

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

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

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

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

February 5, 2020

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 v. Take-Two Interactive Software, Inc., et al.*  
C.A. No. 16-455 (RGA)

Dear Judge Andrews:

We write on behalf of Defendants in response to the Court's request during yesterday's summary judgment hearing for authority supporting the grant of summary judgment where the patentee had initially accused certain products but later dropped those accusations.

In *Intellectual Ventures I, LLC v. Canon Inc.*, the patentee's expert "did not include in his expert report numerous products listed in [the patentee's] infringement contentions," and the defendant sought "summary judgment of non-infringement with respect to such 'omitted' products." 143 F. Supp. 3d 143, 156 (D. Del. 2015). The district court held that "a claim of infringement relating to a product identified in [the patentee's] infringement contentions but not in its expert's report shall be considered dismissed from the case with prejudice." *Id.*

At the time of Dr. Mitzenmacher's report, Plaintiff was accusing five modes of NBA2K of infringement. *See, e.g.*, D.I. 464-1, Ex. A-2 at ¶¶ 63 (accusing MyTEAM, MyPARK, Rec Hall (MyPark), Stage (myCareer), and Crew), 66 (same). At the time of summary judgment, Plaintiff contends that only three modes infringe. *See* D.I. 472 at 7 n.4 (accusing ProAm, MyPark, and Rec Hall). It is undisputed that the no-longer-accused game modes do not infringe for at least the reasons explained in Defendants' motion for summary judgment. *See* D.I. 463.

Defendants therefore request the Court dismiss with prejudice the game modes of NBA2K that Plaintiff no longer contends infringe the asserted claims.

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Respectfully,

*/s/ Jack B. Blumenfeld*

Jack B. Blumenfeld (#1014)

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cc: Clerk of the Court (via hand delivery)  
All Counsel of Record (via electronic mail)