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United States District Court
Northern District of California

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

GREGORY A. GREER,

Plaintiff,

v.

ELECTRONIC ARTS, INC.,

Defendant.

Case No.: C10-3601 RS (JSC)

**ORDER RE: PLAINTIFF’S MOTION
TO COMPEL FURTHER
RESPONSES TO DISCOVERY, FOR
FURTHER DEPOSITIONS, AND FOR
SANCTIONS (Dkt. No. 151)**

Now pending before the Court is the parties’ joint discovery letter brief regarding Plaintiff’s motion to compel further discovery responses and depositions, and for sanctions. (Dkt. No. 151.) After carefully considering the parties’ arguments and evidence, including the arguments and evidence attached to Plaintiff’s second motion to compel, the Court concludes that oral argument is unnecessary, see Civ. L.R. 7-1(b), and DENIES Plaintiff’s motion.

BACKGROUND

Fact discovery closed in December 2011 and trial was scheduled to commence on May 29, 2012. By Order filed February 1, 2012, the Court granted in part Plaintiff’s motion to compel further discovery responses. (Dkt. No. 97.) In March 2012, and at the parties’ joint

1 request, the district court continued the trial to September 24, 2012, and later to February
2 2013. In April of this year Plaintiff moved to extend the discovery cut-off to take additional
3 fact discovery. The district court denied Plaintiff's motion with one limited exception. (Dkt.
4 No. 127.) Eight months after the Court granted in part and denied in part Plaintiff's motion to
5 compel, and nearly a year after the discovery cut-off, Plaintiff filed a second motion to
6 compel, once again seeking additional discovery. Plaintiff contends that Defendant violated
7 this Court's February 1, 2012 discovery order and therefore he is entitled to further discovery
8 responses, depositions and sanctions.

9 **A. The decision to offer Tiberian Dawn as a free download**

10 With respect to Interrogatory No. 3, the Court stated: "Defendant has agreed to identify
11 to Plaintiff those individuals who made the decision in 2007 to make Command & Conquer:
12 Tiberian Dawn available for free download. The Court declines to order any further
13 discovery." (Dkt. No. 97 at 2.) Defendant identified Andrew Kaufman in full compliance
14 with the Court's Order. Plaintiff's assertion that Mr. Kaufman did not make the decision is
15 wholly unsupported. Moreover, in denying Plaintiff's request to reopen discovery to permit a
16 deposition of Mr. Kaufman, the district court ruled—in effect—that the deposition of the
17 person who made the decision would be irrelevant. (Dkt. No. 127 at 3.) Plaintiff has ignored
18 this ruling in moving for permission to take the depositions of others who Plaintiff believes
19 were the actual decision makers, and once again fails to offer any explanation of relevance.
20 Plaintiff's motion is denied.

21 **B. Encouragement of mods with Destructible Times**

22 Plaintiff contends that at the hearing on his first motion to compel "Defendant falsely
23 represented that the creation of infringing TD mods was impossible because EA had not
24 released a software developer kit or SDK, for TD, and that nobody at EA knew anything of
25 such mods." (Dkt. No. 151 at 2.) Plaintiff misstates Defendant's representations. Defendant
26 did represent that it had never released a software developer kit ("SDK") for Tiberian Dawn;
27 indeed, it has now submitted a declaration supporting that representation. It also represented
28 that "there has never been anything that could—anything remotely be called encouragement

1 any third-party to take the Destructible Times out of Command & Conquer: Tiberian Dawn
2 and use it in some other game, whether it's a mod or not a mod or whatever you want to call
3 it." (Dkt. No. 125 at 20.) Defendant represented again: "there's nothing in EA's files or
4 searches of even the archive forums on the web that would suggest there's been any
5 encouragement to create anything with the song Destructible Times or to encourage patches
6 to be downloaded that would insert the song Destructible Times or and got the song for that
7 matter into a mod of any game." (Dkt. No. 125 at 25.) The You-Tube video upon which
8 Plaintiff premises his motion does not establish that the above representations are false.
9 Defendant did not represent that it never promotes any mods; it represented that it does not
10 encourage the creation of mods that use Destructible Times. One reason it does not do so is
11 that it has not released a SDK that would allow third parties to build mods on the actual
12 Command and Conquer: Tiberian Dawn. Another reason is that it has not released or
13 encouraged patches that allow third parties to insert Destructive Times into their Tiberian
14 Dawn mods that were built on other Command and Conquer engines. Accordingly, the
15 motion to compel is denied.

16 Plaintiff contends that Defendant is wrong, and that third parties have figured out how
17 to create mods of games even without a SDK. Even if that is true, however, Plaintiff is
18 essentially asking the Court to reconsider its earlier ruling and now order Defendant to
19 produce documents that reflect any promotion of websites that promote Tiberian Dawn mods,
20 even if there is no direct promotion of Tiberian Dawn mods that include Destructible Times.
21 Plaintiff has not asked for leave to make such a reconsideration motion, and any such motion
22 would, in any event, be denied as the YouTube video upon which Plaintiff relies was
23 available at the time of the first motion to compel.

24 **C. Web analytics**

25 Plaintiff contends that the Court previously declined to order "web analytics
26 discovery" based on Defendant's misrepresentation that it did not perform any website
27 tracking of the Command and Conquer franchise until 2011 and that Tiberian Dawn was
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1 available for only a short time on Defendant’s website; accordingly, it seeks “analytics
2 information.”

3 The Court does not find that Defendant has withheld any responsive discovery.
4 Plaintiff’s discovery requests sought “each and every Internet Address to which one or more
5 downloads of Tiberian Dawn have been made from” Defendant’s websites (Interrogatory No.
6 14), and documents concerning the identities and behaviors of visitors to those websites (RFP
7 No. 7). Defendant “represented that it cannot ascertain either the IP addresses or the number
8 of downloads made from Defendant’s site in August 2007 when Command and Conquer:
9 Tiberian Dawn became available for download on the site.” (Dkt. No. 105 at 3.) Plaintiff has
10 not submitted anything that suggests this representation is untrue. To the contrary, Defendant
11 again represents, under oath, that it has “been unable to determine the number of times the
12 game was downloaded, the IP addresses of persons who downloaded the game, the countries
13 from which those downloads were made, or anything else about the identity or behaviors of
14 persons who downloaded the game.” (Dkt. No. 151-8 at ¶ 8.) Defendant explains: “Because
15 Command & Conquer Gold is a legacy title, EA did not generate metric reports for the game.
16 In addition, because the game was made available for free download as an ISO file, EA would
17 not have automatically captured the downloads or IP addresses from which they originated
18 through the web tagging that was in place at the time.” (Id. ¶ 9.) The hearsay “Linked In”
19 profiles upon which Plaintiff relies do not suggest that Defendant is lying.

20 Plaintiff’s complaint regarding Defendant’s assertion as to the length of time Tiberian
21 Dawn was available for download is not well taken. Regardless of how long Tiberian Dawn
22 was available, Defendant does not possess the information Plaintiff seeks.

23 **D. Pre-2006 Revenues from Command and Conquer**

24 Plaintiff demands “a country by country breakdown of EA sales and profits.” (Dkt. N.
25 151 at 3.) Plaintiff does not contend that the Court previously ordered such discovery;
26 instead, he claims he does not trust the discovery Defendant has produced and thus he wants
27 additional supporting documentation and information. Plaintiff already made a version of this
28 request to the district court and it was denied. (Dkt. No. 107 at 7.) Moreover, the purpose of

1 the additional four hours of 30(b)(6) deposition testimony was to address Defendant's
2 production of financial information. This request is denied.

3 **E. Request for Sanctions**

4 Since the Court has denied Plaintiff's motion to compel in its entirety, it goes without
5 saying that his request for sanctions is also denied. Defendant, too, seeks sanctions, although
6 it does not identify the rule or authority upon which it bases its request. Its request is
7 therefore also denied.

8 The Court is concerned, however, with Plaintiff's disregard of the deadlines for
9 discovery motions; indeed, Plaintiff does not even attempt to justify why this request is being
10 made at this late date notwithstanding the Local Rule regarding the deadlines for bringing
11 discovery motions. See Civ. L. R. 37-3. While the Court does not anticipate there being any
12 proper grounds for any further discovery motions, at least with respect to fact discovery, the
13 Court hereby orders that going forward no party may require the opposing party to participate
14 in the drafting and presentation of a joint discovery letter until the moving party has first
15 received written permission from the Court. In other words, if a party wishes to move to
16 compel, or bring some other discovery motion in accordance with this Court's standing order,
17 it must first file a letter with this Court explaining why such a motion is necessary.

18 **CONCLUSION**

19 For the reasons explained above, Plaintiff's motion to compel and for sanctions is
20 DENIED. At some point fact discovery must end. That point has arrived.

21 This Order disposes of Docket No. 151.

22 **IT IS SO ORDERED.**

23
24 Dated: December 10, 2012

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26 _____
27 JACQUELINE SCOTT CORLEY
28 UNITED STATES MAGISTRATE JUDGE