

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

ACCELERATION BAY LLC,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 15-228 (RGA)
	)	
ACTIVISION BLIZZARD, INC.	)	
	)	
Defendant.	)	

**ACTIVISION|BLIZZARD, INC.’S REPLY BRIEF IN SUPPORT OF ITS  
MOTION TO DISMISS PLAINTIFF’S CLAIMS OF INDUCED INFRINGEMENT**

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June 1, 2015

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**I. Plaintiff's Induced Infringement Claims Fail Because The Complaint Does Not Identify Any Single Direct Infringer.**

Activision|Blizzard, Inc. ("Defendant" or "Activision") moved to dismiss all of Plaintiff's induced infringement claims because the Amended Complaint failed to identify – even generically – any single alleged direct infringer. Plaintiff's opposition acknowledges that a claim for induced infringement must identify at least one direct infringer and argues that the Amended Complaint meets that requirement. According to Plaintiff's Opposition ("Opp."), D.I. 15 at 1-3, the Amended Complaint alleges that Activision's "customers, users and developers are each single *direct* infringers."

Plaintiff's argument relies on selective short-quoting to assert that the Amended Complaint alleges that "all the steps of the method claims are performed by *either* Defendant, its customers, users *or* developers." See Opp. at 2 (citing Amended Complaint ¶¶ 75, 106, 127). When those allegations are read in full, the Amended Complaint does not allege that any of these actors, standing alone, is a direct infringer or performs all of the steps of any method claim. What those paragraphs *actually* allege is that Activision induces "others" to perform "*one or more*" of the steps of the method claims and that "all of the steps of the method claims" are performed by either "Defendant, its customers, users or developers" *or* "*some combination thereof*":

Defendant indirectly infringes... by instructing, directing and/or requiring *others*, including but not limited to, its customers, users and developers, to perform *one or more of the steps of the method claims*, either literally or under the doctrine of equivalents, of the [ ] Patent, where all the steps of the method claims are performed by either Defendant, its customers, users or developers, *or some combination thereof*.

(D.I. 7, ¶¶ 75, 106 and 127.) Plaintiff's Opposition never addresses these allegations, but simply ignores them to make unsupported arguments that the Amended Complaint alleges that a single

user, a single customer or single developer, standing alone, performs all of the steps of the asserted method claims. The Amended Complaint makes no such allegations, and the induced infringement claims should all be dismissed.

## **II. Plaintiff's Unpleaded Hypotheticals Do Not Make Its Pleading Plausible.**

Even if the Court were to accept Plaintiff's argument that the Amended Complaint allege underlying direct infringement by a single "user," "developer" or "customer," Plaintiff's inducement claims still fail because the Amended Complaint lacks sufficient factual allegations to make such a claim plausible. The opposition's reliance on unpleaded hypotheticals divorced from the allegations of the Amended Complaint only underscores the defects of the Amended Complaint.

In its opening brief, Activision demonstrated that each of the asserted method claims facially appears to require more than one actor. (D.I. 12 ("Op. Br.") at 7.) Activision also noted that – in addition to its failure to identify any single, direct infringer – the Amended Complaint does not plead facts explaining how any single actor allegedly performed all of the steps of any of the asserted method claims. (*Id.* at 8.) Activision explained that the nature of the claims, coupled with the "one or more of the steps" and "or some combination thereof" style of pleading, confirms that the Amended Complaint fails to state a plausible claim or to provide notice of what is in fact alleged to be the infringing conduct. (*Id.*)

In response to these arguments, Plaintiff does not deny that the claims require multiple actors. Instead, Plaintiff departs from the facts pleaded in the Amended Complaint to assert that unpleaded hypothetical facts *could* show a single "user," "developer" or "customer" *might* perform the roles of multiple actors and therefore perform all of the steps of an asserted method claim. (Opp. at 4-5.) Plaintiff argues that direct infringement by a single entity such as "a

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