

**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. 11 AS TO CERTAIN
AUGUST 16, 2017 MOTIONS FILED BY THE PARTIES**

On August 16, 2017, the parties filed various motions. Plaintiff's Motion was identified as Discovery Motions, as to which Special Master Order No. 10 was entered September 7, 2017, except for one of Plaintiff's discovery motions. Defendants, on August 16, 2017, filed what they described as Motions A-F ("Defendants' Motions"). Defendants' Motion C Regarding Expert

Report Framework was briefed and argued, and resulted in Special Master Order No. 9. On September 6, 2017, Defendants' Motions A, B, D-F were heard, following extensive briefing among the parties. Also heard on September 6, 2017, was Plaintiff's Discovery Motion to preclude Defendants from relying on any agreements with Sony, Microsoft and Bungie, or, at the very least, compelling them to produce unredacted copies of these agreements. This motion was deferred until September 6, 2017, in order to allow Sony, which had successfully moved to intervene, to participate in the September 6, 2017 argument.

Below are the Motions heard on September 6, 2017 and my rulings thereto:

Plaintiff's Motion heard September 6, 2017 seeks to preclude Defendants from relying upon any agreements with Sony, Microsoft and Bungie, or at the very least compelling them to produce unredacted copies of these agreements ("Plaintiff's Motion"). Defendants produced to Plaintiff redacted agreements with Sony, Microsoft and Bungie as well as other documents regarding possible damages claims. The redacted portions of these agreements sought by Plaintiff relate to the financial terms in the agreements and possible royalty rates. Plaintiff states that these redacted portions of the agreements are relevant to Plaintiff's calculation of its damages claim. Defendants' principal argument is that these agreements are not comparable to patent license agreements. However, Plaintiff contends that the comparability or not of these agreements can be addressed by the parties' competing expert reports.

Defendants and Sony both argue that the agreements are not relevant because they are not comparable to patent license agreements. Rather, the agreements concern extensive business relationships among the Defendants and the independent companies Sony, Microsoft and Bungie. These agreements cover their complex business relationships, including manufacturing and marketing terms.

The Defendants and Sony contend that these agreements are extremely confidential and sensitive, such that the redacted financial terms should not be disclosed even under the Protective Order. They observe that if the redacted financial terms were made available to the Plaintiff's expert and used in court testimony, there is a risk of the loss of their confidentiality. Sony in particular explains the irreparable harm to it if the financial terms in its agreement were disclosed.

I am persuaded that the Sony, Microsoft and Bungie redacted portions of their agreements with Defendants are extremely confidential and not likely to be relevant to Plaintiff's damages, because of the lack of comparability of these agreements with standard patent license agreements. IT IS ORDERED that Plaintiff's Motion is DENIED.

* * * * *

Defendants' Motion A seeks to compel compliance with Special Master Order No. 2 and sanctions. This Motion deals with Defendants' interrogatories Nos. 7 and 9 regarding Plaintiff's infringement allegations. Special Master Order No. 2 on April 19, 2016, required Plaintiff to provide further responses to Interrogatories Nos. 7 and 9 as soon as reasonably possible. Thereafter, these cases were dismissed and refiled. After Activision moved for compliance with the Special Master's Order, on May 19, 2017 Special Master Order No. 3 granted Activision's Motion. In Special Master Order No. 3, I ordered Plaintiff to be "as specific as possible" as to the infringement claims in its supplemental interrogatory responses." On July 5, 2017, Activision filed a motion to compel compliance with Special Master Order No. 3. On July 17, 2017, Special Master Order No. 6 was entered, indicating that after receipt of Plaintiff's expert reports, it may be appropriate to reconsider the Defendants' Motion for sanctions and appropriate relief. Two of the Defendants, Electronic Arts and Take-Two sought to have Special Master

Order No. 6 apply to them as well. Plaintiff agreed to supplement its interrogatories to those Defendants.

It appears that Plaintiff has supplemented its interrogatory responses with respect to its infringement contentions, purportedly in response to the Special Master's Orders. Plaintiff has provided supplemental contentions following depositions of witnesses connected with the particular games at issue in this litigation. These updated responses have occurred on May 18, July 11 and August 25, 2017.

Defendants contend that they still have not received complete and adequate infringement contentions from Plaintiff. In their brief and at oral argument on September 6, 2017, Defendants have thoroughly argued why Plaintiff's contentions are incomplete. Plaintiff, on the other hand, described at the Hearing and in its brief with particularity its contentions and how it has provided updated infringement charts with respect to each game following the depositions. Plaintiff points out that there are 22 claims at issue in this litigation and each is treated as a different invention. Not all claims involve the same elements or issues, such as whether they require m-regular. In short, the complexity of the many claims and their various technologies makes it difficult for me to decide that the infringement claims are incomplete at this stage of the cases.

Defendants have at this Hearing and at prior hearings complained that they are at risk of being "ambushed" by Plaintiff with respect to what exactly Plaintiff's infringement contentions are. Defendants argue that Plaintiff's strategy is to be as vague and general as possible in its infringement contentions; and then to provide its contentions for the first time in Plaintiff's expert reports. Plaintiff denies that it has any such strategy; asserts that its infringement contentions comply with the Delaware "notice" standard for infringement contention disclosures by interrogatories; and that its infringement contentions are far more complete than are

Defendants' invalidity contentions. Plaintiff represented at the Hearing that it doesn't expect its expert reports to be inconsistent with its contentions.

Since fact discovery has concluded in these cases and with Plaintiff's expert reports due within about a week, it seems appropriate to deny without prejudice Defendants' Motion A and await Plaintiff's expert reports. IT IS ORDERED that Defendants' Motion A is DENIED without prejudice.

* * * * *

Defendants' Motion B is to preclude or strike and for an order to show cause regarding Dr. Abarbanel.

Dr. Abarbanel was a Boeing employee who apparently had some involvement years ago with the patent involved in this litigation. Dr. Abarbanel signed a declaration filed by Plaintiff in the IPR proceedings. He was deposed briefly in those proceedings. In this litigation, Defendants sought Dr. Abarbanel's deposition, which was opposed. Following Defendants' motion to compel the deposition, I ordered the deposition to be taken. It is this deposition that is the basis of Defendants' Motion B.

Defendants argue that there was not an attorney-client relationship between Dr. Abarbanel and Plaintiff's law firm, Kramer, Levin, Naftalis & Frankel LLP ("Kramer Levin"). At his deposition, Dr. Abarbanel did not recall much that is in his declaration detailing the alleged inventions, and he explained that the declaration had been drafted by Kramer Levin; and he could not confirm his attorney client relationship with Kramer Levin. According to Defendants, Dr. Abarbanel stated at his deposition that he had no knowledge that a deposition had been requested or that it had been objected to by Kramer Levin on his behalf. At the deposition, Defendants sought, and by this Motion B still seek, the documents that Kramer Levin

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