

**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.,)	PUBLIC VERSION
)	
Defendant.)	
)	
ACCELERATION BAY LLC,)	
)	
Plaintiff,)	
)	C.A. No. 16-454 (RGA)
v.)	
)	
ELECTRONIC ARTS INC.,)	
)	
Defendant.)	
)	
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. 9**

OF COUNSEL:

Paul J. Andre
Lisa Kobialka
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: September 6, 2017

Public Version Dated: September 14, 2017

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*

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 September 1, 2017 Order No. 9 (Ex. A, D.I. 283, the "Order").¹

I. NATURE AND STAGE OF THE PROCEEDINGS

Acceleration Bay objects to the Order because it imposes an unprecedented, arbitrary and highly prejudicial page limit on expert reports in these actions. Rather than further any bona fide disclosure concerns, Defendants' pursuit of page limits is a transparent attempt to first limit Acceleration Bay's expert disclosures and then seek to preclude expert testimony and opinion by arguing that it has not been sufficiently disclosed. Accordingly, the Court should overrule the Order, and the parties should proceed with expert discovery under the requirements of the Scheduling Order and the Federal Rules of Civil Procedure.

Opening expert reports are due September 22, 2017.

II. OBJECTIONS

The Court reviews the Special Master's Order *de novo*. Fed. R. Civ. P. 53(f).²

Acceleration Bay respectfully objects to the Order on the following grounds:

(1) the Order imposes an unwarranted and arbitrary page limit on expert discovery that is unsupported by precedent, the Scheduling Order, the Local Rules or the Federal Rules of Civil Procedure; and

¹ All docket citations are to C.A. No. 16-453-RGA, and are representative of filings in the related cases.

² 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.

(2) the Order is highly prejudicial to Acceleration Bay given the complex nature of the case, the number of issues upon which the experts will opine and the asymmetrical nature of the parties' respective burdens of proof.³

III. ARGUMENT

A. Page Limits For Expert Reports Are Unprecedented and Unwarranted

The Court should overrule the Order's grant of Defendants' unprecedented request to set a highly prejudicial page limit for the expert reports in this case. Defendants' motion was premised upon speculation about what might happen in the future — that Acceleration Bay's experts might serve voluminous reports that did not disclose their opinions. Beyond bald speculation, Defendants offer no evidence that Acceleration Bay's experts will submit unnecessarily voluminous expert reports.

There are hundreds of patent cases filed every year that proceed without expert report page limits, and such page limits are not part of the practice in this District (or any other District known to Plaintiff's counsel). Indeed, Defendants did not come forward with a single example of a Delaware (or other) court imposing a prior restraint on the length of expert reports. Nor did Defendants identify any reason that this case in particular compels a drastic departure from the approach to expert reports under the Scheduling Order, Local Rules and Federal Rules of Civil Procedure ("FRCP").

Rather than offer any evidence particular to the needs of this case, Defendants pointed to three orders in completely unrelated cases from the Northern District of California, involving some of the experts Acceleration Bay has retained here, where portions of their reports were excluded. Those orders have no bearing on this case and provide no support for a page limit.

³ Acceleration Bay does not object to the portion of the Order requiring each expert report to include a summary of the opinions presented therein.

Those cases involved different parties, different technology and different issues. None of the decisions cited by Defendants struck portions of the expert reports on grounds that they had too many pages — let alone suggested that page limits were necessary or appropriate, and that District has not imposed page limits in those cases or any related actions. *See, e.g., Finjan, Inc. v. Proofpoint, Inc.*, No. 13-cv-05808-HSG, 2016 WL 612907, at *2 (N.D. Cal. Feb. 16, 2016) (striking limited portions of expert reports concerning accused products that had not been previously identified); Ex. D at Ex. 3, *Finjan, Inc. v. Blue Coat Systems, LLC*, No. 15-cv-03295-BLF, Dkt. No. 277 at 13 (N.D. Cal. July 28, 2017) (same).

Finally, limitations on expert reports cannot be equated to other limits on discovery, e.g. number of interrogatories and length of depositions, as Defendants argued. In instances where the FRCP places limits on discovery, the restrictions are meant to prevent unnecessary burden on the responding party. With expert reports, Acceleration Bay is responding to the disclosure requirements in FRCP 26(a)(2). To place a limit on the size of expert reports is, therefore, akin to placing a page limit on an interrogatory response or the number of documents a responding party can produce. Courts and the FRCP do not impose such limits because doing so would unfairly hinder a party from proving its case. Here, the scope of an expert witness's opinion is defined by the report. Therefore, limiting the length of an expert report, severely prejudices Acceleration Bay's ability to present its case fully.⁴

Thus, there was no basis for the Order to impose a page limit in these actions, let alone a compelling basis to depart from the universal practice in this District and elsewhere of not imposing page limits on expert reports.

⁴ Defendants' other argument, that the length of trial has some impact on the length of expert reports, is also unsupported by the practice in this District and others. In any event, the presentation of Plaintiff's case at trial should not be decided now through an arbitrary page limit on expert reports.

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.