

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

**PLAINTIFF ACCELERATION BAY LLC'S
OBJECTIONS TO SPECIAL MASTER ORDER NO. 4**

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I. INTRODUCTION

Pursuant to Rule 53(f)(2) of the Federal Rules of Civil Procedure, Plaintiff Acceleration Bay respectfully requests that the Court overrule the Special Master's June 20, 2017 Order No. 4 (Ex. A, No. 16-453, D.I. 185, the "Order"), which denied Plaintiff's motion to compel discovery on the updated versions of Defendants' accused products.¹ When discovery in these actions resumed in 2017, Acceleration Bay timely accused of infringement these updated versions of the accused products. As set forth below, Acceleration Bay diligently sought discovery on the updated accused products and inclusion of these products in these actions is not overly burdensome given their similarity to the other accused products, as confirmed by Defendants' witnesses. Moreover, addressing infringement of these updated versions now will avoid the need for a second wave of actions, conserving the resources of the parties and the Court.

II. NATURE AND STAGE OF THE PROCEEDINGS

In connection with the Scheduling Conference in the actions, Defendants proposed that Acceleration Bay should not be permitted to add additional products. D.I. 46 (Proposed Scheduling Order) at § 1.b. The Court declined to include that provision in the Scheduling Order and referred any disputes regarding this issue to the Special Master. Ex. M (2/17/17 Hearing Tr.) at 10:13-12:4.

On February 13, 2017, Acceleration Bay provided its Updated Identifications of Accused Products to each Defendant. Exs. C, D, E. Acceleration Bay then sought discovery on a variety of topics relating to all of the accused products, including the updated versions. Acceleration Bay sought confirmation from Defendants in April 2017 that they would provide this discovery, three months before the July 31, 2017 end of fact discovery in these cases and five months before

¹ All docket citations are to C.A. No. 16-453-RGA, and are representative of filings in the related cases.

the due date for opening expert reports. D.I. 62 at §§ 3(a), 10(a); *see also* Ex. G at Ex. 5. When Defendants declined to provide this discovery, Acceleration Bay promptly sought relief from the Special Master after complying with the formal meet and confer requirements. The Special Master denied Acceleration Bay's motion to compel. Ex. A. Acceleration Bay timely submits these objections to the Order.

III. OBJECTIONS

The Court reviews the Special Master's Order *de novo*. Fed. R. Civ. P. 53(f).² Acceleration Bay respectfully objects to the Order on the following grounds:

(1) the Order's finding that Acceleration Bay did not promptly pursue this issue is erroneous because Acceleration Bay sought a definitive position from Defendants in April, with three full months of fact discovery remaining, and promptly followed the procedures to seek relief from the Special Master; and

(2) the Order's finding that Acceleration Bay's requested discovery on the updated games is unduly burdensome is erroneous because these products are similar to the earlier versions accused of infringement, as confirmed by Defendants' witnesses, and including them in this action will be far less burdensome for the parties and the Court than requiring a subsequent round of litigation.

A. Acceleration Bay Diligently Included the Updated Versions in the Case and Moved to Compel Discovery

Acceleration Bay objects to the Special Master's finding that Acceleration Bay did not timely seek discovery into the updated versions of the accused products.

² Acceleration Bay submits these objections pursuant to the Order Appointing Special Master. C.A. No. 15-228-RGA, D.I. 94 at ¶ 6. In accordance with that Order, Acceleration Bay submits herewith an Appendix containing the transcript from the hearing before the Special Master (Ex. B) and the materials submitted by the parties in connection with the hearing.

Acceleration Bay filed suit against Defendants in early 2015, and refiled the instance actions in June 2016. During the period of time in which these cases were dormant following the dismissal of the 2015-filed cases, Defendants released updated versions of various accused products. Prior to the February 17, 2017 Case Management Conference, Acceleration Bay served its Updated Identifications of Accused Products, timely identifying these updated versions.³ Exs. C, D, E (the “Updated Identifications”). The Updated Identifications explained that, based on publicly available information, these new versions operated in the same, or substantially the same way, as the products already accused of infringement. The similarity of the updated versions was subsequently confirmed by Defendants’ deposition witnesses (as discussed in the following section).

When discovery resumed in these actions, Acceleration Bay sought discovery on a variety of topics relating to all of the accused products, including the updated versions. During an extended chain of correspondence beginning on March 6, 2017, following a February 23, 2017 meet and confer, Acceleration Bay asked Defendants to confirm that they would provide financial information for the updated versions. Ex. G at Ex. 5 (April 26, 2017 email). At that time, the end of fact discovery was still three months away and the due date for opening expert reports was five months away. D.I. 62 at §§ 3(a), 10(a). When Defendants declined, Acceleration Bay promptly initiated the procedures to file a motion to compel. Ex. F.

³ The “Updated Versions” include the 2017 versions of Take-Two’s NBA 2K franchise, EA’s FIFA and NHL franchises and Activision’s World of Warcraft and Destiny franchises, as well as two additions to the Call of Duty series and several variants of the Blizzard Downloader, which Acceleration Bay did not learn about until after the dismissal of the 2015-filed case against Activision.

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