

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.,	)	<b>TGFCEVGF</b>
	)	<b>RWDNÆ'XGTUQP</b>
Defendant.	)	
<hr/>	)	
ACCELERATION BAY LLC,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 16-454 (RGA)
	)	
ELECTRONIC ARTS INC.,	)	<b>TGFCEVGF</b>
	)	<b>RWDNÆ'XGTUQP</b>
Defendant.	)	
<hr/>	)	
ACCELERATION BAY LLC,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 16-455 (RGA)
	)	
TAKE-TWO INTERACTIVE SOFTWARE,	)	<b>TGFCEVGF</b>
INC., ROCKSTAR GAMES, INC. and	)	<b>RWDNÆ'XGTUQP</b>
2K SPORTS, INC.,	)	
	)	
Defendants.	)	
<hr/>	)	

**DEFENDANTS' OPENING BRIEF IN SUPPORT OF  
THEIR MOTION TO STRIKE ACCELERATION BAY'S  
UNTIMELY DISCLOSED PROPOSED CLAIM CONSTRUCTIONS**

OF COUNSEL:

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

David P. Enzminger  
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

Qtki kpcnHtpi "F cvg<" May 31, 2017  
Redacted Filing Date: June 1, 2017

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 Defendant*

**TABLE OF CONTENTS**

	<b>Page</b>
I. NATURE AND STAGE OF THE PROCEEDINGS .....	1
II. SUMMARY OF ARGUMENT .....	1
III. STATEMENT OF FACTS .....	5
IV. ARGUMENT .....	9
A. Legal Standard .....	9
B. Acceleration Bay Knowingly and Persistently Violated the Scheduling Order .....	11
C. Acceleration Bay’s Conduct Was Intended to, and Did, Prejudice Defendants. ....	13
D. Acceleration Bay’s Violations of the Scheduling Order Merit Sanctions .....	18
E. The Sanctions Should Include Striking Acceleration Bay’s Untimely Claim Constructions.....	18
V. CONCLUSION.....	20

**TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>Cases</b>	
<i>Allen v. Bayer Corp. (In re : Phenylpropanolamine (PPA) Prods. Liab. Litig.)</i> 460 F.3d 1217 (9th Cir. 2006) .....	19
<i>Brown v. 3M</i> 265 F.3d 1349 (Fed. Cir. 2001).....	13
<i>Constant Compliance, Inc. v. Emerson Process Mgmt. Power &amp; Water Solutions, Inc.</i> 598 F. Supp. 2d 842 (N.D. Ill. 2009) .....	13
<i>eBay Inc. v. MercExchange, L.L.C.</i> 547 U.S. 388 (2006).....	20
<i>Info. Tech. Innovation, LLC v. Motorola, Inc.</i> 391 F. Supp. 2d 719 (N.D. Ill. 2005) .....	12
<i>Integrated Discrete Devices, L.L.C. v. Diodes Inc.</i> C.A. No. 08-888-GMS (D. Del. Apr. 28, 2010) .....	10
<i>Jones v. Thompson</i> 996 F.2d 261 (10th Cir. 1993) .....	19
<i>Koplove v. Ford Motor Co.</i> 795 F.2d 15 (3d Cir. 1986).....	10
<i>Media Duplication Services, Ltd. v. HDG Software, Inc.</i> 928 F.2d 1228 (1st Cir. 1991).....	19
<i>Mindek v. Rigatti</i> 964 F.2d 1369 (3d Cir. 1992).....	11, 19
<i>Newton v. A.C. &amp; S., Inc.</i> 918 F.2d 1121 (3d Cir. 1990).....	9
<i>Poulis v. State Farm Fire &amp; Casualty Co.</i> 747 F.2d 863 (3d Cir. 1984).....	18
<i>Robertson v. Horton Bros. Recovery, Inc.</i> No. 02-1656, 2006 U.S. Dist. LEXIS 73969 (D. Del. Oct. 10, 2006) .....	11
<i>SanDisk Corp. v. Memorex Prod., Inc.</i> 415 F.3d 1278 (Fed. Cir. 2005).....	10

<i>Tracinda Corp. v. DaimlerChrysler AG</i> 502 F.3d 212 (3d Cir. 2007).....	11, 18
<i>United States v. 68.94 Acres of Land</i> 918 F.2d 389 (3d Cir. 1990).....	18
<i>Vehicle Operation Techs. LLC v. Am. Honda Motor Co. Inc.</i> 67 F. Supp. 3d 637 (D. Del. 2014).....	17
<i>Via Vadis LLC v. Skype, Inc.</i> Civ. A. No. 11-507-RGA, D.I. 97 (D. Del. Dec. 17, 2012).....	1, 10, 18
<i>Vizio, Inc. v. ITC</i> 605 F.3d 1330 (Fed. Cir. 2010).....	13
<b>Statutes</b>	
35 U.S.C. § 101.....	6
35 U.S.C. § 112(6) .....	6
35 U.S.C. 101.....	7
<b>Other Authorities</b>	
Fed. R. Civ. P. 11 .....	<i>passim</i>
Fed. R. Civ. P. 16.....	9, 11
Fed. R. Civ. P. 16(b) .....	9
Fed. R. Civ. P. 16(f).....	1, 10, 18
Fed. R. Civ. P. 37 .....	18
3-16 Moore’s Federal Practice – Civil § 16.15.....	11

# 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.