

# Exhibit C

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February 13, 2014

### **Via Hand Delivery and E-mail**

Mr. Scott Miller  
Apogee Software, Ltd d/b/a 3D Realms  
4809 Beltline Rd., #111  
Mesquite, TX 75150

RE: Breach Notice/IP Infringement

Dear Mr. Miller:

As you may recall, my firm represents Gearbox Software, LLC (“Gearbox”) for certain litigation matters. In this capacity, I am providing notice that 1) you, Apogee Software, Ltd. d/b/a 3D Realms (“3DR”) and various collaborators are currently infringing Gearbox’s intellectual property rights; and 2) this infringement constitutes a material—and actionable—violation of your preexisting obligations to Gearbox.

According to various news outlets—as well as your own admissions within certain correspondence—you and 3DR are colluding with other, equally-unauthorized parties to develop a new video game based upon the Duke Nukem IP. No developer reveres Duke Nukem and its fans more than Gearbox; it’s why Gearbox committed so much to rescuing Duke back in 2010. As you well know: 3DR’s rights were reduced under the terms of that rescue, not expanded. The Gearbox rights—and 3DR restrictions—imposed by the Asset Purchase Agreement (“APA”) and all related contracts executed between the parties (collectively, the “Duke IP Terms”) are unwavering, and they are explicit on this point: 3DR’s actions breach the Duke IP Terms.

The Duke IP Terms are clear: 3DR assigned to Gearbox all of 3DR’s rights, title and interest to the “Duke IP” with only the most limited exceptions. Regarding video games, specifically, 3DR retained only Gearbox’s narrow permission for Apogee, LLC (“Apogee”) to complete the few games previously in development by Apogee for certain platforms; these few, now-outdated games are listed in Exhibit 1 of the 2010 Supplement to the APA (“Supplement”). Your new “*Duke Nukem: Mass Destruction*” project—which is mentioned nowhere within the

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Supplement and involves new, non-Apogee partnerships—undeniably violates the aforementioned exceptions.<sup>1</sup> There is simply no legal basis for what 3DR is attempting to do.

Furthermore, Gearbox does not believe, as you reportedly claim, that this new project was formerly known as “Survivor” (or any of the games listed in the now four-year-old Supplement). Indeed, not even your collaborators at Interceptor believe your claim.<sup>2</sup> As generous as Gearbox has been to you and 3DR, Gearbox never authorized such a profound (and prolonged) evolution of Apogee’s limited ability to complete its old work in 2010.

The Duke IP Terms are unambiguous: Exhibit 2.2 of the APA states that “*all future development in the Duke IP*” is a development right held exclusively by Gearbox. It seems basic enough: After February 2010 (i.e., the aforementioned “*future*”), only Gearbox possesses the right to use the Duke Nukem IP in the development of *any and all new* Duke Nukem games, ancillary projects and materials. Such rights belong to Gearbox alone, not 3DR or its unsanctioned abettors.

State and federal law validate Gearbox’s proprietary rights: The copyrights, trademarks and other intellectual property rights associated with the Duke IP are legally and exclusively owned by Gearbox. Neither 3DR nor Interceptor owns any commercial rights to exploit Gearbox’s Duke Nukem copyrights and trademarks, and even attempting such exploitation is unlawful. Because no one else may incorporate or use any Duke IP without the express authorization of its lawful owner (i.e., Gearbox), be advised: All of the unauthorized characters, music, plots, trade dress, and other elements of the Duke IP that you and 3DR’s collaborators seek to exploit do not belong to you or any 3DR accomplice(s); those things already belong to Gearbox, exclusively.

Accordingly, 3DR must *immediately* cease any and all use of the Duke IP with respect to its “*Duke Nukem: Mass Destruction*” project (as well as any other activities infringing those effectively-obsolete courtesies retained for Apogee under the Duke IP Terms).

At this time, any non-Gearbox efforts involving Gearbox’s Duke Nukem IP are strictly unauthorized. As such, you do not have Gearbox’s permission to proceed with the referenced game and may not utilize the Duke IP for any unauthorized project. By proceeding with any such efforts, you—and anyone else acting in concert with you and 3DR—are acting in willful violation of the Duke IP Terms, as well as federal copyright and trademark law. This cannot be stressed enough: The continued production of the “*Duke Nukem: Mass Destruction*” project—and any other unauthorized use of Gearbox’s Duke IP—will incur immediate legal action against you individually, 3DR, and all other infringing parties.

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<sup>1</sup> In preparation for formal pleadings, Gearbox has already secured written confirmation of Apogee’s non-involvement in your “*Duke Nukem: Mass Destruction*” efforts.

<sup>2</sup> <https://www.psu.com/a021917/Duke-Nukem-founder-working-on-top-secret-new-PS4+-PC-title-> (describing the “new videogame” revealed by Interceptor Entertainment’s CEO, Frederik Schreiber); *see also* <http://www.eurogamer.net/articles/2014-02-03-duke-nukem-mass-destruction-teased-for-pc-ps4> (stating “the game has [only] been in development since September [2013]”).

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By committing a material breach of the governing Duke IP Terms, this also constitutes official notice of the following: By willfully committing a material breach of the governing Duke IP Terms, 3DR has granted Gearbox's termination rights against any/all interests 3DR may have previously possessed in the Duke IP. 3DR cannot expect to reap the benefits of a partnership it has so thoroughly and methodically violated.

Gearbox has instructed me to inform you that, by repeatedly overstepping the limits of the studio's patience and legal rights, you have irreparably damaged the relationship between Gearbox and 3DR. Gearbox has no further tolerance for the actions of you, 3DR and whomever else you're consorting with. Having committed a material breach of the legal obligations owed to Gearbox, you and 3DR must promptly: 1) remedy the infringement as requested (if you wish to have any hope of mitigating damages); and 2) prepare for litigation (over both the rights that have been violated, as well as the rights that you and 3DR no longer have).

With respect to 3DR's current infringement, "*Duke Nukem: Mass Destruction*," please execute the enclosed Compliance Declaration, which confirms 3DR's compliance with Gearbox's lawful requests.<sup>3</sup> If you have not returned a fully executed version of this document to me by **Noon (CST) on February 20, 2014**, Gearbox has instructed Thompson & Knight to promptly take more formal legal action(s) against you individually, and 3DR. Such actions can be expected to include, *inter alia*, the formal pursuit of all statutory fines, declaratory relief against 3DR's further participation in any future Gearbox efforts, and the immediate recovery of all infringing assets developed thus far. Gearbox is also seeking full recovery of the legal fees and costs associated with restraining your malfeasance.

Very truly yours,



William M. Katz Jr.

WK/ab

Enclosure

cc: Wade Callender, Esq.  
J. Holt Foster III, Esq.  
Stephen E. Stein, Esq.  
Deborah L. Lively, Esq.

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<sup>3</sup> 3DR's failure to immediately return the completed Compliance Declaration will constitute yet another breach of 3DR's obligation to "do such other acts and things" that Gearbox may reasonably request for the purpose of carrying out the Duke IP Terms, per Section 6.5 of the APA.

### **Declaration of Scott Miller**

1. My name is Scott Miller. I am over the age of twenty-one and am otherwise competent to make this declaration. I have personal knowledge of the facts in this declaration, and each such fact is true and correct. I am executing this Declaration personally, and on behalf of Apogee Software, Ltd d/b/a 3DR (“3DR”), in accordance with the Breach Notice/IP Infringement letter from Gearbox Software, LLC (“Gearbox”) dated February 13, 2014 (the “Breach Notice”).
2. I have read the Breach Notice and I understand the statements therein.
3. I am currently the \_\_\_\_\_ of 3DR. In this position, I have knowledge of the development of all 3DR products and certain legal agreements, including without limitation the Asset Purchase Agreement (“APA”), and all related documents executed between Apogee Software, Ltd. d/b/a 3DR and Gearbox in February 2010 (collectively, the “Duke IP Terms”).
4. I hereby acknowledge that 3DR assigned over all rights, title and interest to the “Duke IP” with very limited exceptions. More specifically: 3DR retained only Gearbox’s narrow permission for Apogee, LLC (“Apogee”) to complete the few games previously in development by Apogee for certain platforms; these few, now-outdated games are listed in Exhibit 1 of the 2010 Supplement to the APA (“Supplement”).
5. I am aware that Exhibit 2.2 of the APA states that “all future development in the Duke IP” is a development right exclusively held by Gearbox. As such, only Gearbox has possessed the right to use the Duke IP in the development of any and all new Duke Nukem games, ancillary projects and materials since February 2010. Because such rights belong to Gearbox alone, development efforts such as 3DR’s “*Duke Nukem: Mass Destruction*” effort with others was not

only unauthorized, but a material infringement of Gearbox's rights. I apologize to Gearbox for the infringement and breach represented by my efforts.

6. In accordance with the Breach Notice, I agree to, and shall immediately cause 3DR to:
  - a. cease any and all use of the Duke IP with respect to its "*Duke Nukem Mass Destruction*" project (as well as any other activities infringing the effectively-obsolete rights retained by 3DR under the Duke IP Terms);
  - b. identify and cease all other unauthorized use(s) of all other intellectual property associated with Gearbox's Duke Nukem brand;
  - c. take any and all other actions as may be reasonably required to comply with the Breach Notice and Gearbox's exclusive rights;
  - d. refrain from any acts that use or violate the Duke IP, which exclusively belongs to Gearbox;
  - e. immediately provide Gearbox with confirmation of 3DR's compliance with the obligations identified herein.

7. I acknowledge that 3DR's actions, which were taken at my behest, constitute a material breach of the Duke IP Terms. Accordingly, I hereby acknowledge that due to this material breach, Gearbox may pursue all legal remedies against me and/or 3DR.

With sincere apologies for my actions, I declare under penalty of perjury that the foregoing is true and correct.

Signed this \_\_\_\_ day of February, 2014, in \_\_\_\_\_, Texas.

**Apogee Software, Ltd d/b/a 3DR**

**Scott Miller, an individual**

By: \_\_\_\_\_

\_\_\_\_\_

Name: Scott Miller

Title: \_\_\_\_\_