

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

**SPECIAL MASTER ORDER NO. 2 AS TO MOTIONS TO COMPEL
BY BOTH PLAINTIFF AND DEFENDANTS**

On March 31, 2017 Plaintiff and Defendants filed eleven Motions to Compel with Opening Briefs and Exhibits; on April 11, 2017 the parties filed Answering Briefs and Exhibits; and an additional brief and exhibits were filed on April 12, 2017. The Hearing was held on April

14, 2017 before the Special Master (the “Hearing”). This is Special Master Order No. 2 as to all pending motions to compel.

Plaintiff filed five motions to compel. Set forth below are my rulings with respect to each motion:

P1. Plaintiff moves that Defendant should produce emails as to its use of the search terms. In addition to the production to date by Defendants, Defendants maintain that the additional discovery sought by Plaintiff is irrelevant, overly broad, and burdensome. Defendants’ counsel indicates that Plaintiff’s search request could involve over 800,000 “hits”. Costello’s declaration states that the cost of the search to Defendants would be approximately \$250,000.00. Plaintiff will not assume the costs of this search. The Plaintiff’s motion is denied, principally on the ground that the burden of the additional search would be excessive.

P2. Plaintiff moves to compel Defendants to amend their invalidity contentions. Plaintiff has some justification for challenging the prior art elections as being in excess of the appropriate limit on the number of contentions and for failure to identify with specificity. However, the invalidity contentions meet the “notice requirement” for this stage of the litigation. As further evidence is developed in the litigation, it may be necessary for Defendants to amend their invalidity contentions. At this time, Plaintiff’s motion to compel is denied.

P3. Plaintiff moves for Defendants to produce any agreements they have with Bungie, involving the development of the game of Destiny. Defendants represent that they have produced the documents within their possession, that Bungie is an independent company that developed the game of Destiny, and that they will seek further information from their clients. Subsequent to the Hearing, the parties requested that the Special Master defer a decision while the parties seek a resolution among themselves, and it is so Ordered.

P4. With respect to Plaintiff's request for a supplemental response to interrogatory No. 6 as to the locations of the development and manufacturing of Defendants' products, Defendants advised during the Hearing that they will provide further information (Hearing Transcript p. 169). Subsequent to the Hearing, the parties reached an agreement on the motion. Accordingly, the motion to compel is moot.

P5. Plaintiff moves to compel Electronic Arts to produce its financials. Revenue from sales prior to 2015 cannot be used to calculate damages in this case. The motion to compel with respect to Electronic Arts' sales prior to 2015 is denied.

Defendants filed six motions to compel. Set forth below are my rulings with respect to each motion:

D1. Defendants' first motion to compel seeks supplemental responses to their interrogatory No. 1, with regard to the dates of conception and practice as to each claim. Plaintiff's interrogatory response gave the date of November 1996 for conception and "no later than November 1999" with regard to practice on all six patents in litigation. During the Hearing, Plaintiff's counsel agreed to the definitive dates (Hearing Transcript p. 113). The motion to compel is denied based on Plaintiff's statement.

D2. Defendants moved to compel supplemental responses to their interrogatory No. 5 with regard to the testing performed by Plaintiff. This motion involves generally two tests; those conducted prior to the litigation, and those subsequent to the litigation. Testing performed prior to filing the case, known as "play testing", has been produced, according to Plaintiff. Testing after the filing of the case is privileged and no privilege log is needed with respect to such testing, according to the parties' Protective Order. Defendants' motion is denied

D3. Defendants move to compel information as to the hit count by Plaintiff on its email searches. As to the hit counts, Plaintiff has represented that it will produce the hit terms and hit counts shortly after producing the relevant emails next week. If Defendants are not satisfied with what is produced by Plaintiff, Defendants can renew this motion to compel.

D4. Defendants moved to compel an email search of Plaintiff's CEO Joe Ward's personal email accounts. The motion is addressed to the Plaintiff and is not a subpoena to Mr. Ward. There is an insufficient basis for a "good cause" requirement of a privilege log, since counsel for the Plaintiff has represented that Mr. Ward's communications with regard to acquiring the patents in question were entirely oral. Accordingly at this time, the motion to compel is denied.

D5. Defendants' motion to require Boeing to produce a privilege log is based upon the argument that Boeing should either be treated as a party, or in any event, is subject to Federal discovery rules with regard to document production. Neither argument is persuasive. There are no grounds at this time to treat Boeing as a party in the case and its connection to Plaintiff has already been disclosed. Plaintiff represents that Boeing has produced all documents within its possession involving the Plaintiff. There is no obligation for Boeing to provide a privilege log for its documents. The motion to compel as to Boeing is denied.

D6. Defendants' final motion is to compel compliance with a subpoena to Messrs. Holt and Bourassa. Messrs. Holt and Bourassa are not parties to the litigation. Plaintiff represents that it has produced their emails (Hearing Transcript p. 34). They were allegedly the inventors of the patents in question and have consulting agreements with the Plaintiff. Their consulting fee of \$400 per hour has been disclosed and Plaintiff represents that they have no other financial interest in this litigation. There is no requirement under the Protective Order that

a privilege log be produced with regard to Messrs. Holt and Bourassa. The motion to compel compliance with the subpoena is denied.

Dated: April 19, 2017

/s/ Allen M. Terrell, Jr.
Special Master Allen M. Terrell, Jr.