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. 4 AS TO THE PARTIES' MOTIONS TO COMPEL

MOTIONS

On June 7, 2017, the plaintiff filed a motion to compel and brief seeking two separate orders:

1.   To compel defendants to provide discovery on the updated versions of the accused products identified in Acceleration Bay's February 13, 2017 updated identification of accused products ("Motion to Compel Discovery on the Updated Versions"); and

2.   To compel the deposition of John Hynd, a senior programmer at Take-Two for the accused Grand Theft Auto product (the "Motion to Compel the Deposition of Hynd").

On June 7, 2017, the defendants filed their motion and opening brief in support of their motion to compel responses to interrogatories No. 7 and 9 in compliance with Special Master Order No. 3 ("Motion to Compel Responses to Interrogatories No. 7 and 9").

On June 14, 2017, the parties filed their responsive briefs regarding the above motions.

On June 16, 2017, a Hearing was held before the Special Master ("Hearing").

This is the Special Master's Order No. 4 as to the parties' motions to compel identified above:

A.   Plaintiff's Motion to Compel

1. Motion to Compel Discovery on the Updated Versions.

The issue is whether plaintiff Acceleration Bay can obtain discovery with regard to alleged updated versions of the accused product that have been released since the date the suit was filed in 2015.   After discovery reopened in the current actions in early 2017, plaintiff served Updated Identifications of Accused Products on defendants, accusing these new versions of infringement.   The plaintiff seeks access to the source code, core technical discovery and discovery into the sales of these products and other financial data for the alleged updated versions.

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Plaintiff contends that it is permitted to obtain this discovery because defendants requested in the Scheduling Order a provision that would preclude the plaintiff from adding additional products. Defendants did not succeed in obtaining such a provision.

Plaintiff also argues that it is entitled to the core technical discovery before it needs to provide its infringement contentions as to these updated versions. Plaintiff points to the October 29, 2015 Scheduling Order to demonstrate its view as to the proper sequencing: first, the plaintiff identifies accused products; then defendants provide core technical discovery; and only thereafter does plaintiff provide infringement contentions. Since defendants have not provided source code or other technical documents, plaintiff submits that it is premature for it to provide infringement contentions as to the updated versions.

Finally, plaintiff points out that in depositions of defendants' witnesses, there has been confirmation of the relevant functionality in the new versions. Thus, plaintiff contends that the new versions are functionally related to the accused products. According to plaintiff, the updated versions would use the same multiplayer networking functionality as do the versions already accused of infringement.

Plaintiffs proposed an alternative to its motion to compel full discovery on the new versions. That alternative is that the defendants could stipulate that the prior versions of the games accused of infringement are representative of the new versions for purposes of finding infringement. Under that alternative, plaintiff contents that defendants should provide financial and marketing discovery for the new versions.

Defendants resist discovery with regard to the updated versions on the grounds that the plaintiff has not provided "any notice of the purported theory of infringement". The plaintiff

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responds that its updated identifications incorporate, by reference, plaintiff's prior disclosures of its infringement theories for earlier versions of the products. Since the functionality of the games is the same in relevant part for both products, according to the plaintiff, there is no need for plaintiff to add more to its infringement contentions.

Defendants submit that plaintiff has delayed in bringing this motion. As early as January, 2017, defendants informed plaintiff that defendants object to adding new products to the case. In response, plaintiff points to Exhibit 5 in its opening brief in support of this motion to argue that the parties have been trying to amicably resolve this issue. Exhibit 5, according to plaintiff, shows that the parties have been in email and oral communication concerning the plaintiff's attempt to add new products. It was only when those discussions broke down that the plaintiff brought this motion. However, a careful review of Exhibit 5 does not persuade me that the parties were negotiating with regard to updated versions of any product. At the Hearing, defendants' counsel represented that plaintiff was advised on February 17th that defendants would not produce any new versions of the games. In view of the upcoming date for closure of fact discovery, plaintiff appears to have delayed in bringing this motion.

Defendants strongly dispute that any new games are merely updated versions of the accused games. Defendants explain that the new games involve major changes, software modifications and often take years to produce. Defendants persuade me that these alleged updated versions are probably different products, with their own code base and technical features.

Finally, defendants argue that it is extremely time consuming and burdensome to respond to plaintiff's discovery with regard to these alleged updated versions. The discovery includes not

just the technical aspects of the games, source code and functionality of the games; but also marketing plans, and financial data.

THE PLAINTIFF'S MOTION TO COMPEL DISCOVERY ON UPDATED VERSIONS IS DENIED.

2.   Motion to Compel the Deposition of Hynd.

Plaintiff contends that it needs to take the deposition of John Hynd, a senior programmer for the accused Grand Theft Auto game ("GTA"). Take-Two has identified Hynd in its disclosures as knowledgeable as to the operation of GTA. Take-Two's only technical witness to date in the litigation has already confirmed that Hynd was involved in the network programming for GTA and for issues dealing with the peer-to-peer network.

Take-Two's response is that it does not intend to call Hynd as a witness and that Mr. Baca's deposition covered areas of Hynd's knowledge of the game. Take-Two next argues that the plaintiff should take only one more technical deposition regarding GTA and submits Mr. Yelland as that witness. Finally, Take-Two argues that it is both burdensome and not proportional to the needs of this case to depose Hynd.

Hynd clearly is a busy programmer and important depositions do take time for the preparation of the witness. However, the parties are going to depose Yelland in Scotland next month. Hynd is also located in Scotland. Yelland will be deposed first and presumably plaintiff would be deposing Hynd on topics that Yelland could not answer or gives incomplete answers.

PLAINTIFF'S MOTION TO DEPOSE HYND IS GRANTED.

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