

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

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

**DEFENDANTS' RESPONSE TO PLAINTIFF ACCELERATION BAY LLC'S
OBJECTIONS TO SPECIAL MASTER ORDER NO. 6**

OF COUNSEL:
Michael A. Tomasulo
Gino Cheng
David K. Lin
Joe S. Netikosol
WINSTON & STRAWN LLP
333 S. Grand Avenue, 38th Floor
Los Angeles, CA 90071
(213) 615-1700

MORRIS, NICHOLS, ARSHT & TUNNELL LLP
Jack B. Blumenfeld (#1014)
Stephen J. Kraftschik (#5623)
1201 North Market Street
P.O. Box 1347
Wilmington, DE 19899
(302) 658-9200
jblumenfeld@mnat.com
skraftschik@mnat.com
Attorneys for Defendant

David P. Enzminger
WINSTON & STRAWN LLP
275 Middlefield Road, Suite 205
Menlo Park, CA 94025
(650) 858-6580

Dan K. Webb
Kathleen B. Barry
WINSTON & STRAWN LLP
35 West Wacker Drive
Chicago, IL 60601
(312) 558-5600

Krista M. Enns
WINSTON & STRAWN LLP
101 California Street, 35th Floor
San Francisco, CA 94111
(415) 591-1000

Michael M. Murray
WINSTON & STRAWN LLP
200 Park Avenue,
New York, NY 10166
(212) 294-6700

Original Filing Date: August 17, 2017
Redacted Filing Date: August 24, 2017

I. Introduction

The documents the Special Master ordered produced go to a central issue: the truth of claims made by Acceleration Bay in its pleadings about itself and the damages it has supposedly suffered. Acceleration has pled and argued throughout this litigation that it is an operating company, that litigation is not its sole business, that it incubates businesses, invests in companies, collaborates with research institutions, and brings solutions to market through partnerships with companies and startups. App.Ex. C, F5 (Complaint) at ¶¶ 3-4.¹ Acceleration has also pled that Defendants' alleged infringement is causing it "irreparable harm," and presumably it will argue that the alleged infringement has impaired its supposed non-litigation business operations.

But the facts tell another story. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] The documents ordered produced by the Special Master bear relevance to the "impeachment or corroboration" of Acceleration's assertions. *Hickman v. Taylor*, 329 U.S. 495, 511 (1947). For example, the companies Acceleration claims to incubate are the same companies it uses to argue that the patents can be commercialized. Some of the documents may show that Acceleration's incubation of and investment in these companies is not genuine, which would undermine Acceleration's claims about commercialization of the patents.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Thus, the Loan Agreement is "part and parcel" of the agreements by which Acceleration acquired its interest in the patents,

¹ Citations to "App.Ex. ___" refer to Plaintiff's Appendix (C.A. No. 16-453, D.I. 254).

and is therefore directly relevant to the issues of damages and ownership for this reason alone.

Acceleration Bay's objections to the Special Master's Order depend on the erroneous allegations that Defendants seek to "tar" Plaintiff and seek its litigation budget. Neither argument is correct. Acceleration's \$15 million litigation budget, including its total expenditures to date, is already matter of public record in an unrelated criminal proceeding. Ex. 1 (Burstein Declaration), ¶¶ 8-13. Nor are Defendants attempting to "tar" plaintiff; but Defendants are certainly permitted to full discovery to challenge *Plaintiff's pleaded assertions* that it is an operating technology company that has been "irreparably harmed" by Defendants. *See Avago Techs. Fiber IP (Singapore) Pte. Ltd. v. IPtronics Inc.*, No. 10-CV-02863-EJD, 2011 WL 3267768, at *5 (N.D. Cal. July 28, 2011) (noting that whether plaintiff is a "non-practicing entity" or a competitor is relevant to irreparable harm). [REDACTED]

undermines Acceleration's pleaded allegations that it is an "investor" and "incubator." The documents are thus discoverable and the Order was not an "abuse of discretion." *See Callwave Commc'ns LLC v. AT&T Mobility LLC*, 2016 WL 3450736, at *1 & n.3 (D. Del. June 16, 2016). Acceleration's objections to the Order should be overruled and Acceleration should be required to immediately produce documents in compliance with the Special Master's Order.

II. The Unredacted Hamilton Capital Agreement.

Acceleration asserts that the Special Master's Order countermands a previous order by the Court. It does not. Eighteen months ago and in the context of the narrow issue of standing, the Court allowed production of the February 27, 2015 litigation finance agreement with Hamilton Capital (App.Ex. D, G3) with the litigation budget redacted because the financial information was not relevant to standing. The Court did not address whether the information was relevant to other issues. The Special Master recognized correctly that the testimony of Acceleration's designee, coupled with the apparently contradictory Complaint, and Acceleration's refusal to commit to not

making this argument at trial makes this information relevant. The Order should be sustained.

A. Background and History of Dispute

On February 27, 2015, *two months after* it had supposedly bought the patents from Boeing, Acceleration entered into the Loan Agreement with Hamilton Capital. Ex. 1 at ¶¶ 8-13. Defendants sought production of the Loan Agreement and Plaintiff objected to producing it. App.Ex. D, G4 (February 12, 2016 Hearing), 51:12-18. In evaluating whether a redacted version of the document would satisfy the concerns of both parties, this Court asked Defendants' counsel whether a redaction of the numbers would affect its arguments on standing to sue. *Id.* at 52:4-11, 56:19-57:2 ("if I redact the litigation budget, you don't care, because that's not what you are interested in; right?"). Defendants' counsel confirmed that the numbers were not relevant to standing, and the Court ordered the production of a redacted version. *Id.* at 52:8-11.

But Acceleration redacted more than just its litigation budget, it redacted *how Acceleration could use the funds* (App.Ex. D, G3 at 2335), how licensing and litigation proceeds would be distributed (*id.* at 2336), and *the amount to be repaid* (*id.* at 2323, 2330, 2337, 2345, 2347).

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.