

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

ACCELERATION BAY LLC,)
)
Plaintiff,)
) C.A. No. 16-453 (RGA)

v.)

ACTIVISION BLIZZARD, INC.)
)
Defendant.) **PUBLIC VERSION**

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.)

**LETTER TO THE HONORABLE RICHARD G. ANDREWS
FROM PHILIP A. ROVNER, ESQ.
REGARDING ORAL ORDER QUESTION ON THE ELECTION OF PRIOR ART**

Dear Judge Andrews:

In response to the Court's question (D.I. 338, C.A. 16-453-RGA), Acceleration Bay did not raise with the Special Master the issue it presented to the Court, namely, "confirming that Defendants may not rely on the Alagar prior art reference because Defendants did not include it in their initial election of prior art and have not sought leave to amend their election to include this new reference." D.I. 333, C.A. 16-453-RGA, at 1. To the contrary, Acceleration Bay only informed the Special Master of the prior art election issue and that it was being presented to the Court as opposed to the Special Master to avoid any confusion as to the relief it was seeking from each:

Acceleration Bay also objects to Defendants' reliance on the Alagar reference for seven of its nineteen prior art-based invalidity arguments advanced in Dr. Karger's report *because Defendants did not include Alagar in their preliminary election of prior art*, which was the disclosure that required Defendants to identify their asserted prior art in these cases. *Defendants are not permitted to rely on new prior art references without first moving the Court for leave to amend their prior art election after demonstrating good cause.* Ex. 8 (D.I. 116, 4/13/17 Order) ("Absent good cause . . . Defendants cannot substitute different art for the ones currently asserted"); Ex. 9 (Defs. 5/6/16 Election of Prior Art) at 24-26 (not including Alagar as elected prior art). *The parties are submitting this dispute to the Court* and, should the Court deny Defendants' motion for leave to amend their election of prior art to include Alagar, the portions of Dr. Karger's report and corresponding opinions relying on the Alagar reference will be stricken.

Ex. 1 (10/20/17 Br. to Special Master) at 11, n.4 (emphasis added).

Given that Acceleration Bay explicitly stated to the Special Master that this issue was before the Court and not the Special Master, Defendants' representation to the Court is baseless. Acceleration Bay only informed the Special Master of this issue because the Special Master is addressing a discovery issue regarding Defendants' invalidity expert, who improperly relied on eight obviousness combinations that Defendants did not disclose in their *invalidity contentions*. Ex. 1 at 16. This is the type of discovery dispute that the Special Master has been addressing in this case. This is a distinct issue from Defendants' attempt to assert new prior art not included in its prior art election well after discovery has closed. The issues surrounding whether Defendants have good cause to amend their prior art election is one that falls under the purview of the Court.

Furthermore, Acceleration Bay's submission of this dispute to the Court is consistent with the parties' past practices in this case, where the parties submitted disputes regarding amendment of the parties' elections to the Court, while submitting disputes regarding invalidity and infringement contentions to the Special Master. *See* D.I. 116, C.A. 16-453-RGA (Order regarding Acceleration Bay's election of asserted claims), D.I. 146 (Order permitting Acceleration Bay to amend election of asserted claims for good cause).

The Honorable Richard G. Andrews
October 31, 2017
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Respectfully,

/s/ Philip A. Rovner

Philip A. Rovner (#3215)

Attachments

cc: All Counsel of Record (Via ECF Filing, Electronic Mail)

Public version dated: November 7, 2017

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