books. This plan he said was a unique agreement, something that had not occurred before. The record will show Mr. Foster's testimony went back to costs and finances of the deal, the necessity for capital improvements for fulfillment and projected economic growth. The base fee figures were clearly built on the economics.

In discussing the variable charges, the variable fees that were paid, Mr. Foster testified that the discussion revolved around whether or not TRUCC was bringing anything to the table. There was a difference of opinion as to who was going to be getting business from whom. AMAZON felt that TRUCC was not going to bring additional customers to AMAZON. TRUCC made it clear that its brand and its presence in the international market, would bring traffic to the AMAZON site

Mr. Foster was of the opinion this deal was the putting together of the number one toy seller in the world and with the number one provider of site, fulfillment and customer service. When you put those two together, there was no way the store/site would not be number one and continue to grow in all aspects. AMAZON was not necessarily giving up a competitive position in the marketplace. AMAZON was utilizing its strengths and expertise with someone who had specific knowledge about the toy market and how to make it work. Together they both were going to grow. Part of the negotiations involved TOYS.com offering and giving AMAZON warrants in the company. AMAZON received an equity ownership and as Foster put it, an interest "…in our company at a valuation significantly higher than Softbank had invested in it". (Foster VDT151-20 to 21 (4/19/05).) No one could be sure, but Foster and the other negotiators felt this equity investment had value for both sides.

The negotiators felt the long term deal was best for both parties. AMAZON was giving up its toy store and its relationship with vendors. TRUCC was giving up its own toy store, its independent presence and control over fulfillment and customer service. The parties were becoming an integrated entity. To become that integrated the parties needed to commitment to a long term deal. It was Mr. Foster's impression both sides recognized unwinding this connection after a five year period would be extremely difficult for both parties. Unwinding after a ten year period would be challenging but provided a better scenario.

Mr. Foster's testimony offered a very interesting insight into what the parties concerns were about links to other sites. AMAZON was concerned about customer leakage and did not want customers leaving the AMAZON site to shop elsewhere. AMAZON did not want there to be any impression in this agreement that it approved of any other site, (i.e., scholastic). Mr. Foster articulated the concern once someone leaves your site you are not certain that they are

ever coming back. AMAZON did not want to facilitate people leaving the AMAZON site. This testimony is critical in this Court's consideration of how this Court should deal with sponsored links and why the technology development has created such a problem for the parties.

Mr. Foster never once testified that third parties would have the ability to sell toys on the AMAZON site. At one point his discussion about product sales focused on an example, the Madeline Doll. The following exchange of questions and answers took place with Mr. Foster:

> Q. Yes. Yes. And so if for whatever reason Toys "R" Us said, look, out of all the toys, games and baby products in the market, we only want to offer these 10, 000 SKUs –
> A. Yes.
> Q. – then the rest of the market would be available for Amazon and/or third parties to offer those products that Toys did not elect to choose.
> A. Listen, it was my clear impression at the time that we were going in the toy business as partners to beat up on Wal-Mart and eToys.
> Q. Right.
> A. And, you know, where Amazon got SKUs 11 through 15 from Madeline, didn't think a whole lot about.
> But it was always our sense that it was simply the fact that Amazon would have the inventory and we wouldn't.
> Q. Okay.
> A. We never thought they were getting into it with any other vendors or any of that kind of stuff – any other retailers or any of that kind of stuff, because the only time it came up that there might be some other toys sold on the site was in things like zShops or drugstore.com.
> Q. Okay.
> A. This was simply going to be a minor part of the site because weren't prepared to do 40,000 SKUs.
>
> [(Foster VDT198-19 to VDT199-20 (4/19/05).)]

There is a continued dialogue in the testimony wherein their counsel tried to have Mr. Foster confirm AMAZON's contention that third parties had the right to sell on AMAZON. However, Mr. Foster never confirmed that position. The next question and answer exchange made it very clear this agreement never intended to permit third parties to sell toys at the AMAZON-TOYS website:

Q. Okay. Okay.

Do you recall any – do you recall why the parties used the – included the defined term – I'll tell you it's a defined term – "third party" in this provision in 12.1.1? In other words, why it limits both AMAZON and third parties from selling selected exclusive products . . .

A. We were, I think, clear amongst ourselves, and I can't speak to the drafting of one line in a huge document, that Toys "R" Us was the toy seller, Amazon was the infrastructure partner, and Amazon could simply source products we didn't select to include in our mutual site with the same look and feel.

Q, Okay.

A. I go back to my Madeline example . . .

Q. Okay. Okay.

A. If we didn't pick that last Madeline doll because we sold five last year, Amazon cold go find it and slide it into our site – same look and feel.

Q. Okay.

A. There was never any intention that they would have another toy seller, another toy site or any of that sort of approach.

Q. Okay.

A. This was just really about inventory risk, quite frankly, and profit potential on products that we weren't selling.

Q. Okay. So look with me at 12.1.2 now, --

A. Okay.

Q. – Limitations.

A. Um-h'm.

Q. And it begins with: "TRUCC acknowledges and agrees that nothing in this agreement will prevent or otherwise restrict," and then it has a number of limitations, (a), (b), (c), (d), et cetera.

Do you see those?

A. Yes.

Q. What do you understand those to be limitations on?

A. Well, I'd have to go – I'd have to read it. I'm obviously happy to, but we talked about, for example, the zShops before—

Q. Right

A. – in my time this morning. We talked about, you know drugstore.com not tripping if they sell a couple of dolls.

Q. Right.

A. We were meant to be partners, we were going to be clearly the winners in the toy business; but Amazon, being a large company with lots of different tabs, --

Q. Right.

A. – didn't want to trip on this agreement if they had some – what I'll say are ancillary obligations or efforts.

Q. Okay.

A. That was the 40,000 foot intention.

[(Foster VDT211-19 to VDT215-3 (4/19/05).)]

Mr. Foster makes a comment that seemed to echo in every witnesses testimony "and again we're documenting a unique transaction really fast". These parties moved at tremendous speed to put together a deal that was to take two giant companies into a partnership designed to last for ten years and make them the pre-eminent force in e-commerce.

It is Mr. Foster's testimony that perhaps gives the best understanding and definition of Programmatic Selling Initiatives of any of the witnesses that had testified. Again, it was language that was unique to this agreement. Mr. Foster discussed Programmatic Selling Initiatives as follows:

> A. A programmatic selling initiative, the clear intention of the parties in my opinion was that there were certain things, as we discussed, like zShops, which were not unique tabs, which were not major stores, that Amazon simply didn't want to trip on. They were – it was never meant to be a limitation such that Toys "R" Us could have a major competitor. Let me go back one more time to my drugstore example. There were a few dolls in the drugstore. If drugstore.com has, I don't know, 40,000 SKUs, I bet there are a hundred toy SKU's. We were fine. We were going into partnership here. We didn't want to trip them upon this document. But this was never meant to be a carve-out for a real competitor to our partnership in the toy business.
>
> [(Foster VDT217-11 to 24 (4/19/05).)]

Mr. Foster knew as did everyone else what a Programmatic Selling Initiative was. He understood there would be more Programmatic Selling Initiatives and TRUCC did not create a major issue in reaching the agreement because these PSI's were never intended ever to be competitive. Auctions were a new area in e-commerce. Mr. Foster said Jeff Bezos was very interested in them as a result of the success of E-Bay. Mr. Foster emphasized this was a partnership. There was never an intention for Programmatic Selling Initiatives to interfere in the parties' business plans. The shops would not be toy shops, but rather, Programmatic Selling

Initiatives were small individual efforts to provide Mr. Bezos with his selection. The focus in the definition was on the phrase "terms that were available to the general public." Despite repeated questions and repeated direction by AMAZON's counsel, it was from Mr. Foster's testimony that both the Programmatic Selling Initiative concept and the 3.5% Safe Harbor located in Section 12.1.2 were put in the agreement to give AMAZON the flexibility to offer a selection that TOYS had not chosen Programmatic Selling Initiative provided AMAZON with the ability to open up to the general public the ability to come and sell on AMAZON. There was never any intention that third party competitors would ever appear on the site.

Mr. Foster dismissed the idea that terms put in the early memoranda of understanding were terms the parties had agreed to. The parties negotiated the Strategic Alliance Agreement. There was no real argument about exclusivity and/or third parties because no one intended third parties to take a place on the AMAZON site in direct competition with TRUCC. Again, this was a "clever transaction". The parties who negotiated and drafted this agreement were very proud of the work they had accomplished. They set up a toy store structure on the AMAZON site. Mr. Foster said everyone understood the terms that went into this agreement. He hoped they had drafted and crafted an agreement as clearly as their understandings during the negotiations. The negotiators were very aware of the goals of Jeff Bezos, John Barber, and John Eyler. They crafted an agreement full of compromises. This was economically, the best case scenario for the parties needs. They consciously chose not to define TOYSRUS.com's exclusivity in terms of who would not be on this site because of the potentiality of another competitor coming into e-commerce during the ten year term of the agreement. In Jonathan Foster's view this was an exclusive partnership.

At the conclusion of Mr. Foster's testimony the stage had been set. Mr. Foster's testimony was proposed to this Court by AMAZON.com. This Court must comment in rendering its decision that it finds AMAZON's choice of Jonathan Foster as its lead witness in this case unusual. While to some extent Mr. Foster's testimony may support AMAZON's position that the 1x1 GUI, Graphic User Interface, is a Programmatic Selling Initiative. Mr. Foster's testimony in no way supports AMAZON's position that it had the right to bring third party sellers on to the AMAZON site to sell exclusive toys, games, and baby products.

The majority of Mr. Foster's testimony came from the video deposition that was taken on or about Tuesday, April 19, 2005, but there was a follow up deposition that was taken on Tuesday, May 10, 2005.[15] The only thing that came out of the May 10, 2005 deposition that is helpful to this Court in analyzing the facts presented at trial is his description of Rudy Gadre.

Rudy Gadre would be the second witness produced by AMAZON to testify and was identified by Jeff Bezos "as the go to person," the person that had most of the knowledge about the agreement. Mr. Foster describes Mr. Gadre as being a very aggressive individual. Mr. Foster testified he produced an awful lot of writing early on, memorandums of understanding, some of which was appreciated, most of which was not. Mr. Foster described Mr. Gadre as intelligent and very capable. His perception of Mr. Gadre was that he was very purposeful in attempting to move the negotiations along rapidly and his goal was to move them in a specific direction. None of the negotiators identified Mr. Gadre as a negotiator with significant impact upon the deal, however, Mr. Foster raises the inference that Mr. Gadre played a role in creating some of the problems exist between the parties today.

This fairly concluded testimony on the issue of the base fee containing a premium. The remaining issues are: 1) Has AMAZON.com breached the Strategic Alliance Agreement and its

[6] As occurred even with live witnesses during the trial, the testimony was repetitive.

amendment of September 2001 by the addition of third party sellers, such as Merchant@sellers and TARGET.com, who sell exclusive products as defined by the Agreement; 2) Is 1x1 GUI, (Graphic User Interface), a Programmatic Selling Initiative; 3) As a Programmatic Selling Initiative, are sales from 1x1 GUI and/or other categories of Programmatic Selling Initiatives included in the 3.5% Safe Harbor calculation; 4) What is the intent and purpose of the 3.5% Safe Harbor for sales by AMAZON and third parties in Section 12.1.2, Does this section give AMAZON permission to allow third party seller of toys, games and baby products to be present on the site; 5) Has the 3.5% Safe Harbor provision been breached; and lastly; and 6) Has AMAZON proven TOYS R US.com breached the Strategic Alliance Agreement by failing to live up to the inventory requirements of the Strategic Alliance Agreement.

In order to discuss those issues the Court needs to consider the remaining witnesses. Jorrit Van der Meulen, John Sullivan, Ghalia Bhatty, produced by TOYS R US, who discussed exclusivity in a day to day relationship. John Larson, Rudy Gadre, Michelle Rothman, Kimberly Allen, Ruben Baerga, Casey Roy, and Paul Kotas, produced by AMAZON who also testified about day to day operations, the impact of the relationship on the two companies and the inventory arrangement. First, however the Court will briefly review the testimony of the various expert witnesses on brand, Jim Shepard, and Dr. Peter Sealey. Later on the Court will consider the financial expert Mark Hosfield, Bruce Budge, and Robert Brunner with reference to the 3.5% Safe Harbor calculation issue and the counterclaim of a breach of the minimum inventory requirement.

The parties stipulated pursuant to the Agreement and Delaware law that there can be no damages awarded for brand damage or consequential damage. Those witnesses who provided testimony with regard to brand gave the Court some perspectives on the world of e-commerce

and put this litigation in context. Dr. Sealey was one of the most interesting witnesses this Court has ever heard testify. His testimony with regard to brand and brand value focused this Court on the impact on the business world of an agreement such as this between two commercial giants. The parties conduct towards each other during the last two years, while not compensable, does speak to whether or not it would have considered exclusivity an issue in this matter.

With regard to the testimony of Jim Shepard, this Court found Mr. Shepard's testimony useless and subject to being stricken from the record altogether. His positions lacked any solid foundation in the evidence provided to this Court and lacked any foundation in the business world. The opinions presented to this Court were not the opinions of an expert but were the personal opinions of Mr. Shepard. As such, those opening rendered his opinion less than a net opinion as designed in our case law.

The Supreme Court of New Jersey has held that under the "net opinion" rule "an expert's bare conclusions, unsupported by factual evidence, is inadmissible." Prasa v. Trezoglou, 2005 WL 3739705, * at 3 (App. Div. 2005); citing Buckelew v. Grossbard, 87 N.J. 512, 524 (1981). An expert's testimony, pursuant to N.J.R.E. 702[16] and 703[17], must be "based 'primarily on facts, data, or other expert opinion established by evidence at the time of trial.'" Id.; Buckelew, 87 N.J. at 524-25. An expert must "give the why and wherefore of his expert opinion, not just a mere conclusion." Kaplan v. Skoloff & Wolfe, P.C., 339 N.J. Super. 97, 102 (App. Div. 2001); citing Jimenez v. GNOC, Corp., 286 N.J. Super. 533, 540 (App. Div.), *certif. denied*, 145 N.J.

[16] Testimony by Experts, N.J.R.E. 702 states: " If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise."

[17] Bases of Opinion Testimony by Experts, N.J.R.E. 703 states: "The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence."

374 (1996). A court will find that an expert opinion is a net opinion when it is based on an expert's personal view or standard of the expert. See Id. at 103; see also Taylor v. Delosso, 319 N.J. Super. 174, 54 (App. Div. 1999); Crespo v. McCartin, 244 N.J. Super. 413, 422 (App. Div. 1990).

Jorrit Van der Meulen was the go to person at AMAZON.com with regard to the Toys account from 2001 through 2004. In the end of 1999 into 2000, Mr. Van der Meulen was the product manager for the TOYS team at AMAZON.com. He was promoted to the director of AMAZON.com about a year later. Mr. Van der Meulen was not involved in any of the negotiations, but entered the picture when the agreement was finalized. He then took over the day to day operations.

In early 2000, when AMAZON began considering what would be the best option for AMAZON.com with regard to the operation of its toy business, Van der Meulen was the man in charge. He articulated his position that the best option for AMAZON'S toy business was to keep running it. As the toy business project manager it was only reasonable he would want to continue running his department without any substantial changes

Mr. Van der Meulen is one of those witnesses who would have benefited from personal appearance time in this Court. His videotaped testimony projected a rather cold and arrogant individual who saw things strictly in terms of black and white without nuances. His personal appearance later on in the case dispelled that impression and forced the Court to re-evaluate his testimony. In person, Mr. Van der Meulen is articulate, gracious and personable. The fact that his deposition was taken on his last day as an AMAZON.com employee may have impacted on his deposition demeanor. Jorrit Van der Meulen's testimony provides a window into the operations of AMAZON.com in relation to their relationship with TOYS.COM.

As an observation, all the AMAZON employees are very condescending when they talked about TRUCC. From the very beginning of this agreement AMAZON was looking for ways to expand the selection of toys sold regardless of what the agreement provided. Repeated efforts were made by in house people to find alternatives to the way items were marketed, how to identify the products and the way items were sold.

Mr. Van der Meulen provides the clearest description of the difference between a single detail page, easy single detail page, and ultimately 1x1 GUI technology. Single detail pages are put up against products that are already in the AMAZON catalog. Easy detailed pages would allow a seller to place an item on the AMAZON site that had previously not appeared in the AMAZON catalog. As for the 1 x 1 GUI technology, Mr. Van der Meulen makes a distinction between zShops, auctions, etc., and the general retail stores on the AMAZON site. This is the same distinction that was made all along by the TOYS people, and explains why they did not see 1x1 GUI Technology as being a Programmatic Selling Initiative. 1 x 1 GUI will function and allow sales along side products on retail pages, whereas, zShops never did. 1x1 GUI technology would not cause a problem for other sellers on AMAZON, because there were no other agreements with exclusivity. Sales of Select Exclusive Products or even Exclusive Products on zShops would not get TOYS attention. It is products appearing alongside TOYS' through 1x1 GUI technology that has cause alarm.

Mr. Van der Muelen testified when AMAZON began discussions internally about moving single detailed pages and easy detailed pages into the retail area, they approached TRUCC with the concept of revenue share for those products. The plan was seen as a way to increase selection on AMAZON. Revenue sharing was not provided for in the Strategic Alliance

Agreement. Therefore, the agreement would need to be amended to allow it to occur. However, TRUCC was not accepting of this concept and AMAZON pulled back its offer.

Mr. Van der Muelen's testified exclusivity was not only disavowed in November of 2004, but had never been a shared concept between the TRUCC people and the AMAZON people. However, AMAZON'S technology had not been developed sufficiently to block selective exclusive products, so, there was no need to create antagonism. As AMAZON'S technology became more advanced and Jeff Bezos pushed for more selection of product on AMAZON, it began setting up programs and defining them in such a way they would fit into the exception of the Strategic Alliance Agreement. For example, AMAZON decided to identify 1x1 GUI technology as a Programmatic Selling Initiative because Programmatic Selling Initiatives were carved out as an exception to the Agreement. 1x1 GUI Technology was not necessarily a Programmatic Selling Initiative as it was away into an exception in the Agreement giving AMAZON a defense against TRUCC objections. AMAZON even contemplated making Merchant@agreements fit within the definition of a Programmatic Selling Initiative but realized that Merchants@ would never agree to sign on to an agreement that was on the same terms as the general public.

Mr. Van der Muelen testified he, Rudy Gadre, Jeff Bezos, and Michele Rothman understood the process for expanding selection in the Strategic Alliance Agreement was ill defined. Mr. Van der Muelen's tone during the videotape testimony suggested a lack of respect and in fact, disregard for Ray Arthur. Mr. Van der Meulen did not take Ray Arthur's understanding and interpretation of the Agreement seriously.

Mr. Van der Meulen testified it was not until late in 2003, when the relationship really began to deteriorate, that AMAZON attempted any efforts to track the 3.5% safe harbor sales.

PSI's were not included in the evaluation because no one understood them to be within the 3.5% Safe Harbor provision. AMAZON knew after the "Time Square Meeting" that if they proceeded to move forward with expanding Merchant's@ agreements, TRUCC would move to terminate the agreement. Ray Arthur clearly articulated to Jorrit Van der Meulen that unrestricted Merchants@sellers were a clear breach of the Strategic Alliance Agreement.

AMAZON had lost control of the toy store site and loss of control at the site is not something that Jeff Bezos, the alter ego of AMAZON.com, would tolerate. AMAZON wanted to increase the selection/assortment of toys offered on the AMAZON website. They wanted to offer everything. Mr. Van der Meulen's testimony does not articulate any concern that this rabid expansion of third party sellers would impact AMAZON'S ability to control and/or calculate 3.5% safe harbor provision figures. Ray Arthur told AMAZON, TRUCC would never give up recapture and, AMAZON knew third party sellers would not enter into agreements where the hot toys could not be sold because of TRUCC. Therefore, until AMAZON could ensure a smooth operation it held back challenging TRUCC.

In the end of his testimony, Mr. Van der Muelen proffered that neither he nor any one at AMAZON took seriously TOYS argument about the fifty million dollar base fee including a provision for exclusivity. Nor, did AMAZON believe TOYS took it seriously. It was never articulated in the Agreement, it was never discussed by anyone during negotiations, and, it came up whenever TOYS had an argument with something that AMAZON had done, but lacked a legitimate reason to complain. It was seen in the same category as "teenaged angst".

Mr. Van der Meulen also was the first witness to suggest to the Court when TRUCC was out of stock of a Selected Exclusive Product, AMAZON took the position it was no longer a protected product for sale by TOYS only. Rather the product became a exclusive product

meaning AMAZON could sell the product and so could third parties. However, there is no language in the Strategic Alliance Agreement to substantiate this position. This idea would appear again during other testimony.

Mr. Van der Meulen's testimony suggests, if TRUCC would not accommodate AMAZON's model then, AMAZON was going to find a way around or completely disregard the terms of the Strategic Alliance Agreement. AMAZON was going to interpret language in the Agreement to mean what AMAZON wanted it to mean. A Programmatic Selling Initiative could be anything AMAZON decided to call it. The third party reference in 12.1.2 does not refer to other existing partner with incidental sales, but third parties meant anyone that AMAZON decided to bring on board to sell products.

One of the most honest and credible witnesses the Court heard from during the course of the trial was John Sullivan. Mr. Sullivan is a Senior Vice President of TOYS R US, Inc., and General Manager of TOYS R US.com. TOYS R US is the only company he has ever worked for, joining them in 1982. In 2000 at the request of John Barber, he left TOYS R US, Inc., to go work at TOYS R US.com to run its merchandising department assuming the title of Vice President and General Manager. His only role during the drafting the Strategic Alliance Agreement was in the creation of the list of categories which became part of the Strategic Alliance Agreement definition of TRUCC products.

Mr. Sullivan was offered as a witness to testify about the Strategic Alliance Agreement operation including his relationship with AMAZON throughout the term of the agreement. His position gave him the unique ability to talk about various problems the parties encountered and the site function. His testimony began with a discussion about the sale of electronics which the Court finds telling about the relationship of the parties. AMAZON was selling child oriented

electronics. The witness was referred to P116, which is a series of e-mails about the sales of electronics. (See Exhibit P116, E-mail String from Van der Meulen to Sullivan and "cc" to Birtwistle, Harrison, Pulda of 10/25/00 through 10/26/00.) At the time, Mr. Sullivan took the position child age electronics were products in the exclusive product category of TRUCC and AMAZON should not be selling them. Jorrit Van der Meulen took the position that AMAZON had already been selling these products and so were an AMAZON product. Harrison Miller intervened resolving the conflict in Mr. Sullivan favor. These electronics were in TRUCC exclusive product category, however, if TRUCC wanted to sell them they had to be selected/recaptured TRUCC did make the selection pursuant to Section 5.1. (See Strategic Alliance Agreement, at 17.) In the spirit of the partnership, TRUCC had some older aged electronics warehoused prior to the signing of the Strategic Alliance Agreement. Rather than allowing the products to just sit, TRUCC was permitted to sell those items through zShops and auctions. In Mr. Sullivan's own words these items were not sold through AMAZON but in fact were sold in the marketplace through zShops and auctions. (See Exhibit D71, Amendment No. 1 to Merchants@Amazon.com Participation Agreement; see also Exhibit P118, E-mail from Westlund to Sullivan and "cc" to Guthrie and Van der Meulen of 10/10/03).

Mr. Sullivan testified problems developed as AMAZON began to role out its 1x1 GUI technology in other areas of the AMAZON site. TRUCC.com became aware of 1x1 GUI technology because it found individuals selling used age based electronics through this technology in other stores. This first occurred in early 2003, and Mr. Sullivan had direct and amicable discussions with Mr. Van der Meulen. After some debate, AMAZON agreed to take these products down off the website.

In 2004, this problem became a little more touchy. It was clear, at least to Mr. Sullivan, that AMAZON was pursuing third party sellers through merchant's@agreements and 1x1 GUI technology. It was AMAZON's position it was permitted to allow third party sellers on its website pursuant to the Agreement.

Mr. Sullivan was shown Exhibit P118, to begin a discussion of the types of product sold through AMAZON Advantage. (See Exhibit P118, E-mail from Westlund to Sullivan and "cc" to Guthrie and Van der Meulen of 10/10/03.) He referred to AMAZON Advantage as a consignment program. AMAZON had identified some products within the learning aid category, which are in the TRUCC exclusive product category. AMAZON wanted the products sold through the toy store. Pursuant to the Agreement, TRUCC was noticed that AMAZON wanted to sell these products through the toy store pursuant to Section 5.1. TRUCC was given the opportunity to then select the product for sale or alternatively, allow AMAZON to sell it directly. He testified this was the way the agreement was set up to work and how it did work.

Mr. Sullivan's next area of testimony dealt with search results. Until 2004, if you went online to the AMAZON TRUCC site and went to the toy store "you went into" the TRUCC/AMAZON co-branded toy store. Once in there if you typed the name of a toy, for example Monopoly and hit go, what was returned were search results for products sold only by TRUCC. However, the search results changed in 2004.

Mr. Arthur was asked to identify the difference between the searches and navigation. He testified navigation was the path that takes a user to the ultimate search results. In 2004 if you typed in a product, for example a bike, even from the co-branded pages of the TRUCC/AMAZON site, one would come up with a result page that was no longer only products

from the co-branded store, but would give TRUCC products as well as products offered from other merchants. This was the true beginning of the deterioration of the relationship.

Initially, AMAZON responded to TRUCC complaints by taking items down off the site in order to avoid a problem. Then problems arose concerning what has been referred to as Merchant@sellers. Exhibit P308 is a list of those Merchant@sellers which included very large toy selling competitors of TRUCC. Finding these other toy sellers actively engaged in toy sales on the AMAZON site was extremely troublesome to TRUCC and in Mr. Sullivan's view violative of the Agreement. TRUCC does the marketing for its brick and mortar and online stores. Each promotes the others locations for the convenience of the customers. They do radio spots, they do television spots. The idea is to direct the customer to the online shopping experience in order to promote sales. TRUCC has no other internet site. To suddenly discover TRUCC was paying for and promoting a website that allowed sales of its competitors was extremely problematic.

Mr. Sullivan not only identified the impact on TRUCC but explained the financial impact. Merchant@sellers fee arrangements do not contain base fee payments. Rather, for every product sold, there was a revenue sharing agreement between the Merchant@sellers and AMAZON.com. The proceeds of this revenue share were not shared with TRUCC if a customer purchased a toy that was not a TRUCC product from AMAZON. Mr. Sullivan's point was whether or not a consumer purchased a toy from TRUCC; TRUCC was still required to pay to AMAZON a base fee for the maintenance of this site as well as fulfillment and customer service. This pricing differential was a profit issue.

Additionally there was confusion for vendors and customers. Vendor's products were being sold by other sellers on the TRUCC site, and customers who purchased products from the

site thought the products were coming from TRUCC. When problems with a product arose the customers would go to TRUCC, and/or if they would try to return a product to TRUCC only to learn they had not purchased the toy from TRUCC. Mr. Sullivan then identifies an additional problem with these other sellers being present on the AMAZON site. To demonstrate this problem to the Court certain documents and screen shots were marked as exhibits. These newly identified toys were not for children, but rather, were sex toys located and listed for sale when a search was conducted in the co-branded store, identify TRUCC as the seller.

The Court would like to take this opportunity to discuss some of the evidence that was presented in this case. On a variety of occasions, live witness testimony included actually going to the internet on a computer projected to screens viewable by all in the courtroom. Each page location was referred to as screen shots. The screen shot was captured, copied and marked with an exclusive identification "SS____." Some screen shots were capturing and photocopied during the pre-trial proceedings. This case provided a unique advantage and problem for the Court in reviewing evidence. A screen shot may come up one day during a particular search, but would not always appear in the same way even an hour later. Since it was necessary for the parties to actually photocopy and be able to identify the dates these screen shots were taken and the times, the Court required they all be marked with exhibit numbers in preparation for the trial and then ultimately at trial. Right from the beginning at the initial application for the temporary restraining order, these screen shots were critical in capturing a moment in time that could not be reproduced in any other fashion. For example, Exhibit P131 was screen shots initially attached to the Complaint. (See Exhibit P131, Various Screen Shots of the Amazon Website.) These screen shots were gathered by TRUCC staff, in preparation of the Complaint as examples of

what it had observed over the last couple of months. Exhibit P134 was a screen shot of a search showing a product being sold by TRUCC and another seller selling a within the same search.

This evidence issue highlighted one of the other unique problems associated with this case. In a breach of contract agreement involving brick and mortar stores, the customers coming through the door of those brick and mortar stores are tangible. The shelves for products are physically present in a way that a witness can touch, feel, locate, and capture the product itself, how many sales there are, and how many people come through the door. There is a different sense with e-commerce. The site navigation and search results on the internet rarely, if ever, repeat the same pattern. In fact, during the course of this trial, just simply checking a different icon on the Courts own lap top computer, resulted in a different screen shot than was being presented to the Court by counsel as evidence. In analyzing the evidence presented to this Court and its impact on the Courts decisions I cannot emphasize strongly enough the complexity of the problems presented. The Court looked for the most efficient and reliable source for evidence as our rules require – they were unique but invaluable.

Exhibit P132 is a list of some 4,000 exclusive products Mr. Sullivan and his staff identified as being sold on the AMAZON site by sellers rather than TRUCC. (See Exhibit P132, Spreadsheet of Products.) Mr. Sullivan explained how difficult it is to go through the AMAZON site to determine exactly how many of exclusive products were actually being sold. The volume of sales on AMAZON.com and the complexity of how those sales occur are beyond just simple math calculations. In an attempt to discovery exactly what was going on this site and to protect its rights, TRUCC not only had its own employees go on the AMAZON site and search, but also had an outside agency create and use a “spyder”. This process could climb in and out of the fine intricacies of AMAZON sales in an attempt to determine exactly what was

being sold and therefore not trackable. Many of the sales were taking place in other site locations. Some of those toys might be classified as those fringe areas of items that the parties had considered within the 3.5% Safe Harbor of Section 12.1.2 of the Agreement, and were sold on site but by different merchants in different categories. (See Strategic Alliance Agreement, Section 12.1.2, at 45.)

But it was Mr. Sullivan's testimony and position these were sales occurring in direct competition with TRUCC and in violation of the Agreement. The problem was many were actual toy sellers selling not only exclusive products but on more occasions than he cared to identify or could possibly identify, they were selling Selected Exclusive Products.

In fairness, AMAZON provided testimony that disputed these presentations. Their employees challenged the accuracy of TRUCC search and counsel agreed that many results were distorted. Mr. Sullivan on cross examination was the strongest witness this Court has seen with regard to credibility. He admitted that both parties have benefited from this agreement. TRUCC has seen profitability as a result of this Agreement. AMAZON has done what it does the best, it has a good website, is good at fulfillment and has good customer relations.

Mr. Sullivan's main point and a point he stood firmly by, even through cross examination, was while the agreement does not contain a specific exclusion or a specific prohibition against third parties selling exclusive products on the AMAZON site, third party sales were not the intention of the agreement. Moreover, it was not the way the business operated for three years. It was his position that no amount of money damages or any type of injunctive relief could fix the damaged relationship. He was very clear in articulating that the parties needed to separate, that TRUCC wanted out of this agreement.

Mr. Sullivan was credible because of his willingness to admit the Agreement does not always contain a provision to support TRUCC view of the relationship. He admitted AMAZON has control over site navigation, site look and feel, and the way searches are conducted. However, he echoed Mr. Arthur's testimony about the disappearance of the TRUCC toy store. While you may get there by initially clicking on toys and games line, there is no longer a TRUCC toys and games tab, nor do you stay strictly within the co-branded store once you arrive. Today, there is no guarantee a consumer will find only TRUCC products and there is no way to limit a search such that a person remains solely within the TRUCC internet store.

TRUCC last factual witness was Ghalia Bhatty, who is the Director of Product Management for TRUCC. She was working for TRUCC at the time of the Strategic Alliance Agreement but was not a participant in the negotiations. Her responsibilities deal with the functionality of the website. Her major responsibilities grew in 2001 when she started "working on refreshing the site". At the signing of the Agreement, TRUCC and AMAZON.com had a site that was ready to go in September of 2000. However, she called it "a quick and dirty launch that definitely needed to be re-worked". It was important to get the site up and operable for the 2000 holiday season, but in 2001 the site needed to look and feel the way all parties wanted.

Ms. Bhatty is fully familiar with the TARGET agreement as well as the terms and conditions of the Strategic Alliance Agreement between TRUCC and AMAZON. Her concentration and focus has been on the actual operational functions of the website. (See Exhibit P21, Strategic Alliance Agreement between Target and Amazon of 8/31/01; see also Exhibit P47, Strategic Alliance Agreement between Target and Amazon of 10/24/02; Exhibit P150, Amendment No. 1 to Strategic Alliance Agreement between Target and Amazon of 10/1/03.) Ms. Bhatty's was called to testify to show it was possible to terminate the Agreement since there

is a functional way in the agreement to separate these two companies. Ms. Bhatty acknowledged that TRUCC has been looking for a way to move to another site. She testified that separation is not an impossible task to accomplish. Ms. Bhatty testified other former big name partners of AMAZON.com had left successfully and established their own sites with no complications for each partner during the transition, citing as examples, drugstore.com and Circuit City.com.

On cross examination, Ms. Bhatty indicated she had not seen the drugstore.com agreement nor did she have a tremendous amount of information with regard to Circuit City. Her testimony on the parties relationships and the departure of other parties without a significant amount of disruption or publicity, is helpful to the Court.[18]

Ms. Bhatty's was responsible to gather and also provide data to Plaintiff's expert for his calculation and analysis of cost. This data was necessary to compare the TRUCC and TARGET figures to calculate the price TRUCC was paying for exclusivity.

Ms. Bhatty is another one of those witnesses whose directness and honesty affirmed their credibility. Like Mr. Sullivan before her, Ms. Bhatty's answers were not the most helpful to the TRUCC's position, but her answers were always consistent, responsive to the questions that were being asked, and based on sound logic.

The last trial witnesses for TRUCC were their two experts, Mark Hosfield, Dr. Peter Sealey.

Mr. Hosfield projected that sixty five million dollars, through September 2005, represents the damages number calculated for TRUCC loss of exclusivity based on AMAZON's breach and TRUCC payment of the base fee. This number was based upon a comparison of the TRUCC agreement with the TARGET agreement entered into in 2001. Both parties received fulfillment,

[18] Drugstore.com was an original partner of AMAZON with a financial interest in AMAZON. Jeff Bezos also has an interest in Drugstore.com.

website maintenance and customer service. The services from AMAZON to TRUCC and TARGET were similar, but are not precisely the same. Mr. Hosfield compared the two agreements by payment, extrapolating a premium paid to AMAZON. Exhibit P-314 is the summary prepared by the witness to establish the comparable fees. In documents that were not presented in open court but which this Court has access, regarding Mr. Hosfield's analysis shows the difference in pricing that he finds established an exclusivity premium paid by TRUCC.

This Court cannot find any factual basis in the drafting of the Agreement for TRUCC's position there is a calculable figure or premium for exclusivity found in the base fee. This Court has no doubt from listening to all the witnesses in this case that there is an inherent element of premium involved in the financial relationship between TRUCC and AMAZON. The concept of partnership, is a special relationship that permeates through the Agreement and through all of the witnesses' testimony. This was envisioned to be a unique relationship. This agreement was designed to take the partnership to the paramount position in e-commerce beginning in the year 2000. There was a shared vision for future growth of not just each individual but the partnership as it relates to the growth of internet commerce and the importance of the internet in the lives of the daily consumer. What was not shared in the drafting of this Agreement was a specific or discernable value attributable to that unique relationship. Mr. Hosfield's methodology and manner of presentation is consistent with the practice of other professionals in his field. The comparison of the agreement and his manner of presenting the facts and calculations has merit. If any one witness had testified the parties considered certain percentage of base fee to be a recognized premium for exclusivity the Court would have been able to consider his opinion. What this Court cannot do under the law is to write a better agreement for the parties than they

wrote for themselves. There was never any consideration given for establishing a value for exclusivity in this agreement and to attempt to factor out a value for that concept based upon the testimony that had been presented to this Court would be improper and an inappropriate exercise of judicial discretion. The parties have recast this Agreement by amendment already. The amendment was added to this Agreement subsequent to AMAZON's agreement with TARGET in 2001. Both parties were fully aware of this issue of a premium for exclusivity at the time, TRUCC alleges it was a factor in bringing about the amendment. It was addressed in that amendment. Therefore, while the Court wants the record to reflect it considered Mr. Hosfield's calculations and his testimony, testimony could not help this Court render a decision because there was no testimony within which to ground it.

What was more troubling about Mr. Hosfield's testimony and an issue that continued even through the defendants' case is the calculation as of the 3.5% Safe Harbor provision and whether it has been breached by the sales of TRUCC product categories by AMAZON, its affiliates and third parties. It is this 3.5% Safe Harbor provision which has provided the most difficult issue for the Court's analysis. The documentation on those items sold by parties other than TRUCC.com are the reason this Court appointed Justice Gary Stein, Retired, as the Special Discovery Master to handle the discovery matters between the parties. A primary issue during discovery was documentation relating to data necessary to address a breach of the 3.5% Safe Harbor of Section 12.1.2. Just before this trial commenced, Justice Stein issued findings with regard to certain of those discovery issues. Justice Stein felt based upon all of the pleadings and all of the arguments before him, that AMAZON had been dilatory in its production of documents and had not complied with his previous Orders for documentation to be given to TRUCC to assist in its analysis. Coupled with those findings by Justice Stein and the testimony by

AMAZON's witnesses that they did not even begin to keep any kind of records or data regarding third party sales until sometime late in 2003, any analysis is suspect. TRUCC's expert, Mr. Hosfield, and AMAZON's experts, Mr. Brunner and Mr. Budge, all testified they did not have direct contact with the data maintained by AMAZON. Information provided to the experts or pursuant to discovery inquiries where the result of searches that were done by the AMAZON staff. This Court was repeatedly told all these searches were properly done in the only reasonable fashion of doing a data collection due to complexity and the volume of the data maintained by AMAZON.

TRUCC wants this Court to determine sales on AMAZON have breached this 3.5% Safe Harbor provision. TRUCC argues in calculating the 3.5% Safe Harbor provision, the Court should include revenues from sponsored links, 1x1 GUI sales, sales through Programmatic Selling Initiatives such as zShops as well as direct sales by AMAZON and third parties.

Mr. Hosfield's calculations do not show sales that breach the 3.5% Safe Harbor. He testified this result is because of the inadequate and incomplete data he was provided. On cross examination, he acknowledged it would take sales of nine million dollars by sponsored links and other sellers to reach the 3.5% Safe Harbor provision of TRUCC online sales in a given year. However, Mr. Hosfield asked the Court to consider the fact that sponsored links income received by AMAZON amounted to approximately eight million dollars in 2004.

This Court will comment further on the issue of breach of the 3.5% Safe Harbor, but before we get to that particular issue there were a number of witnesses produced by TRUCC and AMAZON who are important to perspective to the issues before this Court.

Dr. Peter Sealy was produced as an expert with regard to brands and brand damage. As the parties stipulated, that there are no permissible damages for brand damage pursuant to both

the Agreement and Delaware law. Dr. Sealy's testimony is helpful to this Court only in an abstract fashion. His testimony solidified for this Court the importance of brand with regard to the role these corporations play in the business world. TRUCC's brand stands among the highest recognized brand in the under 14 years set of consumers. TRUCC ranks equal to Disney World, Disneyland in brand recognition and is only surpassed by Oreo Cookies. TOYS.com and TOYS R US brick and mortar organizations are indistinguishable in the minds of the consumer. The names represent one company, one image and one set of expectations. What happens to the brick and mortar store happens to the dot-com and what happens to the dot-com impacts on brick and mortar stores. It is an image that comes into the mind of that consumer.

AMAZON faces the same issue in today's world. It is the image that comes to mind for the consumer when they think about internet sales. This Court finds that AMAZON has its own image issues and brand issues in the marketplace. It is that brand image that perhaps is contributing to the disagreement between the partners. AMAZON's founder and current Chief Executive, Jeff Bezos, continues to refer to AMAZON as the greatest store on the web. He and all of the witnesses for AMAZON identify that the core value and principle of AMAZON is the greatest selection on earth.

This Court understands that the drafters of this agreement attempted to merge the images of greatest selection with the hottest toy seller and finalize a business model that would work for both. It was the failure to honestly address those irreconcilable images that ultimately laid the framework for the disruption of this relationship.

AMAZON'S opposition to TRUCC'S case continued with the testimony of Rudy Gadre. Mr. Gadre was in-house counsel for AMAZON until May of 2005. Mr. Gadre came on board at AMAZON in 1999. In early 2000, he was appointed Associate General Counsel, and in 2003,

he was appointed Vice President. Mr. Gadre's academic credentials are impressive. He is well educated, very bright and falls into the category of "the very bright aggressive individuals" identified by earlier witnesses.

In fact, it was Jonathan Foster who identified Mr. Gadre as very bright and very aggressive in this negotiation. Mr. Gadre was responsible for the first draft of the Memorandum of Understanding after Mark Britto and Harrison Miller had their first contacts with the TRUCC people.

This Court listened to Mr. Gadre testify and made observations about his demeanor during trial. From the very beginning of his testimony, Mr. Gadre emphasized that his purpose and role in the negotiations and drafting was to be able to "to make sure that the contracts we entered into would not, you know, limit to the extent possible AMAZON's ability to provide selection". (17T2378-11 to 14.) In other words, he reiterated the position that this contract was focused on giving AMAZON products selection without the risk of carrying substantial inventory. "AMAZON is not, you know, capable necessarily of carrying everything in a profitable or efficient manner, so to expand selection you need selection from third parties." (17T2375-3 to 6.) Mr. Gadre's role through the negotiations was to draft language that facilitated AMAZON's control of navigation on its website and to ensure AMAZON had the capability to expand selection whenever and however it saw fit. While the discussions of the various Memorandums of Understanding were important to establish the background, it is the Strategic Alliance Agreement and various drafts of that Agreement which are relevant to this Court's decision.

Mr. Gadre confirmed a basic element of the Agreement was that TRUCC would abandon its own independent URL. Pursuant to the Agreement, TRUCC would provide merchandising

and marketing experience, and be allowed to select products for sale on the site. AMAZON would run the website giving up the role as the primary seller of toys on the site. Like Mr. Bezos, Mr. Gadre is a master of using multiple definitions for a single word. The word "tab" for instance was subject to at least two separate definitions and two separate uses depending on whether it was being used in house or in the outside world. TRUCC in the early stages of the Agreement was a "tab" partner meaning TRUCC had its own independent tab on the AMAZON.com homepage. TRUCC was the premiere ISP retail brand in the world of toys. Initially, AMAZON saw TRUCC as the seller of the mass market toys, the toys that would appear in stores like TOYS R US, Wal-Mart, and TARGET, and AMAZON saw itself as retaining the right to sell small specialty products to the exclusion of TRUCC. As previously testified to by Mr. Arthur, Mr. Gadre testified AMAZON eventually moved away from this position since there was a recognition of the relationships TRUCC had with both mass market vendors. and with specialty vendors. This was not a deal breaking issue for AMAZON.

Mr. Gadre gave one of the most concise explanations of Programmatic Selling Initiatives, the role they played on the AMAZON site and why certain language was used in the Agreement when referring to them. He also provided one of the most eye opening insight as to what was going on in the background during the negotiations.

At the time the negotiations were taking place, AMAZON had yet to master the technologies it relies on today. All the while AMAZON was pursuing this Strategic Alliance Agreement with TRUCC it was also working on expanding its technologies to support programs that would fall under the concept of the "marketplace". These were auctions, AMAZON Advantage, zShops and as would develop over the course of the next five years, single detailed

pages, ez detail pages, concepts which would eventually morph into the 1x1 Graphic User Interface.

Mr. Gadre said AMAZON did not want to limit its ability to pursue the marketplace that would allow small companies, individuals, or just independent sellers the ability to post products on AMAZON's website for sale. It must be understood these products went up on the site continuously and in high volume. Mr. Gadre testified AMAZON did not have the technology to control, limit and/or block products that might fall within the TOYS exclusive category area. Instead, AMAZON seized upon the definition of Programmatic Selling Initiatives because it would be vague enough to allow AMAZON to open up its selection without breaching the Agreement.

Since Programmatic Selling Initiatives were things like auctions, available on terms used by the general public, how could that threaten TOYS? Even as Mr. Gadre testified, it was easy to understand how the deal makers, the negotiators, and the toys representatives could have visualized these programs as opportunities for flea markets, Kiosks sellers, and e-bay type auctions for collectibles. Mr. Gadre was very good at downplaying the economic impact of these programs on TRUCC.

Mr. Gadre testified the issue of exclusivity was not contentious but it was not heavily negotiated either because he and Mr. Miller made it very clear to TRUCC that lack of selection was a deal breaker for AMAZON. "We would all get fired if we did a deal that didn't set that up". It was Mr. Gadre's testimony that TRUCC was fully aware that AMAZON would supplement product selection on the AMAZON site if TOYS did not. TRUCC could be exclusive as long as it selected a product to sell. However, if TRUCC failed to select a product,

and AMAZON felt that product should be sold, it would be sold by AMAZON or someone else in order to ensure that AMAZON had the world's greatest toy store.

In various parts of Mr. Gadre's testimony, he maintained the position that every change of language and every posturing move that was made throughout the negotiations was consistent with the plan to bring TRUCC on as the premiere toy seller. AMAZON agreed to grant exclusivity over items that TRUCC chose to sell but retained control over its right to expand the selection of items either by AMAZON selling the product or by permitting a third party to sell the product. Mr. Gadre denied the distinction between selected exclusive products and exclusive products was in any way connected with the idea of mass market toys vs. specialty toys. Rather, the Agreement was a compromise on the idea of exclusivity for TRUCC and control over selection for AMAZON. Programmatic Selling Initiatives were merely an avenue for AMAZON to open up its selection without breaching the Agreement.

Mr. Gadre explained the notice provisions set up in Section 5[19], et seq., with its recapture provision was another way of offering a compromise to AMAZON and TRUCC to balance exclusivity and selection. The language struck from the section[20] was only struck because AMAZON lacked the technology to provide TOYS with notice that third parties were anxious to sell exclusive products. It had nothing to do with restricting third party sales. Toys had the right to select toys for sale sold by AMAZON or third parties on the AMAZON site. Once TRUCC selected a toy for sale, AMAZON or the third party parties would have to stop selling that toy on AMAZON. Mr. Gadre testified this was an open discussion and everyone understood the

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[19] Section 5.1.4 "ACT Right to Offer TRUCC Products" which states: "ACT Right to Offer TRUCC Products" which states: "To the extent that TRUCC fails to select any TRUCC Product for sale through the Co-Branded Stores following a request by ACT to select for sale such TRUCC Product through the Co-Branded Stores, ACT and/or one of its Affiliates may offer any such TRUCC Product on the ACT Site (including, without limitation, through the Co-Branded Toy and Video Game Store and/or Co-Branded Baby Store, as applicable, subjection to Section 5.1.5.)." (See Strategic Alliance Agreement, Section 5.1.4 at 18.)

[20] See Strategic Alliance Agreement, Draft 2.0, *supra* note 12.

language was due to the overly burdensome nature of the notice provision. While AMAZON would not go out of its way to provide notice of third party products to TRUCC, it also was not going to go out of its way to protect third party sellers. Once TRUCC identified a third parties' toy as a selected exclusive product or an exclusive product it wished to sell, then AMAZON would simply take down the third party or AMAZON product being offered. TOYS would then be responsible to take over any inventory of that product that AMAZON had acquired. However, if TOYS selected a product for sale by a third party, it would not become responsible for inventory of third parties. Mr. Gadre was dismissive in testifying there was no concern on AMAZON's part as to what happened to a third party if TOYS selected its product. It was a risk the third party sellers accepted. This view is a poor indication of AMAZON's good faith dealings with merchants.

Mr. Gadre testified to two direct conversations he had with Ray Arthur. The first discussion involved this issue of recapture and third party sales of exclusive products. Mr. Gadre is the only person to testify about this particular conversation and its content. Mr. Arthur's testimony did not reference this particular discussion and none of the other negotiators testified that a discussion of this nature had taken place. The other conversation involved a conversation with Ray Arthur about Programmatic Selling Initiatives.

Mr. Gadre saw the most heavily negotiated issues in this case as the issues of co-branding, how extensive the co-branding was, site control, the economics of the deal and who would pay for what costs. Under site control Mr. Gadre testified in 2000 AMAZON was not interested in limiting how its technology could develop and be used in 2003, 2005, 2007 or 2010. AMAZON wanted the ability to continue to grow and develop new technologies for internet commerce. This dynamic view was attractive to TRUCC.

While Mr. Gadre was consistent in testifying selection and the ability to expand selection was a goal of AMAZON, many times he became unclear and fuzzy as to how this was going to be achieved. Even on direct examination, he waffled in discussing the purposes of the 3.5% Safe Harbor provision. He always seemed to try to fit his answer into other witnesses' answers describing the Safe Harbor. This safe harbor was a "no tripping zone", an area to deal with sales that were "de minimis" incidental sales by partner, sales which should not cause a problem.

It was on cross examination, that the second conversation with one of the negotiators came up. Again no one else remembered the conversation or testified to a discussion between Ray Arthur and Rudy Gadre about Programmatic Selling Initiatives. Mr. Gadre testified he told Ray Arthur in Seattle early on in the negotiations that even Wal-Mart would be permitted to sell toys on the AMAZON site if it did so as a programmatic seller. Even more expansive, was that Wal-Mart could sell toys that TRUCC selected as a selected exclusive product as a programmatic seller.

Mr. Gadre's testimony in many ways was disturbing to this Court. While it had been five years since the negotiations for this Agreement, Mr. Gadre's selective memory of conversations and lack of clarity about other discussions raised issues in this Court's mind regarding his credibility. His demeanor on the stand was condescending and at sometimes unbelievable. As stated above, sometimes it seemed he attempted to keep his testimony consistent with that of previous witnesses affiliated with AMAZON. In that regard, he failed. His explanations for many of the changes in the agreement could be viewed as half truths containing facts articulated by the negotiations but not quite complete. His answers lacked a sound basis either in economics or law and failed to sustain their plausibility.

While Mr. Gadre was actively engaged in drafting language, he was not truly engaged in the negotiations. It seems it was his obligation in the drafting process to ensure AMAZON's control over the site whether it was navigation, look and feel, or functionality. There had to be language in the Agreement that reserved control to AMAZON. Additionally, no matter how many compromises the negotiators and deal makers were willing to make with regard to the business model, there had to be ability for AMAZON to supplement the selection, to satisfy Jeff Bezos view of the greatest assortment possible on this web site.

His explanation of the exclusion of third parties from the various portions of the agreement and the purpose of the 3.5% Safe Harbor also lack credibility. This Court in no way found believable his testimony that Ray Arthur and Jonathan Foster as negotiators and representative of TRUCC understood this Agreement provided for unlimited third party sales of products not specifically selected by TRUCC. His own testimony destroyed his credibility. If any particular word could be used to mean one or more things in the parlance of AMAZON, Mr. Gadre could apply it. This Court has no doubt of Mr. Gadre's ability to create ambiguous language to protect Jeff Bezos' core philosophy without revealing the internet to TRUCC during those negotiations.

As AMAZON moved forward with its case, both in response to TRUCCS' claims of damages as a result of loss of exclusivity, and breach of the 3.5% Safe Harbor provision , AMAZON also presented testimony on its own claim. TRUCC had breached this Strategic Alliance Agreement by failing to maintain proper inventory levels.

Gideon Charles Roy, otherwise known as Casey Roy, was a key witness in this area. Mr. Roy is the Vice President of Merchant Services at AMAZON and before that he was responsible for fulfillment operations and served as a Manager of Transportation. He has been with

AMAZON since the year 2000. Mr. Roy's role in this trial was to educate the Court on AMAZON's fulfillment capacity. His testimony focused on the size of the fulfillment centers and the manner with which AMAZON keeps track of products at its warehouses. He also testified about merchant dealing and customer service.

There had been an earlier motion on the part of AMAZON to have the Court take a site trip to tour one of AMAZON's fulfillment centers in Kentucky. This Court declined the site visitation indicating that it would interrupt trial time and was not necessary for the Court in understanding the testimony with regard to the process of fulfilling customer orders. This Court did suggest that perhaps a live video walk through of the fulfillment center would serve the same purpose. However, there were complications and instead, AMAZON produced a video to demonstrate what goes on at a fulfillment center with Mr. Roy providing the explanations as the video ran.

AMAZON has fourteen distribution centers throughout the United States. They are characterized as sort able and non sort able locations and are run on AMAZON designed software. Mr. Roy testified that AMAZON operates under "real time inventory" so that it knows where every piece of product is at all times. Product is scanned as soon as it is delivered to a fulfillment center and is tracked continuously. These fulfillment centers, particularly those that are designed to meet the TRUCC needs pursuant to the Strategic Alliance Agreement, are designed to ramp up during the holiday period to accommodate ten to twelve thousand product items. The video shown was marked as evidence Exhibit D153. The video walked the court through the process of product arriving at the docks and then ultimately being shipped out to a customer.

The fulfillment centers operate twenty four hours a day, seven days a week for 364 days a year with only Christmas and New Years Day closed. Of those fourteen (14) fulfillment centers, nine (9) are designated for TRUCC products. In order to meet the growth of the business, Mr. Roy has projected that AMAZON will need to build additional fulfillment centers in order to support TRUCC.

Currently, in a normal season, TRUCC products represent approximately five to ten percent in off peak periods. During the peak season, TRUCC utilizes 20% of "the thru put or capacity to process". Actually during those peak periods the actual physical storage of the product is at 40%. The peak season runs from October to November for receipt of product through the day after Thanksgiving to the first two weeks of December for out flow.

Mr. Roy then provided testimony regarding the impact on AMAZON if this Court's entered an injunction prohibiting third party sales of any toys, games and baby products, as requested initially by TRUCC. He said such an action would reduce the selection AMAZON would be able to offer on its website by over 45,000 product items dramatically affect total sales. Mr. Roy estimated there would be a reduction in sales on AMAZON in general because customers would not be able to find products and therefore would go to other sites. Second, if this Court were to terminate the Agreement at this point, Mr. Roy felt this would create significant problems for AMAZON since TRUCC represents "forty percent of their utilization of fulfillment centers". The cost to AMAZON in meeting those fulfillment centers has already been spent and would not be recoverable because of the unique fee structure that was established with TRUCC.

On cross examination it was inferred particularly, with regard to AMAZON's agreement with TARGET, AMAZON's fulfillment centers would not go empty. This is because many

fulfillment centers contain products which are identical to TRUCC products already.[21] Mr. Roy also admitted pursuant to an amendment to the TARGET agreement, in the event TRUCC ceases to do business on the AMAZON site, TARGET will be able to sell the very same toys, games and baby products that TOYS R US.com currently provides through AMAZON's site.

Additionally, Mr. Roy's testified that by permitting Merchants@sellers to sell non selected toys, games, and baby products, AMAZON had added forty five thousand toys, games and baby products to the its site. There was some attempt to clarify for this Court as to whether or not those forty five thousand items were included in analysis that was ultimately rendered by both companies and their experts regarding the 3.5% Safe Harbor of toys sales analysis. However, there never was a definitive answer obtained.

Cross examination also involved a discussion regarding the ability of AMAZON to block the sale of selective exclusive products while allowing the sale of exclusive products. On direct Mr. Roy had testified AMAZON spent approximately $500,000.00 in resources to support a manual review process of items on the site that were for sale. Another trip to the website showed additional selected exclusive products being sold by third party merchants. This was a pattern throughout the testimony of both AMAZON's and TRUCC principal witnesses.

AMAZON's affirmative position has been that it utilizes the best technology possible to block sales of selective exclusive products by any categories of seller other than those classified as Programmatic Sellers on the website. Although pursuant to the initial injunction which was vacated by the Appellate Division there had been an attempt to block programmatic sellers of selective exclusive products. TRUCC presentation to this Court through its own witnesses testimony and on cross examination of almost every AMAZON witness, showed that at any

[21] Amazon provides website management for many merchants including TARGET. Additionally AMAZON provides fulfillment and customer service.

given time both during the pre-trial discovery phase and now as the trial progressed, one could find any number of selective exclusive products being sold by third parties.

Mr. Roy and later witnesses, Michele Rothman and Kimberly Allen, attempted to defend AMAZON's position because many of the products TRUCC alleged were selected exclusive products carry different ASINS than products sold by TRUCC. Beginning with Mr. Roy continuing with Ms. Allen, and most strongly and almost to the point of absurdity with the testimony of Michele Rothman this Court has seen how extremely difficult it is to separate, even with technology, selected exclusive products from exclusive products. The credibility of Defendants position would have been enhanced if it had simply admitted there was an inability to control the products marketed. The Court is not involved with the day to day business of product identification and ASIN assignments. The Court has tried to be open to the experience. However, some of the testimony present by the witnesses has this Court trying to decide whether the witness was nervous, just not uneducated or misinformed or worse, outright lying to this Court. While Mr. Roy's examples were not so out of line, the testimony later of Michele Rothman was useless.

AMAZON called Mr. Robert Zuckerman. Mr. Zuckerman is a former employee of the various TOYS R US entities. From 1990 through 1995, Mr. Zuckerman was employed by TOYS R US, Inc, and after the execution of the Strategic Alliance Agreement, he returned to work for the TOYSRUS.com and continuing there through December 2004. In these various roles, he worked as a budget manager and a financial director. Mr. Zuckerman was apparently the ghost author of a memo from Ray Arthur to the Board in 2001 regarding the evaluation of the base fee portion of the Agreement. His testimony re-affirmed AMAZON's position and re-affirmed this Court's decision the base fee calculation was a fee based on what AMAZON's

costs would be for fulfillment and other services provided for TRUCC. In 2001, when the base fee was revisited and capped for a period of time, Mr. Zuckerman's testimony indicated, that the discussion and action was taken on the basis of a lower sales reality than had been projected by the parties.

The Court heard next from Michele Rothman. Ms. Rothman is the Senior Manager of Client Services at AMAZON.com. Ms. Rothman started out in 1999 as a toy buyer for the AMAZON toy store. (The Court has to acknowledge that Ms. Rothman was obviously nervous about testifying and admitted so when asked.) Ms. Rothmans testimony did nothing to assist AMAZON's position either as a rebuttal to TRUCC direct case or for AMAZON's counterclaim for damages for breach of the agreement by failure to provide sufficient inventory.

This Court has no doubt that Ms. Rothman is an extremely bright individual. During the pre-trial motion phase, her certifications were certainly helpful in the focusing the Court's attention on many of the issues. However, her testimony was hard to follow and difficult to accept. Ms. Rothman has been critically involved in the operations issues that have come up between the parties. For the last two years she primarily worked with Ruben Baerga, who is the TRUCC representative on the account. AMAZON and TRUCC people meet at least once a month to go over operational issues in "business reviews". These reviews usually involve from TRUCC, Rubin Baerga, Prama Bhatt and Ghalia Bhatty, occasionally John Sullivan and Ray Arthur participated as well. Ms. Rothman, Kimberly Allen and Jorrit Van der Meulen were the primary AMAZON people at these meetings, which have continued through the course of this litigation.

The fact that TRUCC and AMAZON continue to work together will not affect this Court's decision. This Court has no doubt AMAZON and TRUCC have continued with sound

business practices during this litigation. This Court also has no doubt AMAZON and TRUCC have both worked in a collaborative effort to ensure the business was successful. With the exception of those sections of the Agreement discussed at trial no one has advised the Court of other problems in the Agreement. Both have worked to promote the Strategic Alliance Agreement and have worked to increase each sides profitability.

There is only one dispute between these parties and that dispute is the genesis of the battle over the smaller issues. In some circumstances Ms. Rothman provided very good information to this Court. She was in the possession of knowledge that allowed her to tell this Court TRUCC sold over one hundred seventy seven million products during the year 2005 up to the time of the trial (25% over its 2004 sales). Ms. Rothman appeared to be knowledgeable with regard to the role and importance of forecasting in merchandising, warehousing and fulfillment. She was involved in e-mail promotions for TRUCC and explained to the Court how that operated. She was familiar with how promotions worked on the site, and she was also responsible for some of the way the site looked.

Ms. Rothman was finally asked about one of the more critical issues in this litigation and that is the tab structure which has been changed since the inception of this agreement. TRUCC tab was ranked as one of the top four of among the thirty two tabs that AMAZON had previously provided. In its new format, TRUCCS position still ranks as one of the highest seller on AMAZON. Mr. Rothman testified TRUCC had been advised at least eight months in advance there would be a change in the sites appearance. She explained to this Court how the websites were changed. AMAZON would run a “web lab” meaning a test run online of a new look, operation or functions, to evaluate its value. She explained the partner is advised of the plan,

input is solicited and then all parties are involved in the evaluation. Ms. Rothman herself was responsible for sending a preview of this new site appearance to Ruben Baerga.

Additionally, although there was some attempt by counsel to get Ms. Rothman to talk about sponsored links, she did not have specific information except sponsored links did not appear on the toys and baby site.

The next area of testimony that Ms. Rothman provided was very troubling to this Court. It involves the use of another word that appears to have multiple meanings to the people at AMAZON, depending upon the context. Ms. Rothman was asked about the word "boutique". She defined a boutique as "a section of the web site where a certain merchants products or searches are restrained to just certain merchant's products." (19T2966-17to 19) She testified AMAZON offered TRUCC a boutique. Ms. Rothman put together a screen shot of what a boutique would look like and sent it to TRUCC for evaluation. She explained it would have been an additional site, and AMAZON would have been willing to do this for TRUCC. It would be different than what TOYS had at the time since TRUCC does not have "boutique sites". TARGET is a boutique.

After the discussion of boutique's, Ms. Rothman then began to describe the review process utilized by AMAZON to screen products for compliance with the Strategic Alliance Agreement. Currently, AMAZON's policy is to permit third party sales of exclusive products. In July of 2004, AMAZON created the item review team. Their responsibility was to manually review all 1x1 GUI submissions and all toy and baby merchant submission. There are twenty people on this team who worked on this process twenty four hours a day, seven days a week. She described their work operation as follows:

> They are getting them out -- and they still do. They get an hourly report of all 1x1 submissions from the previous hour, and they literally go click on

> each one, go to the web site, review that product, look at the product data that was submitted, and compare it to the TRU product to see if there's any overlaps.
>
> [(19T2979-1 to 7.)]

Ms. Rothman testified all toys offered for sale by third parties are reviewed and the data provided to TRUCC by advising a product is going to be proffered for sale. The team then goes through what has been called a UPC validation period, to ensure that the UPC's do not overlap. First, it checks to see if the product has a valid UPC, and if it does, then it goes through the blocking process. If in fact it matches a UPC of TRUCC, it is blocked from appearing on the website. This and following testimony was accompanied by D204 in evidence. (See Exhibit D204, Toysrus.com Leadership Meeting PowerPoint Presentation of 8/14/02.) AMAZON visual provided assistance to the Court.

There is a process called an algorithm matching. She refers to this as "fuzzy matching". Ms. Rothman was not involved in its initial determination but she has indicated what it does is compare similar features to see different products match. Basically, they look at the title, the manufacturer, the model number, the description, and all of those types of things to see if in fact there is a match. It was Ms. Rothman's testimony that if something appears to be a match or present a possible match through this "fuzzy matching", the item review team manually reviews the submission. Not only do they look at the page but they look at the product, that is, they look witness says "[t]hey are looking at the two pages, and they they're looking at the third-party product data for the third party and also product data that we have for Toys "R" Us." (19T2985-12 to 15.) It works this way:

> So they're going to the web site. They're comparing the two products. So they're going to look at the title, the image, the manufacturer name, any descriptive copy that is provided, the dimensions and the weight and the price, and they're going to compare whatever we have for Toys "R" Us on

> the site. And they're also going to go to third party web sites, either for that seller or just third-party sites in general and see if they can find any more information on the product to determine if it's a match.
>
> [(19T2985-20 to T2986-5.)]

When these problems arose, AMAZON did what it called the "retroactive scrub". In other words, AMAZON used its updated technology to go through the catalog of currently offered products to match and remove items that would cause dispute with TRUCC. AMAZON also did "key word" searches on the catalog to ensure that when it went forward with launching of 1x1 GUI or Merchants@technologies in the toys, games and baby products categories, it had removed questionable products. Mr. Rothman admitted when faced with screen shots evidence of prior selected exclusive product lists, that exclusive products and selective exclusive products got through the search process even though they were not suppose to. Ms. Rothman did emphasize the effort that AMAZON makes to ensure compliance.

Ms. Rothman also was the individual responsible for review of the products submitted with the initial complaint and Order to Show Cause phase. She certified then, and still maintains TOYS was in error, not all examples were selective exclusive products.

It is AMAZON's position third party sales amounted to less than one fifth of one percent in 2004 and were within the 3.5% Safe Harbor. AMAZON proffered Exhibit P163 and P165, a list which formed the basis of AMAZON's position of products broken down by merchants including TRUCC sales in 2004. (See Exhibit P163, 2004 ASIN Data – 3.5 Percent Analysis Spreadsheet; Exhibit P165, Spreadsheet of 2004 data.)

Ms. Rothman explained the keyword search process, which provided data for the experts 3.5% analysis for the years 2000-2004. Ms. Rothman was responsible for developing those search terms. In review of Exhibit P162, Ms. Rothman supplied the reasons behind the

methodology used to gather the data. (See Exhibit P162, Memorandum from AMAZON.COM c/o David R. Goodnight to TRUCC c/o Michael Dockertman of 11/19/04.) This Court is still not clear on how the methodology evolved, what its elements were, or how it could be tested to confirm its reliability. Ms. Rothman's testimony was halting, and repetitive in parts and incomplete in other. This data formed the basis of both parties 3.5% analysis.

On cross examination Ms. Rothman became even more confusing in her description of documents, products and her search methodology. Her confusion might have been because she was nervous, but she could not keep exhibits straight. She admitted there were parts of the documents she had previously testified about she had not prepared. Ms. Rothman did testify that she may have come up with methodology, but she did not actually do the searching because she was out on maternity leave.

Although this Court had previously heard testimony referring to the TRUCCS co-branded pages as "the TOYS R US boutique", Ms. Rothman denied that AMAZON had ever referred to the TRUCC pages as boutique. In fact she testified, it was referred to as "the Toy Store".

The next area of cross examination focused Ms. Rothman on the product identification part of the screening process. Counsel for TRUCC used Briar Madison Avenue Horses, as an example. For twenty minutes, Ms. Rothman and Ms. Drazdys, who was conducting cross examination, went through web site visuals of Briar Madison Avenue Horses, in their descriptions and whether or not they were a selected exclusive product. More than any document production or witness testimony, it was this effort on Ms. Rothman's part to attempt to identify whether or not a product was an exclusive product or a selected exclusive product that was excruciatingly painful. She testified these products were not the same one was a Selective Exclusive Product, the other an exclusive product. The products were shown on two screen

shots at a time. One product was sold by TRUCC, therefore selected exclusive products, and the other product was not and was being sold by a third party. Ms. Rothman's reason for differentiating between the two products was bizarre. The screen shots were ultimately identified for the record as were the actual products purchased by TRUCC which were physically brought into the Court. The horses were the same product.[22]

The technology that allowed lawyers and witnesses in the Court to go to the AMAZON/TRUCC's website to look at a product and order a product and bring the product into the Court within the timeframe of the trial was incredible. The Court acknowledges this practice was fraught with evidentiary problems, but it cannot be ignored as a tool for fact finding. While the Court recognizes these were just limited examples in light of the one hundred and seventy seven million products that go through the site on a daily basis, it provided hard examples of the problems facing the parties.

On re-direct Mr. Goodnight attempted to salvage Ms. Rothman's testimony with regard to the idea of "boutique". However, she defined the boutique differently than she did on her own direct. A boutique was now offered a place where similar products were sold, so that a Barbie store would be a place where all you would find would be Barbie products. Then making matters worse, she testified the TARGET site on AMAZON was called a boutique, but then quickly added "I think at one point we called them boutique, and I think at another point they changed over. At different points they changed." (20T3105-12 to 15.) There then was an exchange between the Court and Ms. Rothman as follows:

> The Court: So you use different names for different locations as it's convenient?
> The Witness: I don't know why. I know at one point we probably called it the Target@boutique, and we probably call that a Target@boutique still.

[22] The product packages were marked P327 through P28 and became part of the record. The screen shots were marked as PSS76 through PSS91.

> The Court: Well, how did you define it in the Target agreement?
> The Witness: I don't know.
> The Court: Well, how is boutique defined in the Target agreement.
> The Witness: I haven't seen the agreement. I don't know.
> The Court: How is boutique defined in any of the agreements that you've used it in?
> The Witness: I don't know if I've seen boutique in any – I haven't really seen any other contracts other than Toys "R" Us., but I don't know if I've even seen the word "boutique" used.
> The Court: Well, how could you offer that as an option for Toys if you didn't know how it was defined?
> The Witness: I was using it to explain to them this was a section that would have just their products.
> The Court: What is different from a co-branded store? Isn't that what they have on their site, just their toys?
> The Witness: I know there's co-branded pages. I don't know if there's a co-branded store, but I know that when you're in the toy store you can search for other products and get results in the Amazon site for non-TRU products. What we were offering was a section where they could search and browse only for their own products in addition to what is in the toy store.
> The Court: Okay. What is the difference between – Ms. Drazdys asked you a question – between the co-branded home page and the co-branded store?
> The Witness: The co-branded store, from my understanding – from my understanding there are co-branded pages. The home page is the co-branded home page, and there are several other co-branded pages. The toy store includes pages outside of the – the co-branded pages plus pages in addition to the co-branded pages is my understanding.
>
> [(20T3105-16 to T3106-13.)]

To this independent fact finder it is very troubling that a particular word can be used to reference multiple types of site experience for the contracting party only to have it defined as a different type of offering at a different time to a different merchant.

AMAZON followed Ms. Rothman testimony with Ruben Baerga. Mr. Baerga is the Senior Director of Product Management at TOYS R US.com. He served in that role for perhaps two and a half to three years. He is the account manager for the Strategic Alliance Agreement. Mr. Baerga testified he works with AMAZON on a day to day basis and has worked with

Michelle Rothman, Jorrit Van der Meulen, Ross Baker, Kimberly Allen and Brian Roller. Mr. Baerga testified all of the AMAZON people, specifically Jorrit Van der Meulen and Michelle Rothman, were very responsive to any concerns and requests made during the relationship. His AMAZON counterparts listened and they attempted to accomplish things. He respects their professionalism and had developed a personal relationship with both Michele Rothman and Jorrit Vander Meulen.

Mr. Baerga does not deny that in 2003, AMAZON brought proposals to TRUCC seeking to allow third party sales of non selected products. Mr. Baerga admitted some of those discussions included the potential for third parties to sell selected products that were out of stock. Exhibit D-104 is an e-mail sent by Jorrit Van der Meulen to Ray Arthur and Ruben Baerga, referencing expanding selection and in store pickup (a TRUCC concern). The exhibit included a discussion of ways to expand selection to allow third parties to sell, and the technology to monitor that process. Mr. Baerga testified these were proposals "floated" by AMAZON, but never agreed to by TRUCC. Mr. Baerga testified he never viewed the communication as evidence of a 'secret plan" or a conspiracy to undercut TRUCC's position. AMAZON was very open at that point as to where they saw the website moving. Unlike what had been characterized by other TRUCC witnesses as a secret plan to add third parties Mr. Baerga said they were right out in the open about it.

Further, Mr. Baerga did not view AMAZON's 1x1 GUI technology as a Programmatic Selling Initiative. His comment to TRUCC, in his role as a liaison was to explain to TRUCC how AMAZON saw different issues.

> …AMAZON wanted us to believe that 1x1 GUI was a programmatic selling solution. They presented it that way. To this point today, we don't believe that. It isn't. It doesn't feel, taste or smell like anything we see today as a Programmatic Selling Initiatives. My job is to make sure, to be

> a devil's advocate to the people I work with, to make sure they understand our position. That's all I was doing.
>
> [(20T3125-7 to 15.)]

Mr. Baerga was very honest in the face of questions regarding partnership planning during August of 2002 before the Time Square Meeting that ultimately led to the break down in the partner relationship. He was very clear he had been talking to Jorrit Van der Meulen and Michelle Rothman on a daily basis. Therefore, he had an idea of what was coming with regard to their position on third parties.

In discussions with his own people, he felt an obligation to make them aware of AMAZON'S position even though there was a strong reaction by TRUCC to fight any type of effort to add third parties. In seeking alternatives to keep the partnership alive, he testified TRUCC considered negotiating with AMAZON to allow TRUCC to solicit third parties for other products that TRUCC would then offer. The parties were clearly moving into issues of control. Exhibit D204 proffered was a memo from the August 2002 planning and leadership meeting at which Mr. Baerga and others discussed TRUCC options concerning the Strategic Alliance Agreement. (See Exhibit D204, Toysrus.com Leadership Meeting PowerPoint Presentation of 8/14/02.)

AMAZON showed Mr. Baerga Defendant's Exhibit D75, an e-mail in which Mr. Baerga and Ray Arthur discussed Section 12.1.2 and the limitations regarding third party sellers. (See Exhibit D75, E-mail from Baerga to Arthur of 3/19/02.)

Mr. Baerga testified honestly about profitability increases and of his own salary and large bonus in 2004. Mr. Baerga never moved off the position that TRUCC believes it has the exclusive right to be the toy seller on the AMAZON website. He testified TRUCC never abandoned that position, and he has never abandoned the position that third parties are

inappropriate as absolute direct sellers of toys. He is concerned, that not only has TRUCC exclusivity been eroded, but that the TRUCC brand is subject to erosion as a result of the actions taken by AMAZON.

Mr. Baerga's demeanor during his cross examination displayed a sense of disappointment, a sense of distrust, which now affected his own working relationships. He testified in the early years he, Jorrit and Michele never once needed to refer to the contract. They were doing extremely well selling a lot of toys. But sometime in late 2002 he noticed problems. Products were popping upon the website and AMAZON was in his words "taking liberties".

> The Target deal was a big blow to Toys "R" Us. We never expected another vendor to be selling on the Amazon site, let alone our own products. And so the amendment – we were negotiating the amendment. This was a month or so before the actual amendment, so we were in that mode. We were in the mode of looking at – okay, Amazon has come to us, and they want to amend the agreement. What can we get from this opportunity.
>
> [(20T3147-14 to 22.)]

TRUCC and AMAZON were losing trust.

The next person that the Court heard from was Kimberly Allen. Ms. Allen is a Senior Manager in Account Management for fulfillment at AMAZON. She began working for AMAZON two weeks before the Strategic Alliance Agreement was signed. Ms. Allen perhaps was one of the finest witnesses AMAZON presented to this Court. She was precise, informative and credible. She is one of those super bright, highly educated young people that Jonathan Foster mentioned AMAZON employed through the early 2000's. Her testimony in this Court showed the benefit of her fine Princeton undergraduate and Harvard business school education. Much of her early testimony echoed and affirmed some of the basic operational testimony provided by Michele Rothman and Ruben Baerga. Most importantly, she was the person who

supervised the production of documents for the challenge to the 3.5% Safe Harbor provision of the Strategic Alliance Agreement. Ms. Allen provided clear cut detailed information on product identifiers (UPC, SKN, SKU, ASIN). She also clarified some of the search terms that Michele Rothman attempted to discuss during her testimony.

Ms. Allen was involved in weekly and monthly meetings to discuss product forecast and sales forecast. She put a little more clarity into exhibit D204, the review process used to prevent third party sellers from selling selective exclusive products and the process by which TRUCC is notified of a third party sellers intention to sell an exclusive product. (See Exhibit D204, Toysrus.com Leadership Meeting PowerPoint Presentation of 8/14/02.)

While not involved in the original November 2004 3.5% analysis data gathering, she was involved with the April data gathering process. She supervised what she called "the data mining team" which was headed by Diane Lye. She saw her role as a facilitator of the data gathering for the discovery process for TRUCC and, AMAZON's expert Mr. Brunner. Clearly, data gathering for this analysis and any data gathering from the AMAZON site is a Herculean task. The data on product offering and product sales included in Ms. Allen's estimation was between fifty to sixty million records of information. There were two types of data pulled for AMAZON to do its calculation and provided to TRUCC pursuant to discovery requests. The first could be classified as code information, which was data based on UPC's, ASINS, and general ledger code. The second type of data was returned pursuant to a keyword search that was done for toys, games and baby products within the general ledger categories. Lastly, there was a merchants search.

Ms. Allen testified that both product and sale data could be traced from today back to 2000. Ms. Allen testified that the data:

> … was run against a point of time, and so for the information that was in our databases as of 2005 was captured. Because of the

> massive amount of data, we couldn't go back to previous years necessarily and run a search of the keywords against sort of what the database looked like at the end of 2004. But any items that had been existing in our databases as of 2004 or 2003 or 2002 that were still in our database which had keywords against them would have been captured in our search.
>
> [(20T3188-23 to T3189-8.)]

At the end of the above testimony the court and Ms. Allen engaged in some colloquy about these searches as to how far back they could go and why they could or not, the reason some dates were available while other dates were not available.

Ms. Allen provided this Court with an understanding of data gathering and retrieval and how AMAZON saw the 3.5% Safe Harbor provision. Ms. Allen acknowledged there were and continued to be many exclusive products and some selected exclusive products appearing for sale by third parties on the site. However, there is no sales data for products. While the product may appear on the AMAZON site, those sales were limited before a certain time frame and not tracked during certain periods of time. It continues to be one of the reasons why this 3.5% Safe Harbor provision is so difficult. Before the conflict erupted, TRUCC would complain about a product and AMAZON would take it down and because this happened so quickly complete data was not retrievable. Ms. Allen testified that this was the conduct contemplated by the Strategic Alliance Agreement 3.5% Safe Harbor provision Section 12.1.2. (See Strategic Alliance Agreement, Section 12.1.2, at 45.)

Ms. Allen was truthful. It is the data that the Court finds unreliable. The data provided for analysis was done through "the data mining team" facilitated by Michele Rothman and Kimberly Allen in response to specific requests by TRUCC. If documentation was not specifically requested, it was not provided. Data was provided on the basis of a keyword search, provided in accordance with UPC requested search, and only provided in response to specified

merchant names by TRUCC. UPC codes were only searched for by this data mining team once. The documentation was overlapping and duplicative because different types of data were requested. If TRUCC did not know about a particular merchant who was selling on the AMAZON site, the merchant information was not part of the discovery exchanged.

The next witness before this Court was Paul Kotas. For the first time in all of this litigation, this Court finally received information about what 1x1 GUI technology is, and how it operates. It was Mr. Kotas and his team who was responsible for the development of 1x1 GUI. He was hired in January of 1999 as a Director at AMAZON to work on the various auction sites (perhaps Programmatic Selling Initiative sites?) He is now a Vice President responsible for the areas of third party selling. He is responsible for the major development in the computer programs for the auction function which allows third parties to have access to various selling models on the AMAZON site. His testimony covered the difference between auctions, AMAZON Advantage, zShops. Auctions are just that, parties putting up product detailed pages for bidding. AMAZON Advantage operates in a consignment model in which AMAZON receives inventory in fulfillment centers. Upon sale, the seller receives a commission on a consignment basis. ZShops are where a customer creates a detail page and sells their product at a fixed price.

Mr. Kotas was very good at differentiating between each one of these selling modes. The only similarity is all models are available on terms available to the general public. There are no specially negotiated deals. There are no special pricing. 1x1 GUI technology is a feature on the AMAZON site designed to allow a third party to create detailed page which add selection to the AMAZON.com. These detailed pages contain an image of the product "…the description of the product, editorial reviews about the product, customer reviews about the product, a list of items

that are similar based on purchase history for that product and other merchandising features associated with it." (21T3276-22 to T3277-2.) 1x1 GUI technology is similar to AMAZON Advantage where the seller has the ability to create new detailed pages. These pages expand the selection on AMAZON's website.

1x1 GUI technology is a manual application, and not something that would fit within the way that a large merchandiser would choose to list their products. In a very detailed fashion, counsel for AMAZON walked Mr. Kotas through the entire process for selling a product, by adding a product via 1x1 GUI technology. It is an extremely cumbersome process Currently, 1x1 GUI technology is available across the board at AMAZON including all toys, games, and baby products, except 1x1 GUI users are not able to offer for sale selected exclusive products. The TRUCC online catalog requires posting of the UPC. A 1x1 GUI user who fails to provide a UPC is not permitted to list their product for sale on AMAZON. Mr. Kotas was not impressed with the depiction of AMAZON.com as a virtual brick and mortar shopping mall.

> So comparing a brick and mortar representation of the Amazon.com web site with a parking lot and a door and walls and shelves and a place where people walk is just inappropriate. In e-commerce or in Internet technologies generally, you talk about a concept of cyberspace that is wholly distinct from the physical world that we live in. And so to compare an electronic shopping site that you point and click and make purchase decisions using search technologies over a catalog of millions of products and comparing it to a mall with a parking lot and parking spaces and brick and mortar walls just doesn't make sense.
>
> [(21T3299-13 to T3300-1.)]

And in one of the most defining pieces of information provided to this Court however, Mr. Kotas compared a brick and mortar Wal-Mart Store offering of products to the AMAZON site:

> So Wal-Mart's superstore typically has an order of 200 to 300,000 products. The Amazon.com web site has literally millions of products in its catalog.
>
> [(21T3300-15 to 18.)]

Mr. Kotas cross examination was a little more unwieldy than his direct. Primarily the focus was on differentiating the ways people can sell at the AMAZON.com site. Mr. Dockterman took him through a series of areas encompassing all types of sellers on the AMAZON site. He discussed marketplace sellers and how the marketplace program worked. He was asked about a Programmatic Selling Initiatives, but he did not know what that was. He did not believe there was a widely understood or clearly defined usage among the AMAZON staff of the term Programmatic Selling Initiative. Mr. Kotas made it very clear in his testimony that there is a conceptual problem in how TRUCC sees the AMAZON site and how the AMAZON technology people see AMAZON. To TRUCC it is a virtual mall, whereas Mr. Kotas only sees different programs in terms of the technologies that run and support those offerings. For instance, zShops are a feature of the AMAZON site. However, he testified that zShop products do not appear in the AMAZON catalog. ZShops and auctions operate from different technologies than AMAZON.com stores, but are not physically removed off the site.

AMAZON, however, is moving towards "a global platform" and in that global platform, all the technologies will be the same. The real distinction in the relationship is in how the merchant pays for its selling opportunity. There is the monthly program for the merchant selling program, there are the transactional sellers and there are individuals who sell products that appear in the AMAZON catalog, paying AMAZON ninety nine cents for each transaction that takes place. How the product appears and where the product appears comes down to the

business arrangement the parties make for how the products will be sold. With Mr. Kotas, AMAZON ended its factual witness presentation and moved into its experts.

The first expert that AMAZON proffered to this Court was Jim Sheppard. Mr. Sheppard was offered as an expert in the area of brands: brand meaning, brand value and brand damage. As the parties have stipulated that there are no damages assessable for brand, Mr. Sheppard's testimony ultimately does not add to the Courts decision making. Mr. Sheppard's testimony was nothing more in fact less than a net opinion. He never framed his opinions in terms of the accepted standard in the industry for analysis or compared any of the work he had done to accepted practices. His criticism of Dr. Sealey's testimony on brand and brand damage was not based on any accepted standard. He simply disagreed with Dr. Sealey. Further he did not do any independent brand analysis. He rendered an opinion based solely upon the increase in sales on the website. He did not look at any of the testimony of the major witness in this litigation. He did not review Harrison Miller's testimony, he did not review Jonathan Foster's testimony, he did not review Ray Arthur's testimony. His testimony was based on a review of articles about e-commerce, and his prior experience in working with "The Vitamin Store." If the parties had not stipulated Brand damage out of this case, the Court would have stricken the Mr. Sheppard's testimony.

AMAZON's next witness proffered was Mr. Robert Brunner. Mr. Brunner's testimony was subject to numerous motions, pre-trial and during the trial. Mr. Brunner has a dual bachelor's degree in math and economics. His focus was on the mathematical foundations of computer science and their interrelation. He is the Senior Managing Director of FDI Consulting in the area of litigation and technology practice. Mr. Brunner was offered to testify with regard to the analysis provided by the plaintiff's expert, Mr. Hosfield with regard to the

3.5% Safe Harbor provision. He reviewed Mr. Hosfield's report, his working papers, his deposition testimony and his trial testimony. He had discussions with AMAZON's employees, he reviewed certifications, and the data provided to TOYS R US. It is his opinion that Mr. Hosfield's report and opinion contain significant errors.

Mr. Brunner was offered to provide an independent analysis of the data exchanged by the parties. Mr. Brunner opined that sales by third parties on the AMAZON site of exclusive products never even approached 3.5% of TRUCC'S sales, i.e. the 3.5% Safe Harbor provision. In 2003, AMAZON sales of exclusive products was about a third of 1% or .032% of AMAZON and third party sales of selected exclusive products was .079%, a de minimis number. In 2004 there was an increase in those sales of exclusive products AMAZON and third party sales to 1.17% of TRUCC's sales. Third party sales of selected exclusive products were .07%.

Mr. Brunner testified his analysis used a very conservative approach. He explained that it was inappropriate to calculate figures for the partial year 2005, but found exclusive product sales had already reached 1.67%, and selected exclusive product sales at .14%. He included auctions and zShops, in his analog and did an analysis that included Programmatic Selling Initiatives including 1x1 GUI technologies.

It was his opinion that AMAZON has the ability to monitor all sales. He testified that the data retrieval that AMAZON performed for this litigation was acceptable. Mr. Brunner testified that there are serious problems with Mr. Hosfield's work product. Although they both used the same overall approach to the data and used the same mathematical formulas his criticism of Mr. Hosfield's evaluation was that he just plainly made mistakes. Mr. Hosfield's calculations included overlapping numbers. There were duplicate and triplicate transactions counted. Mr.

Hosfield put improper information into the numerator of an equation he calculated. Mr. Hosfield's work was sloppy.

Mr. Brunner proffered that there were four areas of information necessary in order to properly do the 3.5% Safe Harbor calculation. He testified he used product identifying information. Then he failed to identify the other three areas. His testimony moved to a discussion of distinction between selected and exclusive products, and he continued to critique Mr. Hosfield's report.

Mr. Brunner did no independent evaluation of any of the data that he received. He did not seek to determine whether the data provided was accurate and was the product really an exclusive product. He reviewed none of AMAZON'S back-up data. In fact, he testified that he relied only on the information supplied by AMAZON. This data includes items classified by Michelle Rothman as a selected exclusive product, exclusive product or neither of the above. Based upon Ms. Rothman's independent inability to identify selected exclusive products when they were presented to her in Court, the Court has to question the reliability of that data.

Mr. Brunner was very shaky on cross examination. His demeanor was agitated and defensive. Just as he was critical of Mr. Hosfield for overlapping information, it was clear on cross examination that much of his analysis was overlapping. He could not distinguish numbers he got from particular sets of documents. He brought no report, no working papers, and relied on documentation marked by AMAZON's counsel. He had difficulty trying to answer questions on cross examination because he could not recall information. His math was accurate, but his demeanor did not instill confidence in those calculations. He was extremely critical of Mr. Hosfield for being sloppy in the way he undertook his evaluation of the data, but Mr. Brunner's evaluation was no better.

The volume of data in this case is overwhelming. Kimberly Allen's credibility came from her willingness to concede that the volume of data created problems. Conversely, Mr. Brunner was arrogant. His testimony lacked depth and he failed to convince the Court that his data was reliable.

One of the more interesting parts of this trial was AMAZON's counterclaim seeking damages for TRUCC breach of the Agreement's requirements for inventory. The Court heard from Kimberly Allen, Michelle Rothman, Ruben Baerga and Bruce Budge on the economics. The testimony concluded with the Court hearing from Plaintiffs' rebuttal witnesses on the counterclaim, (Prama Bhatt) and Mark Hosfield.

Before discussions the fact witnesses Bruce Budge, defendant's expert, is quickly disposed of. His earlier testimony was clear, concise and informative. His testimony on the issue of damages attributable to allegation of "out of stock" events lacked any foundation. He testified that he had not reviewed Section 8.2 of the Agreement, the section that defines the responsibility of the parties. In his analysis he never considered what was commercially reasonable nor applied the concept of selected product unit forecast, in reaching a determination that TRUCC conduct conform to the Agreement requirements. TRUCC conduct can only be assessed by terms of this Agreement.

Counsel for TRUCC made a motion in the midst of cross examination to strike all of Mr. Budge's testimony. The Court denied the motion to give itself the ability to consider all Mr. of Budge's testimony. In retrospect the Court should have granted counsel's motion. Mr. Budge in no way related his beautiful statistical accounting analysis to the terms and conditions of the Agreement.

In an attempt to dignify his testimony, Mr. Budge indicated he did "an accounting calculation based upon my instructions as to how to interpret 8.2" (25T4104-9 to 10) Again, this Court has to give credit where it belongs, Mr. Budges accounting procedures and calculations could not be faulted. His testimony and his analysis did nothing to assist this Court in understanding AMAZON'S position that TRUCC breached the Agreement, specifically Section 8.2 of the Agreement, with reference to its out of stock position.

Ms. Allen's testimony was again straight forward. Ms. Allen was a very good witness. She understands the information she testified about. She had the ability to explain the operation of data feeds and party communication about inventory so the Court could understand not just the information, but the technology involved. The straight forwardness of her answers did not change the fact that there is a difference in view between AMAZON.com and TRUCC as to what qualifies as "out of stock". Ms. Allen testified that if TRUCC selects a product to sell, it becomes a selected exclusive product from the date that TRUCC notifies AMAZON. Therefore, if TRUCC selects a Buzz Light Year costume for Halloween and a customer clicks on the costume, in January, it is considered to be an out of stock product assuming it is not in the warehouse. This is despite or in spite of the defined term selected product unit forecast. Selected product unit forecast would not call for Buzz Light Year costumes to be in stock during the month of January.

Ms. Allen joined the list of AMAZON employees who testified they never notified TRUCC they were in breach of the Agreement for being "out of stock" based on product availability. Her testimony underscored the philosophic difference and approach to the Agreement and inventory issues between AMAZON and TRUCC. The two parties have never

come to terms with the difference in business philosophy and business model they allegedly agree to. This Court does not doubt Ms. Allen's credibility nor the quality of her answers.

However, the Agreement calls for AMAZON to advise TRUCC what warehouses require what percentage of inventory. The information was never discussed. Ms. Allen and Mr. Baerga had a good working flow of inventory analysis. The parties attempted to overcome the volume of the business by working with selected product unit forecasts, prior sales date and what the market was predicting. They put into place one of the most sophisticated means of product tracking from shipment by the manufacturer through to shipment to the ultimate consumer. The fact remains that the volume of e-commerce requires a constantly shifting inventory that must be re-evaluated and re-adjusted based on the pattern of product movement.

AMAZON considers a product out of stock even though TRUCC does not forecast the product to be sold. If a customer clicks on a product merely to look and to see what is available, it is considered an out of stock click if there is no product available. All of the witnesses were very open in discussing that there was a problem in deciding how to handle out of stock if shipments were expected. Should the product page be taken down so that it would not come up as out of stock, or leave it up as out of stock with a future shipping date to be in process. Ms. Allen said AMAZON's never identified a product as back order. There was a legitimate dispute as to whether or not that was the proper way to operate with regard to internet sales.

On rebuttal Ms. Bhatt who has been employed by TRUCC since 2002 specifically in the planning and operations area since 2004, re-emphasized some of the problems that existed in the inventory calculation. She utilized a Power Ranger as an example throughout this trial. For the Power Ranger vendor there is only one SKU for Power Rangers. However, the Power Rangers come in all different colors. When they are packaged and sent from the manufacturer to

inventory, the SKU comes in for a shipment that may include three Red Power Rangers, two Green Power Rangers, and one Blue Power Ranger. To reorder a particular color or continue to maintain stock in that color, they must reorder the initial package without guarantee they will get the color they want. It is a vendor control issue. Both she and Ruben Baerga testified that their calculations show TOYS R US has never been in breach of the contract. AMAZON must have understood this position, both witnesses said because no one ever said TRUCC was in breach.

This brings us to the second clear cut area for the Court to render a decision. This Court finds based upon the testimony of the witnesses and documents marked that AMAZON has failed to meet their burden of proof in establishing that TRUCC has failed to exercise efforts to ensure in a commercially reasonable practice they are in compliance with the number of products required by the Strategic Alliance Agreement. There was no factual presentation at any time to sustain a breach. AMAZON never gave TRUCC the explicit opportunity to cure a defect. There was no testimony to indicate that AMAZON ever directed TRUCC in accordance with the Agreement as to what percentage of inventory was necessary to be maintained at a location at any given point in time. The testimony of all of the witnesses, Ruben Baerga, Prama Bhatt, Kimberly Allen and to some degree Michelle Rothman, definitively articulate the fact that these parties communicated on a monthly, weekly and daily basis in terms of sales and maintenance of inventory. AMAZON may have been unhappy with inventory (See testimony about third party sellers) but there was no concrete plan to change the pattern of behavior. The Times Square Meeting did not resolve inventory issues. AMAZON never gave this Court explicit areas of problems and solutions. This Court denies judgment for the cause inaction of the counterclaim.

This Court has carefully gone through all the testimony presented. The commentary on the facts presented by witnesses and their demeanor and credibility provides the basis for this

Court's decision. All the remaining issues should be seen in the context of those witnesses. Certainly, the Court has not mentioned every statement of every witness. Nor has the Court commented on every document in evidence. This Court has provided the factual basis however, for the consideration of the remaining issues. The Court has attempted to set forth the facts upon which this decision is based. The Court has taken time to review its notes, transcripts and documents. The Court has ignored nothing. The following are the remaining issues this Court must decide. 1) was the Strategic Alliance Agreement's clear definition of a Programmatic Selling Initiative clear and is the 1x1 GUI technology a PSI?; 2) Are programmatic sellers permitted to sell selective exclusive products?; 3) What sales date would be calculated in Sections 12.1.2's 3.5% Safe Harbor, and were PSI's to be include in that analysis?; 4) What was the purpose of the Safe Harbor set forth in Section 12.1.2; a) Was this Safe Harbor a cap on sales of exclusive products by AMAZON and third parties? or b) was it a number to avoid a disputes between parties resulting from incident sales by AMAZON or other partners or potential de minimis overlapping sales by AMAZON and third parties; c) Was it an open door to expand selection and merchants on the AMAZON platform; d) If it was not the later, has AMAZON materially breached the Strategic Alliance Agreement by permitting Merchants@sellers to sell exclusive products and what is the remedy for the breach. Intertwined with all of the above is the last issue; has AMAZON intentionally breached the Strategic Alliance Agreement by the introduction of technology and site changes. a) Do sponsored links breach the agreement; and b) Has alterations in the tab structure breached the Strategic Alliance Agreement. Then the Court must fashion a remedy.

The Strategic Alliance Agreement provides that Delaware law will control any and all issues that pertain to the parties' relationship. New Jersey has recognizes and will uphold a

parties agreement to have a contract governed by another state so long as "it does not violate New Jersey's public policy". North Bergen Rex Transport, Inc., 158 N.J. at 568; citing Instructional Sys., 130 N.J. at 341.

While this Court has stated that the plaintiff has failed to carry its burden of proof with regard to plaintiff's claim that the base fee includes a premium for exclusivity, the aura of exclusivity permeates the entire Strategic Alliance Agreement. This Court finds as fact exclusivity could be seen in the parties establishment of the co-branded store, advertising and in the accessing of toys, games and baby product catalogs.

TRUCC through its witnesses, particularly Ray Arthur, has argued to this Court that exclusivity and prominence of TRUCC on the AMAZON site was to be found in an identifiable way in the tab structure and the pagination of the "TOYS R US Store." Ray Arthur and John Sullivan have testified however, that now "the TOYS R US store can no longer be found." During closing arguments counsel for TRUCC actually brought into the courtroom a four foot stuffed Geoffrey the Giraffe, arguing that "Geoffrey cannot find his home" and therefore came to Court to ask the Court to help him find it. Conceptually and artistically this was an interesting visual, but is it true? Witness after witness provided the court with an opportunity to see what the TRUCC location on the AMAZON site looked like, at the beginning of the Agreement, through the various years and continuing right up to the present time. AMAZON's witnesses testified that the "tab structure" has evolved and the change has been for every partner or corporation with whom AMAZON has a contractual relationship and was a change across the site which did not single out any particular partner. The Agreement provides control of the site to AMAZON. Is the change in the "tab structures" a breach of the Strategic Alliance Agreement? Is there ambiguity in the language providing control? This Court finds there is no

ambiguity in the terms of the Strategic Alliance Agreement pertaining to the rights and responsibilities of the parties in the look of site and site navigation.

> A contract is not rendered ambiguous simply because the parties do not agree upon its proper construction. Rather, a contract is ambiguous only when the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings.
>
> [Rhone-Poulenc Basic Chemicals Co. v. American Motorists Ins. Co., 616 A.2d 1192, 1196 (Del. 1992); citing Hallowell v. State Farm Mut. Auto. Ins. Co., 443 A.2d 925 (Del. 1982).]

TRUCC came to AMAZON for its site superiority and its ability to maintain a front line position in e-commerce. The Agreement is clear that TRUCC ceded control of many areas of site navigation and search to AMAZON. Site look, feel, and navigation are clearly areas reserved to AMAZON. Those terms of the Strategic Alliance Agreement are straight forward and unambiguous. (See Strategic Alliance Agreement, Section 2.3.1, at 2.)

The tab structure has changed. Testimony and visuals support the TRUCC's position that the look is different. There were no guarantees in the Strategic Alliance Agreement that the tab structure would remain as it was in 2000. However, the Agreement promised that the toys tab would remain consistent with the other major tabs on the site. The Agreement provided that when a customer clicks on any of the major references of toys, games and baby products, he would be brought to the "co-branded store". What is troubling to the Court is the operation of the search function within the co-branded pages, i.e. the co-branded store. The Court sees a deterioration of the singleness of TRUCC status on the AMAZON site even within its own "co-branded store". However, this Court finds as a matter of fact and as a matter of law, TRUCC has failed to establish a material breach of the Strategic Alliance Agreement by the change in the appearance of the tab structure on the AMAZON website. The Court accepts the testimony

presented by AMAZON that the change in appearance and function of the website is consistent with the language of the Strategic Alliance Agreement.

Next the Court moves into the murky area of Programmatic Selling Initiatives.

> Contracts terms themselves will be controlling when they establish the parties' common meaning so that a reasonable person in the position of either party would have no expectations inconsistent with the contract language.
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> [Eagle Industries, Inc., 702 A.2d at 1232.]

To this day, this Court is not sure that any two people share one common understanding of Programmatic Selling Initiatives. A Programmatic Selling Initiative can apply to a technology, a function, or even an area of the AMAZON website. This Court finds as fact that the only true role a Programmatic Selling Initiative serves in this Agreement, and in any other agreement that AMAZON has entered into, is as a vehicle to expand the driving force behind AMAZON…selection/assortment. As referenced in earlier testimony, (See the testimony of Jonathan Foster, Ray Arthur and Rudy Gadre in the opinion) "Programmatic Selling Initiative" meant different things to different people and has no common usage in the language even with in AMAZON itself. Programmatic Selling Initiatives were presented to the negotiators and the representatives of TRUCC initially as marketplace "type" functions. Those functions that already existed on the AMAZON site, zShops, AMAZON Advantage, Auctions, etc., became part of the Strategic Alliance Agreement definitions. In deference to Jeff Bezos and the staff at AMAZON, "Programmatic Selling Initiatives" were even in 2000 a concept that recognized e-commerce should not only address the needs of a TOYS R US, a Wal-Mart or a TARGET, but also cousin Jimmy to try to find a way to re-gift a moose head that Uncle Frank gave him, or even the Bryer Manor Horses that Aunt Jane gave him because she still sees him as an eleven year old in his twenty seventh year. The key to the definition of a Programmatic Selling

Initiative is ". . . through which Third Parties may sell products or services on terms available to the general public . . . ." (Strategic Alliance Agreement, Exhibit B, at 86.) As disturbed as this Court is with the multiple usage of the term "Programmatic Selling Initiative" to represent the technology "de jour", this Court finds any program that provides the offering for sale of an item on terms that are available to the general public qualifies as a Programmatic Selling Initiative under this Agreement. These "offer to sell" agreements meet the definition, terms and conditions of negotiations understood by the parties at the time they executed the Strategic Alliance Agreement. Certainly 1x1 Graphic User Interface as defined by multiple witnesses in this litigation is far more sophisticated and far more problematic than cousin Jimmy posting the moose head for sale. However, based upon the evidence presented at trial, referenced herein it was envisioned by the parties at the time the Strategic Alliance Agreement was executed. This Court finds a basis for this ruling in the testimony of Ray Arthur, Jonathan Foster and Cayce Roy.

The difficulty with this program is it is going to allow users to step into the areas of exclusivity granted to TRUCC and present a tracking problem in the relationship. PSI's provide an area of mischief within this Agreement. AMAZON will be required to be vigilant with regard to who the users are, how the program is maintained and the volume of sales that occur through this new technology. This Court can easily see 1x1 GUI creating steady irritation of parties' relationship and strong possibilities for circumventing the restrictions that exist between the parties. However, as it currently exists 1x1 GUI does not breach the Strategic Alliance Agreement.

The more thorny issue for this Court is whether or not Programmatic Selling Initiatives sales are to be included within the calculation done for the 3.5% safe harbor. This issue of the

safe harbor contained in Section 12.1.2 of the Strategic Alliance Agreement has been and continues to be one of the main focuses of this litigation. This Court has been told repeatedly by both sides that this is an integrated agreement and there are a plethora of cases dealing with how a Court should address on integrated agreement.

"A Court must interpret contractual provisions in a way that gives effect to every term of the instrument, and that, if possible, reconciles all of the provisions of the instrument when read as a whole". Council of the Dorset Condominium Apartments v. Gordon, 801 A.2d 1, 7 (Del. 2003). Ultimately, "[i]t is a court's duty to preserve to the extent feasible the expectations that form the basis of a contractual relationship." Eagle Industries, Inc., 702 A.2d at 1233.

It is permissible for a court to consider extrinsic evidence when interpreting an integrated agreement. See Monsanto Co., 652 A.2d at 39. However, "[a] court may not consider . . . extrinsic evidence that serves to vary, alter or contradict the contract, unless the party offering the extrinsic evidence can show that the contract was either: (a) unitegrated or (b) ambiguous." Id.

> In interpreting an integrated agreement, attention is directed to the written terms in light of the surrounding circumstances. As long as the court is aware of doubts and uncertainty lurk in the meaning and application of agreed language, it will consider testimony pertaining to antecedent agreements, communications and other factors which bear on the issues.
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> [Klair, 531 A.2d at 223.]

In construing ambiguous language a court may also consider "trade usage or course of dealing." Eagle Industries, Inc., 702 A.2d at 1233; see also Klair 531 A.2d at 223; City Investing Co. Liquidating Trust, 1992 Del. Ch. LEXIS 78, at *26; Ibach, 1991 Del. Ch. LEXIS 12, at *21.

Is Section 12.1.2 of the Agreement ambiguous? As cited early in Rhone-Poulenc Basic Chemicals Co., the question to be answered is the Agreement susceptible to different meanings

or interpretations?" See 616 A.2d at 1196. This Court has determined that the Strategic Alliance Agreement is ambiguous and the meanings are reasonable.

There was no testimony provided to this Court by either side that definitively established whether the parties had discussed the inclusion of sales from Programmatic Selling Initiatives in the 3.5% Safe Harbor. (See Strategic Alliance Agreement, Section 12.1.2(a) and 12.1.2(c), at 45.) AMAZON wants this Court to believe that in fact Programmatic Selling Initiatives were discussed as part of that safe harbor and references this Court to testimony provided by Rudy Gadre, Jonathan Foster and Craig Jacoby in its filed conclusions of law and statement of facts provided to this Court at the end of trial. There was extensive testimony from Jonathan Foster about Programmatic Selling Initiatives presented to the Court. What this Court heard was that Programmatic Selling Initiatives were never intended to have an impact on TRUCC business. So if these sales continue to be of a de minimis nature, and of a type that does not impact on product then no one expected them to be part of the safe harbor. But if they develop into something different then it is not clear. As originally described, Jonathan Foster says no their sales are not part of Section 12.1.2(c). (See Foster VDT124-9 to VDT125-25 (5/10/05) and Foster VDT216-6 to VDT224-8 (4/19/05)). As Section 12.1.2 reads:

> TRUCC acknowledges and agrees that nothing in this Agreement will prevent or otherwise restrict: (a) any sales of products or services occurring in connection with Programmatic Selling Initiatives; … (c) ACT and its Affiliates from selling, and permitting Third Parties to sell, Exclusive Products through the ACT Site (other than through the Co-Branded Stores), provided that such sales by ACT and its Affiliates, or any such Third Party . . . do not constitute more than three and one-half percent (3.5%) of the Exclusive Product Revenues for any Year . . . .
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> [(Strategic Alliance Agreement, Section 12.1.2, at 45.)]

To include Programmatic Selling Initiatives sales within the 3.5% Safe Harbor analysis does not prevent or otherwise restrict those sales. Clearly it does not prevent sales through Programmatic Selling Initiatives and it does not restrict those sales because **THE STRATEGIC ALLIANCE AGREEMENT IS SILENT** as to any remedy if there is a breach of the 3.5% safe harbor. This Court could find no language providing a remedy anywhere in this agreement. There is no other language that even references the 3.5% Safe Harbor. This Court directly asked Rudy Gadre where in the Agreement was a remedy provided and Mr. Gadre testified there was no remedy nor any provision to address what happens if sales exceed 3.5% of TRUCC's sales.

Jeff Bezos identified Rudy Gadre as the person with complete knowledge and understanding of the Strategic Alliance Agreement. In Mr. Gadre's own view he was the preeminent drafter of the language in this agreement.

In construing ambiguous language of an integrated agreement, the court will give meaning to written terms "in light of the surrounding circumstances." Del. Racing Ass'n v. Twin City Fire Ins. Co., 2003 Del. Super. LEXIS 110, at *8 (Del. Sup. 2003). The Court may not use evidence to determine the intent of the parties pursuant to the language of the agreement unless there are ambiguities and then the court may look at the collateral circumstances. See National Union Fire Ins. Co. v. Rhone-Poulenc Inc., 1993 Del. Super. LEXIS 494, at *5 (Del. Super. 1993); see also Eagle Industries Inc., 702 A.2d at 1232. It is a well accepted principle in equity that if there is doubt in the language due to ambiguity, it is to be construed against the drafter. See Kaiser Aluminum Corp. v. Matheson, 681 A.2d 392, 398 (Del. 1996); see also Wilmington Firefighters Ass'n, Local 1590 v. City of Wilmington, 2002 Del. Ch. LEXIS 29, at *33 (Del. Ch. 2002).

If this safe harbor is to avoid conflicts between the parties, then because of the uncertainty of the character of PSI is it should be included in the calculations. If the safe harbor is to expand selection, that too is a reason to include them in the calculations. Therefore, this Court finds that sales of exclusive and selected exclusive products by programmatic sellers as they exist today are to be included with in the 3.5% calculation.

How do we determine if AMAZON, third party sellers, Programmatic Sellers and incidental sellers have reached and/or breached the 3.5% Safe Harbor established in the Agreement? If we do determine that they have breached the 3.5 Safe Harbor of the Agreement what does the Court do about it? Neither Plaintiffs' expert nor Defendants' expert provided numbers that showed this Court sales reach 3.5% of exclusive products by the above named categories of sellers through the AMAZON site. Plaintiffs' expert, Mr. Hosfeld, based his inability to do calculations that reached 3.5% of TRUCC's sales on the insufficiency of the data provided by AMAZON.com. Defendant's expert Mr. Brunner, who did none of the actual field work and limited amounts of the calculations, testified he was more than satisfied with the data that was provided by AMAZON in the context of this litigation. The Court's Discovery Master found that while not actually contemptuous of his Order or this Court's Orders, AMAZON was less than forthcoming with documentation in its compliance with requests for discovery.

The Court acknowledges that AMAZON has put into place various tracking methods to block the sale of selected exclusive products and also to calculate and retrieve data with regard to those sales and the sales of exclusive products by TRUCC and other parties. (See attached to Opinion as Exhibit 2, D200, SEP Review.) The Court also acknowledges that the volume of the data maintained by AMAZON makes this search not only difficult but susceptible to tremendous compromise in its credibility. Everyday the volume of documents maintained in electronic

format multiplies exponentially. There were efforts to retrieve data but unless that data was specifically identified and requested by TRUCC it was not provided. TRUCC's request for data in discovery only produced data that TRUCC actually knew existed. However different the data was, it showed a steadily escalating volume of sales by third parties through the AMAZON site.

If the Court follows AMAZON's core philosophy logically, AMAZON is seeking to increase the availability of assortment and selection daily. There is no economic return just because of enormous selection. Business success is measured in terms of sale and profitability. If AMAZON is having problems tracking sales and product data with the limitations existing before the litigation and before this Court's temporary injunction in December 2004, how is AMAZON going to supervise and manage product and sales data with open access to any merchant selling exclusive products? Add to that, Programmatic Sellers utilizing 1x1 GUI or any subsequent technology developed. Jorrit Van der Meulen admitted to this Court that, until TRUCC requested the information in late 2003, early 2004, AMAZON did nothing to track sales that would be classified as part of this "Safe Harbor".

Ideally, the sale of toys, games and baby products by TRUCC through the AMAZON site will continue its steady increase. There is no guarantee, however of continued growth. With the addition of competitor sellers, particularly those who have independent websites, it is not difficult to envision the erosion of TRUCC's market share. The preponderance of the evidence does not technically establish a breach of the 3.5% safe harbor. The preponderance of the evidence with all inferences drawn from the data provided does establish it will not be long before that safe harbor not only is reached but breached by those third party sellers. The evidence produced at trial does not sustain a breach of the Agreement. However, the tenor of the

witnesses' testimony coupled with the overwhelming volume of the data strikes a sour note to the Court.

Sponsored links is in no way identified, defined or discussed in the Strategic Alliance Agreement. Prior to the commencement of trial the Court found the language of Section 12.1.2 ambiguous. The language does not completely express the parties' intent of the purpose of the 3.5% Safe Harbor. During pre-trial motions this Court discussed the possibility of a reference point for sponsored links a section of the Strategic Alliance Agreement, Section 12.1.2(b), which discusses "aggregation of lists" of sales. Therefore, evidence was appropriate on TRUCC's claim alleging the "click revenue" derived from sponsored links and the existence of sponsored links themselves could have some impact on the parties' agreement.

At trial, no testimony was provided to establish that AMAZON shared in revenues derived from sponsored links with TRUCC. There was also no evidence presented that AMAZON did or would share "click revenue" from sponsored links on the co-branded pages or pages detailing sales of toys. Ray Arthur and Jonathan Foster testified that AMAZON wanted to limit TRUCC's potential leaks from the AMAZON site to other sites, that there was language negotiated to allow links only to dead end sites. Sponsored links are not links to dead end cites but are direct routes to outside sites allowing AMAZON to provide the best of both worlds.

Sponsored links provide additional revenue without inventory risk. If a customer clicks on a sponsored link for another toy seller there is no way for AMAZON or TRUCC to know whether a sale of the product category occurs or not because the customer has now left the AMAZON site. If there is no way to determine if a sale was made on the sponsored link website, then there is no way to include its sales revenue within the 3.5% Safe Harbor. AMAZON has increased its customers' ability to find selection and assortment, although not on

its website, has increased its own revenue flow and it has evaded any restrictions that the Strategic Alliance Agreement places upon AMAZON's relationship with other toys sellers. Sponsored links are not a technical violation of the Strategic Alliance Agreement but are additional indicia of the view that AMAZON has of the Strategic Alliance Agreement and its relationship with TRUCC.

The 3.5% Safe Harbor clause in the Strategic Alliance Agreement is the key to understanding the difficulties between the parties. The 3.5% Safe Harbor is the focal point of the parties understanding of exclusivity in this Agreement. Following the rationale in Eagle Industries, this Court allowed, into evidence for consideration, "exhibits containing correspondence between the parties, drafts of the Agreement and drafting session notes. . . ." 702 A.2d at 1233. The Court also considered the actions of the parties, their business context and the status of the industry in order to determine both the intent of the 3.5% Safe Harbor and the issue of exclusivity that pervades this argument. See Tenneco Automotive Inc. v. El Paso Corp., 2004 WL 3217795, at *8 (Del. Ch. 2004). "[T]here is no surer way to misread any document than to read it literally." Schierstead v. Brigantine, 29 N.J. 220, 231 (1959) (quoting Judge Learned Hand in Guiseppi v. Walling, 144 F.2d 608, 624 (2d. Cir. 1944), *aff'd sub nom.* Gemsco, Inc. v. Walling, 324 U.S. 244 (1945)). Moreover, "[d]isproportionate emphasis upon a word or clause or single provision does not serve the purpose of interpretation." Newark Publishers' Ass'n v. Newark Typographical Union, 22 N.J. 419, 426 (1956). And "[w]ords and pharses are not to be isolated but related to the context and the contractual scheme as a whole, and given the meaning that comports with the probable intent and purpose." Id.

Consistent in every witnesses testimony was the discussion of the 3.5 clause as "a safe harbor", "a fudge factor", "a friction reducer". Mark Britto, Harrison Miller, Jonathan Foster

and most forcibly Ray Arthur saw this clause as the mechanism for avoiding controversy between the parties. If Drugstore.com sold Barbies or sand toys in the summer or Halloween masks in the fall, these sales were not going to cause a disruption in Strategic Alliance Agreement. If Nordstrum sold a Barbie dressed in a T-Shirt that said "Nordstrums" on it, the parties were not going to move into litigation. E-Toys.com selling Barbie or the sixteenth Madeline Doll that TRUCC did not sell, now that is a different story. TRUCC argues those sales are a problem for the Strategic Alliance Agreement. The **ONLY WITNESS who testified contrary to that intent of the 3.5% safe harbor was RUDY GADRE.** Even the video taped testimony provided by AMAZON of Jonathan Foster and the counter-designations of Harrison Miller and Mark Britto fail to establish as fact that the 3.5% Safe Harbor was anything more than a provision to avoid controversy over incidental sales by other merchants of toys, games or baby products which fell in TRUCC's product categories. Harrison Miller and Mark Britto both acknowledged that Jeff Bezos required some ability to expand selection. However, there was nothing concrete in any of the testimony to allow this Court to draw the inference that Section 12.1.2(c) provides an open door for third parties to compete directly with TRUCC by selling those toys that are not specifically selected by TRUCC for sale.

TRUCC isolated itself from e-commerce with the exception of its location at AMAZON. TRUCC brought with it all of its vendor relationships and contacts, its brand recognition and its drive for future e-commerce success. The evidence supports the position that third parties were systematically eliminated from every other section of the Strategic Alliance Agreement. There was overwhelming evidence, testimony and documents that AMAZON expected TRUCC to assume all inventory risks and required a minimum inventory. All these facts militates that this Court find the safe harbor provision was not an open door for AMAZON to pursue third party

sellers via Merchant@agreements or other contractual formula to introduce competition on the AMAZON site. Jonathan Foster and even Rudy Gadre addressed the issue of assortment in terms of inventory risk. Every member of the negotiation team except Rudy Gadre emphasized the partnership plan for going forward. There was an overwhelming sense that the intent of the parties was steeped in good faith as a pair – a partnership of two (2) not many. This "safe harbor" was described consistently as an area to avoid conflict. E-toys, board games.com, Nascar.com and others, have not entered into agreements with AMAZON to realize de minimis sales on the AMAZON site. Rather, these sellers have come to AMAZON for the same reason TOYS R US entered this Agreement in 2000. AMAZON has proven itself to be the master of technology for internet commerce.

Evidence of the AMAZON agreement with TARGET was not helpful in finding a hidden fee for exclusivity, but it speaks loudly about AMAZON's view of the Strategic Alliance Agreement. Initially, TARGET on the AMAZON website, was not permitted to sell "excluded" category products meaning no toys. So TARGET retained its own URL, which is maintained by AMAZON, so it could continue sell any products it wanted to sell. TARGET was told it could not sell toys, games and baby products because of a prior agreement with TRUCC.

AMAZON was aware that TRUCC believed it would be the exclusive seller of these categories of products throughout the ten year term of this Agreement which is also clear to this Court. First, AMAZON concealed that in its negotiations with TARGET. Next, AMAZON developed talking prints to placate TRUCC with regard to the TARGET agreement. (See Exhibit P20, E-mail from Miller to Jenson, Van der Meulen, Kalmbach, Broussard, Britto and "cc" to Curry, Risher, Bezos of 9/6/01.) Why did AMAZON employees including a negotiator go to such an effort to minimize TRUCC's concerns about TARGET? If third parties could sell

exclusive products just let it happen. Id did not happen because no one intended direct third party sales of products in TRUCC exclusive categories. This conduct blatantly demonstrated AMAZON's pattern of behavior of misleading TRUCC in this exclusive Agreement as long as it was convenient for AMAZON. Whether AMAZON believed it had the right to add third party purchasers, or found a way to get around the Strategic Alliance Agreement – AMAZON was not forthright with TRUCC.

Other conduct gives further support for this view in the introduction of sponsored links and 1x1 GUI which was done via "web labs". A web lab is a testing protocol for changes in website, look, fee and operations. The only web lab of any importance that AMAZON gave TRUCC prior notice of was the changes to the structure. Until the technology was in the full control of AMAZON, it would respond to TRUCC objections to changes by calling them web labs, which it would end or the product or function would be taken off the website. Testimony provided this Court with a pattern of AMAZON's disregard for TRUCC's position as long as it felt technology gave them the upper hand.

AMAZON had no special concern for those third parties it would bring on the site to serve selection. Rudy Gadre cavalierly testified any product that TRUCC chose to select after a third party had been selling it would be taken down to allow TRUCC to market it. This action would be taken without any regard to any inventory or merchandising commitment between AMAZON and that third party seller. As long as the product was offered for sale and AMAZON had no inventory risk itself, AMAZON was unconcerned with the consequences for TRUCC or any other seller.[23]

Mark Britto, Harrison Miller and Jonathan Foster are no longer affiliated with AMAZON or TRUCC and have all moved positions. Their focus in 2000 was the deal itself. They were

[23] See discussion of Rudy Gadre's testimony pertaining to Section 5.1 recapture provision.

creating a deal that promised rapid increase in profitability for both parties and changed the way consumers shopped on the internet. The deal was negotiated and drafted under pressure. The deal was negotiated and drafted with a deadline. The only major negotiator who remained with TRUCC or AMAZON after negotiating this deal was Ray Arthur. He singularly had a dedication to the company and business model he represented. Rudy Gadre, as drafter, shared Harrison Miller's knowledge that they could not close the door on increased selection for AMAZON. Mr. Arthur perhaps lacked the aggressiveness and facility of language that Rudy Gadre possessed. He lacked the sophistication to appreciate the subject of the ambiguity or its consequences.

Craig Jacoby, outside counsel for TRUCC during the contract negotiations, was asked about the language in Section 12.1.2. His testimony was presented by AMAZON to convince the Court that TRUCC knew its exclusivity was limited. His testimony did not raise the inferences that AMAZON sought to have this Court read from this lawyer/drafter. Craig Jacoby did not convince this Court that TRUCC did not intend to be the exclusive online seller of toys, games and baby products at AMAZON. Mr. Jacoby did not convince the Court the language was straight forward. Just as Jeff Bezos provided this Court with three different definitions or ways of using the word "competition", "exclusive" in terms of the Strategic Alliance Agreement, and the parties' relationship were subject to those different meanings. This Court finds reasonable and credible the TRUCC position that it never saw Section 12.1.2 of the Strategic Alliance Agreement as a way for toy sellers to sell exclusive products. TRUCC is credible when they say AMAZON was to be that seller of exclusive products.

To rule as AMAZON now asks this Court that TRUCC's exclusivity right pursuant to the Agreement is limited to the sales of Selected Exclusive Products and permit third parties to sell

non-selected exclusive products for the remaining four and a half years of this Agreement is the easy solution to this litigation. It is simplistic, it is technical but it is not equitable. Equity does not permit this Court to frivolously substitute its own judgment and to give meaning to a contract that was not the intent of the parties. Equity does not allow this Court to go beyond the law and to draft a better agreement for the parties than they had drafted for themselves. But when there is ambiguity in the agreement, equity permits a Court to put into practice what the parties intended.

This Court has looked "to the parties' prior conduct under the agreement" and the Court has listened to the parties tell me what they meant by the agreement. Board of Ed. of the Appoquinimink School District v. Appoquinimink Education Association, 1999 Del. Ch. LEXIS 188, at *24 (Del. Ch. 1999). Whether Section 12.1.2 was carefully drafted to mislead TRUCC or whether it was carefully drafted to permit an ambiguity in the event AMAZON needed to move in a different direction or whether it was simply inartful, this clause is a deal breaker.

Even if this Court were to rule as AMAZON asks it to only find that TRUCC bargained only for the right to be exclusive with regard to the products they select for sale, this Court would be inviting five years of continued litigation. Despite their sense of superiority and mastery of the technology AMAZON lacks the ability to carefully restrict the sales of Selected Exclusive Products by third parties. Not only do they lack the technology to block sales of Selective Exclusive Products by third parties, they have demonstrated an inability, perhaps an unwillingness to track and maintain those sales of exclusive products within the 3.5% Safe Harbor. Further, this Court finds that the Agreement fails to provide any recourse or direction for the parties in the event third party sales of exclusive products move beyond the 3.5% Safe Harbor.

What TRUCC has failed to prove to this Court is that rescission is an appropriate remedy. There is no way to return TRUCC and AMAZON to the positions they were in 2000. It is an impossibility. This Court is satisfied from the testimony provided by both sides that it is practical and economically feasible and necessary to terminate the agreement between the parties. This Court is satisfied that the Strategic Alliance Agreement provides a mechanism for disengagement/termination in a way that will not interrupt the business functions of either partner. (See Strategic Alliance Agreement, Section 15, et seq., particularly Section 15.6, at 54.)

A party has the right to terminate a contract when there has been substantial nonperformance or breach by the other party. See Saienni v. G&C Capital Group, Inc., 1997 Del. Super. LEXIS 186, at *6 (Del. Super. 1997); see also DeMarie v. Neff, 2005 Del. Ch. LEXIS 5, at *14-15 (Del. Ch. 2005); Brandywine Realty Mgmt. v. Freeman, 2000 Del. C.P. LEXIS 37, at *18 (C.P. Del. 2000). A breach is found, under Delaware law, pursuant to the following elements: "1) a contractual obligation; 2) a breach of that obligation by the defendant; and 3) a resulting damage to the plaintiff." H-M Wexford LLC v. Encorp, Inc., 832 A.2d 129, 140 (Del. Ch. 2003). Not all breaches permit a party to terminate the agreement. See Saienni, 1997 Del. Super. LEXIS 186, at *6. Rather, the breach must go to the substance of the agreement. See DeMarie, 2005 Del. Ch. LEXIS 5, at *15.

This Court finds that termination is the appropriate remedy in this case due to a breach of the Agreement. Clearly, the parties reached a binding contractual obligation. The resulting damage to the plaintiff is the alteration of Plaintiff's unique position, its inability to plan, and inability to strategize due to the presence of other third party toy sellers on the AMAZON website. Further, the Agreement failed to provide any remedy for a breach of the Agreement's provisions involving third party sellers.

AMAZON's conduct has not been consistent with the drafters' intent in reaching the Agreement. Pursuing third party sellers to expand selection in the face of TRUCC's objection is a breach of the parties' agreement envisioned in the language of the 3.5% Safe Harbor. It is clear from the parties conduct and the testimony of all of the witnesses that AMAZON would not be in an Agreement that limited the potential for un-restricted assortment and selection of products offered. Amazon says their intent and understanding of Section 12.1.2 was to have an Agreement that allowed third party sales of exclusive products. The language as drafted whether intentional or inartful gave Amazon the words to play the game their way.

For TRUCC exclusivity was the heart of the Agreement. They abandoned their independent site and partnered with AMAZON to be the exclusive toy seller. When TARGET came on, Harrison Miller told TRUCC they were the toy seller. At all times, in every action they took, TRUCC was the "toy partner". AMAZON knew from day one, this was how TRUCC saw the agreement. AMAZON does not want an exclusive partner. AMAZON's conduct since 2004 has been a breach of that exclusivity. The build up was subtle – vary the definition of boutique, of Programmatic Selling Initiative, fail to track or maintain data on sales, "fuzzy match" products. Build your technology, alter the appearance. Each action individually while arguably within the agreement, looked at together demonstrates a material shift in the configuration of the partnership. The shift creates a breach at the heart of the Agreement. To give TOYS R US an agreement that permits dedicated third party sellers of toys, games and baby products an entry and a position on the AMAZON platform would frustrate their intent to be the partner who sells the toys on the platform. The ambiguity and conduct is not reconcilable by way of injunction.

AMAZON.com did not want a ten year agreement with TRUCC. Long term commitment in a world where the technology is advancing almost on a daily basis is difficult to

maintain. The negotiators achieved their goal and closed a clever and profitable deal. What constitutes an exclusive partnership continues to be a challenge not only for individuals who work on the partnership daily, but for business entities. Based upon all the factual and credibility findings set forth above and the law cited, this Court grants termination of the Strategic Alliance Agreement and orders a winding up as governed by the terms set forth in Section 15 of the Agreement. (See Strategic Alliance Agreement, Section 15, at 52.)

All other relief requested by either party is denied. Any rulings reserved during trial not consistent with this final judgment are moot (denied). The Court would ask that Peter Bray, Esq., with the assistance from trial counsel, Michael Dockterman, Esq., draft a form of Judgment. This Court also thanks all counsel involved in the litigation for their professionalism, their attention to detail, and their courtesies to this Court and its staff.

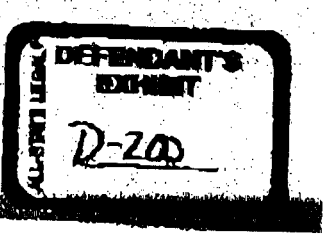
Very truly yours,

Margaret Mary McVeigh, P.J.Ch.

MMM:rlg

SEP REVIEW

1. Item Review Team (24/7) Established
2. Regular Reports Issued to TRUCC
3. UPC Validation
4. UPC Blocking
5. Algorithm Matching
6. Manual Review Team
7. Retroactive Scrub of TRUCC's Catalog
8. ASIN Review for New TRUCC Listings
9. Keyword search
10. Additional Reviews/Protections



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