

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ACCELERATION BAY LLC, a Delaware)
Limited Liability Corporation,)
)
Plaintiff)
)
v.) C.A. No. 16-453-RGA
)
ACTIVISION BLIZZARD, INC.,) **PUBLIC VERSION**
a Delaware Corporation,)
)
Defendant.)
)

**DECLARATION OF PAUL ANDRE IN SUPPORT OF ACCELERATION BAY'S
OPPOSITION TO DEFENDANT'S MOTION TO DISMISS AND
CROSS-MOTION FOR ATTORNEYS' FEES AND SANCITIONS**

[VOLUME 1 OF 3]

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*Attorneys for
Plaintiff Acceleration Bay LLC*

I, Paul Andre, hereby declare as follows:

1. I am an attorney with the law firm Kramer Levin Naftalis & Frankel LLP, counsel of record for Plaintiff Acceleration Bay LLC (“Acceleration Bay”). I have personal knowledge of the facts set forth in this declaration and can testify competently to those facts.

A. Pre-Filing Investigation

2. Before filing suit against Activision in 2015, Acceleration Bay’s counsel carefully reviewed the asserted patents and their file histories in order to interpret the claims and understand the relevant technology. Counsel also reviewed all of the publicly available information they could find regarding the accused products to determine if Acceleration Bay had a reasonable basis to allege infringement, including publications, technical materials and the games themselves, and compared the claims, construed in light of the intrinsic record, with the accused products. These activities included using the games to verify their functionality, as documented in screen captures used in Acceleration Bay’s complaint and infringement charts.

3. Acceleration Bay also retained Dr. Nenad Medvidović, a leading expert in the field of computer software and networking architecture, to assist with its pre-filing investigation.

4. Acceleration Bay’s counsel prepared a detailed pre-filing memorandum based on their investigation and Dr. Medvidović’s analysis. [REDACTED]

5. After determining that Activision infringes the Asserted Patents, Acceleration Bay filed suit against Activision.

B. Discovery in the 2015 Case

6. While the 2015-filed case pended, Activision provided only limited documentary discovery for the accused Call of Duty games (“CoD”) — none of which related to the specifically accused functionality — and no documents for the accused World of Warcraft game (“WoW”), other than offering source code for inspection.

7. During the pendency of the 2015-filed case, Activision did not provide a single email, even though Acceleration Bay provided proposed search terms in March 2016, consistent with the Scheduling Order in the case, and followed up numerous times to request email production.

8. Acceleration Bay expended considerable resources reviewing Activision's source code for CoD and WoW without any guidance from documents or deposition about how the code was organized and the relevant portions of the source code files. Dr. Medvidović personally reviewed source code for CoD and WoW and informed Acceleration Bay that it confirmed his opinion that these products infringe Acceleration Bay's patents.

9. Acceleration Bay had no technical discovery on Destiny. Acceleration Bay served a document and deposition subpoena on Destiny's developer, Bungie, but had not yet received any confidential documents and had not taken any deposition when the 2015-filed case was dismissed. [REDACTED]

10. On March 2, 2016, in compliance with the Scheduling Order, Acceleration Bay served Activision with its initial infringement claim charts. These claim charts provide a detailed explanation of the basis for Acceleration Bay's infringement allegations. Notwithstanding Acceleration Bay's service of deposition notices in January 2016 shortly after the issuance of a protective order, Activision refused to make witnesses available for depositions on the theory that Acceleration Bay's claim charts were inadequate. The Special Master granted Acceleration Bay's motion to compel Activision to proceed with depositions, finding Acceleration Bay's charts sufficient to provide Activision with notice of Acceleration Bay's infringement theories so that Activision could prepare its witnesses for deposition. The Special Master reached this decision after a full day hearing featuring extensive oral argument on the

same issues Activision raises in this Motion. The Special Master further ordered Acceleration Bay to update certain interrogatory responses regarding infringement after taking depositions, and the parties agreed to a schedule for doing so after the completion of initial depositions on a game.

11. Shortly before the dismissal of the 2015-filed case, Acceleration Bay took a 30(b)(6) deposition on CoD and a partial 30(b)(6) deposition on WoW, covering certain aspects of the game. Acceleration Bay has not yet taken a deposition on Activision's accused Blizzard downloader functionality, used in WoW and other Activision products.

12. Acceleration Bay also retained a consulting expert who conducted tests on certain accused products. The results of these tests were consistent with Acceleration Bay's infringement theories.

C. Acceleration Bay Refiled This Action

13. After the Court's order regarding prudential standing in the 2015-filed case, Acceleration Bay filed the instant action. Before doing so, Acceleration Bay's counsel carefully evaluated and relied upon the additional evidence of Activision's infringement discussed above.

14. Activision hand served correspondence and draft Rule 11 motion papers on my firm's Managing Partner and General Counsel, neither of which are counsel of record in this action.

15. Acceleration Bay warned Activision that it would seek sanctions against Activision if it filed this Rule 11 Motion, but Activision did so anyway.

D. Exhibits

16. Attached hereto as Exhibit 1 is a true and correct copy of the Order from *HBAC Matchmaker Media, Inc. v. CBS Interactive Inc.*, Civ. No. 13-428-SLR, D.I. 42 (D. Del. Nov. 18, 2013).

17. Attached hereto as Exhibit 2 is a true and correct copy of Chart A to Acceleration Bay's Initial Infringement Contentions regarding WoW, served on March 2, 2016.

18. Attached hereto as Exhibit 3 is a true and correct copy of Chart B to Acceleration Bay's Initial Infringement Contentions regarding Destiny, served on March 2, 2016.

19. Attached hereto as Exhibit 4 is a true and correct copy of Chart C to Acceleration Bay's Initial Infringement Contentions regarding CoD, served on March 2, 2016.

20. Attached hereto as Exhibit 5 is a true and correct copy of excerpts from the transcript of proceedings held on February 12, 2016 in the 2015 Case.

21. Attached hereto as Exhibit 6 is a true and correct copy of the Order Granting Defendants' Motion to Dismiss Plaintiff's First Amended Complaint in *Activision Publishing, Inc. v. xTV Networks Ltd, et al.*, Case No. 16-cv-00737-SJO-MRW (N.D. Cal.) Docket No. 38, filed on July 25, 2016.

22. Attached hereto as Exhibit 7 is a true and correct copy of Acceleration Bay's Initial Disclosures Pursuant to Rule 26(a)(1), served on November 2, 2015.

23. Attached hereto as Exhibit 8 is a true and correct copy of excerpts from the

[REDACTED]

24. Attached hereto as Exhibit 9 is a true and correct copy of Activision's Second Supplemental Responses to Acceleration Bay's Second Set of Interrogatories (Nos. 5 and 9), served on April 8, 2016.

25. Attached hereto as Exhibit 10 is a true and correct copy of excerpts from the

[REDACTED]

26. Attached hereto as Exhibit 11 is a true and correct copy of a document entitled "Downloader command-line options," bearing bates numbers ATVI0025987-91.

27. Attached hereto as Exhibit 12 is a true and correct copy of excerpts from the transcript of the proceedings held on April 14, 2016 before Special Master Terrell.

28. Attached hereto as Exhibit 13 is a true and correct copy of Petitioners' Consolidated Reply to Patent Owner's Response in *Activision Blizzard, Inc. v. Acceleration Bay LLC*, Case IPR2015-01951 regarding U.S. Patent No. 6,714,966, filed before the Patent Trial and Appeal Board on October 15, 2016.

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