

**IN THE UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF TENNESSEE  
NORTHERN DIVISION**

ROBERT C. PRINCE,	§	
	§	
Plaintiff,	§	
	§	
v.	§	CASE NO. 3:19-cv-00380
	§	
RANDY PITCHFORD,	§	
GEARBOX SOFTWARE, L.L.C.,	§	
GEARBOX PUBLISHING, L.L.C.,	§	
and VALVE CORPORATION,	§	
	§	
Defendants,	§	
	§	
GEARBOX SOFTWARE, L.L.C.,	§	
	§	
Defendant/Third-Party Plaintiff,	§	
	§	
v.	§	
	§	
APOGEE SOFTWARE, LTD.,	§	
ACTION ENTERTAINMENT, INC.,	§	
SCOTT MILLER, and GEORGE	§	
BROUSSARD,	§	
	§	
Third-Party Defendants.	§	

**DEFENDANT GEARBOX SOFTWARE, L.L.C.'S THIRD-PARTY COMPLAINT**

1. Gearbox Software, L.L.C. files this Third-Party Complaint against Apogee Software, Ltd., Action Entertainment, Inc., Scott Miller, and George Broussard. In support thereof, Defendant/Third-Party Plaintiff Gearbox Software, L.L.C. would respectfully show the Court the following:

## **PARTIES**

2. Defendant/Third-Party Plaintiff Gearbox Software, L.L.C. is a limited liability company with its principal place of business in Texas.

3. Third-Party Defendant Apogee Software, Ltd. a/k/a 3D Realms is limited partnership with its principal place of business in Texas.

4. Third-Party Defendant Action Entertainment, Inc. is a corporation with its principal place of business in Texas.

5. Third-Party Defendant Scott Miller is an individual domiciled in Texas.

6. Third-Party Defendant George Broussard is an individual domiciled in Texas.

## **JURISDICTION AND VENUE**

7. This court has supplemental jurisdiction over Third Party Plaintiff's claims against Third-Party Defendants Apogee Software, Ltd., Action Entertainment, Inc., Scott Miller, and George Broussard pursuant to Federal Rule of Civil Procedure 14 and 28 U.S.C. §1367.

8. The Court has personal jurisdiction over Third-Party Defendants Apogee Software, Ltd. and Action Entertainment, Inc. Apogee Software, Ltd. and Action Entertainment, Inc., Apogee Software, Ltd.'s general partner, entered into contracts with Plaintiff Robert C. Prince, a resident of the Eastern District of Tennessee. Additionally, Third-Party Defendants Apogee Software, Ltd. and Actions Entertainment, Inc. marketed and sold the *Duke Nukem* video game series in East Tennessee. Third-Party Defendants Scott Miller and George Broussard negotiated the contracts with Plaintiff Robert C. Prince and controlled Apogee Software, Ltd. and Actions Entertainment, Inc. efforts to sell the *Duke Nukem* video games series in East Tennessee.

9. Venue is proper as to Third-Party Defendants, because Defendant/Third-Party Plaintiff's claims arise from the same nucleus of operative facts as the claims brought by Plaintiff Robert C. Prince currently pending in this Court.

### **FACTUAL BACKGROUND**

10. *Duke Nukem* is a video game series originally created by Third-Party Defendant Apogee Software, Ltd. a/k/a 3D Realms ("3D Realms"). Defendant/Third-Party Plaintiff Gearbox Software, LLC ("Gearbox") purchased assets from 3D Realms related to *Duke Nukem* by an Asset Purchase Agreement dated February 2, 2010 (the "APA"). The APA was executed on behalf of 3D Realms by Scott Miller and George Broussard in their respective capacities of Chief Executive Officer and President of Action Entertainment, Inc., the general partner of 3D Realms.

11. Pursuant to the APA, Gearbox purchased all intellectual property related to the *Duke Nukem* video game series (the "Duke IP") from 3D Realms. In the APA, 3D Realms represented to Gearbox that the Duke IP was owned free and clear by 3D Realms and that 3D Realms had the right to use the Duke IP "without payment to a Third-Party." 3D Realms further warranted in the APA that no copyright was infringed by use of the Duke IP in the *Duke Nukem* video game series.

12. On September 27, 2019, Plaintiff Robert C. Prince ("Prince") filed suit in this Court against Gearbox. Prince alleges that he owns the copyright on certain music and that Gearbox is infringing his copyrights on that music through its inclusion in *Duke Nukem 3D World Tour*, a video game published by Gearbox on or about October 11, 2016.

13. Prince further asserts that the use of Prince's music in earlier *Duke Nukem* video games published by 3D Realms was subject to a license agreement between Prince and 3D Realms. Thus, contrary to the representations and warranties made by 3D Realms in the APA, Prince

alleges that Gearbox does not own the rights to certain music transferred to Gearbox pursuant to the APA and included in *Duke Nukem 3D World Tour*, and said allegations form the basis of Prince's claim against Gearbox.

14. The APA requires 3D Realms and its shareholders, including Scott Miller and George Broussard, to indemnify Gearbox for claims based upon a breach of the APA, or any of the warranties, representations, covenants, or obligations therein.

15. On November 25, 2019, counsel for Gearbox notified Third-Party Defendants 3D Realms Software, Ltd., Action Entertainment, Inc., Scott Miller, and George Broussard of claims made by Prince against Gearbox and demanded that Third-Party Defendants indemnify Gearbox from the claims in this case pursuant to the APA because the lawsuit arises from a dispute over the ownership of the Duke IP.

16. To date, Third-Party Defendants have failed and refused to comply with their indemnity obligations under the APA.

### **COUNT 1 - BREACH OF CONTRACT**

17. The essential elements of a breach of contract cause of action are as follows: (1) the existence of a valid contract; (2) performance or tendered performance by the plaintiff; (3) breach of the contract by the defendant; and (4) damages to plaintiff resulting from the breach.

18. Gearbox and Third-Party Defendants entered into the February 2, 2010 Asset Purchase Agreement. The APA is a valid, binding, and enforceable contract. Gearbox performed according to the terms of that contract. Third-Party Defendants breached the contract by failing to deliver the Duke IP free and clear, breaching the warranties and representations regarding ownership of the Duke IP, and failing to indemnify Gearbox from Prince's claims as agreed. As a result of Third-Party Defendants' breach of the contract, Gearbox has and will to continue to

suffer damages in the form of costs of defense, including attorney's fees and expenses, as well as the costs of any settlement or judgment with respect to Prince's claims. Further, in the event 3D Realms did not own the Duke IP at issue in this lawsuit at the time of the transfer of the Duke IP to Gearbox, Gearbox has incurred actual damages equal to the difference in value of what 3D Realms agreed to transfer to Gearbox and what Gearbox actually received.

### **PRE-JUDGMENT AND POST-JUDGMENT INTEREST**

19. As a result of the conduct of Third-Party Defendants as hereinabove described, Gearbox has been damaged and is entitled to recover pre-judgment interest.

20. Additionally, Gearbox is entitled to recover, and seeks, post-judgment interest at the maximum lawful rate from the date of judgment until paid pursuant.

### **ATTORNEY'S FEES**

21. It was necessary for Gearbox to employ the services of the undersigned attorneys to represent it in this action. Gearbox is entitled to recover its attorney's fees from Third-Party Defendants by contract and Chapter 38 of the Texas Civil Practice & Remedies Code.

### **CONDITIONS PRECEDENT**

22. All conditions precedent necessary for Gearbox to recover the amounts due and owing as set forth herein have been performed by Gearbox.

### **CONCLUSION AND PRAYER**

23. Based on the foregoing, Defendant/Third-Party Plaintiff Gearbox Software, LLC requests that Third-Party Defendants be cited to answer and appear herein, that on trial hereof Gearbox be awarded judgment against Defendant/Third-Party Plaintiff for all of its actual damages, plus its attorney's fees, pre-judgment and post-judgment interest, all costs of court, and such other and further relief to which Gearbox may be justly entitled.

Respectfully submitted,

/s/ *Byron K. Henry*

Martha L. Boyd (22029)  
John M. Scannapieco (014473)  
Baker Donelson Center, Suite 800  
211 Commerce Street  
Nashville, Tennessee 37201  
(615) 726-5652  
(615) 744-5652 (facsimile)  
mboyd@bakerdonelson.com  
jscannapieco@bakerdonelson.com

Byron K. Henry (Admitted Pro Hac Vice)  
Leslie M. Sanderson (Admitted Pro Hac Vice)  
Scheef & Stone, LLP  
2600 Network Blvd., Suite 400  
Frisco, Texas 75034  
(214) 472-2100  
(214) 472-2150 (facsimile)  
byron.henry@solidcounsel.com  
leslie.sanderson@solidcounsel.com  
*Attorneys for Defendant/Third-Party Plaintiff  
Gearbox Software, L.L.C.*

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing was served electronically by operation of the Court's electronic filing system or via U.S. certified mail, return receipt, postage pre-paid, to Tim Harvey and Keane A. Barger, counsel for Plaintiff, on this 12th day of June, 2020.

/s/ *Byron K. Henry*  
Byron K. Henry