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REDACTED - PUBLIC VERSION
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The Honorable Richard G. Andrews
United States District Court
For the District of Delaware
844 North King Street
Wilmington, DE 19801

VIA ELECTRONIC FILING

[redacted]

Re: *Acceleration Bay LLC*–C.A. Nos. 15-228 (RGA); 15-282 (RGA); and 15-311 (RGA)

Dear Judge Andrews:

I. Protective Order From Depositions And Related Discovery

Defendants respectfully request the Court help focus and sequence discovery by:

- requiring Plaintiff to provide infringement contentions that identify with particularity the networks and functionalities which are accused of infringement before taking technical depositions, including FED. R. CIV. P. 30(b)(6) depositions;
- limiting discovery to matters that Plaintiff can demonstrate are relevant to accused functionalities identified with particularity in its infringement contentions; and
- requiring that technical depositions occur after the date for substantial completion of document production; or, in the alternative, preclude Plaintiff from seeking to retake the deposition of any technical witness based on discovery occurring after that deposition.

This relief is necessary because Plaintiff is demanding discovery regarding every technical aspect of the accused games without any meaningful focus. The patents-in-suit relate to specific network topologies and functionality, but Plaintiffs have yet to identify with any particularity what aspects of the accused games it contends infringe and instead are seeking exploratory discovery on every aspect of the accused games in the pursuit of an infringement theory.

Defendants have provided extensive discovery regarding the structure and operation of the network architecture for the multiplayer modes for the Accused Products, including source code regarding their online gaming features. Nevertheless, Plaintiff demands wide ranging and unduly burdensome discovery and refuses to articulate any basis for relevance. Plaintiff refuses to provide infringement contentions or otherwise narrow the scope of its overbroad and irrelevant deposition topics and document demands:

- Topic 1 asks for a witness on every aspect of the Accused Products: "[t]he design, structure, research, development, operation, features, testing and functionality of each of the Accused Products, including each program, feature and application of the Accused Products."). The accused products have thousands of features unrelated to this case. (DX1).

- Topics 2-19 are similarly vague and overbroad. For instance, Topics 6-7, 9, 11-12, and 14-19, seek discovery of "MultiPlayer Networks," defined as "networks, software and hardware used to provide, support or enable peer to peer and/or multiple player functionality in the Accused Products." *Id*. (emphasis added). The definition is unclear, overbroad and untethered to specifically accused features.
- Topic 4 asks for a witness on every computer system in the company: ("The topology, protocols, design, structure, research, development, operation, features, testing and functionality of any network that allows servers to communicate with each other, servers to communicate with clients, or clients to communicate with each other used by You …."). *Id*.

- Plaintiff demands that Defendants produce technical witnesses for all Accused Products before it provides any infringement contentions, and it will not agree not to retake those depositions. *See* DX2, (ignoring request to "(3) agree that [its] tactic of taking premature depositions cannot serve as a basis for seeking witnesses on the same topics later.").
- [redacted]
- Plaintiff demands that Defendants answer interrogatories and produce documents and witnesses on the unaccused "multiple server network[s]" but refuses to articulate any theory of infringement. *See* DX1 Topics 4, 7, 10; DX4.

Contrary to well-settled law, Plaintiff is seeking this discovery on matters not relevant to its pleaded claims**.** *See* FED.R.CIV.P 26(b)(1) advisory committee's note (2000) ("parties … have no entitlement to discovery to develop new claims or defenses that are not already identified in the pleadings.").

Plaintiff's discovery conduct also places an undue burden on Defendants and is unreasonable in scope. Rule 30(b)(6) requires a deposition notice to "describe with reasonable particularity the matters for examination." However, Topics 1-19 are improperly broad, defying any possibility of preparing a witness. *See, e.g.*, *Reed v. Bennett*, 193 F.R.D. 689, 692 (D. Kan. 2000) (overbroad Rule 30(b)(6) notice subjects noticed party "to an impossible task."); *see also Unzicker v. A.W. Chesterston Co.*, No. 11-cv-66288, 2012 WL 1966028, at *1 (E.D. Pa. May 31, 2012); *Tailored Lighting, Inc. v. Osram, Inc.*, 255 F.R.D. 340, 349-50 (W.D.N.Y. 2009).

[redacted]
Proceeding with depositions at this stage of the case, without the benefit of focused infringement contentions, is both unfair and inefficient. It will almost surely lead to Plaintiff's seeking to retake those depositions, wastefully duplicating efforts. Indeed, Plaintiff refuses to forego further depositions on these topics or from these witnesses, arguing that its future document collection efforts may warrant additional testimony. They should not be burdened with having to prepare for and appear in an unbounded, never-ending series of depositions.

It is for this reason that some judges in this District routinely follow this orderly approach Defendants seek. For example, Judge Robinson does not permit substantive depositions until

after the completion of document production. *See also, e.g.*, DX5, Judge Farnan's Scheduling Order (No. 08-876-JJF, D.I. 74), ¶4.d ("Depositions shall not commence until the discovery required by ¶ 4(a), (b) [regarding contention interrogatories], and (c) [regarding requests for admissions] is completed."). Initial infringement contentions, as observed by Judge Robinson, merely provide a "starting point…to help people focus the continuation of discovery." DX6, Tr. at 14 & 19 (D. Del. Nov. 6, 2013). Taking depositions without proper infringement contentions and before substantial completion of document production is inefficient, costly, and almost guarantees duplicative discovery.

Finally, the requested relief will not prejudice Plaintiff. Plaintiff will suffer no prejudice if its ability to take depositions and that discovery is postponed until it has served reasonably specific infringement contentions and has all the documents it needs. Assuming that Plaintiff already had an infringement theory when it sued, [redacted] And at the very least, it has a year to take discovery after it serves contentions.

II. Hamilton Capital XII Loan Agreement And Other Withheld Documents

Defendants also request an order to compel production of a Loan Agreement, and any related documents, between Plaintiff's predecessor, Acceleration Bay, Inc., and Hamilton Capital XII LLC ("Hamilton"). Specifically, the February 27, 2015 "Patent Security Agreement" between Acceleration Bay Inc. and Hamilton, filed with the U.S. Patent Office (*see* DX7), refers to a "Loan Agreement" that Acceleration Bay refuses to produce on the grounds of "relevance and common interest." (DX8). [redacted] Plaintiff has failed to explain how or why the Loan Agreement is protected by common interest privilege. *See Leader Techs., Inc. v. Facebook, Inc.*, 719 F. Supp. 2d 373, 377 (D. Del. 2010).

Defendants further request an order compelling a privilege log for documents withheld by Plaintiff regarding its interactions with [redacted] Although the Interim Protective Order provides that documents need not be logged after the retention of litigation counsel, it makes clear that "[t]his agreement is without prejudice to any Party's ability to make a particularized request for a limited privilege log relating to specific documents, or upon an appropriate showing of the potential discoverability of the documents over any privilege or protection objections." (No. 15-228, D.I. 49). Defendants' request is narrowly tailored to only those documents involving Plaintiff and its immediate [redacted] (i) Boeing and (ii) Hamilton or other litigation funding companies. Communications related to negotiations over contemplated business transactions may be relevant to a number of issues, including ownership of the patents, whether plaintiff has standing to bring suit, patent valuation, market share, damages, royalty rates, and pre-suit investigative diligence, *inter alia*. Under well-developed law, such documents are unlikely to be privileged in any event.

Respectfully,

/s/ Jack B. Blumenfeld

Jack B. Blumenfeld (#1014)

JBB/dlw
Enclosures
cc: Clerk of Court (Via Hand Delivery; w/ encl.)
All Counsel of Record (Via Electronic Mail; w/ encl.)