

**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.,	)	<b>PUBLIC VERSION</b>
	)	
Defendant.	)	
<hr/>		
ACCELERATION BAY LLC,	)	
	)	
Plaintiff,	)	
	)	C.A. No. 16-454 (RGA)
v.	)	
	)	
ELECTRONIC ARTS INC.,	)	
	)	
Defendant.	)	
<hr/>		
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**

OF COUNSEL:

Paul J. Andre  
Lisa Kobialka  
James R. Hannah  
KRAMER LEVIN NAFTALIS  
& FRANKEL LLP  
990 Marsh Road  
Menlo Park, CA 94025  
(650) 752-1700

Aaron M. Frankel  
KRAMER LEVIN NAFTALIS  
& FRANKEL LLP  
1177 Avenue of the Americas  
New York, NY 10036  
(212) 715-9100

Dated: July 11, 2017  
Public version dated: July 18, 2017  
5306804

Philip A. Rovner (#3215)  
Jonathan A. Choa (#5319)  
POTTER ANDERSON & CORROON LLP  
Hercules Plaza  
P.O. Box 951  
Wilmington, DE 19899  
(302) 984-6000  
provner@potteranderson.com  
jchoa@potteranderson.com

*Attorneys for Plaintiff Acceleration Bay LLC*

## **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.<sup>1</sup> 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

---

<sup>1</sup> 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).<sup>2</sup> 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.

---

<sup>2</sup> 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.<sup>3</sup> 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.

---

<sup>3</sup> 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.

# 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.