

**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.)	
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ACCELERATION BAY LLC,)	
)	
Plaintiff,)	
)	
v.)	C.A. No. 16-454 (RGA)
)	
ELECTRONIC ARTS INC.,)	
)	
Defendant.)	
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ACCELERATION BAY LLC,)	
)	
Plaintiff,)	
)	
v.)	C.A. No. 16-455 (RGA)
)	
TAKE-TWO INTERACTIVE SOFTWARE,)	
INC., ROCKSTAR GAMES, INC., and 2K)	
SPORTS, INC.,)	
)	
Defendants.)	
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**JOINT REPORT REGARDING PROPOSED PAGE LIMITS FOR SUMMARY
JUDGMENT AND DAUBERT MOTIONS**

As requested by the Court at the December 18, 2017 claim construction hearing, the parties have conferred regarding page limits for summary judgment and *Daubert* motions. The parties did not reach agreement, and respectfully request the Court's guidance on page limits.

The scheduling order in each of the above-referenced actions provides a schedule for briefing summary judgment and *Daubert* motions. C.A. No. 16-453, D.I. 343. Summary judgment and *Daubert* motions in the 16-453 action and all motions relating to validity/invalidity in the three related actions are due February 2, 2018. Motions specific to the 16-454 and 16-455 cases are respectively due March 23, 2018 and June 15, 2018. *Id.*

Acceleration Bay's Proposal:

Acceleration Bay's proposal for page limits on all summary judgment and *Daubert* motions in all three cases will require the parties to focus on discrete issues that are genuinely appropriate for a summary judgment and *Daubert* motion practice. Acceleration Bay proposes the following for all summary judgment and *Daubert* motions for the 16-453 action, which will also include all motions related to validity/invalidity:

- Opening brief: 50 pages total
- Opposition brief: 50 pages total
- Reply brief: 25 pages total

Acceleration Bay further proposes that summary judgment and *Daubert* motions be combined into a single opening, answering and reply brief.

For the motions in the 16-454 and 16-455 cases, which will not include any validity/invalidity issues, Acceleration Bay proposes, for each case, the following limits for all summary judgment and *Daubert* motions:

- Opening brief: 40 pages total
- Opposition brief: 40 pages total
- Reply brief: 20 pages total
- The parties may not reargue issues already presented in prior rounds of briefing, including validity/invalidity

Acceleration Bay further proposes that summary judgment and *Daubert* motions be combined into a single opening, answering and reply brief.

Plaintiff's proposed page limits are more than sufficient for the parties to present manageable issues that the Court can address on summary judgment or in connection with a *Daubert* challenge. Increasing both parties' (or just Defendants') page limits for such a brief to 80 pages will guarantee an indiscriminate "shotgun" approach, instead of a concise brief addressing only certain discrete issues, and will serve only to increase the burden on the Court. Similarly, delaying a decision regarding the page limits of the briefs for the 16-454 and 16-455 cases makes no sense. Defendants have Acceleration Bay's opening expert reports in all three cases and know what the issues.¹ Indeed, setting a page limit now will encourage Defendants to focus on discrete issues, instead of recycling arguments or taking a different spin on unsuccessful arguments.

Defendants' arguments for an excessive number of pages for the 16-453 case highlight why Acceleration Bay's proposal for all three cases is appropriate. For example, summary judgment motions on the issue of infringement are generally not appropriate because they are fraught with questions of material fact. If Defendants intend to seek summary judgment of non-infringement, they only need to address a single claim element, which should not require substantial briefing. For broader issues, such as willful infringement and damages, those issues are also either questions of fact. Willfulness requires an assessment regarding Defendants' conduct which usually involves a factual dispute and is often assessed by a jury. Similarly, whether worldwide sales are an appropriate measure for damages is a factual dispute based on the nature of Defendants' infringing conduct in the United States, as well as the benefit Defendants receive from their infringing conduct.

¹ There is no merit to Defendants' complaints regarding the length of, or citations in, Acceleration Bay's expert reports. The reports are well under the page limit set by the Special Master and upheld by this Court. Moreover, the Special Master specifically rejected Defendants' arguments regarding citations. D.I. 293 (C.A. No. 16-453).

As to *Daubert* challenges, they are generally more appropriately addressed on cross-examination, as opposed to invoking the Court's gate-keeping function. Defendants' citation to *Finjan, Inc. v. Blue Coat Sys., Inc.*, 2018 WL 341882, at *8 (Fed. Cir. Jan. 10, 2018) is curious, as it has no similarity whatsoever to this case and is completely irrelevant.

In either case, the claim that a substantial amount of briefing is required on any of these issues cuts against any assertion that there is no disputed issues of material fact or there is truly an issue appropriate for consideration under *Daubert*. Acceleration Bay's page limits will force the parties to select issues, and by requiring that they are addressed concisely and avoid having unnecessary issues briefed, so that they cannot be characterized as "summary judgment and other annoying motions." December 4, 2017 Transcript at 112, lines 17-20 (D.I. 370, C.A. No. 16-453).

Defendants' Proposal:

Under the Court's scheduling order, there will be three sets of briefing. D.I. 343. The first set is due on February 2, 2018. D.I. 343. This set will include joint motions on validity/invalidity, and all other motions with respect to the Activision case. In keeping with the Court's instruction to focus on significant issues for this set of briefs, Defendants request that the Court allow each side to file opening briefs totaling no more than 80 pages, answering briefs totaling no more than 80 pages, and reply briefs totaling no more than 40 pages. Defendants also do not agree that all issues should be included in a single brief. Defendants believe that the briefs will be more manageable for the Court and the parties if, for example, damages *Daubert* briefs are not combined with noninfringement summary judgment briefs.

Defendants' requested page allocations for the first set are necessary given the breadth and complexity of Plaintiff's claims and Defendants' numerous substantial arguments for

summary judgment and for exclusion under *Daubert*. Plaintiff asserts 16 claims across six patents against multiple accused products and networks from three distinct product families (Call of Duty, World of Warcraft and Destiny) with separate code bases and methods of operation. Destiny is developed and operated by a third party and Activision only sells the software.

In February 2017, when Activision's counsel raised the breadth of Plaintiff's claims—that “there could be as many as six patents and three non-overlapping sets of infringement contentions”—the Court remarked that it would “ridiculous” to try “six patents” and the parties were “going to have to get rid of some of them.” D.I. 60 at 21. Plaintiff has not focused its allegations, however, and the breadth of those allegations makes it impossible to address the allegations fully on summary judgment and *Daubert*. Plaintiff has offered reports from eight experts and its infringement reports alone run hundreds of pages and rely, without line citations, on thousands of pages of source code. In addition to alleging literal infringement of all asserted claims, Plaintiff alleges infringement under the doctrine of equivalents for eighteen of twenty-four limitations for the asserted independent claims of those patents. Fully half of the DOE allegations are directed at claim elements that were amended during prosecution to overcome prior art. Plaintiff even alleges infringement under the doctrine of equivalents for the “m-regular limitations” that were added to secure allowance of the asserted claims. Acceleration also alleges willful infringement (based solely on post-filing conduct) and seeks damages for future and foreign sales.

Allowing Activision 80 pages for its opening briefs amounts to only about 13 pages per patent. Indeed, Plaintiff has accused five networks of infringing the six asserted patents. Within the 80 pages, Defendants will make joint arguments as to invalidity, and Activision will focus on

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