

**MORRIS, NICHOLS, ARSHT & TUNNELL LLP**

1201 NORTH MARKET STREET  
P.O. BOX 1347  
WILMINGTON, DELAWARE 19899-1347

(302) 658-9200  
(302) 658-3989 FAX

REDACTED - PUBLIC VERSION

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**JACK B. BLUMENFELD**  
(302) 351-9291  
(302) 425-3012 FAX  
jblumenfeld@mnat.com

February 11, 2016

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

VIA ELECTRONIC FILING

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

Dear Judge Andrews:

**A. Technical depositions should occur after parties have the benefit of Plaintiff's infringement contentions**

Defendants propose an orderly and reasonable approach to discovery that follows the spirit of the Default Standard provisions for "Initial Discovery in Patent Litigation," and standing orders and practices of other Judges in this District: depositions should follow—and be guided by—infringement contentions, which define the scope of the case, and document discovery.

Plaintiff mischaracterizes its discovery demands. It claims it merely asked for a witness from each defendant on 14 topics for each accused game (Topics 3-6, 8-11, and 14-19 (D.I. 83, at 1)), suggesting an easy task. But Plaintiff ignores its own email confirmation that it intends to proceed with all other topics. *See* DX10. Topics 1 and 4 demand a witness on *every* feature of *every* accused game and *every* computer system, regardless of their relation to any claimed function.<sup>1</sup> After weeks of meeting and conferring, Plaintiff refused to narrow its unduly burdensome topics or articulate any relevance.

Contrary to Plaintiff's assertions, Defendants have provided extensive discovery regarding the structure and operation of the network architecture for multiplayer modes of the Accused Products, including—as Plaintiff points out—

Moreover, Defendants served Interrogatory No. 7 requesting clarification of Plaintiff's infringement allegations to help guide discovery. Instead of answering, Plaintiff stated that it "will provide disclosures related to the subject matter of this Interrogatory pursuant to the scheduling order in this action." DX12 at 18. Plaintiff should apply the same restraint to deposition scheduling. Defendants require knowledge of Plaintiff's infringement contentions to adequately prepare witnesses to address these deposition topics.

<sup>1</sup> Defendants objected to the Topics and asked Plaintiff to narrow their scope. DX11 ("As we discussed during our conference on Friday, it is impossible to prepare witnesses in this case without infringement contentions on such overly broad topics.").

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Finally, Defendants did not delay. Defendants are willing to provide witnesses if Plaintiff describes with “reasonable particularity” the matters for examination (DX11) and refrains from duplicative discovery. But Plaintiff declined. And Defendants informed Plaintiff of their objections repeatedly, in meet and confers, and by email.

**B. Plaintiff does not need all of Take-Two’s source code**

[REDACTED]

[REDACTED] Plaintiff declined, declared an impasse, and brought this motion instead.

[REDACTED] Yet Plaintiff offers no declaration from either consultant explaining what is missing.

[REDACTED] Refusing to explain how the discovery it seeks is proportional to the needs of the case, Plaintiff cannot show “the importance of the discovery in resolving the issues” or “the burden or expense of the proposed discovery outweighs its likely benefit.” FED.R.CIV.P. 26(b)(1).

Courts have repeatedly rejected in patent cases motions to compel production of source code that is not relevant to specific issues in dispute. *See, e.g., Kelora Sys., LLC v. Target Corp.*, 2011 WL 6000759, at \*3 (N.D. Cal. Aug. 29, 2011) (denying production of source code that was “completely unrelated to the accused functionality”); *Microsoft Corp. v. Multi-Tech Sys., Inc.*, 2001 U.S. Dist. LEXIS 23155, at \*25-26 (D. Minn. Dec. 14, 2001) (“Multi-Tech is not entitled to the whole universe of source code for the products at issue because, as Microsoft explains, there are many functions within the relevant products which have no bearing on this case.”).

Plaintiff argues that courts generally require a defendant in a software patent case to produce its entire source code, but its cases do not support such a sweeping proposition. *Fleming v. Escort, Inc.*, 2010 WL 3833995, at \*2 (D. Idaho Sept. 24, 2010), related to redactions of information *within* a file. In contrast, Take-Two has produced source code files without redactions. In *Forterra Sys., Inc. v. Avatar Factory*, 2006 WL 2458804, at \*1-2 (N.D. Cal. Aug 22, 2006), infringement contentions were served *prior to* the production of source code, from which the court was able to determine the entire source code’s relevance to the infringement theory. Finally, the issue in *InTouch Techs.*, 2012 WL 7783405, at \*1 (C.D. Cal. Apr. 23, 2012), was whether to compel production of source code that was “several hundred thousand lines

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long.” DX16 at 8. [REDACTED]

**C. Activision has provided discovery from [REDACTED]**

[REDACTED]

Plaintiff refuses to say what relevant information is missing. Instead, Plaintiff asserts it is entitled to unbridled discovery from [REDACTED] without having to articulate relevance. And Plaintiff’s claim that Activision’s core technical discovery was “extremely limited” is both wrong and self-contradicting. [REDACTED]

**D. The law does not require Defendants to produce foreign sales information**

Plaintiff has not made out a case for foreign sales. Foreign use of method claims is not infringing activity. *See NTP, Inc. v. Research in Motion, Ltd.*, 418 F.3d 1282, 1318 (Fed. Cir. 2005) (“a process cannot be used ‘within’ the United States as required by section 271(a) unless each of the steps is performed within this country.”). Here, the vast majority of the claims of the asserted patents are directed to methods and systems,<sup>2</sup> rather than physical devices. To the extent the claimed broadcast methods and network entry/departure methods are used abroad, they are not infringed and cannot be used to bloat the infringing royalty base.

Further, Plaintiff’s cases are distinguishable. This is a software case, where the functionality of the executed software is at issue; the software itself is not an infringing article and making a copy of the software in the U.S. does not constitute an instance of infringement as would a physical article’s “manufacture.” A functioning hardware entity does not come into being until the software copy is loaded by the foreign user abroad. By contrast, *Induction Innovations, GE Healthcare, and Carnegie Mellon* involved patents that included apparatus claims and/or accused products that were hardware items or self-contained, discrete hardware systems (i.e., devices). Without infringement contentions that implicate foreign activity, manufacture, use, sales or importing into the U.S. of the foreign-made software copies, Plaintiff’s reliance on Carnegie Mellon cuts the other way. *Id.* at 1306.

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<sup>2</sup> The '069 patent contains method claims only. The '147 patents contains claims to a “medium” in addition to method claims. The '496 patent contains claims to a “component” in addition to method claims. The '344 patent claims “[a] computer network” and “[a] distributed game system.” The '966 patent claims “[a] computer network” and “[a]n information delivery service.” Defendants are software developers and do not manufacture or sell computer networks, distributed game systems, or information delivery services, nor export them for use abroad.

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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.)