

Case assigned D57
to Judge *Richard J. Tappan*

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

MARK A. SAMUELS (S.B. #107026)
ROBERT M. SCHWARTZ (S.B. #117166)
RYAN K. YAGURA (S.B. #197619)
O'MELVENY & MYERS LLP
1999 Avenue of the Stars, 7th Floor
Los Angeles, CA 90067-6035
Telephone: (310) 553-6700
Facsimile: (310) 246-6779

Attorneys for Plaintiff
Harmonix Music Systems, Inc.

FILED
LOS ANGELES SUPERIOR COURT

MAR 10 2008

JOHN A. CLARKE, CLERK
[Signature]
BY D.M. SWAIN, DEPUTY

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

HARMONIX MUSIC SYSTEMS,
INC., a Delaware corporation,

Plaintiff,

v.

ACTIVISION PUBLISHING, INC., a
Delaware corporation; and
REDOCTANE, INC., a California
corporation; and DOES 1-20, inclusive,

Defendants.

Case No. 80386960

COMPLAINT FOR:

- 1. BREACH OF CONTRACT
- 2. DECLARATORY RELIEF

CIT/CASE: RC386960 LEA/DEF#:
RECEIPT #: CCH12121019
DATE PAID: 03/10/08 03:39:11 PM
PAYMENT: \$320.00 0310
RECEIVED:
CHECK: 320.00
CASH:
CHANGE:
CARD:

1 Plaintiff Harmonix Music Systems, Inc. ("Harmonix"), by and through its
2 attorneys of record, hereby brings this complaint against defendants Activision
3 Publishing, Inc. and RedOctane, Inc. (collectively, "defendants"), and avers as follows:

4 **NATURE OF THE ACTION**

5 1. Despite explicit obligations under various development agreements with
6 Harmonix, defendants Activision Publishing, Inc. ("Activision") and RedOctane, Inc.
7 ("RedOctane") have failed to pay Harmonix its full share of royalties earned in connection
8 with Harmonix's essential and undisputed contributions of its intellectual property and
9 technology to the bestselling video-game *Guitar Hero III*. To date, defendants have
10 wrongfully withheld at least \$14.5 million from Harmonix.

11 2. Harmonix created, designed, and developed *Guitar Hero*, an award-winning
12 video-game franchise that has generated more than \$1 billion in sales. Pursuant to various
13 agreements with RedOctane, Harmonix developed, designed, and programmed the first
14 *Guitar Hero* game ("*Guitar Hero I*") including its logo and packaging, *Guitar Hero II*,
15 and a 1980s-themed expansion to the series. Harmonix also made valuable design
16 contributions to the hardware used with the *Guitar Hero* games. Defendants Activision
17 and RedOctane publish (e.g., distribute and sell to wholesalers and retailers) the *Guitar*
18 *Hero* games.

19 3. *Guitar Hero III*—a sequel game not developed by Harmonix—uses,
20 incorporates, and is derived from all manner of intellectual property and technology that
21 Harmonix invented and used in the development of *Guitar Hero I* and *Guitar Hero II*,
22 including, without limitation, the coding, patents, trade secrets, and other proprietary
23 implementations of design and gameplay elements. Pursuant to agreements between
24 RedOctane and Harmonix, such use of Harmonix's property in *Guitar Hero III* entitles
25 Harmonix to substantial royalties. To date, however, defendants have underpaid
26 Harmonix by at least \$14.5 million.

27 4. Defendants are also generating significant revenues from *Guitar Hero III*-
28 related products and merchandise, such as song downloads, standalone guitar peripherals,

1 in-game advertising, and licensing of the Guitar Hero brand to third parties. Harmonix is
2 also entitled to a royalty on those revenues. To date, however, Activision and RedOctane
3 have not paid *any* of the royalties they are contractually obligated to pay Harmonix in
4 connection with those related products and merchandise.

5 5. Harmonix is informed and believes, and based thereon alleges, that
6 defendants plan to release even more *Guitar Hero* games, and other spin-off games, that
7 will also use, incorporate, and be derived from the intellectual property and technology
8 that Harmonix created and implemented during its development of *Guitar Hero I* and
9 *Guitar Hero II*. Harmonix will be entitled to significant royalties on these future *Guitar*
10 *Hero* products, as well. Given defendants' current course of conduct, however, Harmonix
11 is further informed and believes that defendants will continue to wrongfully deprive
12 Harmonix of its agreed-upon share of revenues from *Guitar Hero III*, future *Guitar Hero*
13 titles and spin-off games, as well as related products and merchandise. Accordingly,
14 Harmonix's losses will mount at the rate of tens of millions of dollars per year.

15 6. Harmonix has repeatedly demanded that Activision and RedOctane abide by
16 their contractual obligations. Activision and RedOctane have failed and refused, and
17 continue to fail and refuse to do so. Their repeated refusals to pay Harmonix the agreed-
18 upon share of royalties for *Guitar Hero III*, in breach of the parties' written agreements,
19 leaves Harmonix with no choice but to seek relief from this Court.

20 JURISDICTION AND VENUE

21 7. This action arises under the laws of the State of California and is within the
22 subject matter jurisdiction of this Court. Further, defendants are subject to the personal
23 jurisdiction of this Court. Venue is proper pursuant to California Code of Civil Procedure
24 section 395 as defendant Activision's corporate offices are in the County of Los Angeles.
25 Venue is also proper by contractual agreement between the parties.

26 THE PARTIES

27 8. Plaintiff Harmonix is a corporation organized and existing under the laws of
28 the State of Delaware, with its principal place of business at 625 Massachusetts Avenue,

1 Cambridge, MA 02139. Harmonix created and developed the *Guitar Hero* video-game
2 franchise, including *Guitar Hero I*, *Guitar Hero II*, and *Guitar Hero Encore: Rocks the*
3 *80s*. Harmonix is duly authorized to do business, and is doing business, in the State of
4 California.

5 9. On information and belief, defendant Activision is a corporation organized
6 and existing under the laws of the State of Delaware, with its principal place of business at
7 3100 Ocean Park Blvd., Santa Monica, CA 90405.

8 10. On information and belief, defendant RedOctane is a corporation organized
9 and existing under the laws of the State of California, with its principal place of business
10 at 444 Castro Street, Mountain View, CA 94041.

11 11. Plaintiffs are ignorant of the true names and capacities of the defendants
12 sued herein under the fictitious names DOES 1 through 20 inclusive. Plaintiffs will seek
13 leave of court to amend this complaint to allege such names and capacities when they are
14 ascertained. Plaintiffs are informed and believe, and based thereon allege, that each of the
15 fictitiously named DOE defendants is responsible in some manner for the wrongful
16 conduct alleged herein and are liable to plaintiffs therefor.

17 12. On information and belief, plaintiffs allege that, in engaging in the wrongful
18 acts and omissions alleged herein, each defendant acted individually for himself and itself,
19 as well as in concert with, as agent or representative for, or at the request or on behalf of
20 each of the other defendants.

21 **FACTS COMMON TO BOTH CAUSES OF ACTION**

22 **Harmonix's Extensive Background in Music-Based Video Games**

23 13. Harmonix is an award-winning video-game development company that
24 specializes in music-based games for the "rhythm-action" genre. Harmonix was founded
25 in 1995 by Alex Rigopulos and Eran Egozy, two graduate students at the MIT Media
26 Laboratory who wanted to combine their technical skills and love of music to create new
27 ways for non-musicians to engage in musical experiences. The company initially created
28

1 interactive music attractions for theme parks before turning to the growing field of video
2 games—and rhythm-action games in particular.

3 14. The rhythm-action genre of video games is characterized by its style of
4 gameplay, which often involves players matching on-screen musical notes using a
5 specialized “peripheral” game controller, such as a guitar-shaped controller or a drum
6 controller. For example, in the *Guitar Hero* series of games, players use a guitar-shaped
7 peripheral, pressing buttons on the fret bar portion while they “strum” along to a wide
8 range of guitar-oriented songs.

9 15. In 2001, Harmonix released its first rhythm-action video game, *FreQuency*,
10 and was quickly recognized as one of the key creative forces in the emerging rhythm-
11 action genre. *Amplitude*, Harmonix’s 2003 follow-up game, was selected by *Rolling*
12 *Stone Magazine* as one of the best console games of the year. Thereafter, Harmonix went
13 on to develop the successful *Karaoke Revolution* series of video games, which was named
14 by *Time* magazine as the “#1 Video Game of 2003” and won *Electronic Gaming*
15 *Monthly’s* “Gaming Innovation of the Year” award.

16 **The Guitar Hero I Development Agreement**

17 16. In 2005, RedOctane approached Harmonix—by then one of the leaders in
18 the rhythm-action genre—in connection with a potential rhythm-action video game in
19 which the player would use a controller to play rock-and-roll music. After discussions
20 and negotiations, RedOctane and Harmonix entered into an agreement for the
21 development and production of a guitar-based video game, which, at Harmonix’s
22 suggestion, was eventually named “Guitar Hero.” Under the Development Agreement for
23 *Guitar Hero I*, effective as of March 2, 2005, and amended March 27, 2006 (the “GH1
24 Agreement”), Harmonix agreed to create, design, and program the game, drawing on its
25 previous experience, trade secrets, and technological know-how in the rhythm-action
26 genre. RedOctane agreed to finance the development, and to market and distribute the
27 game. The parties agreed that the specific terms of the GH1 Agreement should be treated
28 as “confidential” and not publicly disclosed. Accordingly, for purposes of this complaint

1 and until such time as the Court enters an appropriate protective order in this case,
2 Harmonix will describe in only general terms the applicable provisions of the relevant
3 agreements (the specific terms of which are obviously known to defendants).

4 17. Central to the GH1 Agreement was the allocation of the ownership of the
5 intellectual property and technology created for or in connection with *Guitar Hero I*.
6 RedOctane received copyrights to certain of the game's visual and audio elements, while
7 Harmonix retained all other rights to the intellectual property and technology in the game
8 including, without limitation, the source code, game engine, patents, and trade secrets
9 used or invented in the course of developing the game (collectively, the "Harmonix
10 Property"). Under the GH1 Agreement, Harmonix granted to RedOctane a license to use
11 the Harmonix Property in *Guitar Hero I*, expansion packs, and sequel and spin-off games.

12 18. Under the terms of the GH1 Agreement, if a sequel game to *Guitar Hero I* is
13 produced by a game developer other than Harmonix, but incorporates, uses, or is derived
14 from any Harmonix Property, Harmonix is entitled to an agreed-upon percentage royalty
15 on sales of the sequel game, as well as additional royalties in the form of specific
16 percentages of revenues from related products and merchandise (e.g., song downloads,
17 standalone guitar peripherals, in-game advertising, and licensing of the *Guitar Hero* brand
18 to third parties). In the unlikely event that the sequel game does not use, incorporate, or is
19 not derived from any Harmonix Property, then the Harmonix royalty percentage on game
20 sales is one-half the higher rate, and there are no royalties for related products and
21 merchandise.

22 Harmonix Creates *Guitar Hero I*

23 19. During 2005, Harmonix designed and programmed the thousands of
24 elements, large and small, that comprise *Guitar Hero I*. These included, without
25 limitation, the graphical user interface, the visual environment, the game engine, the
26 scoring system, the guitar-based gameplay, the storyline, the characters, and the
27 animation. Harmonix also hired musicians and arranged the recording for sound-alike
28 songs used in the game.

1 20. *Guitar Hero I* was released in November 2005, and achieved rapid critical
2 and financial success. It won five Interactive Achievement Awards and two Game
3 Developers Choice Awards, and received high ratings from many video-game reviewers.
4 Since its release, *Guitar Hero I* has sold more than 1.5 million copies.

5 **The Guitar Hero II Development Agreements**

6 21. Following the great success of *Guitar Hero I*, Harmonix and RedOctane
7 entered into additional Development Agreements on March 27, 2006, for the creation of
8 *Guitar Hero II* for PlayStation 2 and Xbox 360 (the "GH2 Agreements").

9 22. The royalty structure set forth in the GH2 Agreements is virtually identical
10 to the structure in the GH1 Agreement. For any sequel game not developed by Harmonix
11 that incorporates, uses, or is derived from Harmonix Property, Harmonix is entitled to a
12 royalty on game sales, plus royalties on revenues from related products and merchandise.
13 If the sequel game does not use, incorporate, or is not derived from Harmonix Property,
14 Harmonix receives one-half that royalty rate on game revenues, and no royalties from
15 related products and merchandise.

16 **Harmonix Creates Guitar Hero II**

17 23. Throughout 2006 and early 2007, Harmonix designed and programmed all
18 of the elements comprising *Guitar Hero II*.

19 24. *Guitar Hero II* was released in November 2006 for PlayStation 2, and in
20 April 2007 for Xbox 360. Both versions of the game achieved even greater critical and
21 commercial success than *Guitar Hero I*, reaching combined sales of more than 3.1 million
22 copies. *Guitar Hero II* became one of the most highly rated games in the history of the
23 PlayStation 2. *Guitar Hero Encore: Rocks the 80s*, an expansion pack containing
24 additional songs that was also created by Harmonix, was released in July 2007.

25 **The Creation and Release of Guitar Hero III**

26 25. Activision, one of the world's largest video-game publishers, acquired
27 RedOctane in June 2006 and co-assumed (with RedOctane) RedOctane's obligations
28 under the *Guitar Hero* Development Agreements (the GH1 Agreement and the GH2

1 Agreements). According to Activision's public statements, Activision delegated the
2 development of *Guitar Hero III* to, among others, one of its wholly-owned subsidiaries,
3 Neversoft Entertainment.

4 26. Before Activision completed development of *Guitar Hero III*, Harmonix
5 delivered to Activision game source code, engine object code, and other source materials
6 for *Guitar Hero*, in compliance with Harmonix's obligations under the GH1 Agreement
7 and the GH2 Agreements.

8 27. In October 2007, Activision and RedOctane released *Guitar Hero III*. It
9 features fundamentally the same gameplay and graphical user interface as its *Guitar Hero*
10 predecessors, with some additional functionality. After generating revenues of \$115
11 million in its first week on sale, *Guitar Hero III* went on to sell six million copies in its
12 first four months and more than five million downloadable songs.

13 **Defendants Breach Their Contractual Obligations**

14 28. *Guitar Hero III* is a sequel game not developed by Harmonix that
15 incorporates, uses, and is derived from Harmonix Property. As such, pursuant to the GH1
16 Agreement and the GH2 Agreements, Harmonix is entitled to the higher royalty rate on
17 game revenues, and royalties on sales of related merchandise and products. However,
18 notwithstanding defendants' clear contractual obligation, they have refused to pay
19 Harmonix the appropriate royalty.

20 29. On February 1, 2008, Harmonix received its first statement reflecting
21 royalties it was owed based on defendants' sale and exploitation of *Guitar Hero III* and
22 related products through December 31, 2007 (the "12/31/07 Royalty Statement").

23 30. Despite the incorporation of substantial Harmonix Property in *Guitar Hero*
24 *III*, defendants calculated royalties for *Guitar Hero III* game sales at the lower royalty rate
25 for sequel games that do not incorporate any Harmonix Property.

26 31. The 12/31/07 Royalty Statement also improperly excluded from royalty
27 calculations all sales of *Guitar Hero III*-related products, such as song downloads and
28 standalone guitar peripherals.

1 section 2.6 of the GH2 Agreements, Harmonix is entitled to a royalty in the form of a
2 substantial percentage of the revenues from all such Intangible Deals. Harmonix is
3 informed and believes, and based thereon alleges, that defendants have generated
4 substantial revenues from Intangible Deals associated with the *Guitar Hero III* product.

5 39. The 12/31/07 Royalty Statement also incorrectly excluded sales of Ancillary
6 Merchandise associated with *Guitar Hero III*, such as standalone guitars and guitar cases.
7 Under Schedule D, section 2.6 of the GH1 Agreement and Schedule D, section 2.7 of the
8 GH2 Agreements, Harmonix is entitled to a royalty in the form of a substantial percentage
9 of the revenues defendants collect from all such Ancillary Merchandise. Harmonix is
10 informed and believes, and based thereon alleges, that defendants have generated
11 substantial revenues from Ancillary Merchandise associated with the *Guitar Hero III*
12 product.

13 40. Defendants have materially breached the terms of the *Guitar Hero*
14 Development Agreements by failing to fulfill their obligations and failing to comply with
15 all conditions in those agreements. To date, despite Harmonix's February 2008 letters
16 placing defendants on notice of such breaches, they remain uncured.

17 41. As a result of defendants' breaches of the *Guitar Hero* Development
18 Agreements, Harmonix has been damaged in an amount exceeding the sum of \$14.5
19 million. Harmonix's damages will increase substantially as defendants continue their acts
20 of breach.

21 **SECOND CAUSE OF ACTION**

22 **(Declaratory Relief)**

23 **(Against All Defendants)**

24 42. Harmonix realleges and incorporates by this reference the allegations
25 contained in paragraphs 1 through 41 as though fully set forth herein.

26 43. An actual controversy has arisen and now exists between Harmonix, on the
27 one hand, and defendants, on the other hand, relating to the legal rights of Harmonix and
28 the obligations of defendants under the *Guitar Hero* Development Agreements.

1 Harmonix contends:

- 2 a. That *Guitar Hero III* uses, incorporates, and is derived from the
3 intellectual property and technology that Harmonix created and licensed to
4 RedOctane in the development of *Guitar Hero I* and *Guitar Hero II*.
5 b. That as a result of such use, incorporation, and derivation of Harmonix-
6 created intellectual property and technology, *Guitar Hero III* is a
7 “Harmonix-Based Extension Product” within the meaning of the
8 Development Agreements.
9 c. That pursuant to Schedule D, sections 2.4-2.6 of the GH1 Agreement and
10 Schedule D, sections 2.5-2.7 of the GH2 Agreements, the status of *Guitar*
11 *Hero III* as a “Harmonix-Based Extension Product” entitles Harmonix to
12 the higher royalty percentage on game revenues from *Guitar Hero III* and
13 specified royalties on revenues from *Guitar Hero III*-related Intangible
14 Deals and Ancillary Merchandise, respectively.

15 44. Harmonix is informed and believes, and based thereon alleges, that
16 defendants dispute these contentions and contend to the contrary.

17 45. Harmonix desires a judicial determination of its rights under the
18 Development Agreements, and a declaration that its contentions, as set forth above, are
19 correct. Such a declaration is necessary and appropriate in order to set at rest the
20 respective rights and obligations of the parties and to avoid a multiplicity of actions.
21
22
23
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

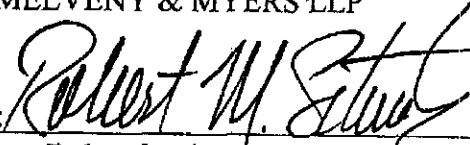
PRAYER FOR RELIEF

WHEREFORE, plaintiff Harmonix prays for judgment as follows:

1. For monetary damages in an amount to be proven at trial;
2. That defendants be required to pay over to Plaintiff prejudgment interest from the date of breach as provided by statute;
3. For a declaration of the parties' rights, as alleged hereinabove;
4. For the costs of suit and attorneys' fees incurred herein; and
5. For such other, further or different relief as the Court deems just and proper.

Dated: March 10, 2008

MARK A. SAMUELS
ROBERT M. SCHWARTZ
RYAN K. YAGURA
O'MELVENY & MYERS-LLP

By: 
Robert M. Schwartz
Attorneys for Plaintiff
Harmonix Music Systems, Inc.

CCI:780847.1