

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.)	REDACTED
)	PUBLIC VERSION
)	
Defendant.)	

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

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

**DEFENDANTS' RESPONSE TO
PLAINTIFF'S OBJECTIONS TO SPECIAL MASTER ORDER NO. 3**

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
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
WINSTON & STRAWN LLP
200 Park Avenue,
New York, NY 10166
(212) 294-6700

Original Filing Date: June 19, 2017
Redacted Filing Date: June 26, 2017

I. INTRODUCTION

Acceleration's objections to the Special Master's May 19, 2017 Order No. 3 (Ex. A, No. 16-453, D.I. 155, the "Order") is part of a case-long tactic to avoid giving defendants *any* meaningful information about Plaintiff's positions. With these objections, Acceleration is seeking to avoid providing basic facts supporting its (1) infringement claims, (2) damages position, (3) the date of the hypothetical negotiation for purposes of determining a reasonable royalty, and (4) its claim that Sony copied and practiced the claimed inventions of the patents. To date, Acceleration has refused to comply with *three* Special Master's orders directing them to identify the facts supporting their infringement claims. Last week, Acceleration's 30(b)(6) witness testified that it knew no facts supporting any claim of infringement, and that all facts are "privileged" because only its counsel has any idea what this case is about. And Acceleration's counsel acknowledged that he structured the company and patent deal to make sure there were no documents. The information sought by Defendants does not require expert opinion and is not burdensome – they are foundational fact and contention discovery that every patent plaintiff is required to provide early in a case. Allowing Acceleration to deny Defendants all fact discovery into the fundamental aspects of Plaintiff's case, and giving Defendants notice of Acceleration's basic positions for the first time in expert discovery is antithetical to the Federal Rules and has greatly prejudiced Defendants' ability to prepare their defense. Before the close of fact discovery, Acceleration should be required to comply fully with the Order.

II. RESPONSES TO PLAINTIFF'S OBJECTIONS

The Special Master held multiple hearings on these motions, and the Court should uphold the Special Master's Orders as follows:

1. As to all interrogatories, the objections should be overruled as a preemptive tactic designed to prevent the Special Master from issuing further orders.

2. Interrogatory No. 1: By close of fact discovery, Acceleration should be required to disclose all facts underlying *all* (not just some) of its damages theories. If Acceleration fails to do so, it should be precluded from relying on facts that it has not disclosed in its responses.
3. Interrogatory No. 2: Acceleration should be required, in good faith, to identify the date it contends is the date of first infringement and the full factual basis for that contention.
4. Interrogatory No. 4: Acceleration should be required to identify all Sony PlayStation games that infringe. The Sony license and the number of games under that license is highly relevant to the calculation of damages. As Acceleration contends damages of nearly \$550 million for the three Defendants (and for a damages period of around 18 months), discovery on this issue is certainly proportional to the needs of this case.¹
5. Activision Interrogatory Nos. 7 and 9: Acceleration should be ordered to provide complete responses as required by the Special Master or be precluded from relying on facts or position that it has not disclosed in its responses. Acceleration did not object to the two previous orders from the Special Master and has therefore waived its objections. Even if the Court considers the objections to the third Special Master order, these objections should be overruled as further attempts by Acceleration to obfuscate its infringement theories.

A. Acceleration's Objections Are An Improper Attempt to Foreclose the Special Master's Authority

Acceleration states that it will provide additional interrogatory responses, but then objects to the extent Defendants do not believe the answer complies with the Special Master's Order. These objections should be overruled as an improper attempt to foreclose the authority of the Special Master regarding discovery disputes. Defendants reserve their right to pursue relief before the Special Master for noncompliance with his Orders.

B. Acceleration Fails (or Refuses) to Disclose Facts Supporting Each of its Damages Theories (Interrogatory No. 1)

As the Special Master explains, "Interrogatory No. 1 seeks discovery as to Acceleration's damages theories and all the facts that Acceleration intends to [rely (sp.)] upon to support each of its theories." Ex. A, 7; Ex. C, 5; Ex. D, 5, Ex. E, 5. Defendants noted, and the Special Master agreed, that this Court's decision in *In re Cyclobenzaprine* has particular relevance to the dispute

¹ Moreover, in the PTAB proceedings, Acceleration contended that Sony copied and practiced the claimed inventions in support of Acceleration's argument of non-obviousness. Thus, Acceleration has admitted both the relevance and lack of burden of providing its position on this issue when it serves Acceleration's need.

here. Ex. A, 8. There, the Court explained that “to claim, e.g., lost profits, plaintiffs must have some underlying data” to support such a theory. Ex. F, 3. Similarly, it explained that the plaintiffs “should also have underlying data supporting their other theories of recovery” and that the defendants were entitled to such facts “before [they] are massaged and manipulated by their expert witnesses. *Id.* The Special Master granted Defendants’ motion without qualification.

Although Acceleration claims it has complied with the Special Master’s order, it has not provided supporting facts for a number of its damages theories. It says it will not disclose more. But, per *In re Cyclobenzaprine*, Acceleration has an “obligation to provide [its] good faith bases for electing [its] theories of recovery.” Ex. F, 3. If Acceleration continues to refuse to do this, it should be held to its interrogatory responses and precluded from relying on other facts.

Acceleration’s recent supplements to this interrogatory belie its alleged compliance with the Order. First, Acceleration identifies a number of theories without providing *any* facts that would support such theories. [REDACTED]

[REDACTED] Ex. G, 8; Ex. H, 8; Ex. I, 8. But Acceleration refers to nothing in support of this number. Similarly, Acceleration contends the [REDACTED]

[REDACTED] *Id.* Acceleration also identifies five different theories of potential recovery but cites no specific facts in support of each theory.²

Second, Acceleration objects “to the extent ... the Order requires further disclosures” and then states that “after fact discovery has been completed, Acceleration Bay will provide reports

² See also Ex. S at 27 (this Court explained that “[w]hen you answer the interrogatory ... [y]ou actually do need to explain the damages theory without waiting for the expert report. You don’t need to have the same level of detail, but you ought to have an idea of what the revenue base is and the royalty rate and, you know, whatever your Reasonable Royalty theory is.” (Andrews, J).

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.