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FILED

LOS ANGELES SUPERIOR COURT

SEP 30 2005

JOHN A. CLARKE, EXECUTIVE OFFICER/CLERK

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES
CENTRAL DISTRICT

SPARK UNLIMITED, INC., a California corporation,

Plaintiff,

v.

ACTIVISION PUBLISHING, INC., a Delaware corporation, and Does 1 through 10 inclusive,

Defendants.

ACTIVISION PUBLISHING, INC., a Delaware corporation,

Cross-Complainant,

v.

SPARK UNLIMITED, INC., a California corporation, and CRAIG ALLEN (aka Craig Annis), an individual, and DOES 1 through 10 inclusive,

Cross-Defendants.

Case No. BC 338918

NOTICE OF HEARING ON DEMURRER;
DEMURRER OF DEFENDANT
ACTIVISION PUBLISHING, INC. TO
PLAINTIFF SPARK UNLIMITED, INC.'S
SECOND CAUSE OF ACTION FOR FRAUD
AND MISREPRESENTATION;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT THEREOF

Date: November 4, 2005

Time: 8:30 a.m.

Dept.: 23

Judge: Hon. Tricia Ann Bigelow

Complaint Filed: August 25, 2005

FILED: BC338918 LEA/NEF#:
RECEIPT #: CCH280304039
DATE PAID: 09/30/05 11:55:36 AM
PAYMENT: \$332.50
RECEIVED: 0310
CHECK #: 332.50
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NOTICE OF DEMURRER; DEMURRER OF ACTIVISION PUBLISHING, INC.; MEMORANDUM OF POINTS AND AUTHORITIES

1 NOTICE OF HEARING ON DEMURRER

2 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

3 PLEASE TAKE NOTICE THAT on November 4, 2005, at 8:30 a.m., or as soon thereafter
4 as counsel may be heard in Department 23 of the above-entitled Court, located at 111 N. Hill
5 Street, Los Angeles, CA 90012, Defendant and Cross-Complainant Activision Publishing, Inc.
6 ("Activision") will and hereby does demur to the "Second Cause of Action – Fraud and
7 Misrepresentation" stated in Plaintiff and Cross-Defendant Spark Unlimited, Inc.'s ("Spark's")
8 Complaint. Activision demurs to the Second Cause of Action on the grounds that it does not state
9 facts sufficient to constitute a cause of action because (1) it does not plead with particularity any
10 statement by Activision that is fraudulent; and (2) even if Activision made the promise alleged by
11 Spark, the alleged fraud contradicts the express terms of the parties' integrated agreement, and as a
12 matter of law is deemed inadmissible parol evidence. *Civ. Proc. Code* § 430.10(e).

13 This demurrer is based on this Notice of Hearing on Demurrer, the Demurrer and the
14 Memorandum of Points and Authorities appended hereto, all pleadings, papers, and records on file
15 in this action, such matters of which this Court may take judicial notice, and such further argument
16 that may be presented to the Court prior to or at the hearing on this matter.

17 Dated: September 30, 2005

Respectfully submitted,

18 IRELL & MANELLA LLP
19 Elliot Brown
20 Philip M. Kelly
21 Todd A. Maron

22 By: 

23 Elliot Brown
24 Attorneys for Defendant and Cross-
25 Complainant Activision Publishing, Inc.
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1 **DEMURRER OF DEFENDANT ACTIVISION PUBLISHING, INC. TO**
2 **PLAINTIFF'S SECOND CAUSE OF ACTION**

3 Defendant and Cross-Complainant Activision Publishing, Inc. will and hereby does demur
4 to the Second Cause of Action alleged in Plaintiff and Cross-Defendant Spark Unlimited, Inc.'s
5 ("Spark's") Complaint. The Second Cause of Action does not state facts sufficient to constitute a
6 cause of action because (1) it does not plead with particularity any statement by Activision that is
7 fraudulent; and (2) even if Activision made the promise alleged by Spark, the alleged fraud
8 contradicts the express terms of the parties' integrated agreement, and as a matter of law is deemed
9 inadmissible parol evidence. *Civ. Proc. Code* § 430.10(e).

10 This demurrer is based on this Notice of Hearing on Demurrer, the Demurrer and the
11 Memorandum of Points and Authorities appended hereto, all pleadings, papers, and records on file
12 in this action, such matters of which this Court may take judicial notice, and such further argument
13 that may be presented to the Court prior to or at the hearing on this matter.

14
15 Dated: September 30, 2005

Respectfully submitted,

IRELL & MANELLA LLP
Elliot Brown
Philip M. Kelly
Todd A. Maron



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20 By: _____
21 Elliot Brown
22 Attorneys for Defendant and Cross-
23 Complainant Activision Publishing, Inc.

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1 MEMORANDUM OF POINTS AND AUTHORITIES
2 IN SUPPORT OF DEMURRER

3 Defendant and Cross-Complainant, Activision Publishing, Inc. ("Activision"), submits this
4 memorandum in support of its demurrer to the "Second Cause of Action – Fraud and
5 Misrepresentation" stated in Plaintiff and Cross-Defendant Spark Unlimited, Inc.'s ("Spark's")
6 complaint (the "Complaint").

7 **I. INTRODUCTION AND BACKGROUND**

8 By way of background to the present motion, Activision is one of the world's premier
9 developers, publishers and distributors of video games. Spark is a video game developer who
10 participated in the development of an Activision game called *Call of Duty®: Finest Hour* pursuant
11 to a 2002 Software Publishing and Development Agreement ("Development Agreement" or
12 "D.A.") that is attached to the Complaint as Exhibit A. *Finest Hour* is a game set in World War II.
13 It is just one game in Activision's *Call of Duty®* franchise of World War II games, which includes
14 *Call of Duty®*, *Call of Duty®: United Offensive*, *Call of Duty® 2* and the forthcoming *Call of*
15 *Duty®2: Big Red One*. Spark did not develop any of these other *Call of Duty®* games, and it
16 owns no intellectual property rights in *Call of Duty®*, all of which are exclusively owned by
17 Activision.

18 Spark's work on *Finest Hour* was marred from the outset by unprecedented problems
19 caused by the incompetence of Spark's management. Under the Development Agreement, Spark
20 was obligated to develop versions of *Finest Hour* for three game console platforms (PlayStation 2,
21 Xbox and GameCube) within a total \$8.5 million budget. Although the game had been slated for
22 public release in the Summer of 2004, as the year began the only thing Spark had produced is what
23 Spark's own CEO described as "one of the most painful and absurd production systems ever used
24 to create a game." Spark was millions of dollars over-budget, it chronically missed its milestones,
25 it was months off the release schedule and struggling to develop even a single working version of
26 the game for a single platform. Spark ousted its CTO but it had no replacement to guide its
27 technical staff, and no solution to extricate itself from the disaster Spark's own management had
28 created. To protect Activision's investment and mitigate damages caused by Spark, it therefore

1 fell on to Activision to take decisive action to salvage *Finest Hour* – and in the process save Spark
2 from ruin. Activision supplied an acting technical director and a crack team of technologists to
3 figure out how to get the project back on track, and it mobilized a large team of Activision
4 employees and contractors (paid for by Activision) to take over from Spark development
5 responsibilities for 2 of the 3 platforms and one third of the game levels.

6 In light of the foregoing, in March 2004, Activision and Spark began to negotiate an
7 amendment to the Development Agreement ("Amendment No. 2" is attached to the Complaint as
8 Exhibit B). Among other things, Amendment No. 2 memorialized that Spark was no longer going
9 to develop the game for Xbox and GameCube and it reaffirmed that Activision was entitled to
10 recoup Activision's skyrocketing development costs, including the costs Activision had to incur to
11 complete the game for Xbox and GameCube. In light of Spark's failure to meet its obligations
12 under the Development Agreement, its dramatically reduced role in developing *Finest Hour* and
13 Activision's considerable additional investment, Amendment No. 2 also adjusted the royalty
14 "breaks" for Spark – that is the total number of game units that had to be sold for Spark to be
15 entitled to royalties in the event all expenses for the game were recouped. Amendment No. 2 left
16 untouched, however, and therefore "in full force and effect," the vast majority of the provisions of
17 the Development Agreement.

18 Spark's CEO agreed to back the amendment, but he delayed finalizing the negotiation,
19 telling Activision that he wished to first complete the ouster of Spark's then CTO, Adrian Jones,
20 from Spark's board. In May 2004, apparently after the CTO had left Spark and Spark's board,
21 Activision and Spark executed Amendment No. 2.

22 Spark now alleges it was induced to enter into Amendment No. 2 by fraud. Spark
23 contends that Activision somehow promised (although it cites no such promise) during the
24 negotiations leading to Amendment No. 2, that Activision would continue to use Spark to develop
25 additional games under the Development Agreement after work on *Finest Hour* was completed.
26 Spark alleges that Activision did not intend to fulfill this promise, as it had already decided to end
27 its association with Spark after the development of *Finest Hour* was concluded.

1 Spark's claim is patently false. At the time Amendment No. 2 was negotiated and signed,
2 Activision made no decisions about ending its association with Spark after Spark finished *Finest*
3 *Hour*. Activision did not even know at that point whether *Finest Hour* would ever be released,
4 and the focus of Activision's team was getting the game finished and distributed in time for the
5 holiday season. Furthermore, months after Amendment No. 2 was signed, and many weeks prior
6 to the completion of *Finest Hour*, Activision carefully considered making a Sequel (as that term is
7 defined in the D.A.) with Spark. Activision pursued a Sequel proposal from Spark's CEO, who
8 procrastinated for over six weeks before he got around to sending even a rough draft of a proposal.
9 Activision carefully evaluated Spark's Sequel proposal on an expedited schedule to meet a short
10 deadline unilaterally imposed by Spark's CEO.

11 Activision executives carefully reviewed Spark's proposal and gave Spark detailed
12 feedback. Spark failed to provide a proposal that was creatively compelling, which complied with
13 Spark's contractual obligations and which addressed Activision's legitimate concerns about a broad
14 range of issues. Only then did Activision decide to reject Spark's proposal and terminate its
15 relationship with Spark.

16 For the purposes of this motion, it is not necessary for the Court to grapple with and
17 debunk Spark's falsehoods. Even taking as true the allegations of the Complaint, Spark's fraud
18 claim fails as a matter of law for two reasons.

19 First, the Complaint does not identify any misrepresentation by Activision. Spark points to
20 a statement by Spark's CEO as the apparent basis for the alleged fraud, but this statement is
21 obviously not attributable to Activision (nor does it even resemble the alleged fraud). Activision's
22 promises to Spark concerning making other games, both *Finest Hour* and future games, are
23 memorialized in the four corners of the parties' integrated agreement. Activision's sole promise at
24 all times was that Activision had the right, but not the obligation, to use Spark's services. Spark's
25 failure to identify a misrepresentation by Activision dooms Spark's claim.

26 Second, to prevent the use of fraud claims to eviscerate the parol evidence rule, California
27 courts hold there can be no fraud claim where the alleged misrepresentation is contrary to the
28 express terms of the parties' controlling agreement. The Development Agreement provides that

1 Activision was not required to complete any game, not even *Finest Hour*, with Spark. The
2 Development Agreement did not require Activision to develop any future products with Spark, let
3 alone a Sequel. Amendment No. 2 had no impact on Activision's obligations in that regard. The
4 purported "promise" that Activision was obligated to do a second game with Spark is contradicted
5 by the plain terms of the parties' integrated, written agreement. Spark's fraud claim necessarily
6 fails as a result.

7 II. SUMMARY OF ALLEGATIONS

8 For the purposes of this motion only, Activision will assume as true the allegations in the
9 Complaint. The Court may also consider the terms of the parties' Development Agreement and
10 Amendment No. 2 which are attached to the Complaint. *See Satten v. Webb*, 99 Cal.App.4th 365,
11 375 (2002) (holding that on demurrer, the court may consider "those evidentiary facts found in
12 recitals of exhibits attached to a complaint"). To the extent the allegations in the Complaint
13 conflict with the terms of these agreements, the Court should give effect to the agreements. *See*
14 *Mead v. Sanwa Bank California*, 61 Cal.App.4th 561, 567-68 (1998) ("For purposes of a demurrer,
15 we accept as true both facts alleged in the text of the complaint and facts appearing in exhibits
16 attached to it. If the facts appearing in the attached exhibit contradict those expressly pleaded,
17 those in the exhibit are given precedence.").

18 A. The Development Agreement Specifies the Parties' Respective Rights and 19 Obligations.

20 1. Activision had Sole and Absolute Discretion Whether to Have Spark Make 21 any Products under the Development Agreement.

22 The Development Agreement is an arms-length contract that Spark, represented by
23 counsel, participated in drafting. D.A. ¶ 19.8. It provides that Activision could require Spark to
24 develop three separate videogame products for Activision. *See, e.g.*, Complaint, ¶¶ 1.1 - 1.3;
25 D.A., ¶ 4.1.1. The parties agreed that Activision, however, would have "sole and absolute
26 discretion" to cancel Spark's development of *any* of the products Spark was obligated to develop at
27 any time by simply giving notice:
28

1 Activision has the right, in its sole and absolute discretion, to cancel (for so-
2 called "convenience purposes" as opposed to "for cause" or due to a
3 material breach) the development by Developer of any of the Products
4 contemplated by this Agreement by giving a written notice to Developer.
5 D.A., ¶ 17.2. Furthermore, the Development Agreement states that even if Spark developed a first
6 game, such as *Finest Hour*, "Activision shall have the right, *but not the obligation*, to develop,
7 produce and publish Sequels." D.A., ¶ 8.1 (emphasis added). Paragraph 10.3 of the Development
8 Agreement further provides that:

9 In the event the parties are unable to agree on the successive Product [e.g., a
10 Sequel] and/or Activision elects in its discretion not to proceed with
11 Developer's providing services as to any additional Products, this
12 Agreement shall be deemed terminated and the parties shall have no further
13 obligations to each other[.]

14 D.A., ¶ 10.3.

15 The Development Agreement is integrated: "This Agreement ... constitutes the entire
16 agreement and understanding between the parties with respect to the subject matter hereof, thereby
17 superseding all prior negotiations, preliminary agreements, correspondence or understandings,
18 written or oral, between the parties, including the Letter Agreement." D.A., ¶ 19.6.

19 **B. Amendment No. 2: Activision's Termination Rights "Remain in Full Force**
20 **and Effect."**

21 Spark alleges that in May 2004, following months of negotiations, the parties entered into
22 Amendment No. 2 to the Development Agreement. Complaint, ¶ 15. Amendment No. 2 altered
23 the royalty arrangements. But with respect to the terms of the Development Agreement that were
24 not amended, Amendment No. 2 provides: "the parties agree that all terms and conditions in the
25 Agreement shall otherwise remain in full force and effect." Amendment No. 2, ¶ 6. Spark thereby
26 agreed that the provisions of the Development Agreement that gave Activision the sole and
27 absolute discretion whether to make any product with Spark, *or not*, were unaffected by
28 Amendment No. 2. Both before and after the parties agreed to Amendment No. 2, Activision had

1 the right, but not the obligation (D.A., ¶ 8.2), to make a Sequel to *Finest Hour*, and to cancel
2 Spark's development of any or all games Spark was obligated to deliver, for convenience rather
3 than for cause (D.A., ¶ 10.3).

4 **C. Spark's Fraudulent Inducement Claim.**

5 Spark alleges that Amendment No. 2 was induced by fraud because Activision allegedly
6 "reaffirmed the long-term nature of the Development Agreement" by promising Spark during
7 negotiations that it intended to develop subsequent games with Spark even though, according to
8 Spark, "Activision had no intent to work with Spark to develop any additional products under the
9 Development Agreement." Complaint, ¶ 15, 18. Spark's Complaint identifies the following three
10 statements as the apparent basis for its allegation that Activision made a fraudulent
11 misrepresentation:

- 12 • "[O]n March 14, 2004, Kathy Vrabeck of Activision emailed Craig Allen at Spark
13 to explain Activision's proposed amendment. In that email, Ms. Vrabeck explained
14 the proposed royalty rate reduction, and then stated that "[a]ll other definitions and
15 conditions of the deal would remain in tact [sic]." Complaint, ¶ 15 (typo in
16 Complaint, not in underlying document).
- 17 • "[O]n March 15, 2004, Craig Allen responded to Kathy Vrabeck's email referenced
18 above, and specifically stated that Spark 'look[ed] forward to working with
19 [Activision] to build not only [the "Call of Duty"] game but many more in the
20 future!' Never did anyone at Activision inform Mr. Allen that the parties'
21 relationship would end after the game was released, or that Activision had any
22 reservations whatsoever about developing another Product (including a Sequel)
23 with Spark." Complaint, ¶ 16.
- 24 • "Amendment No. 2 specifically states that the **'parties agree that all terms and**
25 **conditions contained in the [Development] Agreement shall otherwise remain**
26 **in full force and effect.**" Complaint, ¶ 17 (emphasis in Complaint).

27 Spark contends that these statements somehow amount to a promise on the part of
28 Activision – notwithstanding that Activision did not even make all of the statements alleged – to

1 team with Spark to develop a second and third game under the Development Agreement. It was
2 based on this "promise," which Spark contends Activision had no intention of performing, that
3 Spark agreed to enter into Amendment No. 2.

4 **III. ARGUMENT**

5 Spark's fraud claim fails for two separate and independent reasons: (1) the Complaint is
6 devoid of any allegation that Activision falsely represented that it would do a second game with
7 Spark, and (2) even if Activision did promise to do a second game with Spark, evidence of that
8 promise is barred under California law because it is contradicted by the express terms of the
9 parties' controlling agreement.

10 **A. The Complaint Fails to Allege any Promise or Misrepresentation By** 11 **Activision.**

12 To plead an action for fraud under California law, Spark was obligated to allege with
13 particularity the alleged misrepresentations that form the basis for the fraud. *See Lazar v. Superior*
14 *Court*, 12 Cal.4th 631, 645 (1996) ("In California, fraud must be pled specifically; general and
15 conclusory allegations do not suffice."). "This particularity requirement necessitates pleading
16 *facts* which "show how, when, where, to whom, and by what means the representations were
17 tendered." *Stansfield v. Starkey*, 220 Cal.App.3d 59, 73 (1990). Courts require fraud claims to be
18 specifically pleaded because "allegations of fraud involve a serious attack on character, and
19 fairness to the defendant demands that he should receive the fullest possible details of the charge
20 in order to prepare his defense." 5 Witkin, *Cal. Procedure*, Pleading, § 669 (4th ed. 1997).

21 Spark's fraud claim fails because the Complaint identifies no false representation made by
22 Activision that it would continue its relationship with Spark going forward. Spark identifies three
23 statements that purportedly form the basis of its fraud claim, but only two even originate from
24 Activision. Whether considered individually or collectively, these statements simply do not
25 support a claim that Activision made a promise that it would work with Spark after *Finest Hour*
26 was completed, notwithstanding any terms in the Development Agreement to the contrary.

27 The first statement attributed to Activision is a quote from a contract negotiation in which
28 Activision truthfully represented its position: all terms in the Development Agreement not

1 addressed by the amendment (for example, terms relating to subsequent games, termination rights,
2 etc.) would be left intact. The second statement attributed to Activision is a quote from
3 Amendment No. 2 itself. The quoted passage demonstrates that both parties agreed and therefore
4 stated in Amendment No. 2 that all terms in the Development Agreement that were not amended
5 were left "in full force and effect."

6 The two statements attributable to Activision are not a misrepresentation of anything.
7 They state a point of agreement between the parties: that the Amendment had no effect on terms
8 of the Development Agreement that were not amended.

9 The only other statement quoted in the Complaint as evidence of the alleged fraud is a
10 statement by Spark's CEO, Craig Allen, who obviously did not speak on behalf of Activision, that
11 Spark "look[ed] forward to working with [Activision] to build not only [the "Call of Duty"] game
12 but many more in the future!" Mr. Allen's statement that he "looked forward" to building "many
13 more" games in the future with Activision is obviously not a representation of Activision nor does
14 it alter the terms of the parties' integrated agreement. Indeed, Mr. Allen's statement of his
15 aspirations does not even show that Spark's CEO had deceived himself into thinking that
16 Activision was committed to making future games with Spark notwithstanding anything in the
17 Development Agreement to the contrary. Spark's effort to twist its CEO's "I look forward" into
18 "you agreed you would" speaks volumes about Spark's inability to produce any evidence of a
19 misrepresentation by Activision.

20 In sum, Spark's fraud claim fails for the simple reason that Spark has failed to identify any
21 misrepresentation by Activision.

22 **B. An Alleged Oral "Promise" that Contradicts the Terms of the Parties'**
23 **Agreement is Not a Legally Cognizable Basis for a Fraud Claim.**

24 Even assuming for the sake of argument (and contrary to the evidence cited by Spark) that
25 Activision made a misrepresentation about its future intentions, Spark's claim must fail as a matter
26 of law. The gist of Sparks' fraud allegation is that, allegedly, Activision promised Spark that it
27 would use Spark to develop future products under the Development Agreement even though
28 Activision had no intention of actually doing so. This theory of fraud is called promissory fraud.

1 See *Alling v. Universal Manufacturing Corp.*, 5 Cal.App.4th 1412, 1436 (1992) ("Promissory
2 fraud' is a promise made without any intention of performing it.").

3 It is well-settled that, pursuant to the parol evidence rule, a claim of promissory fraud fails
4 as a matter of law if the alleged false promise contradicts an integrated written agreement. *Alling*,
5 5 Cal.App.4th at 1436 ("The fraud exception to the parol evidence rule does not apply to such
6 promissory fraud if the evidence in question is offered to show a promise which contradicts an
7 integrated written agreement."); see also *Bank of America etc. Assn. v. Pendergrass*, 4 Cal.2d 258,
8 263 (1935) (holding that a party may not submit evidence of "a promise directly at variance with
9 the promise of the writing"); *Pacific State Bank v. Greene*, 110 Cal.App.4th 375, 389-90 (2003)
10 ("The California Supreme Court has declared the fraud exception [to the parol evidence rule] does
11 not apply if the evidence is offered to show a promise contradicting the written agreement.")
12 (quoting *West v. Henderson*, 227 Cal.App.3d 1578, 1583 (1991)); *Continental Airlines, Inc. v.*
13 *McDonnell Douglas Corp.*, 216 Cal.App.3d 388, 419 (1989) (refusing to consider evidence
14 "offered to show a fraudulent promise directly at variance with the terms of the written
15 agreement").

16 While the parol evidence rule "does not exclude ... evidence ... [used] to establish
17 illegality or fraud," C.C.P. § 1856(g), it has long been held that the fraud exception to the parol
18 evidence rule does not apply when the allegedly fraudulent promise contradicts the terms of the
19 parties' governing agreement. California courts have explained this distinction in the following
20 manner:

21 [I]f, to induce one to enter into an agreement, a party makes an independent
22 promise without intention of performing it, this separate false promise constitutes
23 fraud which may be proven to nullify the main agreement; *but if the false promise*
24 *relates to the matter covered by the main agreement and contradicts or varies the*
25 *terms thereof, any evidence of the false promise directly violates the parol evidence*
26 *rule and is inadmissible.*

27 *Bank of America v. Lamb Finance Co.*, 179 Cal.App.2d 498, 502 (1960) (emphasis added).
28

1 Accordingly, a claim of promissory fraud necessarily fails as a matter of law where, as here, it is
2 based upon a party's promise to take an action that is at odds with the rights and obligations
3 expressly provided for in the parties' governing agreement.

4 These California authorities negate Spark's fraud claim, which is a blatant attempt to
5 rewrite both the Development Agreement and Amendment No. 2. The Development Agreement,
6 which was fully integrated, contains no promise that Activision is obligated to make other games
7 with Spark. The parties instead agreed that Activision could terminate its relationship with Spark
8 at any time as Activision saw fit within its sole discretion. *See* D.A., ¶¶ 8.1, 10.3, 17.2. The
9 provisions of the Development Agreement giving Activision the discretion to terminate Spark's
10 services were not modified by Amendment No. 2. To the contrary, Spark agreed in Amendment
11 No. 2 that these provisions would "remain in full force and effect." Amendment No. 2, ¶ 6.
12 Notwithstanding Activision's rights under the Development Agreement, which were unchanged by
13 Amendment No. 2, Sparks contends it had a right to rely on Activision's alleged "promise" to use
14 Spark to develop additional products beyond *Finest Hour*. This "promise," however, (in addition
15 to never having been made) is contradicted by the express terms of the integrated Development
16 Agreement and Amendment No. 2. Activision had the right "but not the obligation" to do Sequels
17 and indeed could terminate Spark's services without cause even before the completion of *Finest*
18 *Hour*. Because the promise on which Spark's fraud claim is based is "covered by the main
19 agreement and contradicts or varies the terms thereof," any evidence of it is barred by the parol
20 evidence rule. *Bank of America*, 179 Cal.App.2d at 502. Spark's fraud claim fails as a matter of
21 law for this separate reason.

22 IV. CONCLUSION

23 Activision specifically bargained with Spark for the right to cancel any game at any time,
24 to publish or not publish a Sequel to *Finest Hour*, and to use Spark, or not use Spark, to develop
25 subsequent products. This is what the parties expressly agreed to in the Development Agreement,
26 and what they left in full force and effect in Amendment No. 2. Spark's fraud claim attributes to
27 Activision a promise that the pleading never ties to a statement by Activision and which, even had
28

1 it been made, is parol evidence contradicted by the parties' integrated agreement. Spark's Second
2 Cause of Action – for fraud and misrepresentation – therefore fails as a matter of law.

3 Dated: September 30, 2005

Respectfully Submitted,

4 IRELL & MANELLA LLP
5 Elliot Brown
6 Philip M. Kelly
7 Todd A. Maron



8 By: _____

9 Elliot Brown
10 Attorneys for Defendant and Cross-
11 Complainant Activision Publishing, Inc.

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PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 1655 Beverly Boulevard, Los Angeles, California 90026.

On September 30, 2005, I served the foregoing document described as **NOTICE OF HEARING ON DEMURRER; DEMURRER OF DEFENDANT ACTIVISION PUBLISHING, INC. TO PLAINTIFF'S SECOND CAUSE OF ACTION FOR FRAUD AND MISREPRESENTATION; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** on each interested party, as follows:

Stephen S. Smith, Esq.
Suann C. Macisaac, Esq.
Greenberg Glusker Fields Claman Machtinger &
Kinsella LLP
1900 Avenue of the Stars, 21st Floor
Los Angeles, California 90067-4590

I delivered such envelope by hand to the offices of each interested party.

Executed on September 30, 2005, at Los Angeles, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Craig Martin

(Type or print name)

Craig Martin

(Signature)