

CAUSE NO. DC-13-06381-KAPOGEE SOFTWARE, LTD. d/b/a
3D REALMS ENTERTAINMENT,

Plaintiff,

v.

GEARBOX SOFTWARE, LLC,

Defendant.

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IN THE DISTRICT COURT OF

DALLAS COUNTY, TEXAS

§ 19^{2ND}-K JUDICIAL DISTRICT**PLAINTIFF'S ORIGINAL PETITION**

Plaintiff Apogee Software, Ltd. d/b/a/ 3D Realms Entertainment ("3D Realms" or the "Plaintiff") files this Original Petition against Defendant Gearbox Software, LLC ("Gearbox"), and in support of its claims, would show the Court as follows:

I. INTRODUCTION

1. This is a breach of contract case involving two successful video game developers. Plaintiff 3D Realms seeks to recover more than \$2 million dollars that Defendant Gearbox has failed to pay to 3D Realms under the express terms of the Asset Purchase Agreement the Parties entered into on February 2, 2010 (the "Purchase Agreement"). The specific amount that remains due and owing from Gearbox has not been determined, however, because Gearbox has also breached the Purchase Agreement by refusing to permit 3D Realms to conduct an independent audit of royalty amounts earned by Gearbox.

2. In the Purchase Agreement, Gearbox acquired certain rights from 3D Realms in a popular video game series. The Agreement is confidential and, therefore, the specific terms of the Parties' Agreement will not be disclosed in this Original Petition. In summary, Gearbox agreed to the following contractual obligations relevant this dispute: (i) Gearbox agreed to pay a set percentage of "royalties" generated from sales of Duke Nukem games developed by Gearbox

on revenue earned from a publisher; (ii) Gearbox also agreed to pay to 3D Realms a set percentage for every “advance” received from a publisher related to the Duke Nukem games; (iii) Gearbox agreed to assume a \$2.9 million loan that 3D Realms owed to another company and *without* applying the “royalties” or “advances” money to pay this loan; and (iv) both parties had “Audit Rights” to conduct an independently verify the amount of royalties due.

3. In breach of the Purchase Agreement, Gearbox has refused to pay substantially more than \$2 million to 3D Realms that consists of (i) over \$800,000 in “royalties” due to 3D Realms, which is a set percentage of the \$2.9 million that Gearbox inappropriately deducted from royalties received from publishers (the “Royalty Damages”); (ii) the second component of the Royalty Damages consists of over \$1.3 million in payments owed as “royalties” from \$4.5 million received by Gearbox after the video game release; and (iii) at least \$80,000 (and potentially upwards of \$500,000) in “advance” payments, which is a percentage of the total “advances” that Gearbox received from publishers (the “Advance Damages”).

4. The Purchase Agreement expressly authorizes 3D Realms to conduct an audit of the Gearbox royalty statements and related records to verify the royalties due, yet Gearbox has also refused to permit 3D Realms to have an independent audit firm verify information regarding Gearbox’s royalty and advance revenue.

II. SUMMARY STATEMENT OF CLAIMS

5. 3D Realms is a video game developer, and its games include the “Duke Nukem” franchise. Gearbox is also a video game developer and it has collaborated with 3D Realms on various games. 3D Realms and Gearbox shall be collectively referred to as the “Parties.”

6. In February 2010, the Parties entered into the Purchase Agreement in which Gearbox purchased certain interests and intellectual property to develop future video games based on the “Duke Nukem” franchise, including the right to complete (and later sell) video

games called “Duke Nukem Forever” and “Duke Begins” that were already under development (collectively, the “Future Duke Games”). This was a deal among friends, because Gearbox’s President, Randy Pitchford (“Pitchford”), had long been friendly in the industry with Scott Miller (“Miller”) and George Broussard (“Broussard”), the principals of 3D Realms.

7. After the deal closed, however, Gearbox refused and failed to make substantial royalty payments it had agreed to pay to 3D Realms in the Purchase Agreement to acquire rights in the Future Duke Games. Gearbox has also refused to allow the independent auditor retained by 3D Realms to audit the records of Gearbox to verify the amount of royalties due to 3D Realms. Gearbox has blocked this audit even though 3D Realms’s right to an audit is expressly set forth in the Purchase Agreement and royalty audits are standard practice in the industry.

8. 3D Realms seeks recovery of substantial royalties owed by Gearbox under the terms of the Purchase Agreement the Parties entered into in February 2010. Specifically, in acquiring the rights to the Future Duke Games, Gearbox agreed to assume certain liabilities that included the repayment of a \$2.9 million loan that 3D Realms owed to another software company (the “\$2.9M Duke Loan”). In turn, Gearbox also agreed that 3D Realms would receive a percentage of royalties (the “Royalty Rate”) from the total amount of royalties that Gearbox received from a publisher for the Future Duke Games, and that **Gearbox would not recoup any of the \$2.9M Duke Loan before it paid royalties due to 3D Realms.**

9. To ensure that was no dispute over this critical term, Miller, at 3D Realms, sent an email to Pitchford to confirm their mutual understanding. Miller sent his email on January 21, 2010, just a few weeks before the Parties signed the Purchase Agreement, and specifically requested Pitchford to confirm that Gearbox would not recoup any of \$2.9M Duke Loan from the royalties that Gearbox owed to 3D Realms from sales of the game. Less than two hours after

Miller sent his email on January 21, Pitchford wrote back promptly to Miller the same day and confirmed what Miller understood was correct. Pitchford stated that:

“Gearbox is assuming that liability – the \$2.9m will be Gearbox’s responsibility. The agreement should not include any allowance for that liability to be recouped from [3D Realms’s] share of profits.

... even in the worst case, I am prepared to make sure that debt is repaid in exchange for the opportunity to drive the brand forward and generate profit through the development of the big ticket Duke Nukem video games for many years to come.”

A copy of the exchange of emails between the Parties is attached as Exhibit A to this Original Petition and is referred to as the “Assurance Email.”

10. The President of Gearbox, Pitchford, sent the Assurance Email to 3D Realms shortly before the Purchase Agreement was signed, and confirmed that the \$2.9M Duke Loan—that Gearbox had contractually agreed to assume—would not be recouped from the Royalty Rate that 3D Realms was slated to receive from sales of the Future Duke Games. 3D Realms would not have entered into the transaction with Gearbox without the assurances it received from Gearbox that the \$2.9M Duke Loan would not be recouped from 3D Realms’s future royalties.

11. Under the Purchase Agreement, 3D Realms is owed a Royalty Rate on all monies (*i.e.* sales, licenses, rentals, etc.) paid to Gearbox for any Future Duke Games. But Gearbox has breached the Purchase Agreement where it refuses to pay to 3D Realms the Royalty Rate on the \$2.9 million that Gearbox received from sales of the Future Duke Games and the amount of these unpaid royalties is over \$800,000. Similarly, Gearbox has also refused to pay the Royalty Rate on approximately \$4.5 million that received months after the release of the video game and has resulted in over \$1.3 million in damages to 3D Realms.

12. Gearbox has also refused to pay the Royalty Rate to 3D Realms on several millions of dollars in revenue that Gearbox acknowledges it received after the Future Duke Games were released for sale. Gearbox apparently contends that this additional revenue (several million dollars) is an advance from the publisher that was paid after the game was released, and is, therefore, not attributable to royalties received on game sales. Even if that was true, however, Gearbox agreed in the Purchase Agreement to pay 3D Realms a set percentage (defined as the “Advance Percentage”) of all future advances it received from any publisher, which would require Gearbox to remit several hundreds of thousands of dollars to 3D Realms.

13. In sum, Gearbox agreed to pay 3D Realms significant royalties resulting from the sales of the Future Duke Games. Gearbox also provided assurances to 3D Realms’s principals that their understanding of the Agreement was accurate. Gearbox is now refusing, however, to pay over \$1 million that has become due and owing to 3D Realms. In addition, Gearbox has also barred 3D Realms from conducting an audit to determine precisely how much Gearbox owes to 3D Realms under the Purchase Agreement.

14. 3D Realms has therefore been required to file this lawsuit to enforce the Purchase Agreement, to recover the amounts due and owing from Gearbox and to enforce the audit right provided by the Agreement to enable it to conduct an audit of Gearbox’s royalties. In prosecuting its claims in this lawsuit, 3D Realms is also entitled to recover all of its legal fees, accrued interest and court costs.

III. RULE 190 DISCOVERY CONTROL PLAN

3D Realms intends to conduct discovery under Level 2 as outlined in Texas Rule of Civil Procedure 190.3.

IV. PARTIES

15. Plaintiff Apogee Software Ltd, a/k/a 3D Realms Entertainment is a Texas limited partnership with a mailing address at 4809 Beltline Road, # 111, Mesquite, Texas 75150. 3D Realms may be served with any subsequent pleadings in this matter through its attorney of record.

16. Defendant Gearbox Software, LLC is a Texas corporation with its principal place of business at 101 E. Park Boulevard, Suite 1200, Plano, Texas 75074. Gearbox may be served by service upon its registered agent for service of process, CT Corporation Systems, 350 N. Paul Street, Suite 2900, Dallas, TX 75201. 1 CIT/ ATTY

V. JURISDICTION & VENUE

17. 3D Realms seeks to recover actual damages in this matter that are within the jurisdictional limits of this Court that includes a demand for monetary relief over \$1,000,000 and for all other relief, in law or equity, to which 3D Realms is justly entitled. *See* Tex. R. Civ. P. 47(c).

18. Venue is proper in Dallas County, Texas, pursuant to TEX. CIV. PRAC. & REM. CODE § 15.002 because all or a substantial part of the events or omissions giving rise to Plaintiff's claims occurred in Dallas County, Texas.

VI. FACTUAL BACKGROUND

19. This suit arises out of contract entered into between 3D Realms and Gearbox. For more than 20 years, 3D Realms has developed popular video games that have achieved

significant commercial success, including the “Duke Nukem” franchise. Defendant Gearbox is also a video game developer and the two companies have often collaborated on various games.

20. During the economic downturn in 2009, 3D Realms considered selling rights in some of its properties to narrow its business focus and to achieve a greater level of profitability. As part of this business strategy, 3D Realms began to discuss a potential transaction with Gearbox in late 2009 in which Gearbox would purchase certain rights to develop and produce the Future Duke Games that would then be sold by a publisher. This was a deal among friends, because Gearbox’s President, Pitchford, had long been cordial in the industry with both Miller and Broussard, the principals of 3D Realms.

21. Unfortunately, after the release of the first video game covered under the Purchase Agreement, Gearbox refused to make substantial royalty payments that it owed to 3D Realms as part of the deal to acquire rights in the Future Duke Games. Gearbox also refused to allow the independent auditor retained by 3D Realms to audit the royalties owed by Gearbox. Gearbox blocked this audit even though 3D Realms’s right to an audit is expressly set forth in the Purchase Agreement and royalty audits are standard practice in the industry.

22. 3D Realms seeks recovery of substantial royalties owed to it under the terms of the Purchase Agreement. Specifically, one of the central items of consideration that Gearbox agreed to provide to 3D Realms in acquiring rights in the Future Duke Games was to assume the \$2.9M Duke Loan on 3D Realms’s books. Given the size of this debt, it was critical to 3D Realms that Gearbox agree that the debt would not be recouped by Gearbox from future royalties on sales of the game, *i.e.*, 3D Realms would receive its Royalty Rate from the first dollar that Gearbox earned in royalties, and **Gearbox would not recoup any of the debt underlying the \$2.9M Duke Loan out of the royalties owed to 3D Realms.**

23. To ensure that there would be no dispute over this critical term, Miller, one of the principals at 3D Realms, sent an email to Pitchford to confirm the Parties' mutual understanding. Miller specifically requested Pitchford to confirm that the \$2.9M Duke Loan on 3D Realms's books (that Gearbox had expressly agreed to assume) would not be deducted from any of the royalties owed to 3D Realms from sales of the Future Duke Games. Pitchford promptly wrote back to Miller and confirmed his understanding that Gearbox would not seek to recoup the debt from 3D Realms's share of the profits.

24. Despite the assurance it provided to 3D Realms, Gearbox now claims that it is entitled to *first* deduct the full amount of the debt it assumed (*i.e.* the entire \$2.9M Duke Loan) *before* any royalty payments become due to 3D Realms. Thus, Gearbox is turning the tables and taking a position directly opposite to the Assurance Email, which was sent to 3D Realms shortly before the Purchase Agreement was signed. Now, Gearbox is refusing to pay 3D Realms over \$800,000 in royalties required by the Purchase Agreement and which is attributable to the Defendant's improper recoupment of \$2.9 million on the debt that Gearbox assumed. Simply put, Gearbox cannot use \$2.9 million from sales of the Future Duke Games (a percentage of which is paid to 3D Realms as part of the Royalty Rate) to pay down the \$2.9M Duke Loan. The President of Gearbox said it himself in the Assurance Email: **"Gearbox is assuming that liability – the \$2.9m will be Gearbox's responsibility."**

25. Gearbox has also refused to pay a Royalty Rate to 3D Realms on more than \$4 million that Gearbox acknowledges it received after the Future Duke Games were released for sale. Based on the contractual Royalty Rate, Gearbox has thus withheld more than \$1.3 million in payments to 3D Realms.

26. Apparently, Gearbox contends this additional money is an advance from the publisher, and is not attributable to royalties received on game sales. Even if that was true, however, Gearbox agreed in the Purchase Agreement to pay 3D Realms a set percentage (defined in the contract as the “Advance Percentage”) of all future advances it received from the publisher, which would require Gearbox to remit more than \$500,000 to 3D Realms as its portion of advances received by Gearbox.

27. In sum, Gearbox agreed to pay 3D Realms significant royalties resulting from the sale of the Future Duke Games. Gearbox also provided assurances to the principals of 3D Realms that their understanding of the Purchase Agreement was accurate. Yet, Gearbox has reneged on its commitments by refusing to pay over \$2 million owed to 3D Realms, and also barring 3D Realms from conducting an audit, which is authorized by the Purchase Agreement.

28. 3D Realms has filed this lawsuit to (i) enforce its rights in the Purchase Agreement and to recover the amounts that have become due and owing from Gearbox, and (ii) to enforce the “Audit Rights” provided by the Agreement to enable it to conduct an audit of Gearbox’s royalties. Because this is a breach of contract action, 3D Realms also seeks to recover its legal fees, accrued interest and court costs.

VII. CONDITIONS PRECEDENT

29. All conditions precedent to 3D Realms’s claims for relief have been performed or have occurred.

VIII. CAUSE OF ACTION

Count I (Breach of Contract)

30. Plaintiff 3D Realms fully incorporates by reference the allegations in Paragraphs 1 through 29 of this Original Petition as if they were set forth in full.

31. The Purchase Agreement is a valid and legally enforceable contract, which was duly executed by the parties, and which was entered into for valuable consideration. The Agreement provides that 3D Realms is entitled to recover: (i) a percentage (or the Royalty Rate) of the royalties generated from sales of the Future Duke Games; and (ii) a percentage (or the Advance Percentage) of all amounts advanced to Gearbox by the publisher to complete the design of the Future Duke Games.

32. The Purchase Agreement set forth a minimum payment schedule (defined as the “Guaranteed Amount”), and Gearbox did pay the required minimum advance payments to 3D Realms, over time, totaling \$1 million. But Gearbox then materially breached the Purchase Agreement by refusing and failing to pay additional royalties of more than \$2 million that became due to 3D Realms. As set forth above in this Petition, Gearbox agreed to assume and pay a debt of \$2.9 million on 3D Realms’s books as part of the Purchase Agreement, but in so doing, Gearbox agreed that the amount of this debt would not be recouped from (*i.e.*, be applied against) 3D Realms’s royalties.

33. Contrary to the Parties’ Purchase Agreement (and express assurances that Gearbox provided regarding the correct interpretation of the contract), Gearbox improperly deducted \$2.9 million from the royalties it received from the publisher from the sales of the Future Duke Games. Instead, Gearbox used certain royalties (that should have been paid to 3D Realms) to pay off the \$2.9 million debt that it expressly agreed to assume in the Purchase Agreement. In addition, Gearbox expressly assured 3D Realms that the royalty payments would not be subject to a deduction to pay off the loan. In this manner, Gearbox breached the Purchase Agreement and improperly deprived 3D Realms of close to \$1 million that it was entitled to receive as part of the Royalty Rate defined in the Purchase Agreement.

34. Gearbox has also refused to allow the independent auditor retained by 3D Realms to audit the royalties it is owed by Gearbox. Gearbox blocked this audit even though the Purchase Agreement expressly detailed "Audit Rights" and is standard practice in the industry. Gearbox is simply stonewalling here in an improper attempt to conceal information from 3D Realms that it is absolutely entitled to receive under the terms of the Purchase Agreement.

35. Gearbox's refusal and failure to pay any of the amounts that remain past due and owing to 3D Realms under the Purchase Agreement, and Gearbox's rejection of 3D Realms's audit right both materially breach the Purchase Agreement. As a direct and proximate result of these breaches of the Agreement, 3D Realms has suffered actual damages, the amount of which remains undetermined because Gearbox has precluded the audit from being conducted.

36. In addition, 3D Realms is entitled to recover reasonable and necessary attorney's fees and costs under to Texas Civil Practice & Remedies Code section 38.001(8) because this is a breach of contract action.

37. 3D Realms made a formal presentment of its claims to Gearbox and requested payment of the amounts that are due to 3D Realms under the Purchase Agreement. In response, Gearbox has failed and refused to pay any of the amounts due, in whole in part, before the expiration of the 30th day after the claim was presented.

IX. REQUEST FOR JURY TRIAL

38. Plaintiff 3D Realms fully incorporates by reference the allegations in Paragraphs 1 through 37 of this Original Petition.

39. Plaintiff 3D Realms requests that it have a trial by jury on all matters of fact that are set forth and alleged in this Original Petition.

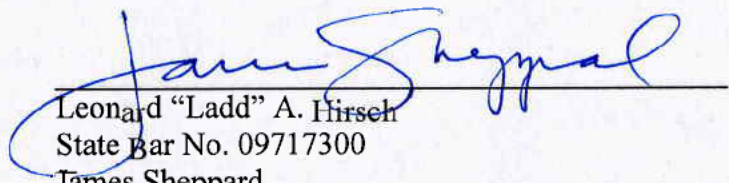
PRAYER

WHEREFORE, Plaintiff 3D Realms requests that Defendant Gearbox be cited to appear and answer and be held liable to 3D Realms for:

- a. A judgment that Gearbox materially breached the Purchase Agreement by failing to pay the amounts that are now past due and owing under that contract after 3D Realms issued written demands for payment;
- b. An award of compensatory/actual damages as required by the provisions of the Purchase Agreement after the Court has ordered Gearbox to comply with the "Audit Rights" provision in the Purchase Agreement;
- c. An award reimbursing 3D Realms for all costs of collection including, but not limited to, reasonable attorneys' fees it incurs in prosecuting its claim against Gearbox and all recoverable litigation expenses in this action;
- d. Post judgment interest as allowed by law; and
- e. All other relief, in law or equity, to which 3D Realms is justly entitled.

DATED: June 7, 2013

Respectfully submitted,


Leonard "Ladd" A. Hirsch
State Bar No. 09717300
James Sheppard
State Bar No. 24071125

DIAMOND MCCARTHY LLP
1201 Elm Street, Suite 3400
Dallas, Texas 75270
(214) 389-5300 (telephone)
(214) 389-5399 (facsimile)
E-mail: LHirsch@diamondmccarthy.com
E-mail: JSheppard@diamondmccarthy.com

**COUNSEL FOR PLAINTIFF
3D REALMS SOFTWARE LTD, D/B/A 3D
REALMS ENTERTAINMENT**

EXHIBIT A

From: Randy Pitchford [randyp@gearboxsoftware.com]
Sent: Thursday, January 21, 2010 7:10 PM
To: Scott Miller; PJ Putnam
Cc: Pat Heptig; George Broussard
Subject: RE: Re[2]: Draft GBX-Apogee APA and Supplement

The intent, as I understand it, is that Gearbox is assuming that liability – the \$2.9m will be Gearbox's responsibility.

The agreement should not include any allowance for that liability to be recouped from 3dRealm's share of profits.

The liability will be a factor in the case of both buy-back or IP sale as a matter of protection of Gearbox's investment – else you would be able to do this deal and then immediately buy back the brand leaving us with the bill for the liability but no opportunity to generate value.

On our side, we are hoping that Gearbox's position with 2k will afford me some negotiating room to make the situation better, but even in the worst case, I am prepared to make sure that debt is repaid in exchange for the opportunity to drive the brand forward and generate profit through the development of big ticket Duke Nukem video games for many years to come.

Cheers!

- Randy

From: Scott Miller [mailto:scottm@3drealms.com]
Sent: Thursday, January 21, 2010 5:39 PM
To: PJ Putnam
Cc: Randy Pitchford; Pat Heptig; George Broussard
Subject: Re[2]: Draft GBX-Apogee APA and Supplement

Got it!

Quick question, for clarification--George wants to be absolutely sure: Gearbox's position is that the \$2.9m liability will not affect 3DR's royalties, correct? My understanding is that this figure only comes into play is there's a buy-back or third-party who buys the IP. But until that time, 3DR is unaffected by this current liability. Is this accurate?

Scott Miller
www.RadarGroup.com