

## Judge Albright Grants Motion to Compel Discovery on Uncharted Products in *IGT v. Zynga*

MARCH 17, 2022

On March 1, 2022, Judge Albright granted Plaintiff IGT's motion to compel. Specifically, Defendant Zynga must either produce technical documents and source code for each product identified in IGT's preliminary infringement contentions, or it must provide discovery of an exemplary product that Zynga stipulates is representative of the uncharted games.

IGT's preliminary infringement contentions stated that the charted infringing games were "exemplary only" and "representative of and exhibit the same accused instrumentalities common to all identified products." It did not chart every accused game listed in IGT's contentions. Because of this, Zynga refused to produce discovery for the approximately 100 accused games that were listed in the contentions but uncharted. Zynga asserted that the uncharted games should not be produced because IGT neither identified independent infringement theories nor explained how the charted games were representative of the uncharted games.

Judge Albright disagreed. At the outset, he remarked that the court must adhere to a policy of liberal discovery. Noting that the case is only at the preliminary infringement contention stage, Judge Albright granted the motion to compel because IGT demonstrated, albeit barely, that the uncharted games were reasonably similar to the charted games. Zynga argued that the charted and uncharted games were not reasonably similar because the uncharted games could be played in airplane mode, meaning that they did not communicate to servers in the same manner as the charted games, which do not have airplane mode. However, the Court found the uncharted games may nonetheless infringe when not in airplane mode, and that Zynga did not provide evidence showing that the uncharted games never communicate with a server. Therefore, Judge Albright held that Zynga could not withhold discovery based on its unilateral argument that the uncharted games do not infringe the underlying patent. He also observed that discovery into the uncharted games will allow IGT to submit the more detailed final infringement contentions that will be provided at a later stage in the litigation.

Nor did Judge Albright accept Zynga's argument that discovery into the uncharted games is unduly burdensome. He listed multiple remedies that could address Zynga's concerns without denying discovery outright.

- **Meet and confer:** The parties could agree to discovery of a couple of exemplary uncharted games, which IGT could use to chart representative infringement contentions.

- **Create “smaller, more reasonable representative buckets” of games.** These smaller buckets would allow IGT to provide initial charts for additional games, while addressing Zynga’s concerns regarding the burden of discovery.
- **Alternative relief.** Zynga can seek a Rule 26 protective order, file a motion to dismiss the uncharted games, or move for sanctions due to an improper discovery purpose, lack of a good-faith basis, or failure to conduct a reasonable pre-suit inquiry.

Ultimately, IGT demonstrated a basis for the requested discovery, and there are other remedies more appropriate than denial of discovery. As a result, Judge Albright granted IGT’s motion to compel.

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