IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ACCELERATION BAY LLC, Plaintiff, v. ACTIVISION BLIZZARD, INC., Defendant.	)	C.A. No. 15-228 (RGA)
ACCELERATION BAY LLC, Plaintiff, v. ELECTRONIC ARTS INC., Defendant.	)	C.A. No. 15-282 (RGA)
ACCELERATION BAY LLC, Plaintiff, v. TAKE-TWO INTERACTIVE SOFTWARE, INC., ROCKSTAR GAMES, INC. and 2K SPORTS, INC., Defendants.	)	C.A. No. 15-311 (RGA)

PLAINTIFF ACCELERATION BAY LLC'S SUR-REPLY
IN OPPOSITION TO DEFENDANTS' MOTION FOR ATTORNEYS' FEES

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OF COUNSEL:

Paul J. Andre
Lisa Kobialka
James R. Hannah
KRAMER LEVIN NAFTALIS
& FRANKEL LLP
990 Marsh Road
Menlo Park, CA 94025
(650) 752-1700

Aaron M. Frankel
KRAMER LEVIN NAFTALIS
& FRANKEL LLP
1177 Avenue of the Americas
New York, NY 10036
(212) 715-9100

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Philip A. Rovner (#3215)
Jonathan A. Choa (#5319)
POTTER ANDERSON & CORROON LLP
Hercules Plaza
P.O. Box 951
Wilmington, DE 19899
(302) 984-6000
provner@potteranderson.com
jchoa@potteranderson.com

Attorneys for Plaintiff Acceleration Bay LLC

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Plaintiff Acceleration Bay LLC respectfully files this sur-reply in further opposition to Defendants' Motion For Attorneys' Fees. (C.A. No. 15-228-RGA, D.I. 157). In their reply brief, Defendants cite for the first time *TufAmerica, Inc. v. Diamond*, 12-cv-3529-AJN, 2016 WL 3866578 (S.D.N.Y. July 12, 2016), which issued after Defendants filed the instant motion.

Defendants rely heavily on *TufAmerica* as supporting their argument that they are the prevailing parties, even though they have not received any final determination in their favor. *See* C.A. No. 15-228-RGA, D.I. 165 at 1, 2, 7. In *TufAmerica*, the court denied the plaintiff's motion for reconsideration of a fee award. Significantly, the court found that the plaintiff "waived the argument that Defendants were not prevailing parties" by not raising it in opposition to Defendants' motion for fees. *Id.*, at *1. In a footnote, which Defendants quote, the court simply noted that plaintiff's argument, "briefly considered, appears to be without merit." *Id.*, at n. 1. Thus, by the court's own admission, it did not give great consideration to whether the defendants were prevailing parties. Therefore, this dicta should be given no weight.

In addition, the facts of the underlying opinion, *TufAmerica, Inc. v. Diamond*, 12-cv-3529-AJN, 2016 WL 1029553, (S.D.N.Y. Mar. 9, 2016), further demonstrate its irrelevance to Defendants' motion. First, the court's decision in *TufAmerica* appears to be based on a lack of constitutional standing, not prudential standing, as was the case here. Second, there is no indication that the court gave plaintiff an opportunity to cure prudential standing by joining additional parties, as the Court did here. Finally, there is no indication that the defendants in *TufAmerica* saw the need to file mirror declaratory judgment actions after allegedly becoming the "prevailing party," as Defendants did here.

Nor is *TufAmerica* relevant to whether Acceleration Bay acted reasonably. In *TufAmerica*, the court found that the plaintiff acted unreasonably in pursuing a copyright infringement claim where "the deficiencies of the agreements cited by Plaintiff as conveying an exclusive license were readily apparent, rendering its claim 'clearly without merit' and 'objectively unreasonable,'" where "one co-owner was not a signatory to one agreement purporting to convey an exclusive license," and a second agreement only "conveyed a bare right

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to sue," not an exclusive license. *Id.* at *2. The circumstances are markedly different here, where both parties to the agreement intended to transfer all substantial rights to the patents-in-suit and the Court's determination that Acceleration Bay lacked prudential standing involved consideration of a multi-factor analysis, not a bright line test. *See* C.A. No. 15-228-RGA, D.I. 162 at 10-15.

Finally, *TufAmerica* supports Acceleration Bay's opposition in noting that "the purposes of the Copyright Act are served when 'close infringement cases are litigated. For this reason, district courts are disinclined to award fees in cases that are close calls or which present novel legal issues or theories." *TufAmerica,* 2016 WL 1029553, at *2.

For all these reasons, *TufAmerica* does not support Defendants' Motion, which should be denied.

POTTER ANDERSON & CORROON LLP

By: /s/ Philip A. Rovner
Philip A. Rovner (#3215)
Jonathan A. Choa (#5319)
Hercules Plaza
P.O. Box 951
Wilmington, DE 19899
(302) 984-6000
provner@potteranderson.com
jchoa@potteranderson.com

Attorneys for Plaintiff Acceleration Bay LLC

OF COUNSEL:

Paul J. Andre
Lisa Kobialka
James R. Hannah
KRAMER LEVIN NAFTALIS & FRANKEL LLP
990 Marsh Road
Menlo Park, CA 94025
(650) 752-1700

Aaron M. Frankel
KRAMER LEVIN NAFTALIS & FRANKEL LLP
1177 Avenue of the Americas
New York, NY 10036
(212) 715-9100

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