

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.)	C.A. No. 16-455 (RGA)
)	
TAKE-TWO INTERACTIVE SOFTWARE, INC., ROCKSTAR GAMES, INC. and 2K SPORTS, INC.,)	
)	
Defendants.)	

**DEFENDANTS' RESPONSE TO PLAINTIFF'S
OBJECTIONS TO SPECIAL MASTER ORDER NO. 9**

Again objecting to an Order of the Special Master, Acceleration Bay makes the remarkable claim that its experts need more than 2,500 pages, for each of the three cases, to provide a “complete statement of all opinions the witness will express and the basis and reasons for them” and “facts or data considered.” But each case is set for a five-day trial, thus limiting the amount of expert testimony that can be offered, and Acceleration Bay provides no reason

why that testimony cannot be disclosed in 2,500 pages (or far less) per case. Acceleration Bay argues that the Order “imposes an unprecedented, arbitrary and highly prejudicial page limit on expert reports in these actions” (Objs. at 1), but makes no effort to explain why it needs more than 2,500 pages to present expert testimony that will last only a few hours. It pretends that 2,500 pages of reports per case is a meager amount but does not explain why it needs more.

Acceleration Bay also ignores the prejudice to Defendants from receiving thousands of pages on the same day (currently September 22) and having to respond in six weeks (currently November 3).¹ Plaintiff states that it will serve “at least” six expert reports, but the facts suggest that there may be more. For each of the three cases, Plaintiff has identified nine experts: seven technical experts, a damages expert and a survey expert. Acceleration Bay identified four of the seven technical experts under the Protective Order within the last few days, meaning that they will have only a few days to prepare reports based on Defendants’ confidential information. Even with a 2,500 page per case limit, the burden to Defendants from having to analyze and respond to six or more reports for each case will be enormous, and perhaps not even doable.

Acceleration Bay’s principal objections are that the Special Master’s Order is “unprecedented” and that somehow it will hamper “disclosure.” There is, however, nothing “unprecedented” about Courts imposing limitations in order to make cases manageable – whether that is by limiting discovery, pages for briefs, duplicative expert discovery, or time for trial. Limiting the length of expert reports serves the same interest in ensuring that litigation is manageable.

Defendants agree that the Federal Rules favor full disclosure. And that is what Defendants seek: disclosure, before trial, of Acceleration Bay’s theories and evidence. That is

¹ Acceleration has disclosed nine experts, including four just this week.

what Defendants have been seeking from Acceleration Bay, in motions before the Special Master, from the very outset of the cases. And this Court has recognized that voluminous disclosures are not disclosures at all, as they are “useless in terms of giving Defendant[s] any information about what theories [Plaintiff] w[ill] actually pursue.” *St. Jude Med. v. Volcano Corp.*, 2012 WL 1999865, at *1 (D. Del. June 5, 2012).

Acceleration Bay’s experts have a history in other cases of submitting voluminous expert reports that obscured, rather than disclosed, the substance of the experts’ anticipated testimony. *See, e.g., Finjan, Inc. v. Sophos, Inc.*, No. 14-CV-01197-WHO, 2016 WL 2988834, at *15 (N.D. Cal. May 24, 2016).² The apparent purpose of these voluminous reports was to provide “nearly limitless combinations of source code” that the experts could “pick and choose from to develop their infringement theories during trial.” *Id.* at *15 (quoting Defendant’s reply brief). Without a page limit, Defendants are concerned that Acceleration Bay will submit thousands of pages of expert reports, and somewhere “buried amidst” these thousands of pages may be the arguments it will “actually pursue” during the five-day trial. *Id.* For that reason, Defendants proposed a bilateral framework for expert reports.³ Defendants requested a 1,500 page per case limit and a

² *See also id.* at *15 (striking parts of the reports of Drs. Cole and Mitzenmacher); *Finjan, Inc. v. Proofpoint, Inc.*, No. 13-cv-05808-HSG, 2016 WL 612907, at *1-2 (N.D. Cal. Feb. 16, 2016) (striking parts of the reports of Drs. Cole and Mitzenmacher); *Finjan, Inc. v. Blue Coat Systems, LLC*, No. 15-cv-03295-BLF, D.I. 278 (July 28, 2017) (order granting in part motions to strike expert reports by Drs. Cole and Mitzenmacher). In each of these cases, these experts had been retained by Plaintiff’s counsel.

³ Defendants asked that expert discovery be governed by the following framework:

- Page limits for expert reports;
- Each report must have “a clear and concise summary of all opinions to be provided at trial and the basis and reasons for them at the beginning of the report;”
- Each report must identify materials relied on with specificity and “explain clearly how those materials provide support for the expert’s opinions.”
- Precluding an expert from testifying “on matters not clearly disclosed in the expert’s

(Continued . . .)

requirement that the experts summarize their opinions in a clear and fulsome manner at the beginning of each report. The proposed framework was designed to focus the cases and require Acceleration Bay to articulate, clearly and concisely, the theories it will actually pursue at trial, and to avoid the prejudice resulting from surprise at trial.

The Special Master was in a unique position to decide the appropriate length of expert reports and the requirement that the reports include an “informative summary” of all of the expert’s opinions. The motion that led to Special Master Order No. 9 was part of Defendants’ effort to require Acceleration Bay to provide basic discovery regarding the core issues of infringement and damages. From the outset of this case, Defendants have been trying to require Acceleration Bay to identify the basis for its infringement case and its damages claim. The Special Master has worked closely with the parties on dozens of discovery issues, hearing numerous motions by which Defendants’ have sought Acceleration Bay’s infringement contentions. The Special Master has held at least eleven discovery hearings, many of which were lengthy, and has heard the parties for many hours. He has issued ten Orders so far, with more coming. In short, Defendants have done everything they can to require the Plaintiff to state the basis for its cases so as to avoid surprise at trial, and the Special Master is in a unique position to assess both the conduct of the parties and the needs of the case. “[B]alanc[ing] the needs of the parties,” the Special Master set the limit for expert reports at 2,500 pages for each case. Defendants believe that the Special Master would have been justified in limiting the pages even more and in accepting the entire expert framework requested by the Defendants.

(. . . continued.)

report”; offering “opinions or bases for opinions not clearly stated in the expert report”; and using “evidence not disclosed and clearly explained in the expert’s report”; and

- Providing for depositions commensurate with the length of the expert’s report.

Acceleration Bay complains that the 2,500 page limit is “arbitrary and draconian.” But expert reports are “intended to set forth the substance of the direct examination.” Fed. R. Civ. P. 26(b)(2)(B), 1993 Adv. Comm. N. These cases are set for five-day trials, and 2,500 pages far exceeds what could be presented in the time each side will have for direct examination of its experts. *See* D.I. 62 at 11 (setting five days for each trial and stating that “[t]he trial will be timed”). The Special Master selected the 2,500 page limit fully aware of the history of the case, the issues involved, the scope of discovery, and the case schedule. There is nothing arbitrary about it, and 2,500-page limit is hardly draconian. To the contrary, it is far more than what the parties need.

The page limit applies equally to both sides. Acceleration Bay asserts that “2,500 pages is insufficient” (*id.*), but it provides no explanation why it cannot package its infringement, damages and validity positions for a 5-day trial into 2,500 pages of expert reports. Defendants face an equivalent burden and do not anticipate being short-changed: Defendants intend to submit five expert reports (a technology tutorial, non-infringement, damages, and two invalidity reports). And Defendants will contest infringement fully, not merely address “a single element of [each] claim” (Objs. at 5), and will demonstrate invalidity, which must be proven by clear and convincing evidence.

Finally, there is no basis for Acceleration Bay’s claim that expert reports “frequently run to 1,000 pages or more,” and no reason they should. As the Special Master recognized, setting a reasonable page limit for expert reports will benefit the Court, the jury, and the parties by forcing each side to articulate its positions clearly and concisely. Such limits are not “unprecedented” (Objs. at 2); courts have imposed page limits on expert reports in patent cases. *See, e.g., Ebay Inc. v. IDT Corp., et al.*, Case No. 08-cv-4015, D.I. 210 (W.D. Ark. April 15, 2010) (enforcing a

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