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FILED
 LOS ANGELES SUPERIOR COURT
 AUG 25 2005
 JOHN A. CLARKE, EXECUTIVE OFFICER/CLERK
 BY J. SUNGA
J. SUNGA, DEPUTY

7 Attorneys for Plaintiff
 SPARK UNLIMITED, INC.

*Case assigned to
 Judge TRICIA ANN ENGELAW*

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
 10 COUNTY OF LOS ANGELES
 11 CENTRAL DISTRICT

D-23

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12 SPARK UNLIMITED, INC., a California
 corporation,
 13
 14 Plaintiff,
 15
 16 v.
 17 ACTIVISION PUBLISHING, INC., a
 Delaware corporation, and DOES 1 through
 18 10 inclusive,
 Defendants.

Case No.: BC333918

COMPLAINT AND DEMAND FOR
 JURY TRIAL:

1. BREACH OF WRITTEN CONTRACT
2. FRAUD AND MISREPRESENTATION
3. BREACH OF AN IMPLIED CONTRACT

21 Plaintiff Spark Unlimited, Inc. ("Plaintiff" or "Spark") by and through
 22 undersigned counsel, hereby sues Defendant Activision Publishing, Inc. ("Defendant"
 23 "Activision"), and in support thereof, states as follows:

CITIZEN: RCT33918 LEA/DEFA;
 SERIAL # : 04280104050
 INIT PAID: 08/25/05 03:36:50 PM
 PAYMENT: \$299.50
 RECEIVED:
 CHECK: 299.50
 DASH:
 CHANGE:
 CARDS:

1 and taking for itself only all benefits of the contract. It then followed up this usurpation
2 by seeking to kill off Spark altogether. Activision refused to pay Spark the royalties
3 owed on "Finest Hour" or the bridge financing due under the contract, stole Spark's idea
4 for the Sequel and then hired away Spark's own employees to develop that Sequel,
5 hoping that if Spark was sufficiently crippled, Spark would be unable to fight to protect
6 its rights. Activision's conduct has been outrageous and abusive in virtually every
7 respect. Spark therefore seeks compensatory damages in excess of \$10,000,000, punitive
8 damages, all attorneys' fees and costs associated with bringing this lawsuit, and
9 injunctive relief to prevent the release of the Sequel to the game.

10 THE PARTIES AND JURISDICTION

11 3. Plaintiff, Spark, is a California corporation with its principal place of
12 business at 15000 Ventura Blvd., Suite 202, Sherman Oaks, California. Spark is a video
13 game developer.

14 4. Plaintiff is informed and believes, and on that basis alleges, that Defendant
15 Activision, is a Delaware Corporation with its principal place of business at 3100 Ocean
16 Park Blvd., Santa Monica, California. Activision is a video game publisher and
17 developer.

18 5. The true names and capacities of Defendants named herein as Does 1
19 through 10 are unknown to Plaintiff. Therefore, Plaintiff sues said Defendants by such
20 fictitious names. Plaintiff will ask leave of this Court to amend this Complaint to show
21 their true names and capacities when the same have been ascertained. Plaintiff is
22 informed and believes, and on that basis alleges, that Does 1 through 10 were responsible
23 in some manner for the acts and transactions alleged in this Complaint and conspired with
24 Defendant Activision to harm Plaintiff, and therefore, are liable to Plaintiff. Defendant
25 Activision, and Does 1 through 10 are collectively referred to herein as "Defendant" or
26 "Activision."

27 6. Plaintiff is informed and believes, and on that basis alleges, that at all times
28 mentioned herein, each Defendant was the agent, servant or employee of the other

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1 Defendants, and at all times mentioned herein acted within the course and scope of such
2 agency.

3 4 GENERAL ALLEGATIONS

5 6 The Development Agreement

7 7. Formal negotiations regarding a potential partnership between Spark and
8 Activision began at the May 2002 E3 trade show in Los Angeles. The E3 trade show is
9 one of the largest video game conferences in the world. At E3, Craig Allen represented a
10 group of former and current EA employees who had developed the enormously
11 successful video game franchise know as "Medal of Honor." These former and current
12 EA employees were starting their own video game development company called Spark.

13 8. The extraordinary success of the "Medal of Honor" franchise made Spark
14 an attractive development partner to a number of major video game publishers, including
15 LucasArts, Infogrames, Ubi Soft, 3DO, THQ, Sammy Studios and Activision. Indeed,
16 after the 2002 E3 trade show, a bidding war ensued for a development deal with Spark.
17 Spark's paramount concern during these negotiations was to find a publisher that would
18 agree to a long-term development contract.

19 9. In September 2002, Activision and Spark entered into the Development
20 Agreement. A true and correct copy of that Agreement is attached hereto as Exhibit "A,"
21 and is incorporated herein as though set forth in full. The Development Agreement is a
22 three-product deal, and contains a bridge funding provision.

23 10. Paragraph 1 of the Agreement provides that the "works that are the subject
24 matter of this Agreement shall include three (3) distinctive interactive entertainment
25 software products to be developed by Developer" Id. (Emphasis added). Paragraph
26 1.1 states that the First Product will be a "'AAA' quality, reality-based World War 2
27 entertainment software product, . . . in the first person shooter genre." Id. Paragraphs 1.2
28 and 1.3 provide that the Second and Third Products will either be Sequels to the First

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1 Product, or new entertainment software products that would be "mutually agreed upon by
2 the parties." Id.

3 11. Paragraph 10.3 of the Development Agreement states that the "parties shall
4 commence discussions in regards to each successive Product and the development fees or
5 advance payable in regards to such Product eight (8) weeks prior to the scheduled
6 completion of the Product under development by Developer at the time." Id. (Emphasis
7 Added). The paragraph further provides that "[i]f the parties are unable to complete their
8 discussion in regards to the successive Product within ten (10) business days following
9 the completion of the preceding Product, Activision agrees to pay Developer such
10 periodic amounts as the parties shall determine in good faith is needed to allow
11 Developer to retain Key Employees and continue its business operations . . . until
12 such time as Developer commences work on the successive Product." Id. (Emphasis
13 added).

14 12. In addition to a three-Product deal and a bridge funding provision, the
15 Development Agreement also gives Spark very specific rights in connection with the
16 development of Sequels. The right to develop Sequels was of paramount concern to
17 Spark during the negotiations of the Development Agreement, and the Sequel paragraph
18 was one of the most heavily negotiated provisions in the Agreement.

19 13. Paragraph 8.1 of the Development Agreement provides in relevant part
20 that:

21 In connection with its ownership of the Products, the Product
22 Technology and the Underlying Properties, Activision shall
23 also have the right, but not the obligation, to develop, produce
24 and publish Sequels. The development of any such Sequel by
25 Developer shall be subject to the mutual agreement of the
26 parties (subject to the limitation on the number of Products
27 Developer is obligated to develop for Activision pursuant to
28 this Agreement), provided that Developer shall have a first
right of negotiation, for a period of ten (10) days from
notice from Activision of Activision's intention to publish
a Sequel, to develop a Sequel as either the Second Product
or Third Product. Activision and Developer agree to

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1 negotiate in good faith with respect to the terms of such
 2 Sequel, including the amount of the development fees or
 3 advance payments to Developer for the applicable Sequel,
 4 and delivery schedules. If the parties fail to reach an
 5 agreement within such ten (10) business day period or
 6 Developer elects to initially reject an offer with respect to
 7 such Sequel, Activision may offer the right to develop the
 8 Sequel to another developer. If Activision's offer to such
 9 other developer contains any terms that are materially
 10 more favorable than those submitted to Developer, then
 11 Activision will give Developer an opportunity to match the
 12 offer by giving Developer written notice of such revised
 13 terms and Developer may accept such offer with ten (10)
 14 business days of receiving notice thereof. (Emphasis
 15 added).

16 Id.

17 Activision Fraudulently Induced Spark to Enter Into Amendment No. 2
 18 to the Development Agreement

19 14. In the fall of 2002, Spark began working on the "Call of Duty: Finest Hour"
 20 console game (the "game"), which was the first of three Products that Spark was to
 21 develop under the Development Agreement. However, in May 2004, Activision
 22 informed Spark that it would not continue funding the game unless Spark agreed to
 23 amend the Development Agreement, and take a substantially reduced royalty rate.

24 15. During the negotiations over this amendment ("Amendment No. 2"),
 25 Activision orally and in writing confirmed its commitment to Spark, and to the
 26 Development Agreement. Amendment No. 2, Exh. B. Indeed, Activision repeatedly
 27 reaffirmed the long-term nature of the Development Agreement. For example, on March
 28 14, 2004, Kathy Vrabeck of Activision emailed Craig Allen at Spark to explain
 Activision's proposed amendment. In that email, Ms. Vrabeck explained the proposed
 royalty rate reduction, and then stated that "[a]ll other definitions and conditions of the
 deal would remain in tact."

16. Additionally, Spark's CEO, Craig Allen, repeatedly communicated to
 Activision during the parties' negotiations that Spark would agree to Amendment No. 2

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1 in recognition of the parties' continuing partnership under the Development Agreement.
2 For example, on March 15, 2004, Craig Allen responded to Kathy Vrabeck's email
3 referenced above, and specifically stated that Spark "look[ed] forward to working with
4 [Activision] to build not only [the "Call of Duty"] game but many more in the future!"
5 Never did anyone at Activision inform Mr. Allen that the parties' relationship would end
6 after the game was released, or that Activision had any reservations whatsoever about
7 developing another Product (including a Sequel) with Spark.

8 17. Moreover, nothing in Amendment No. 2 sought to amend the three-Product
9 nature of the Development Agreement, or Spark's rights to develop Sequels under
10 paragraph 8.1. Indeed, Amendment No. 2 specifically states that the "**parties agree that**
11 **all terms and conditions contained in the [Development] Agreement shall otherwise**
12 **remain in full force and effect.**" (Emphasis added). *Id.*

13 18. However, at the time Amendment No. 2 was being negotiated and
14 executed, Spark is informed and believes, and on that basis alleges that, Activision had
15 no intent to work with Spark to develop any additional Products under the Development
16 Agreement, and had already decided to develop a Sequel to "Call of Duty: Finest Hour"
17 with its internal development companies, Treyarch and Grey Matter.

18
19 **Activision Breached the Development Agreement by Failing to Negotiate in Good**
20 **Faith Over a Second and Third Product, and Failing to Provide Bridge Funding**

21 19. After fraudulently inducing Spark to enter into Amendment No. 2 (which
22 substantially reduced Spark's royalties on the First Product), Activision then breached the
23 Development Agreement by failing to negotiate in good faith over a Second and Third
24 Product, and refusing to provide any meaningful bridge funding. Indeed, Activision
25 simply waited until "Call of Duty: Finest Hour" was virtually complete and then
26 abandoned its relationship with Spark.

27 20. In October 2004, Spark was working tirelessly to complete the multiplayer
28 aspect of the game for its November release. At that time, Spark submitted a Sequel

1 proposal to Activision as its proposed Second Product under the Development
2 Agreement. Activision never engaged in any meaningful negotiation regarding this
3 proposal, or any other.

4 21. Instead, in a conference call which took place on or around October 15,
5 2004, Mark Lamia informed Craig Allen that Activision was "releasing" Spark from the
6 exclusivity requirement of the Development Agreement. At Spark's prompting, Mr.
7 Lamia sent Craig Allen an email which confirmed that "Activision [had] formally
8 rejected the proposal for the sequel to *Finest Hour*, and [was] releasing Spark from any
9 obligations under [the] agreement to make future products for Activision." Remarkably,
10 Mr. Lamia's email also stated that while Activision would continue discussions with
11 Spark regarding possible future products, any future relationship "[would] not be covered
12 under [the] existing deal."

13 22. Activision also refused to provide any meaningful bridge funding during
14 the period when it was contractually obligated to negotiate in good faith for future
15 Products. In the October through November 2004 time frame, a limited number of Spark
16 employees were working around the clock to implement a multiplayer into game. The
17 multiplayer was not in the game's original specifications, and the game was otherwise
18 substantially complete. During this period, Activision had demanded that the remaining
19 Spark employees vacate Spark's premises so that Activision could work closely with the
20 key employees to implement the multiplayer. Although Spark had specifically negotiated
21 a bridge funding provision that was meant to cover employee salaries and overhead
22 during this gap period between Products, Activision refused to provide this funding.

23
24 **Activision Breached the Development Agreement in Connection**
25 **with the Sequel Provision**

26 23. The *Call of Duty: Finest Hour* game was enormously successful for
27 Activision. Indeed, the game was one of the most profitable games released in 2004.
28 Activision is now seeking to further capitalize on the success of the game by releasing a

1 Sequel. As presented at the 2005 E3 trade show (and as widely reported in the press),
2 Activision will release a Sequel to the game in the fall of 2005. In developing and
3 releasing this Sequel, Activision breached all of its obligations under paragraph 8.1 of the
4 Development Agreement:

5 a. First, Activision never gave Spark "notice of its intention to publish a
6 Sequel." Indeed, during Spark's last formal conversations with Activision (which took
7 place in the fall of 2004), Activision represented that its corporate department had not yet
8 determined whether Activision would publish a Sequel to the game.

9 b. Second, Activision failed to give Spark a right of first negotiation after it
10 determined that it would publish a Sequel. Indeed, as stated above, Activision never gave
11 Spark notice of its intent to publish a Sequel, let alone a right to negotiate for the
12 development of that Sequel.

13 c. Third, Activision failed to negotiate in good faith when Spark submitted its
14 Sequel proposal in October 2004. Indeed, although Activision reviewed the proposal, it
15 never negotiated over any specific terms, and took the position that Activision was
16 uncertain whether it would proceed with a Sequel. These abbreviated "negotiations"
17 were conducted in bad faith in that Activision had already begun developing the Sequel
18 internally with Treyarch and Grey Matter.

19 d. Fourth, Activision impermissibly internalized the development of the
20 Sequel by having its in-house developers, Treyarch and Grey Matter, develop the Sequel.

21 e. Finally, even assuming that Activision could develop the Sequel internally,
22 Activision failed to give Spark the opportunity to match as required by paragraph 8.1.

23

24

Activision Breached the Development Agreement in the Royalty

25

Statement that it Provided Spark

26

24. In March 2005, Spark received its first royalty report from Activision,
27 which included several million dollars in unexpected "developer assistance charges."

28

The royalty statement (and limited backup) that Activision has provided Spark, shows

1 that Activision has breached the development agreement in connection with its
2 accounting of Spark's royalties in the following ways:

3 a. First, Activision charged Spark millions of dollars in developer assistance
4 costs that were not approved by Spark, and that were never contained on any amendment
5 to Exhibit D of the Development Agreement, as required by the Agreement.

6 b. Second, many of the developer assistance charges also appear to be related
7 to the Activision Game Engine. The breakdown that Activision provided of Spark's
8 recoupable costs shows over \$300,000 in engine and software licenses.

9 c. Third, Activision charged Spark \$1,822,920.97 from the implementation of
10 the multiplayer in the game, and failed to credit Spark for any of the costs it incurred in
11 implementing the multiplayer. The multiplayer was never part of the original
12 specifications for the game, and Spark repeatedly objected to its implementation.
13 Therefore, Activision cannot recoup its costs for implementing the multiplayer, and must
14 also credit Spark over \$750,000 for the expenses it incurred in implementing the
15 multiplayer.

16 d. Finally, Activision has also failed to credit Spark for over \$70,000 in
17 equipment costs that Activision verbally (and in writing by signing purchase orders)
18 committed to refund Spark.

19

20 **Activision Stole the Idea for Its Sequel from Spark's Sequel Proposal**

21 25. In late August 2004, Spark began informal discussions with Activision
22 regarding a Sequel to the first game. During these discussions, Spark communicated
23 many of its creative ideas for a Sequel. Additionally, in October and November 2004,
24 Spark submitted formal Sequel proposals to Activision (the "proposals"), which were
25 summarily rejected.

26 26. Spark's proposals contained specific creative ideas for a Sequel, including
27 three proposed battles on which the Sequel would be centered. One of the possible
28

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1 battles was entitled "Operation Husky (Landing and Taking Sicily)," and included the
 2 "[l]anding on the beach with the Big Red One - [a] classic contested beach landing."
 3 27. The Sequel that Activision will release in the fall of 2005 is premised on
 4 "Operation Husky," and is entitled "Call of Duty: Big Red One." Spark is informed and
 5 believes, and on that basis alleges, that Activision stole the idea for the Call of Duty 2:
 6 Big Red One game from Spark's Sequel proposals. Indeed, in the fall of 2004, Activision
 7 actually recruited and hired former Spark employee's to work on and implement Spark's
 8 Sequel ideas. Activision recruited these employees after it had financially crippled Spark
 9 by abandoning the Development Agreement (and refusing to provide the contractually-
 10 mandated bridge funding), and during a period when Activision should have been
 11 negotiating in good faith with Spark regarding subsequent Projects (including the
 12 "Sequel").

13
 14 **FIRST CAUSE OF ACTION:**
 15 **BREACH OF WRITTEN CONTRACT**
 16 **(Against All Defendants)**
 17

18 28. The allegations in paragraph 1 through 27, inclusive, are realleged as
 19 though set forth in full and are incorporated herein by reference.

20 29. As detailed above, Activision and Spark entered into the Development
 21 Agreement.

22 30. Spark performed each and every duty under the Development Agreement in
 23 a proper and just manner as required in the writing, except as such obligations have been
 24 excused by Activision's conduct or as a matter of law.

25 31. Activision repeatedly breached the express terms of the Development
 26 Agreement by: (a) failing to negotiate in good faith with respect to a Second and Third
 27 Product, (b) refusing to provide bridge funding during a period when it was contractually
 28 obligated to negotiate in good faith over a Second Product; (c) failing to give Spark

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1 notice of its intent to publish a Sequel to the game; (d) refusing to give Spark a right of
2 first negotiation with respect to developing a Sequel to the game; (e) refusing negotiate in
3 good faith regarding a Sequel to the game; (f) developing a Sequel to the game through
4 its internal developers Treyarch and Grey Matter; (g) assuming alternatively that
5 Activision had the right to develop a Sequel internally, failing to give Spark the
6 opportunity to match its internal development costs for the Sequel, and (h) failing to
7 account honestly to Spark with respect to the royalties earned on the game.

8 32. There is implied in every contract a duty of good faith and fair dealing.
9 The Development Agreement impliedly required Activision to act in a way that would
10 not deprive Spark of the fruits and benefits of the Development Agreement.

11 33. Activision breached the covenant of good faith and fair dealing contained in
12 the Development Agreement by: (a) stealing Spark's idea for a Sequel proposal; (b)
13 soliciting and hiring current and former Spark employees to work on that Sequel; and (c)
14 attempting to hire a Spark employee when Activision was fully aware (as a result of an
15 express provision in the Development Agreement) that the employee was under a four-
16 year, written employment contract with Spark, and was instrumental to Spark's
17 operations.

18 34. As a direct, foreseeable, and proximate result of Activision's repeated
19 breaches of contract and breaches of the implied covenant, Spark has suffered and
20 continues to suffer substantial monetary losses, in an amount to be proven at trial, in
21 excess of \$10 million.

22
23 **SECOND CAUSE OF ACTION**

24 **FRAUD AND MISREPRESENTATION**

25 **(Against All Defendants)**

26
27 35. The allegations in paragraph 1 through 34, inclusive, are realleged as
28 though set forth in full and are incorporated herein by reference.

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1 36. Activision made certain false and fraudulent misrepresentations and
2 promises, and failed to disclose material facts in order to induce Spark to enter into the
3 Amendment No. 2 to the Development Agreement, which substantially reduced the
4 royalties that Spark would receive from the game.

5 37. Indeed, during the negotiations of Amendment No. 2, Activision repeatedly
6 represented both orally and in writing that it intended to perform its obligations under the
7 Development Agreement as modified by Amendment No. 2. For example, on March 14,
8 2004, Kathy Vrabeck of Activision emailed Craig Allen at Spark to explain Activision's
9 proposed amendment. In that email, Ms. Vrabeck explained the proposed royalty rate
10 reduction, and then stated that "[a]ll other definitions and conditions of the deal would
11 remain in tact."

12 38. Moreover, Amendment No. 2 specifically states that the "parties agree
13 that all terms and conditions contained in the [Development] Agreement shall
14 otherwise remain in full force and effect." Amendment No. 2, Exh. B.

15 39. However, at the time Amendment No. 2 was being negotiated and
16 executed, Spark is informed and believes, and on that basis alleges, that Activision had
17 no intent to perform its obligations under the Development Agreement, as modified and
18 reaffirmed in Amendment No. 2.

19 40. Activision knew its promise to be false and fraudulent at the time it was
20 made and intentionally made the promise in an effort to induce Spark into entering into
21 Amendment No. 2. For the same reasons, Activision failed to inform Spark of its internal
22 decision to abandon the Development Agreement, and to develop a Sequel to the game
23 internally.

24 41. Spark had no reason to suspect that Activision's promise was false and
25 fraudulent, and therefore reasonably relied upon it in entering into Amendment No. 2.
26 Had Spark been aware of the true facts as they actually were, Spark would not have
27 entered into Amendment No. 2.

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1 the implied contract in a sum which is not yet ascertained, but which Spark believes will
2 exceed \$10,000,000.

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WHEREFORE, Plaintiff requests relief as follows:

FOR THE FIRST CAUSE OF ACTION

- 1. For actual and compensatory damages in an amount to be proven at trial;
- 2. Reasonable attorneys' fees;
- 3. Costs;
- 4. Interest;
- 5. for such other relief as this Court deems just and proper.

FOR THE SECOND CAUSE OF ACTION

- 1. For actual and compensatory damages in an amount to be proven at trial;
- 2. Reasonable attorneys' fees;
- 3. Costs;
- 4. Interest;
- 5. punitive and exemplary damages;
- 6. for such other relief as this Court deems just and proper.

FOR THE THIRD CAUSE OF ACTION

- 1. For a permanent injunction preventing Activision's release of the Sequel to
the game; or in the alternative;
- 2. For actual and compensatory damages in an amount to be proven at trial;
- 2. Reasonable attorneys' fees;

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- 3. Costs;
- 4. Interest;
- 5. for such other relief as this Court deems just and proper.

DATED: August 25, 2005

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By:



 STEPHEN S. SMITH
 Attorneys for Plaintiff
 SPARK UNLIMITED, INC.

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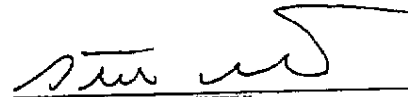
REQUEST FOR A JURY TRIAL

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Plaintiff hereby requests a jury trial on all issues so triable.

DATED: August 25, 2005

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LLP

By: 
STEPHEN S. SMITH
Attorneys for Plaintiff
SPARK UNLIMITED, INC.

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