

**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.)	
<hr/>		
ACCELERATION BAY LLC,)	
)	
Plaintiff,)	
)	C.A. No. 16-454 (RGA)
v.)	
)	
ELECTRONIC ARTS INC.,)	
)	
Defendant.)	
<hr/>		
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.**

Dear Judge Andrews:

Since 2015, when Acceleration Bay first asserted these patents, Defendants have sought to delay these cases and deny Acceleration Bay its day in court, while taking full advantage of judicial and USPTO resources in their unsuccessful attempts to derail these actions. After the dismissal without prejudice of the predecessor cases, Defendants extensively delayed these proceedings by refusing to continue discovery in the 2016 cases, filing declaratory judgment actions in the Northern District of California and filing serial motions to dismiss in lieu of answering in this Court, including a Rule 11 motion that was denied. *See, e.g.*, D.I. 13-1 at 11 (Order from the Northern District of California transferring Defendants' DJ actions to Delaware: "These actions smack of gamesmanship"); *see also* D.I. 6 (first motion to dismiss), D.I. 18 (second motion to dismiss), D.I. 21 (third motion to dismiss), D.I. 49 (Activision's fourth motion to dismiss and Rule 11 motion).¹ Defendants then attempted to derail the claim construction process by proposing more than 50 terms for construction and unsuccessfully moving to strike Acceleration Bay's claim construction positions. *See* D.I. 206. Defendants also filed eighteen petitions for *inter partes* review of the asserted patents, almost all of which have already concluded, with only 2 of the 21 asserted claims remaining subject to Defendants' IPRs. Now, Defendants seek to delay the cases on grounds they manufactured related to claim construction. Given the history of delays, Defendants' request to deviate from the current case schedule, if granted, would significantly prejudice Acceleration Bay by further delaying these proceedings. No further delay is appropriate and these cases should proceed to trial as scheduled.

Nor is there any compelling reason to deviate from the current case schedule. Defendants' concern is of their own making. Specifically, Defendants selected more than 50 terms for construction, many of which were entirely straightforward, such as "computer," "connect" and "data."² Given the overwhelming number of terms Defendants identified, the Court ordered additional limited briefing. D.I. 206. Defendants cannot now use the unnecessary extra burden they placed on the Court as grounds to extend the case schedule anywhere from seven months to a year. Nor did the Court give any indication that its July 5, 2017 Order on Claim Construction Process was intended to broadly modify, let alone effectively stay, the case schedule. *Id.* Moreover, the Court held a hearing on the key claim construction issues, and the remaining claim construction disputes are unlikely to have a significant impact on these proceedings. Given that these cases have been pending since early 2015, judicial economy is best served in maintaining the current schedule, where the trials are scheduled for 2018.

The Limited Briefing on Claim Construction Does Not Impact Upcoming Deadlines.

The entire basis for Defendants' request is their contention that claim construction is necessary to ensure judicial efficiency for the expert and dispositive motion phases of the case. There are multiple flaws with this theory.

¹ Docket citations are to C.A. No. 16-453-RGA, and are representative of the filings in the related cases.

² Many district courts, such as the Northern District of California, limit the number of terms that can be construed to ten, irrespective of the number of patents being asserted, to prevent the abusive practice of over-identification of claim terms for construction. *See* D.I. 176 at 11 (collecting examples of courts limiting construction to ten terms).

The Honorable Richard G. Andrews

August 14, 2017

Page 2

First, the Court already held a hearing on the most substantive claim construction disputes, namely the “m-regular,” “m,” and “m-regular network” terms and the eight disputed means-plus-function elements. Both sides agreed that these terms required construction, and they were the subject of 36 pages of the parties’ joint claim construction brief and 23 pages of supplemental briefing. D.I. 186. In fact, Defendants characterized the “m-regular, incomplete graph” as “fundamental,” “the key feature” of five of the six asserted patents and the “backbone” of the patents. *Id.* at 4, 5, 6. The parties will have the benefit of the Court’s anticipated claim construction order as to these eleven claim terms as they proceed under the current case schedule, which is all the claim construction guidance courts often provide to the parties.

Second, there is very little difference between the parties’ constructions for the remaining terms, such that even if the Court does not issue supplemental claim construction orders prior to expert discovery or summary judgment motions, the parties can address their positions with the alternative constructions before the Court. Indeed, in their letter, Defendants did not identify any specific terms for which they contend the Court’s selection between the proposed constructions would be dispositive. For 11 of the 29 remaining terms, the primary dispute is that Defendants seek to incorporate their flawed construction of m-regular into unrelated terms. *See* D.I. 236-1 (Joint Claim Chart) at Terms 11, 13, 19, 29, 30, 32-34, 38-40. The Court likely will resolve or at least substantially narrow the disputes over these terms when it issues its construction of the m-regular terms already before it. For the other terms, the parties’ differing constructions will not impact the case, and there will be little additional burden from addressing both side’s alternative constructions in expert reports and dispositive motion practice, to the extent even necessary. For example, for “computer network,” Acceleration Bay proposes a construction of “a group of connected computers and/or computer processes”, while Defendants suggest “at least two physical computers that are interconnected.” D.I. 236-1 at Term 9. Since Defendants’ accused products all operate on at least two physical computers that are interconnected, the Court’s construction will not have any material impact on the case.

Third, most of the other claim construction disputes are not competing proposals, but rather Defendants’ contentions that some of the claims are invalid under § 101 or indefinite. Many of these arguments were already before the Court at the first *Markman* hearing, and thus have no bearing on Defendants’ request. For example, the six claims that Defendants identify in their Exhibit C as “Indefinite MPF” are the subject of the prior claim construction hearing and are not part of the additional limited claim construction briefing. *See* D.I. 253-3 at Col. 3 (listing Terms 1-8). To the extent Defendants contend their purported remaining invalidity theories should be resolved prior to the commencement of expert reports, Defendants should have included those arguments in their series of motions to dismiss. Defendants’ decision not to include these theories in their prior motions is an admission that such alleged newfound § 101 challenges are without merit. Accordingly, any further claim construction will not have any meaningful impact on expert reports and dispositive motion practice.³

³ Defendants’ speculation that Acceleration Bay’s expert reports will be inadequate or contain new theories is unfounded, hypothetical and, in any event, has no bearing on their request to stay these cases. Defendants fail to explain how a second claim construction order will alleviate these baseless concerns.

The Honorable Richard G. Andrews

August 14, 2017

Page 3

This Court's Practice Does Not Require a Full Claim Construction Order Before Expert Discovery. Defendants' request fails to take into account that this Court's practice does not require completion of claim construction before proceeding with expert discovery and dispositive motion practice. Other Courts have elected to provide scheduling orders where deadlines for dispositive motion practice are not set until after the issuance of the claim construction order and/or provide for deadlines that are adjusted based on the date the claim construction order issues. *See, e.g.* Ex. 1 (Judge Donato's Standing Order For Claim Construction); Ex. 2 (8/1/16 Scheduling Order setting close of fact discovery "120 days after the Court's claim construction order"). In contrast, the schedule used in this case and the customary approach in this District, is to set a schedule with fixed dates and without a guarantee that the claim construction order will issue prior to the commencement of expert discovery or dispositive motion practice.⁴ That would be the case here even if the Court had not ordered further claim construction briefing. There is nothing special about this case that requires modifying that approach. To the contrary, as discussed above, the impact of supplemental claim construction is anticipated to be modest.

A Stay of These Actions is Not Warranted. Defendants couch their proposal as an "adjustment" of the schedule. However, in reality, it is an extension of the case schedule of anywhere from seven months to a year, and even longer if the Court does not issue a second claim construction order by February 2018, which is in effect a stay of the case. While Defendants propose resuming activity in April, their amended schedule would move the Activision trial date by at least nine months, the EA trial date by ten months and the Take-Two trial date a full year. *See* D.I. 253-1. In deciding motions to stay, this District considers the following three factors: "(a) [W]hether the granting of a stay would cause the non-moving party to suffer undue prejudice from any delay or allow the moving party to gain a clear tactical advantage over the non-moving party; (b) whether a stay will simplify the issues for trial; and (c) whether discovery is complete and a trial date set." *Peschke Map Techs., LLC v. J.J. Gumberg Co.*, 40 F. Supp. 3d 393, 396 (D. Del. 2014). These factors weigh heavily against staying the cases. Acceleration Bay filed suit in early 2015, and it is highly prejudicial to have to wait four to four and a half years to present its claims to the jury. Defendants' alteration of the schedule will have no impact whatsoever on the issues *for trial*, as claim construction will be finally settled by trial, with or without an amendment to the schedule. Finally, these cases involve products sold in 2015 and developed even earlier, fact discovery concluded July 31, 2017 and holding the first trial 18 months later, as Defendants propose, creates a real risk of witnesses becoming unavailable for trial or have fading memories. Accordingly, the Court should deny Defendants' request, and preserve the current case schedule and trial dates.

⁴ Judge Robinson's prior practice to hold a combined *Markman* and summary judgment hearing shows that having the Court's full claim construction positions before beginning expert discovery and briefing dispositive motions is not necessary in every case. While Judge Robinson eventually changed her practice, countless parties were able to draft expert reports and brief summary judgment motions without her full claim construction order. Given Defendants' dilatory tactics and self-made issues, they should be expected to do the same here.

The Honorable Richard G. Andrews
August 14, 2017
Page 4

Respectfully,

/s/ Philip A. Rovner

Philip A. Rovner (#3215)

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

5365391