

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

ACCELERATION BAY LLC,	)	
	)	
Plaintiff,	)	
	)	C.A. No. 15-228 (RGA)
v.	)	
	)	<b>PUBLIC VERSION</b>
ACTIVISION BLIZZARD, INC.	)	
	)	
Defendant.	)	
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ACCELERATION BAY LLC,	)	
	)	
Plaintiff,	)	
	)	C.A. No. 15-282 (RGA)
v.	)	
	)	
ELECTRONIC ARTS INC.,	)	
	)	
Defendant.	)	
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ACCELERATION BAY LLC,	)	
	)	
Plaintiff,	)	
	)	C.A. No. 15-311 (RGA)
v.	)	
	)	
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 DISPUTES**

Public Version Dated: February 17, 2016

Dear Judge Andrews:

**A. Defendants Should Make 30(b)(6) Witnesses Available for Deposition**

Defendants are refusing to make witnesses available for depositions in response to 30(b)(6) Notices served on January 5, 2016, despite originally agreeing to offer witnesses well in advance of March 2, 2016, the due date for Acceleration Bay's infringement contentions. The noticed topics seek discovery on core technical issues and, to date, Defendants have not served any objections to these deposition notices. Defendants strung Acceleration Bay along for weeks, repeatedly indicating that they were working on providing dates for the depositions. When Acceleration Bay initially requested a meet and confer, they confirmed that, "Defendants are not refusing to produce witnesses." Ex. 1 (1/24/16 email), Exs. 2-7 (six emails requesting deposition dates). During a January 29, 2016 meet and confer, nearly a month after the depositions were noticed, Defendants reversed position and stated for the first time that they would not provide depositions.

It is not premature for Acceleration Bay to seek depositions prior to service of its infringement contentions, where this case was filed 10 months ago, Defendants have claimed they completed production of their core technical information, and the parties have been diligently pursuing discovery. There is no requirement under the Federal Rules, the Local Rules or the Scheduling Order to serve contentions before taking depositions. Moreover, Defendants agree that depositions are appropriate at this time, as they have noticed four third-party depositions. Further, the depositions Acceleration Bay is seeking will assist its ongoing review of Defendants' source code, especially in the absence of substantial core technical documentation from Defendants, which, much to Acceleration Bay's disbelief, Defendants claim does not exist beyond what has been provided.

Defendants' claim that Acceleration Bay has failed to specifically identify the scope of the depositions is belied by the specific topics sought in the deposition notices and Defendants' original promise to provide witnesses on such topics. *See, e.g.*, C.A. No. 15-228-RGA, Dkt. 59 at 6-9. As repeatedly indicated to Defendants in writing and during two meet and confers, Acceleration Bay seeks discovery on the accused "multiplayer, networking and server-interconnection functionality for each of the accused games." Ex. 2 (1/14/16 email). Acceleration Bay further specifically identified the most relevant topics: "we would like to begin with a designee prepared to testify as to the multiplayer, networking and server-interconnection functionality for each of the accused games. The highest priority topics are 3-6, 8-11 and 14-19." Ex. 4 (1/22/16 email). After receiving that list, Defendants confirmed they would provide witnesses, noting, "[w]e appreciate your prioritizing, and we will work to get you witnesses." Ex. 1 (1/24/16 email). Thus, Defendants understand the discovery Acceleration Bay is seeking.

Finally, despite not identifying which witnesses they will be designating for the depositions, Defendants are demanding that Acceleration Bay agree not to depose these unknown witnesses again at a later date. Acceleration Bay cannot agree *a priori* to limits on discovery when it does not know who Defendants will designate, what Defendants' objections to the topics are, or whether Defendants will modify the topics, as they have not served any objections or responses to the 30(b)(6) Notices. Defendants' failure to engage in deposition discovery is simply a delay tactic that needs to end. Acceleration Bay requests that Defendants be ordered to make witnesses available for deposition without further delay.

## B. Take Two Should Make Available the Full Source Code For the Accused Games

Take Two refuses to make available for inspection the full source code for the accused games. Instead, it cherry-picked about [REDACTED] excerpted from three different games, a very small portion of the total source code. In contrast, Electronic Arts and Activision, who provided the entire code for their accused games [REDACTED] [REDACTED]). The prejudice from Take Two's position is compounded by the fact that it has not provided a *single* technical document, relying only on its very limited offer of source code to satisfy its core technical production obligations.

Take Two's limited selection of files does not disclose the functionality of the accused products and, therefore, does not satisfy the Defendants' burden to produce the "core technical documents" required in the Court's Scheduling Order. Each of the accused Take Two games includes numerous modes and features, almost all of which incorporate and interact with the accused multiplayer functionality. Source code is a series of interrelated and cross-referenced files, and access to the full context of the source code is necessary to trace accused functionality through a game. Courts have previously required production of all source code for accused products and rejected Take Two's position that it may offer for inspection only selected excerpts. *See, e.g., InTouch Techs., Inc. v. VGO Comm'ns, Inc.*, No. CV 11-9185 PA (AJWx), 2012 WL 7783405, at \*1 (C.D. Cal. Apr. 23, 2012) ("... experience suggests that the ability of plaintiff's counsel . . . to properly understand the directly relevant portions of the source code may depend in part on their ability to review other portions of the source code . . . to place the directly relevant portions of the source code in context."); *see also Fleming v. Escort, Inc.*, No. CV 09-105-S-BLW, 2010 WL 3833995, at \*2 (D. Idaho Sept. 24, 2010) (patentee entitled to complete source code in order to verify defendant's claims that missing code was unimportant or related to non-infringing products); *Forterra Sys., Inc. v. Avatar Factory*, No. C-05-04472 PVT, 2006 WL 2458804, at \*1-2 (N.D. Cal. Aug. 22, 2006) (permitting access to full source code for accused software as relevant under broad standard of Rule 26).

There is no merit to Take Two's claim that it does not know what accused features are missing from the source code. Acceleration Bay's complaint provided a detailed explanation of how the various features of the accused games interact with multiplayer functionality, and it further provided a list of additional exemplary game modes intertwined with the accused multiplayer functionality that were not included in the available source code. C.A. No. 15-311-RGA, Dkt. 1 at ¶¶ 7-140; Ex. 8 (1/29/16 email). Accordingly, Take Two should be ordered to make available for inspection all source code for the accused products without further delay.

## C. Activision Should Provide Discovery From its Wholly-Owned Subsidiary Demonware

Activision should be ordered to provide discovery from its wholly-owned subsidiary Demonware, including documents and deposition witnesses. Shortly after receiving Activision's extremely limited core technical discovery, Acceleration Bay pointed out that Activision had not identified third-party sources of source code or discovery relating to the accused products. Ex. 9 (12/18/15 letter). Despite repeated follow ups, Activision did not respond to this inquiry for *seven weeks*. In the meanwhile, based on its own investigation, Acceleration Bay learned that accused multiplayer functionality was provided for various accused Activision games, including Call of Duty and Destiny, by its wholly-owned subsidiary Demonware.

Acceleration Bay promptly requested that Activision confirm it would seek core technical and additional discovery from its wholly-owned subsidiary. Activision refused to do so unless Acceleration Bay identified claim elements attributed to Demonware. But Acceleration Bay has done just that, [REDACTED]

[REDACTED] *See, e.g.,* Ex. 10 (2/5/16 email) ([REDACTED]) C.A. No. 15-228-RGA, Dkt. 7 at ¶¶ 35-38, 47 (describing infringing functionality).

Activision is obligated to make reasonable efforts to obtain core technical and other discovery from all of its wholly-owned subsidiaries, including Demonware, and should be ordered to do so without further delay. It is “no defense to claim that the information [or documents requested are] within the possession of a wholly owned subsidiary.” *Ethypharm S.A. France v. Abbott Labs.*, 271 F.R.D. 82, 93-94 (D. Del. 2010) (internal quotation and citation omitted); *E.I. duPont de Nemours & Co. v. Phillips Petroleum Co.*, 621 F. Supp. 310, 312 n.3 (D. Del. 1985) (“A parent corporation must produce documents, pursuant to a Fed. R. Civ. P. 34 request, of a wholly-owned subsidiary even though the subsidiary is not a party to the action . . . such documents are within the possession, custody or control of the parent corporation.”).<sup>2</sup>

#### **D. Defendants Should Produce Discovery Related to Foreign Sales of Accused Products**

Defendants should be ordered to provide requested discovery relating to foreign revenue, billings, expenses, costs, and profit information for the accused products, as related to the domestic manufacture, use, sale, offer for sale, and/or importation of accused products. *See* Ex. 11 (Activision) at Nos. 29-33; Ex. 12 (Take Two) at Nos. 20-24; Ex. 13 (Electronic Arts) at Nos. 25-29. [REDACTED]

[REDACTED] *See, e.g.,* *Induction Innovations, Inc. v. Pacholok*, No. 13 CV 5102, 2015 WL 9582982, at \*8-9 (N.D. Ill. Dec. 31, 2015) (holding foreign sales of patented products made in the U.S. must be included in royalty base). In addition, to the extent the accused products were made outside of the United States but imported into the United States or the commitments for sales were made domestically, such revenues are relevant and discoverable. *See, e.g.,* *Carnegie Mellon Univ. v. Marvell Tech. Grp. Ltd.*, 807 F.3d 1283, 1309-10 (Fed. Cir. 2015); *GE Healthcare Bio-Sciences AB v. Bio-Rad Labs., Inc.*, No. 1:14-CV-07080-LTS-SN, 2015 WL 7582967, at \*2 (S.D.N.Y. Nov. 25, 2015).

<sup>1</sup> It now appears that a reason for Activision’s thin core technical production is because it never went to the developer of a major component of the accused multiplayer connection technology. Notably, Activision failed to mention in its declaration submitted in connection with the prior discovery conference regarding the absence of core technical documents that its wholly-owned subsidiary Demonware likely had the requested documentation. *See* Dkt. 67, Ex. ACTX1 at ¶ 5.

<sup>2</sup> Acceleration Bay also raised concerns regarding Activision’s apparent failure to collect substantial discovery from Sledgehammer and Treyarch, its wholly-owned subsidiaries who developed two of the accused games. Activision represented that it did produce documents from those subsidiaries and is not withholding discovery from them.

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Dated: February 10, 2016  
Public Version Dated: February 17, 2016  
1216178

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