

JURISDICTION AND VENUE

4. The United States District Court for the Southern District of Texas has jurisdiction over this action pursuant to the provisions of 28 U.S.C. § 1331 in that this matter is a civil action arising under the Constitution, laws, or treaties of the United States. This action involves a federal cause of action for trademark infringement under the Lanham Act and others alleged under the laws of the State of Texas.

5. This Court also has jurisdiction over this action pursuant to the provisions of 28 U.S.C. § 1332 in that this matter is a civil action between citizens of different states wherein the amount in controversy exceeds the sum of \$75,000.00, exclusive of interest and cost. TimeGate contends that while both Gamecock and Southpeak are foreign entities, they conduct business and have operations in Texas and have registered with the Texas Secretary of State's Office. Further, this dispute involves matters that occurred in the District.

FACTUAL BACKGROUND

TIMEGATE STUDIOS AND ITS SECTION 8 GAME

6. Founded in 1998, TimeGate is a leading developer of video games software for PCs and game consoles, including Microsoft's Xbox 360. TimeGate has created highly popular video games in the world as exemplified by its immediate success with its first game, KOHAN: IMMORTAL SOVEREIGNS, which included a sweep of the Strategy Game of the Year awards from *Computer Gaming*, *PC Gamer* and *Computer Games Magazine*. TimeGate's second release, KOHAN II: KINGS OF WAR, was included as one of the Top 10 Games of 2004 by *Computer Games Magazine*.

7. In late 2004, TimeGate and Atari released AXIS & ALLIES, a real-time strategy game that let players battle against World War II superpowers. In 2006, TimeGate introduced

the gaming industry to F.E.A.R. EXTRACTION POINT, which was named “Best Expansion Pack of 2006” by *PC Gamer*. In conjunction with the aforementioned titles, TimeGate has also announced other next-generation, cross-platform projects in various development stages, all of which have contributed to its success in making it a well-known developer within the gaming industry.

8. In 2005, TimeGate began developing Section 8, a highly intense, interactive video game where players can customize their character and modify the battlefield on the fly. On or about June 15, 2007, TimeGate entered into a publishing agreement (the “Publishing Agreement”) with Gamecock wherein TimeGate would continue developing Section 8 in exchange for approximately twenty-four milestone payments averaging \$258,928.00 each and royalty payments upon completion of the game and sales to end-users. **See Exhibit “A”**

GAMECOCK BECOMES INSOLVENT, SOUTHPEAK TAKES OVER

9. As publisher of Section 8, the Publishing Agreement provided Gamecock with the right to reproduce, manufacture, package, advertise, publish, market and sell the Game on Microsoft’s Xbox 360 gaming console and the PC. Subsequently, Gamecock encountered financial difficulties which became increasingly evident by their lack of timely milestone payment to TimeGate. Although payments were eventually made, TimeGate was forced to put Gamecock in default in January of 2008, February of 2008, May of 2008, June of 2008, July of 2008, September of 2008 and October of 2008. After an audit revealed that an inordinate amount of debt had already amassed in conjunction with creditors attempting to recoup their losses, Gamecock was essentially rendered insolvent and was sold in a zero cash deal to Southpeak,¹ a Virginia-based video game publisher, on October 10, 2008. **See Exhibit “B”**

¹ At all times after October 10, 2008, Southpeak and Gamecock were the same entity.

SOUTHPEAK'S FAILURE TO ABIDE BY THE PUBLISHING AGREEMENT

10. In turn, Southpeak contacted TimeGate, informed them of the buyout and expressed its desire to continue with the development of Section 8. Soon thereafter, contractual issues arose with Southpeak in that they intentionally withheld milestone payments in certain instances and were responsible for ongoing breaches of the Publishing Agreement.

11. In one instance, Southpeak entered into a licensing agreement with a Russian company, IC, for Section 8 on the Sony PlayStation 3 gaming platform ("PS3") and received a minimum of \$250,000.00 as a result. **See Exhibit "C"**. Southpeak, however, did not own the rights to the PS3 as evidenced by Paragraphs 10.1 and 10.2 of the Publishing Agreement and further supported by Southpeak's CEO's correspondence to TimeGate. **See Exhibit "D"**. Likewise, Southpeak's Chairman, Terry Phillips, confirmed the transaction for the PS3, but attempted to claim that no money had been received. **See Exhibit "E"**. To date, Southpeak has failed to compensate TimeGate for its intellectual property that it sublicensed to a third party without permission. And, while it was given the option to license it, it was never exercised.

12. After Section 8's release on or about September 1, 2009, it was discovered that Southpeak had discounted the wholesale price of the game prior to 90 days after first released in violation of Paragraph 6.7 of the Publishing Agreement. Moreover, TimeGate learned that Southpeak was unlawfully exploiting its federally registered SECTION 8 trademarks under Registration Nos. 3681498 and 77423027 by launching various t-shirt contests with respect to the game, ultimately enabling end-users to sell Section 8 t-shirts with no accounting of revenues. **See Exhibit "F"**. Southpeak not only failed to disclose the contests to TimeGate, but disregarded its obligation to obtain permission to do so as required by Paragraph 11.2 of the Publishing Agreement. Southpeak was notified that they were in breach of the Publishing

Agreement and that its actions constituted trademark infringement. Southpeak also committed trademark infringement when it intentionally registered certain domain names that incorporated the term “Section 8” despite being informed by TimeGate that they were not permitted to do so.

13. As part of its earnings from the game, TimeGate was also entitled to receive both royalty payments and quarterly sales reports pursuant to Paragraphs 6.2 and 7.1 of the Publishing Agreement. Given that Section 8 went on sale on September 1, 2009, the initial sales report was due on November 15, 2009. Because the report was not received on the due date, TimeGate eventually notified Southpeak on November 19, 2009 that it was in breach for their failure to timely provide it. In response, Southpeak engaged in what appeared to be a series of delay tactics until the sales report was sent via email to TimeGate on November 25, 2009. **See Exhibit “G”.**

14. In reviewing the report, it appeared that Southpeak’s provided false and misleading information to TimeGate as to the royalty calculations and sales figures. Upon information and belief, Southpeak deceptively withheld and actively misled TimeGate as to the manner in which the royalties were calculated and prepared. In addition to the report’s suspect number of sales accounted for, Southpeak informed TimeGate that it would not receive any royalties because payment had not been received by Gamecock for any sales of Section 8. **See Exhibit “H”.**

15. As a result, TimeGate immediately disputed the validity of the report and notified Southpeak that, pursuant to Paragraphs 7.3 and 20.3 of the Publishing Agreement, it was exercising its right to audit and proceed to arbitration. TimeGate took the position that even

assuming the report was accurate, it contributed \$2.5 million² to the project and therefore under Paragraph 6.2 of the Publishing Agreement which defined the manner in which net revenue was to be distributed, it was entitled to its share of the royalties.

16. Although TimeGate notified Southpeak on November 30, 2009 that it was requesting for the audit to occur on December 16, 2009, Southpeak responded that it could not accommodate an audit prior to January 15, 2009 and that only Gamecock was subject to the audit, not Southpeak. The rationale was that Gamecock and Southpeak were two distinct entities from one another and that the Publishing Agreement was between TimeGate and Gamecock, not TimeGate and Southpeak. *See Exhibit "I"*.³

17. Despite Southpeak's position that it was not a party to the Publishing Agreement, the evidence provides that all milestone payments after the buyout came from Southpeak, all communications concerning Section 8 were received from and sent to Southpeak, Southpeak's corporate officers executed every amendment to the Publishing Agreement as signatories for Gamecock with the Fourth Amendment even referencing Southpeak, Southpeak also held itself out as the publisher of Section 8 to the general public and included Gamecock in its consolidated filings with the Securities and Exchange Commission. *See Exhibit "J"*.

18. Subsequently, TimeGate learned that there was an internal agreement between Gamecock and Southpeak as to the distribution of Section 8 and upon information and belief, Southpeak received the revenue from the sales of the game, but intentionally withheld payment to Gamecock in order to claim that no revenue had been received. Southpeak purposely withheld

² TimeGate's initial investment of \$2.5 million is set forth under Paragraph 1.12 of the Publishing Agreement. The \$2.5 million contributed was after the Publishing Agreement was executed and does not represent the total dollars spent by TimeGate.

³ At the time, TimeGate inquired if Gamecock required notice as well given their position that the entities were separate and distinct from one another. Southpeak informed TimeGate that it was not necessary.

the existence of the distribution agreement until confronted by TimeGate, but refused to provide a copy of it. Although the Publishing Agreement provided the ability to sublicense distribution to a third party, the agreement between Southpeak and Gamecock appeared to be nothing more than a sham transaction designed to deprive TimeGate of the royalties for its own game.

19. Despite having fully performed its contractual obligations, it notified Southpeak on December 9, 2009 that it was terminating the Publishing Agreement pursuant to Paragraph 18.1(d) for Gamecock's insolvency at the time of the buyout in conjunction with a material breach of contract for infringement as to its intellectual property, failure to properly compensate and for improperly withholding information.

20. Upon information and belief, Southpeak has previously had to answer to similar allegations regarding their contractual obligations as set forth in Civil Action No. 5:03-CV-823-H; *Red Storm v. Southpeak Interactive, LLC* (E.D.N.C.) and most recently in EWHC 2965; *CDV Software Entertainment v. Southpeak Interactive, LLC et al.* (U.K.). Moreover, it appears to have a history of questionable business practices as evidenced by those who have previously felt the brunt of non-payment by Southpeak. **See Exhibit "K"**.

COUNT ONE

MATERIAL BREACH OF CONTRACT

21. TimeGate incorporates all of the matters above as if fully set forth herein.

22. In this instance, TimeGate entered into the Publishing Agreement with Gamecock on June 15, 2007. The Publishing Agreement was valid and enforceable under which TimeGate agreed to perform services in exchange for payment. Although TimeGate tendered performance of its portion of the Agreement, Southpeak and Gamecock breached the Publishing Agreement.⁴

⁴ Although TimeGate contends that Gamecock and Southpeak are one in the same, the Defendants are separated by name for purposes of clarity.

23. Specifically, Southpeak and Gamecock were without rights to the PS3 and thus were not permitted to sublicense it to a third party and avoid compensating TimeGate for monies received as a result. Additionally, they unlawfully exploited TimeGate's intellectual property without obtaining permission to launch contests or register domain names using the SECTION 8 mark. Southpeak and Gamecock also discounted Section 8 prior to the expiration of the 90th day. Likewise, they failed to provide a sufficient sales report, withheld royalty payments and did not adhere to the obligation to act in good faith and fair dealing when they established the sham transaction in order to deprive TimeGate of royalties despite the special relationship between the parties and being in a position of trust.

24. As such, Southpeak and Gamecock have committed a material breach of contract and TimeGate was entitled to terminate the Publishing Agreement as a result and sue for damages incurred.

COUNT TWO

INFRINGEMENT OF FEDERALLY REGISTERED TRADEMARKS 15 U.S.C. § 1114

25. TimeGate incorporates all of the matters above as if fully set forth herein.

26. Southpeak and Gamecock's actions in launching contests and registering domain names constitutes use of the federally registered SECTION 8 marks without authorization in connection with their intent to profit from TimeGate's intellectual property. Using the SECTION 8 trademarks without obtaining TimeGate's permission likely caused confusion, mistake and deception as to the source of origin of TimeGate's trademarks. Not only has TimeGate alleged a material breach and thus, not bound by the Publishing Agreement, but it contends that they have also violated the arbitration provision in the Publishing Agreement.

27. TimeGate also requests an injunction enjoining the use of SECTION 8.

TimeGate asserts that the likelihood of confusion is probable when considering the parties operate in the same industry, the parties are in a developer-publisher relationship and the general public associates all parties with the Section 8 video game. Further, TimeGate has no adequate remedy at law. At the same time, there is also no threatened injury to Gamecock and/or Southpeak given that they do not have ownership rights in TimeGate's intellectual property. Accordingly, injunctive relief will not disserve the public interest.

28. Additionally, TimeGate asserts that their actions were intentional, willful and in bad faith and that this litigation constitutes an exceptional case under 15 U.S.C. § 1117(a) which permits the award of reasonable attorney's fees by the Court.

COUNT THREE

FRAUD, FRAUDULENT INDUCEMENT AND FRAUDULENT CONCEALMENT

29. TimeGate incorporates all of the matters above as if fully set forth herein.

30. Southpeak and Gamecock made repeated and material misrepresentations during the course of the relationship regarding the payment of royalties in order to prevent TimeGate from terminating the Publishing Agreement sooner as a result of Gamecock's insolvency.

31. Southpeak and Gamecock knew that they had no intention of paying royalties to TimeGate and devised a scheme in which a sham transaction was created, despite their contention that payments from retailers had not been received for sales of Section 8.

32. As a direct and proximate result of their actions, TimeGate was induced by their misrepresentations by complying with its obligations as opposed to terminating the Publishing Agreement at an earlier date with the possibility of generating revenue exclusively for itself through its own sales of Section 8.

33. Further, Southpeak and Gamecock have actively and fraudulently concealed

matters pertaining to TimeGate's interests and rights under the Publishing Agreement of which they had actual knowledge and which they had a duty to disclose. Such conduct was committed knowingly, intentionally, and with reckless and wanton indifference to the rights of TimeGate with the specific intent to deprive it of its royalties.

COUNT FOUR

CIVIL CONSPIRACY

34. TimeGate incorporates all of the matters above as if fully set forth herein.

35. Southpeak and Gamecock committed acts for an unlawful purpose by creating the sham transaction amongst themselves in order to deprive TimeGate of its royalties and to ultimately convert them for their own use. Essentially, Gamecock is nothing more than the "alter ego" of Southpeak.

36. Both Southpeak and Gamecock knew that their actions would result in harm to TimeGate and thus had a meeting of the minds and to accomplish their intent, they intentionally mislead and deceived TimeGate by attempting to claim that no payments had been received from retailers. By unlawfully retaining funds that were not theirs, their actions proximately caused TimeGate's injury.

COUNT FIVE

ACCOUNTING

37. TimeGate incorporates all of the matters above as if fully set forth herein.

38. Paragraphs 7.1 and 7.3 of the Publishing Agreement state that Gamecock was required to keep sufficient records of all Gross Revenues, Net Revenues, sales and promotional distributions of Game Units in such a manner that a third party may verify the correct amounts due to Developer. It also provides for a proper audit to verify these items.

39. Timegate repeatedly requested a revised statement as required by the aforementioned paragraphs, but neither Southpeak nor Gamecock provide one as required. Further, TimeGate reasonably requested that an audit take place without delay, but was refused.

40. As such, TimeGate seeks an Order from the Court requiring Gamecock, Southpeak and any affiliated corporations, business entities and agents, to provide a full and accurate accounting to TimeGate of all manufactured and distributed copies of Section 8 and all sales and revenues thereof, to provide a full accounting of all promotions, advertisements and marketing monies spent for the promotion of Section 8, and an inspection of all records relating to all aspects of the performance of all obligations under the Publishing Agreement.

COUNT SIX

ATTORNEY'S FEES

41. Pursuant to Section 38.001 of the Texas Civil Practices and Remedies Code, TimeGate can recover reasonable attorney's fees from both Southpeak and Gamecock, in addition to the amount of a valid claim and costs, as a result of its claim based on a written contract and proper presentment. Because TimeGate rendered services, performed labor and furnished materials pursuant to a written contract, it seeks reimbursement of its reasonable and necessary attorney's fees, expenses and costs, incurred in this matter.

42. Further, pursuant to 15 U.S.C. § 1117(a), TimeGate contends that both Southpeak and Gamecock's actions were intentional, willful and in bad faith and that this litigation constitutes an exceptional case which permits the award of reasonable attorney's fees to TimeGate for those incurred to date and those incurred in the future as a result of this action.

CONDITIONS PRECEDENT

43. All conditions precedent to TimeGate's claims for relief have been performed.

PRAYER FOR RELIEF

WHEREFORE PREMISES CONSIDERED, TimeGate Studios, Inc. prays that:

(a) both Southpeak and Gamecock and their officers, employees, agents, servants, attorneys, successors and assigns, related companies and all those persons in active concert or participation with them, be enjoined and restrained from continuing to infringe upon TimeGate's intellectual property as it relates to the PS3 and its marks;

(b) a proper audit/accounting be conducted as to both Southpeak and Gamecock and their related companies, agents and affiliates;

(c) both Southpeak and Gamecock account for all profits and unjust gains arising from their unlawful acts alleged herein, and trebling such profits in accordance with 15 U.S.C. § 1117;

(d) both Southpeak and Gamecock pay compensatory damages to TimeGate in an amount to be determined caused by their unlawful acts alleged herein, and trebling such damages in accordance with 15 U.S.C. § 1117;

(e) both Southpeak and Gamecock pay all sums realized and damages caused in connection with their breaches of the Publishing Agreement and that it be declared terminated with no future obligation by TimeGate to either Gamecock or Southpeak;

(f) both Southpeak and Gamecock pay attorney's fees pursuant to Section 38.001 of the Texas Civil Practices and Remedies Code and 15 U.S.C. § 1117;

(g) both Southpeak and Gamecock pay the filing fees associated with this action in the amount of \$350.00;

(h) any other relief as the Court may deem appropriate.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "SA Weiss". The signature is written in a cursive, somewhat stylized font.

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