

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. |) | REDACTED |
| |) | PUBLIC VERSION |
| Defendant. |) | |

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

| | | |
|--------------------------------|---|-----------------------|
| ACCELERATION BAY LLC, |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| v. |) | C.A. No. 16-455 (RGA) |
| |) | |
| TAKE-TWO INTERACTIVE SOFTWARE, |) | REDACTED |
| INC., ROCKSTAR GAMES, INC. and |) | PUBLIC VERSION |
| 2K SPORTS, INC., |) | |
| |) | |
| Defendants. |) | |

**DEFENDANTS' RESPONSE TO PLAINTIFF ACCELERATION BAY LLC'S
OBJECTIONS TO SPECIAL MASTER ORDER NO. 13**

OF COUNSEL:

Michael A. Tomasulo
Gino Cheng
David K. Lin
Joe S. Netikosol
WINSTON & STRAWN LLP
333 South Grand Avenue, 38th Floor
Los Angeles, CA 90071
(213) 615-1700

MORRIS, NICHOLS, ARSHT & TUNNELL LLP
Jack B. Blumenfeld (#1014)
Stephen J. Kraftschik (#5623)
1201 North Market Street
P.O. Box 1347
Wilmington, DE 19899
(302) 658-9200
jblumenfeld@mnat.com
skraftschik@mnat.com

Attorneys for Defendants

David P. Enzminger
Louis L. Campbell
WINSTON & STRAWN LLP
275 Middlefield Road, Suite 205
Menlo Park, CA 94025
(650) 858-6500

Dan K. Webb
Kathleen B. Barry
WINSTON & STRAWN LLP
35 West Wacker Drive
Chicago, IL 60601
(312) 558-5600

Krista M. Enns
WINSTON & STRAWN LLP
101 California Street, 35th Floor
San Francisco, CA 94111
(415) 591-1000

Michael M. Murray
Anup K. Misra
WINSTON & STRAWN LLP
200 Park Avenue
New York, NY 10166
(212) 294-6700

Andrew R. Sommer
Thomas M. Dunham
Michael Woods
Joseph C. Masullo
Paul N. Harold
WINSTON & STRAWN LLP
1700 K Street, N.W.
Washington, DC 20006
(202) 282-5000

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I. INTRODUCTION

This Motion is about emails and other materials, including expert analysis, shared by Acceleration Bay (“Acceleration”) with its then-prospective litigation funder, Hamilton Capital (“Hamilton”). These diligence materials were provided for Hamilton’s pre-deal efforts to evaluate whether to extend a [REDACTED] to Acceleration to purchase the Asserted Patents and bring these suits. All the materials were disclosed to Hamilton [REDACTED] [REDACTED]—and therefore before the existence of any common interest between Acceleration and Hamilton.

Plaintiff argues that the emails are work product and privileged. Not only is this incorrect, but Plaintiff forfeited any right to assert work product or privilege over these documents nearly two years ago. In February 2016, Defendants moved for a privilege log of communications between Hamilton and Acceleration. In opposing Defendants’ Motion, Acceleration represented to the Court that there were “no exchanges of diligence information regarding the Asserted Patents between Acceleration Bay and Hamilton Capital” and “nothing to log.” D.I. 340, Ex. C, Ex. 1 at 3; *see also* D.I. 340, Ex. C, Ex. 2 at 60–61. Yet, as explained below and now admitted by Acceleration, it did exchange diligence materials with Hamilton, including emails regarding the Asserted Patents and the Accused Products. In fact, Acceleration now characterizes its pre-loan, pre-suit communications with Hamilton as the “Diligence Emails.” D.I. 339 at 2 (“In connection with diligence for the funding of these actions, outside counsel for Acceleration Bay (Kramer Levin) and its litigation funder, Hamilton (Reed Smith), exchanged several emails (the ‘Diligence Emails’).”). By earlier representing that there was “nothing to log,” Plaintiff waived any right to assert work product or privilege over the materials.

Defendants learned of these materials independently. More than a year after Acceleration denied that any diligence documents existed, Defendants uncovered publicly filed documents in a

criminal case against the owners of Hamilton that revealed that Hamilton had hired Reed Smith to evaluate the loan on its behalf. D.I. 340, Ex. C, Ex. 16 at 4. Defendants then served discovery on Reed Smith. That discovery revealed eight pre-loan diligence email chains between Acceleration's attorneys and Reed Smith relating to the patents, Defendants, and the accused products. Attached to these eight email chains were 16 references, many of which discussed the technology of the asserted patents and Defendants' products, two significant prior art references, and the supposedly highly-confidential Boeing-Airbus Agreement.

Acceleration now admits that it "provided [documents] to Hamilton in connection with due diligence," characterizing them as the "Diligence Emails"; but it never squares that admission with its February 2016 representation to this Court that there were "no exchanges of diligence information" with Hamilton. *Compare* D.I. 339 at 1 *with* D.I. 340, Ex. C, Ex. 1 at 3.¹ In objecting to the Special Master's Order that it produce the documents it withheld for nearly two years, Acceleration raises arguments that this Court has already rejected, that were not raised before the Special Master, or that are, in any event, meritless. Acceleration should have produced or at least logged these documents long ago. By withholding these documents, Acceleration denied Defendants' early access to relevant references that could have clarified Acceleration's allegations and thereby prejudiced Defendants. Because all of these documents were exchanged prior to the consummation of a deal between Acceleration and Hamilton, and before Acceleration even owned the patents, no common interest existed and all privilege and work product protection has been waived. Acceleration's objections should be overruled.

¹ Despite multiple requests, Acceleration has never explained why it did not produce or log those Diligence Emails, saying only that it produced other materials. D.I. 340, Ex. B at 4–5, 50–51. It never explained how it made the February representation, or whether there was some reason for not producing or logging them. *See* D.I. 340, Ex. B. Nor do its Objections explain why.

II. NATURE AND STAGE OF PROCEEDINGS

On September 30, 2015, Defendants requested documents related to Acceleration's relationship with Hamilton. D.I. 340, Ex. C, Ex. 5. When Acceleration objected, Defendants moved to compel a privilege log, arguing the documents could be relevant to issues including "patent valuation, damages, royalty rates, and pre-suit investigative diligence." D.I. 340, Ex. C, Ex. 7 at 3. Acceleration responded that there was "nothing to log" and "*that there have been no exchanges of diligence information regarding the Asserted Patents between Acceleration Bay and Hamilton Capital.*" D.I. 340, Ex. C, Ex. 1 at 3 (emphasis added). The Court ruled that "the representation that there's nothing to log takes care of it for today." D.I. 340, Ex. C, Ex. 2 at 61.

On March 3, 2017, Defendants again requested documents relating to Acceleration's communications with Hamilton. D.I. 340, Ex. C, Ex. 8 (RFP 139) at 8. Defendants again moved to compel. D.I. 340, Ex. C, Ex. 11. The Special Master granted Defendants' motion and ordered Acceleration to respond fully to RFP 139. D.I. 340, Ex. C, Ex. 13 (SM Order No. 6) at 8–9. Acceleration objected to the Special Master's Order, asserting that it "requires Acceleration Bay to produce its exchanges with Hamilton Capital, which are not relevant, contain work product and are subject to common interest immunity." D.I. 340, Ex. C, Ex. 14 at 2. The Court agreed with the Special Master that Acceleration had to comply with the Special Master's Order with respect to RFP 139 if it continued to assert that it was an "operating company." D.I. 340, Ex. C, Ex. 15 at 2–3. The Court also expressly rejected Acceleration's claim of work product protection. *Id.* Acceleration has since stated that it will advance its position that it is an "operating company." *See* D.I. 340, Ex. C, Ex. 17. After that Order, Defendants repeatedly requested that Acceleration produce "the diligence documents between Acceleration Bay including its representatives and Hamilton Capital including its representatives." *See* D.I. 340, Ex. C, Ex. 17 at 1. Acceleration replied, "*There are no such documents.*" *Id.* (emphasis added).

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