

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

ACCELERATION BAY LLC,)	
)	
Plaintiff,)	
)	
V,)	C.A. No. 16-453 (RGA)
)	
ACTIVISION BLIZZARD, INC.,)	
)	
Defendant.)	
)	
ACCELERATION BAY LLC,)	
)	
Plaintiff,)	
)	
v.)	C.A. No. 16-454 (RGA)
)	
ELECTRONIC ARTS INC.,)	
)	
Defendant.)	
)	
ACCELERATION BAY LLC,)	
)	
Plaintiff.)	
)	
v.)	
)	
TAKE-TWO INTERACTIVE)	C.A. No. 16-455 (RGA)
SOFTWARE, INC., ROCKSTAR GAMES,)	
INC. and 2K SPORTS, INC.,)	
)	
Defendants.)	

SPECIAL MASTER ORDER NO. 6 AS TO VARIOUS PENDING MOTIONS

Pending Motions

On July 5, 2017, Plaintiff Acceleration Bay LLC filed its motion to compel source code access with a supporting brief and exhibits 1-25.

On July 5, 2017, Plaintiff also filed its motion to compel as follows:

1. Compelling Activision Blizzard Inc. to produce documents responsive to nearly 50 requests for production;
2. Compelling Electronic Arts. Inc. to produce documents responsive to a similar number of requests for production;
3. Compelling Take-Two Interactive Software, Inc., Rockstar Games, Inc. and 2K Sports, Inc. to produce documents responsive to a similar number of requests for production;
4. Production of non-source code documents; and
5. Compelling Take-Two to make available for inspection source code for GTA and NBA2K.

On July 5 2017, all Defendants filed Motions as follows:

1. Motion to Compel Compliance with Special Master Order No. 2 and Sanctions;
2. Motion to Preclude Regarding Party Specific Interrogatory No. 1;
3. Motion to Preclude Regarding Party Specific Interrogatory No. 2;
4. Motion to Compel Production of Documents responsive to Defendants' Request for Productions Nos. 139, 145, 150, 163, 165, 167 and 174;
5. Motion for Production of an Unredacted Copy of All Agreements Between Plaintiff and Hamilton Capital;
6. Motion for a protective order Against Further Technical Fact Witness Depositions Including Those Noticed to Date.

Each of the Defendants' above identified motions were supported by at least 10 or more exhibits.

On July 5, 2017, Defendants filed a motion to compel production of communications between Boeing and Global IP with a supporting brief and exhibits.

Also on July 5, 2017, Defendant Electronic Arts filed a motion to compel a deposition of Boeing, with supporting brief and exhibits.

On July 12, 2017, Plaintiff filed responsive briefs and exhibits as to all of the Defendants' above identified motions.

Also on July 12, 2017, Defendants filed their responsive briefs and exhibits to Plaintiff's above identified motions.

On July 14, 2017, a hearing on all of the above identified motions occurred before the Special Master.

Plaintiff's Motions

1. Motion to Compel Source Code Access.

Central to many of the motions heard before the Special Master on July 14th is Plaintiff's treatment of Defendants' source codes. Most of the source code review took place in 2016 and was cited in Plaintiff's infringement charts and interrogatory responses. Defendants have repeatedly moved to compel more complete interrogatory responses describing with particularity Plaintiff's infringement contentions. All of the pending motions have been filed within the month that fact discovery is scheduled to close.

Plaintiff argues that it is entitled to source code review up until the close of fact discovery. It further argues that recent technical depositions in the case, relating to the functionality of the accused products, causes Plaintiff to need further source code inspection.

The crux of Defendants' response is that Plaintiff has had plenty of time to inspect the source code and it still refuses to supplement its interrogatory responses with adequate infringement contentions. Defendants contend that Plaintiff should properly state its infringement contentions before any further discovery is granted to it. In Defendants' view, Plaintiff is engaged in a strategy of hiding its infringement contentions until fact discovery closes, and that thereafter it will expose its contentions for the first time in its experts' reports.

Plaintiff requests until August 18, 2017 to review Defendants source code, and allowing it until September 29, 2017 to serve its opening expert reports.

Plaintiff is seeking approximately 30 days of source code review. As Defendants point out in their reply brief, source code review entails careful planning and protections, because of the extreme sensitive nature of the confidential proprietary source codes. In an effort to resolve Plaintiff's request and avoid Plaintiff's motion, the Defendants proposed 6 days for source code inspection. I will accept Defendants' proposal, but observe that it does not preclude Defendants from arguing hereafter that Plaintiff's interrogatory responses as to Plaintiff's infringement contentions are inadequate.

IT IS HEREBY ORDERED THAT PLAINTIFF IS TO HAVE 6 DAYS TO INSPECT SOURCE CODE.

2. Plaintiff's Motion to Compel Production of Documents, As Identified Above.

The parties have conferred as to Plaintiff's request for additional document production, but reached no agreement. As to the documents still sought, Defendants resist on the grounds that the information isn't relevant, some of the documents have been produced and it is burdensome to produce to the full extent Plaintiff is seeking.

Some of the documents at issue are technical documents that have been discussed or identified in depositions. In addition, Plaintiff seeks contracts, licenses, manuals and instructions exchanged with Defendants' customers, developers, vendors and third parties. Plaintiff also seeks Defendants' communications with Sony.

Other requests to produce from Plaintiff seek documents allegedly relevant to damages, including sales forecasts, customer surveys, market reports, usage data and information regarding any alleged non-infringing alternatives. Plaintiff requests revenue, pricing and market share information that it deems relevant to damages. Plaintiff wants sale forecasts for the accused products. Plaintiff seeks marketing materials and customer survey information.

Plaintiff demands documents relating to any analysis made by Defendants regarding the patented technology or comparable technology. Plaintiff requests information regarding any purported non-infringing alternatives. This information is also allegedly relevant to the determination of a reasonable royalty for the patents. Finally, Plaintiff seeks information relating to Defendants' foreign sales. Plaintiff recognizes that foreign sales having no connection to the U.S. are not relevant; but if the accused products, that are sold abroad, are operated and controlled from or manufactured in the United States, then allegedly damages benefit from those foreign sales.

Frankly, time does not permit the Special Master to fully set forth all of the arguments pro and con by the parties as to each of the categories of documents being sought in Plaintiff's motion. The Special Master is expediting the submission of this Order to allow the parties to complete fact discovery by the end of the month as required under the Scheduling Order.

Defendants have demonstrated in their brief and thorough exhibits that they have already produced a large quantity of documents responsive to each of the requests that are the subject of the Plaintiff's motion. Defendants are also continuing to produce documents. It is expected that in good faith Defendants will not use this Order to cease such production.

Plaintiff's requests are broad and still cover a variety of topics and categories. The parties have been in communication for some time over Plaintiff's requests. Plaintiff has proceeded in good faith in presenting its motion, but it is unlikely that Defendants could produce all the documents being sought by Plaintiff before the close of fact discovery.

IT IS HEREBY ORDERED THAT PLAINTIFF'S MOTION TO COMPEL DOCUMENTS IS DENIED, BUT SUBJECT TO DEFENDANTS' GOOD FAITH EFFORT TO PRODUCE REASONABLY RELEVANT DOCUMENTS BY THE END OF JULY, 2017.

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