

CAUSE NO. 416-05837-2018

GEARBOX SOFTWARE, LLC,	§	IN THE DISTRICT COURT OF
	§	
Plaintiff,	§	
	§	
vs.	§	COLLIN COUNTY, TEXAS
	§	
WADE CALLENDER,	§	
	§	
Defendant.	§	_____ JUDICIAL DISTRICT
	§	

PLAINTIFF'S ORIGINAL PETITION

TO THE HONORABLE COURT:

COMES NOW PLAINTIFF GEARBOX SOFTWARE, LLC files this, its *Original Petition* and in support thereof, respectfully shows as follows:

I. DISCOVERY CONTROL PLAN

1. Pursuant to Texas Rule of Civil Procedure 190, discovery in this matter is to be conducted under Level 3.

II. PARTIES

2. Plaintiff Gearbox Software, LLC ("Gearbox" or "Plaintiff") is a Texas Limited Liability Corporation authorized to do business in Texas, with its principal place of business located at 5757 Main Street, Suite 500, Frisco, Texas 75034-3234, Collin County, Texas.

3. Defendant Wade Callender ("Callender" or "Defendant") is an individual residing in Denton County, Texas. Defendant Callender may be served at his residence located at 12315 Shoal Forest Lane, Frisco, Texas 75033 or wherever he may be found.

III. JURISDICTION AND VENUE

4. Jurisdiction is proper because the amount in controversy exceeds the

minimum jurisdictional limits of the Court. Plaintiff seeks monetary relief over \$1,000,000 and non-monetary relief and the damages sought are within the jurisdictional limits of the court.

5. Venue is proper in Collin County pursuant to Texas Civil Practice and Remedies Code §§ 15.002(a)(1) and 15.035(a) because all or a substantial part of the events giving rise to the claims occurred in Collin County, Texas, and the lawsuit involves a dispute between contractual parties and the agreement between the parties provides Defendant will perform in Collin County, Texas.

IV. FACTS

A. The foundation of Gearbox Software, LLC.

6. Gearbox is a video game software development company founded in 1999 by a handful of inventive designers, software engineers, and entrepreneurs. Since its inception and first release, *Half-Life: Opposing Force*, the developers at Gearbox have created video games for some of the most exciting and revered brands on the planet. The Gearbox team has created its own original, award-winning and best-selling brands, including the *Brothers in Arms* series and the record-setting, genre-breaking *Borderlands* franchise.

7. In 2010, Callender was hired by Gearbox as Executive Counsel and, in 2011, was promoted to General Counsel and Vice President of Legal Affairs. While at Gearbox, Callender's main goal and purpose as General Counsel was to protect and enforce the legal rights of Gearbox. He was further charged with the exclusive management of the legal affairs of the company to be performed with the utmost good faith, integrity, and fair dealing.

8. Callender remained General Counsel and a trusted executive at Gearbox until resigning from his position in July 2018. However, Callender harbored secret intentions of

leaving Gearbox dating back to at least November 2017. Despite harboring these secret intentions to leave Gearbox, Callender continued to exploit Gearbox's generosity and trust for his own personal gain.

B. Callender took advantage of Gearbox's trust for his own personal gain.

9. **The Home Loan Agreement.** When Callender fell on hard times and needed financial help purchasing his home in Frisco, Texas (a home that is believed to be valued in excess of \$900,000) he found a helping hand in his childhood friend and business colleague, Randy Pitchford, Gearbox's President and CEO. With Pitchford's approval, on April 14, 2014, Gearbox issued a \$300,000 cash loan to Callender for the purpose of buying his home in Frisco, Texas. At the time of the loan, Callender was not only receiving an annual salary just shy of \$150,000, but also exclusive company benefits and perks, including royalties and merit-based bonuses totaling nearly \$100,000. Despite Callender's handsome compensation and benefits, with Pitchford's approval, Gearbox issued the \$300,000 cash loan so Callender could purchase his \$900,000 home (the "Home Loan")—which sits just down the street from Pitchford's home.

10. In exchange for this cash loan, Callender promised to repay the loan over an agreed period of time (the "Home Loan Agreement"). In order to ensure that Callender would not default on his repayment obligations, Gearbox and Callender agreed that Callender's monthly earnings would be "grossed up," and a portion of that grossed up amount would be applied to the balance of the Home Loan. Despite Gearbox's short-term actions to help its General Counsel avoid defaulting on the loan, Callender understood that Gearbox's long-term intention was to recoup the entirety of the loan from Callender's future royalties. The first grossed-up payment was made in February 2015.

11. In March 2018, well into planning his departure from Gearbox, Callender

demanded that the grossed-up payments cease and objected to Gearbox seeking repayment of the Home Loan from Callender's future royalty payments. At that time, the grossed-up payments had reduced the balance of the Home Loan to \$136,284.96; however, Callender reaped the benefits in the amount of \$300,000, having never paid any sum of his royalty payments toward the balance of the Home Loan.

12. By this point in Callender's tenure with Gearbox, he was earning an annual salary of \$150,000, along with royalties and merit-based bonuses then totaling nearly \$200,000. Despite Callender's even handsomer compensation and benefits, he made no effort to repay the \$300,000 loan extended to him by Gearbox in good faith.

13. The Home Loan Agreement was reduced to writing by the parties thereto and maintained by Callender as General Counsel of Gearbox. Upon information and belief, Callender has knowingly and intentionally destroyed the written and executed Home Loan Agreement, which would prove to be evidence that would be harmful to his potential defenses in the case.

14. **The Tuition Payment.** During his tenure as General Counsel for Gearbox, Pitchford was persuaded by Callender's requests to pursue an MBA to diversify his skills set as General Counsel. Instead of attending a less costly, local university, such as at Southern Methodist University, Callender insisted that he attend a 19-month Executive MBA program at Pepperdine University in Malibu, California, more than 1,500 miles away. Gearbox paid 100% of Callender's tuition, fees, and resulting expenses, including regular hotel and first class airfare to Southern California multiple times per month, as well as airfare and hotel in India for a nearly two-week trip. In tuition alone, Gearbox paid \$36,000 in April 2017 and \$37,500 in August 2017. Additional expenses related to travel and program costs totaled approximately \$52,000.

15. Callender represented to Gearbox that he would remain in his position as General

Counsel for Gearbox until the tuition had been repaid and value realized from Callender's additional education. Gearbox relied on that representation in its decision to fund Callender's MBA and all related expenses (the "Tuition Payment").

16. Callender's representations, however, were false, because on July 27, 2018, less than one year later after Gearbox issued a final tuition payment to Pepperdine University, Callender resigned from his position as General Counsel of Gearbox having never repaid any amount of the tuition or expenses fronted by Gearbox.

17. **Payment of Callender's Personal Legal Fees.** Again, in 2017, when Callender fell on hard times, he turned to Pitchford and Gearbox for help. Throughout 2017 and 2018, Callender found himself involved in contentious litigation regarding personal matters in Maryland. To ensure its General Counsel remained focused and committed to the company while enduring such hardship, Gearbox offered to and paid for Callender's Maryland attorneys' fees and expenses in the amount of \$50,096.88.

18. **Callender's abuse of credit card privileges.** As General Counsel, Callender was given an American Express credit card for use on all Gearbox business expenses and selective pre-approved personal expenses for which Gearbox would later be reimbursed. The credit card balance was routinely paid in full by Gearbox in the normal course of the employment relationship.

19. While Callender regularly used the Gearbox credit card for anticipated business expenses such as airfare and meals related to business travel, he also abused the privilege of credit card access by charging unapproved, wholly personal expenses, including family vacations, gun club memberships and firearms accessories, and trying to get six-pack abs. As an executive with the company and fully knowing that Gearbox's special trust in him would result

in Gearbox's assured payment of his personal charges passed off as business expenses, from 2016 up until his resignation in July 2018, Callender incurred thousands of dollars' worth of charges from Disneyland, Frisco Gun Club, Gun Gear To Go, and sixpackshortcuts.com, just to name a few.

20. Additionally, on July 27, 2018, Callender communicated with Gearbox's Chief Financial Officer, Stephen Bahl, insisting on an increased line of credit so that he could tender an immediate and unexpected payment to his Maryland attorneys in the amount of \$17,000, representing to Gearbox that he would later discuss the logistics of reimbursing the company for this last-minute payment. Based on Callender's representations, Gearbox requested and obtained the credit increase with American Express and incurred the \$17,000 charge, with every expectation of recouping the full amount of the expense from Callender. Callender's urgent press for payment of a last-minute expense, however, occurred only hours before he emptied his office and resigned as General Counsel, and the \$17,000 was never repaid. It was Callender's intent to manipulate Bahl into believing the expense was justified and would be reconciled by Callender. Only after incurring the \$17,000 expense and receiving notice of Callender's resignation did Gearbox understand the extent of Callender's gross and intentional misrepresentation.

V. CAUSES OF ACTION

C. Breach of Contract

21. Plaintiff hereby incorporates each of the foregoing paragraphs herein as if set forth in full in this section.

22. The Home Loan Agreement was a valid, enforceable contract between Gearbox and Callender, wherein Callender promised to repay the amount loaned to him. Callender, however, failed to perform and breached the Home Loan Agreement with Gearbox, and

Gearbox incurred actual damages as a result.

23. Upon information and belief, Callender, as General Counsel, was the only individual to maintain a physical copy of the written Home Loan Agreement as evidenced by email correspondence between Pitchford and Stephen Bahl, Gearbox's Chief Financial Officer. (Attached as Exhibit A.)

D. Promissory Estoppel

24. Plaintiff hereby incorporates each of the foregoing paragraphs herein as if set forth in full in this section.

25. In the alternative, Gearbox seeks to recover against Callender under the theory of promissory estoppel, of which the elements are: (1) defendant made a promise to plaintiff; (2) plaintiff reasonably and substantially relied on the promise to its detriment; (3) plaintiff's reliance was foreseeable by the defendant; and (4) injustice can be avoided only by enforcing the defendant's promise.

26. Callender made a promise to Gearbox to repay the Home Loan Agreement when Gearbox tendered a check in the amount of \$300,000 to Callender for the purpose of buying a home. To its detriment, Gearbox reasonably relied on the promise of repayment when it did, in fact, loan Callender \$300,000, and as a result incurred actual damages. Plaintiff's reliance on Callender's promise to repay the funds was foreseeable by Callender. In the event Gearbox is unable to prevail on its claim for breach of an express contract, injustice can only be avoided by enforcing Callender's promise to repay the remaining balance on the Home Loan.

E. Unjust Enrichment

27. Plaintiff hereby incorporates each of the foregoing paragraphs herein as if set forth in full in this section.

28. In the alternative, Gearbox seeks to recover against Callender under the theory of

unjust enrichment. When a defendant has been unjustly enriched by the receipt of benefits in a manner not governed by contract, the law implies a contractual obligation upon the defendant to restore the benefits to the plaintiff.

29. when Gearbox tendered a check in the amount of \$300,000 to Callender for the purpose of buying a home. Callender has been unjustly enriched by receipt and nonpayment of the Home Loan, and Gearbox has incurred damages as a result.

30. Callender represented to Gearbox that he would remain in his position as General Counsel for Gearbox until the Tuition Payment had been repaid and value realized from Callender's additional education. Callender failed to do so and has been unjustly enriched by receiving a Pepperdine University MBA at no cost to him and failing to repay such value to Gearbox in either monetary value or professional commitment, and Gearbox has incurred damages as a result.

31. Callender made false representations to Gearbox that a last-minute \$17,000 charge for legal fees would be reconciled. Callender has been unjustly enriched by the \$17,000 charge, and Gearbox has incurred damages as a result.

F. Conversion

32. Plaintiff hereby incorporates each of the foregoing paragraphs herein as if set forth in full in this section.

33. The elements of conversion are: (1) plaintiff owned, possessed, or had the right to immediate possession of the property; (2) the property was personal property; (3) the defendant wrongfully exercised dominion or control over the property; and (4) the plaintiff suffered injury.

34. Callender was entrusted with a company American Express card, and with that entrustment, he was expected to keep his personal expenses segregated from his business

expenses incurred for the benefit of Gearbox and its business ventures and to submit receipts on a monthly basis to establish the validity of any business expense. Gearbox held the utmost trust in its General Counsel and paid the monthly balance on Callender's company American Express out of its corporate bank account. Callender took wrongful possession of monies belonging to Gearbox to fund his personal expenses, and Gearbox incurred damages as a result.

G. Common Law Fraud

35. Plaintiff hereby incorporates each of the foregoing paragraphs herein as if set forth in full in this section.

36. The elements of common law fraud are: (1) the defendant made a representation to the plaintiff; (2) the representation was material; (3) the representation was false; (4) when the defendant made the representation, the defendant either knew the representation was false, or made the representation recklessly, as a positive assertion, and without knowledge of its truth; (5) the defendant made the representation with the intent that the plaintiff act on it; (6) the plaintiff relied on the representation; and (7) the representation caused the plaintiff injury.

37. In March 2014, Gearbox funded the Home Loan Agreement, relying on the representation that Callender would repay the amount of the loan. However, Defendant had no intention performing the terms of the Home Loan Agreement. Gearbox relied on such representation from its General Counsel and incurred actual damages as a result.

38. In April 2017 and August 2017, Gearbox funded the Tuition Payment, relying on the representation that Callender would remain General Counsel for Gearbox until the tuition had been repaid to Gearbox and value realized from Callender's additional education. While Defendant had no intention of remaining in his position, he made such material and false representation to ensure Gearbox funded the Tuition Payment. Gearbox relied on such representation from its General Counsel and incurred actual damages as a result.

39. Additionally, in submitting his monthly credit card expenses to Gearbox for payment, Callender represented that all reimbursable charges were made for business purposes. This representation was material and false, as a significant number of charges were clearly personal in nature. Callender had actual knowledge of the personal nature of his purchases and represented to Gearbox that such purchases were actually business expenses with the intent that Gearbox would rely on his representations and pay the balance of his company credit card on a monthly basis. Gearbox relied on the representations of its General Counsel that the balance of his credit card consisted of legitimate business expenses and incurred actual damages as a result.

40. Moreover, Callender made material and false representations in order to compel the increase of the charge limit of his American Express card to pay \$17,000 worth of personal legal fees, while representing that such expense would be reconciled with Gearbox. This representation was material and false, as Callender, without warning, cleaned out his office only hours after processing the payment and resigned from the company later that evening. Callender had actual knowledge of the personal nature of this charge and his imminent departure yet still represented to Gearbox his intentions for reconciliation. Gearbox relied on the representations of its General Counsel that the amount paid would be reconciled by Callender and has incurred actual damages as a result.

H. Fraud by Nondisclosure

41. Plaintiff hereby incorporates each of the foregoing paragraphs herein as if set forth in full in this section.

42. The elements of fraud by nondisclosure are: (1) the defendant concealed from or failed to disclose certain facts to the plaintiff; (2) the defendant had a duty to disclose the facts to the plaintiff; (3) the facts were material; (4) the defendant knew the plaintiff was ignorant of

the facts, and the plaintiff did not have an equitable opportunity to discover the facts; (5) the defendant was deliberately silent when it had a duty to speak; (6) by failing to disclose the facts, the defendant intended to induce the plaintiff to take some action or refrain from acting; (7) the plaintiff relied on the defendant's nondisclosure; (8) and the plaintiff was injured as a result of acting without knowledge of the undisclosed fact.

43. In submitting his monthly credit card expenses to Gearbox for payment, Callender failed to disclose a myriad of personal expenses he had charged to the Gearbox credit card. Having been granted the use of a company credit card and tasked with protecting the legal rights of Gearbox, Callender had a duty to disclose the personal charges made on his company credit card yet failed to do so and/or remained silent on the issue. Callender had actual knowledge that Gearbox was ignorant to the fact that Callender was using the company credit card for his own personal use and represented to Gearbox that such purchases were actually business expenses. Callender did so with the intent that Gearbox would rely on his representations and pay the balance of his company credit card on a monthly basis. Gearbox relied on the disclosures of its General Counsel that the balance of his credit card contained multiple personal expenses and incurred actual damages as a result.

I. Breach of Fiduciary Duty

44. Plaintiff hereby incorporates each of the foregoing paragraphs herein as if set forth in full in this section.

45. The elements of breach of fiduciary duty are: (1) the plaintiff and defendant had a fiduciary relationship; (2) the defendant breached its fiduciary duty to the plaintiff; (3) the defendant's breach resulting in either an injury to the plaintiff or a benefit to the defendant.

46. As General Counsel and a corporate officer of Gearbox, Callender owed Gearbox a fiduciary duty. Callender was charged with the exclusive management of the legal affairs and

protection of legal rights of the company and was expected to perform those duties with the utmost good faith, integrity, and fair dealing. Callender's acts of fraud, nondisclosure, conversion, and misrepresentation, as described in foregoing paragraphs, constituted breach of Callender's fiduciary duty to Gearbox.

47. Callender knowingly and willfully performed these acts and/or omissions in violation of his fiduciary duty, and as a result, Callender's acts and/or omissions resulted in both injury to Gearbox and benefit to Callender.

III. SPOILIATION OF EVIDENCE

48. Upon information and belief, Callender has intentionally engaged in spoliation of material evidence. Specifically, Callender has destroyed the written and executed Home Loan Agreement. As such, the best evidence is gone and cannot be presented as evidence to the jury. Evidence of the written and executed Home Loan Agreement is material, and Gearbox would submit that Callender has spoliated the evidence. The jury should be entitled to infer that the missing evidence was prejudicial against Callender and to presume that such evidence was favorable to Gearbox under the facts and circumstances of this case. Specifically, Gearbox alleges that if this evidence had not been destroyed by Callender, the evidence would have demonstrated Callender's express promise to repay the full amount of the \$300,000 loan, which was the subject of the Home Loan Agreement.

VII. ATTORNEYS' FEES

49. As a result the acts and omissions of Callender complained of herein, Gearbox retained the firm of Thompson, Coe, Cousins & Irons, LLP to represent it in this action and agreed to pay the firm reasonable and necessary attorneys' fees. An award of reasonable and necessary attorneys' fees to Gearbox is authorized by Chapter 38 of the Texas Civil Practice and Remedies Code.

VIII. EXEMPLARY DAMAGES

50. Gearbox would further show that the acts and omissions of Callender complained of herein were committed with malice or gross negligence, with fraudulent intent. Gearbox seeks recovery of exemplary damages from Callender to the extent it is entitled under Chapter 41 of the Texas Civil Practice and Remedies Code.

IX. CONDITIONS PRECEDENT

48. Gearbox asserts that all conditions precedent necessary for recovery of the amounts claimed herein and attorneys' fees have been performed or have occurred.

X. REQUEST FOR DISCLOSURE

49. Under Texas Rule of Civil Procedure 194, it is requested that Callender disclose the information and materials described in Rule 194.2.

XI. PRAYER AND RELIEF

WHEREFORE, PREMISES CONSIDERED Plaintiff GEARBOX SOFTWARE, LLC requests that Defendant WADE CALLENDER be cited to appear and answer, and that on final trial, Plaintiff be awarded the following:

- a) Actual damages;
- b) Exemplary damages;
- c) Prejudgment interest as provided by law;
- d) Post-judgment interest as provided by law;
- e) Costs of suit;
- f) Reasonable and necessary attorneys' fees; and
- g) Any such other and further relief to which Plaintiff may be justly entitled.

Respectfully submitted,

By: /s/ Barry A. Moscowitz

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