

Judge Albright Allows Early Motion for Summary Judgment to Proceed; Orders Expedited Discovery

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On December 8, 2021, Judge Albright issued an order granting limited early discovery in *Ancora Technologies, Inc. v. Nintendo Co., Ltd.* in response to co-defendant Retro Studios' summary judgment motion.

Ancora Technologies accuses Nintendo and Retro Studios of infringing United States Patent No. 6,411,941 (the "941 Patent"), which covers a "Method of Restricting Software Operation Within a License Limitation." Ancora's complaint alleges that the accused Nintendo gaming consoles, controllers, and other devices infringe Ancora's patent because they "transmit . . . over-the-air ('OTA') software updates."

On October 28, 2021, Retro Studios filed for summary judgment. Retro argues that it "does not belong in this patent infringement case . . . [b]ecause Retro is a game development studio and has no involvement in [any of Nintendo's allegedly infringing activities]." In other words, Retro argues that even if the Nintendo devices were found to infringe, Retro nonetheless cannot be liable because it does not commit any of the allegedly infringing acts. In response, Judge Albright held a discovery hearing on November 18 to allow the parties to discuss the validity of the motion.

On December 8, Judge Albright issued an order for limited early discovery to assist the court in deciding whether the summary judgment motion should be granted. However, this initial round of discovery will be limited to studying Retro Studio's role in Nintendo's use of over-the-air software updates. This early discovery period will last until May 20, 2022.

This deviates from Judge Albright's normal practice of staying all discovery up until *Markman*.

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