IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

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

DEFENDANTS' RESPONSE TO PLAINTIFF'S OBJECTIONS TO SPECIAL MASTER ORDER NO. 4

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I. Introduction

With fact discovery scheduled to close on July 31, Acceleration belatedly demands core technical, financial, and marketing discovery on a slew of new products. These seven new products have "their own code base and technical features," were marketed and distributed separately from the current accused games and therefore differ substantially from the current accused products in terms of Acceleration's infringement and damages claims. D.I. 217, Ex. A at 4.[1] As the Special Master observed, Acceleration cannot show that the claims related to the current accused products overlap with the seven new products, because Acceleration has still not provided clear infringement contentions: "Prior orders of this Special Master have cited deficiencies in Plaintiff's infringement contentions" and "without clarity as to Plaintiff's infringement contentions, it is difficult for Defendants to know what aspects and differences in the accused games are relevant to Plaintiff's infringement theories." D.I. 217, Ex. L at 2. Accordingly, Acceleration's request would effectively require the restarting of fact discovery from scratch on a new slate of accused products, including all contention discovery, just as fact discovery is coming to a close. Nothing justifies Acceleration's delay or the burden imposed from full discovery into seven new and distinct products at this late a stage.

Indeed, the Special Master twice considered and twice rejected every argument Acceleration now raises—both initially in Order No. 4 and again in Order No. 5 after Acceleration requested reconsideration. *See* D.I. 217, Ex. A (Order No. 4); Ex. L (Order No. 5). These two orders were correct and plainly 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) (opining that a master's rulings on the "schedule" and the "scope of discovery" are reviewed for abuse of

[1] This filing will cite to the exhibits included in Appendix to Acceleration Bay's Objections to Special Master Order No. 4. *See* D.I. 217.

discretion). Acceleration could have acted in February 2017, after the Court advised Acceleration to raise the addition of new products with the Special Master and warned that "there comes a point … when you have to stop adding new products, so you can get a fixed target to try a case about." D.I. 217, Ex. M at 11. Rather than bring this issue to the Special Master promptly, Acceleration waited until June, a little over a month before the close of fact discovery. Acceleration has never provided a fixed target with its infringement theories and now seeks to change the products too. Conducting yet another round of source code inspections, technical depositions, document productions, and infringement contentions for seven new products at this stage will not only impose an untenable burden on Defendants, but also inject into the case never-before-seen infringement theories. Acceleration's objections should be overruled.

II. Acceleration delayed unreasonably in seeking to accuse the new products.

Acceleration should have raised this issue long ago so that it could be resolved well before the close of fact discovery. The Court's Scheduling Order clearly directed that "[a]ll fact discovery in these cases ***shall be initiated so that it will be completed*** on or before July 31, 2017." D.I. 62 at 3 (emphasis added). In that same spirit, the Order directed that "[d]ocument production shall be substantially complete by: May 15, 2017." *Id.* Acceleration has no good cause for amending the Scheduling Order. *See* Fed. R. Civ. P. 16(b); *Dow Chem. Canada Inc. v. HRD Corp.*, 287 F.R.D. 268, 270 (D. Del. 2012) ("To establish good cause, [a party] must show that a more diligent pursuit of discovery was impossible" and "the Court may consider any prejudice to the party opposing the modification."). And it is untimely to add new products to the case when Acceleration knew of the products' purported relevance for months and yet only sought to add them at the close of discovery. *See Vehicle Interface v. Jaguar*, C.A. No. 12-1285 (RGA), Oral Order (D. Del. March 14, 2014) (precluding plaintiff from adding new products at the end of discovery); *Eon Corp. IP Holdings LLC v. FLO TV Inc.*, 2013 WL 6504689, at *5 (D.

Del. July 12, 2013) (denying the supplementation of additional accused products "[b]ecause the document production [] triggered by the new disclosures could not be completed within the Court's production deadline"); *Enzo Life Sciences, Inc., v. Gen-Probe, Inc.*, C.A. No. 12-104 (LPS), Hr. Tr. at 37 (D. Del. Dec. 18, 2014) (Ex. 1) (precluding the addition of products based on "seeming lack of diligence or at least lack of justification for the timing," "prejudice to the defendants" and "impact [on] the schedule").

Acceleration has no excuse for delaying its motion until June, when the discovery dispute was ripe no later than February. Defendants advised Acceleration in January 2017, before discovery even opened, that they objected to including any of the 2017 products in this case and included a provision to that effect in the draft Scheduling Order submitted to the Court. *See* D.I. 217, Ex. H (Ex. B-1). At the February 17 Case Management Conference, Defendants explained their objection to adding new products, noting that Acceleration still had not provided adequate infringement contentions and that, under the aggressively quick schedule proposed by Acceleration, there was little time to conduct discovery into so many new products. D.I. 217, Ex. H (Ex. B-2 at 10:19–24). The Court decided that "a schedule in the question of whether new products can be added …. is, again, something for the Special Master to figure out," adding that "there comes a point … when you have to stop adding new products, so you can get a fixed target to try a case about." D.I. 217, Ex. H (Ex. B-2 at 11:1–6). In the months that followed, Defendants continued to object to adding these new products into the case. *See* D.I. 217, Ex. K (Ex. H (O'Neill Tr.), 14:10–14 ("MR. TOMASULO: Objection. We're also not producing him as to FIFA 17… Or NHL 17. We don't believe those games are properly in the case.")).

Acceleration implies that a lengthy meet-and-confer and lack of "a definitive position from Defendants" motivated its delay. *See* D.I. 216 at 2–4. Not so. Defendants' objections to

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