

**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.)	
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ACCELERATION BAY LLC,)	
)	
Plaintiff,)	
)	
v.)	C.A. No. 15-282 (RGA)
)	
ELECTRONIC ARTS INC.,)	
)	
Defendant.)	
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ACCELERATION BAY LLC,)	
)	
Plaintiff,)	
)	
v.)	C.A. No. 15-311 (RGA)
)	
TAKE-TWO INTERACTIVE SOFTWARE,)	
INC., ROCKSTAR GAMES, INC. and)	
2K SPORTS, INC.,)	
)	
Defendants.)	

**LETTER TO THE HONORABLE RICHARD G. ANDREWS FROM PHILIP A.
ROVNER, ESQ. REGARDING DISCOVERY DISPUTE CONCERNING
PRODUCTION OF CORE TECHNICAL DOCUMENTS**

Dear Judge Andrews:

Defendants have decided to ignore the Court's Scheduling Order that required them to "produce to Plaintiff the core technical documents related to the accused product(s) *and* accused networking functionalities (to the extent such documents exist), *including but not limited to operation manuals, product literature, schematics, and specifications*" by December 16, 2015. Dkt. 29, Scheduling Order at ¶1(d) (emphasis added).¹ On December 16, Defendants did not produce the ordered operation manuals, product literature, schematics, and specifications for the accused products or the accused network functionality, but instead produced publicly available documents related to validity and SEC filings. Defendants continue to refuse to comply with this portion of the Court's Scheduling Order, and are now arguing that source code satisfies the core documents requirement in the Court's Order.

However, when the issue of core technical documents arose in negotiating the proposed scheduling order, Defendants agreed to produce the core technical documents and argued that "[t]here is no requirement of early production of source code." Dkt. 23, Proposed Scheduling Order at ¶1(d). The Court agreed with Defendants. Ex. 3, 10/13/15 Hearing Tr. at 34: 8-16. Now, however, Defendants claim "that the source code is the key document on how the games operate at the level of the patent." Ex. 1 at 12/28/15 email. Based on this position, Activision Blizzard and Take-Two Interactive Software have not produced a single core technical document in their core document production, while Electronic Arts ("EA") produced only four.²

Plaintiff Acceleration Bay respectfully submits that Defendants are in contempt of the Court's Scheduling Order and seeks an order (1) compelling Defendants to comply with their obligations under the Scheduling Order to provide an adequate core technical document production disclosing the relevant functionality of the accused products and (2) granting Acceleration Bay relief by modifying the Scheduling Order with respect to infringement contentions to address the prejudice Defendants caused by refusing to comply with the Scheduling Order and their discovery obligations.

A. Defendants Failed to Provide Schematics, Specifications and Other Non-Source Code Documents Describing the Accused Products and Networking Functionality

¹ All citations are to *Acceleration Bay v. Electronic Arts Inc.*, Case No. 15-282-RGA.

² After the close of business Friday (January 8, 2016), Activision produced 150 pages of information about how to install one of the accused products. EA produced 900 pages of documents that, on initial review, appear to be relevant but are far from a complete disclosure of the accused functionality. Take-Two did not produce any additional documents. Less than two hours before the deadline for filing this letter, Activision confirmed that it would be producing additional technical documents "shortly," including for the first time documents regarding the accused Destiny game, and EA acknowledged that it had just "produced additional non-source code technical documents." Take-Two did not provide any updated information. Despite the upcoming hearing and Plaintiff's repeated requests, Defendants still have not provided any specific information as to what additional technical documents will be produced, when they will be produced and by when Defendants will finally complete their core technical productions. These recent supplementations only confirm that Defendants' December 16, 2015 productions were incomplete and deficient.

There is no dispute that the responsive confidential core technical documents which the Court ordered Defendants to produce are critical given the specific infringement issues in these cases. Defendants simply decided to disregard the Court's unambiguous and explicit Order, and thus are in contempt of such Order. *Harris v. City of Phila.*, 47 F.3d 1311, 1326 (3d Cir. 1995) (contempt exists where there is a valid court order, Defendant had knowledge of the order and disobeyed it). Particularly troubling is the fact that Defendants do not dispute that these technical documents the Court ordered produced exist. *See, e.g.*, Ex. 1 at 12/28/15 Email ("As the case proceeds, Defendants will of course continue to produce documents, including technical documents."). Rather, during meet and confers, they have claimed that these documents are harder to find and were not a focus of the companies' initial document collection efforts. That Defendants might at some time in the future possibly produce responsive documents, however, is not a defense to their contempt of the Court's Scheduling Order. *Robin Woods Inc. v. Woods*, 28 F.3d 396, 399 (3d Cir. 1994). Indeed, Defendants have ignored Acceleration Bay's repeated requests that they confirm the date by which they will complete their technical production. *See, e.g.*, Ex. 2 (1/8/16 email).

Until Friday's limited supplemental production by EA, Defendants only made source code available for inspection and dumped irrelevant publicly available documents wholly unrelated to the functionality of the accused products, such as SEC filings and documents from Defendants' petitions for *inter partes* review of the asserted patents. After Acceleration Bay immediately pointed out Defendants' December 16, 2015 production was incomplete, Defendants supplemented it on December 30, 2015 with some publicly available user manuals. Other than confirming that these accused games include multi-player functionality, these publicly available non-technical manuals do not address the specific network features that relate to the accused networking functionality, such as the network topology for the multiplayer networks.

As companies selling, supporting and developing computer games for which multiplayer functionality is a critical feature, Defendants have significant documentation regarding the implementation of the multiplayer functionality for the accused products and, as noted above, Defendants do not dispute that such documents exist. Indeed, software programmers typically use specifications and design documents before Defendants' teams of programmers write the millions of lines of software code underlying the accused products. Thus, there is documentation about how those networks operate, including relevant technical notes, descriptions and other documentation. The very limited documents EA produced prove this is the case. One EA document discusses different network topologies (without linking them to specific games), while the other three discuss changes to the multiplayer functionality in specific games, confirming that EA does document its multiplayer networking functionality. Moreover, Defendants necessarily tested and refined their multiplayer networks, which would generate additional relevant core technical documents. The Court noted during the parties' scheduling conference that "[d]ocuments describe how [source code] work[s]. That's usually how I hear the core technical production described." Ex. 3, 10/13/15 Hearing Tr. at 33:1-3. Yet, Defendants unilaterally decided not to produce such documents.

B. Defendants' Offer of Source Code Inspection Does Not Discharge Their Core Technical Document Obligations

Rather than provide the requisite schematics, specifications and other documentation of how their products and networks operate, Defendants have offered source code for inspection.

This fails to discharge Defendants' discovery obligations for multiple reasons. *First*, as noted above, the Scheduling Order specifically required the production of "schematics and specifications," to the extent they exist, as well as other documents relating to the accused products and accused networking functionality. Dkt. 29 at ¶ 1(d). The Scheduling Order did not provide that Defendants could, alternatively, provide source code for inspection in lieu of producing the core technical documents. Furthermore, the parties' competing proposals to the Court regarding core technical discovery confirm that source code inspection was in *addition* to the requirement to produce schematics, specifications and other specifications. Dkt. 23 at 3. Defendants took the position that non-source code documentation *alone* would be sufficient to satisfy their discovery obligations. *Id.* Defendants' prior arguments belie any attempt to suggest now that non-source code documents are not important or that only source code discloses the key functionality. And EA's belated partial production of technical documents confirms that these documents exist, are relevant and should have been produce a month ago.

Second, while source code may control certain software functionality, that functionality is described at a very low level. This makes source code a good source of evidence for specific operations, but it can be difficult to derive higher-level attributes of the accused software, such as the network topology at issue in this case, through reviewing millions of lines of source code (especially without the ability to compile the source code and test the back end of the software networks in operation). Based on Acceleration Bay's ongoing review of source code, that is the case here. Schematics, specifications and other documentation regarding the multiplayer networks and functionality used in Defendants' accused games would readily reveal this information, and would inform the review of the source code.

Third, even if the source code fully disclosed the accused network topology and functionality (which is very unlikely), Defendants still should have produced documentation of this functionality because of the highly burdensome provisions controlling the review of source code. At Defendants' insistence, under the protective order Acceleration Bay can only access source code by scheduling inspections during limited hours and cannot, *inter alia*, take notes with a computer, make a single copy, print more than a limited number of pages, scan the source code or share it electronically among the litigation team. Accordingly, by limiting the core technical production to source code, Defendants are unnecessarily forcing Acceleration Bay to go through an extremely burdensome process to attempt to verify the relevant functionality of the accused products and to prepare infringement contentions. Defendants' core technical production should, as the Court ordered, include non-source code documents as a far less burdensome source of necessary discovery.

C. Modification of the Deadline and Requirements for Infringement Contentions is Warranted

Acceleration Bay has made diligent efforts to collect the discovery it needs, including reviewing Defendants' source code, requesting the 30(b)(6) depositions of Defendants on the operation of the multiplayer networks, and seeking discovery from third parties. Nevertheless, in view of Defendants' failures to produce the core technical documents by December 16, 2015, as required by the Scheduling Order and the upcoming February 17, 2016 deadline for infringement contentions, it is necessary to seek relief from the Court. As such, Acceleration Bay requests that the Court order (1) Defendants to produce the core technical documents in compliance with the Court's Scheduling Order within 7 calendar days and (2) that the time for Acceleration Bay to serve initial claim charts is extended by thirty days.

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Dated: January 11, 2016

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