IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ACCELERATION BAY LLC, Plaintiff, v. ACTIVISION BLIZZARD, INC. Defendant.	)	C.A. No. 16-453 (RGA) **PUBLIC VERSION**
ACCELERATION BAY LLC, Plaintiff, v. ELECTRONIC ARTS INC., Defendant.	)	C.A. No. 16-454 (RGA)
ACCELERATION BAY LLC, Plaintiff, v. TAKE-TWO INTERACTIVE SOFTWARE, INC., ROCKSTAR GAMES, INC. and 2K SPORTS, INC., Defendants.	)	C.A. No. 16-455 (RGA)

LETTER TO THE HONORABLE RICHARD G. ANDREWS FROM
PHILIP A. ROVNER, ESQ. REGARDING UNTIMELY ELECTION OF PRIOR ART

Dear Judge Andrews:

Acceleration Bay seeks an order confirming that Defendants may not rely on the Alagar prior art reference because Defendants did not include it in their initial election of prior art and have not sought leave to amend their election to include this new reference. Defendants have thereby failed to follow the procedure the Court previously ordered the parties to follow before amending elections. D.I. 116 (4/13/17 Order).[1] Moreover, as explained below, Defendants have stalled presentation of this dispute to the Court, backing away from an agreement to move for leave to amend, and heightening the prejudice to Acceleration Bay by forcing it to contend with prior art not properly in the case in connection with rapidly upcoming expert reports.

Defendants injected Alagar into the case, even though they did not include it in their initial election of prior art. The Scheduling Order in the predecessor cases to these actions required Defendants to provide a preliminary election of prior art, which would limit the prior art they could present in the case. C.A. No. 15-228-RGA, D.I. 34 at § 10(b). Defendants' May 6, 2016 election, incorporated into these cases, included the maximum twelve references, but did not include Alagar. Ex. 1 at 24-26.[2] Defendants provided updated invalidity contentions on June 8, 2017 and July 31, 2017 that also did not include Alagar. On September 15, 2017, Defendants served a final election of prior art adding Alagar as a reference and on September 25, 2017, served an opening invalidity report relying on Alagar. Ex. 2 (9/15/17 Election of Prior Art). Defendants did not confer with Acceleration Bay regarding adding this new prior art to the case and did not seek leave from the Court to amend their initial election of prior art to include Alagar. Acceleration Bay's responsive validity report is due November 10, 2017.

Defendants failed to follow the Court's procedure to amend case elections. When Acceleration Bay served an updated election of asserted claims adding new claims in view of developments in *inter partes* review proceedings, the Court held that both parties must first move for leave to amend elections upon a showing of good cause. D.I. 116 ("'Preliminary' refers to time. It does not mean 'subject to change at whim.' As Defendants point out, the goal is to narrow the case into something that could be triable. When one side or the other seeks to replace[] newly-identified weaklings with more robust claims, that side is going in the wrong direction. ***Absent good cause***, Plaintiff cannot substitute different claims for the ones currently asserted, ***and Defendants cannot substitute different art for the ones currently asserted.***") (emphasis added). Defendants argued at that time that it was improper for Acceleration Bay to add unelected claims — an argument that applies fully to their attempt to add new, unelected

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[1] Unless otherwise noted, all docket citations are to C.A. No. 16-453-RGA, and are representative of filings in the related cases.

[2] Defendants' invalidity election also improperly purported to reserve the right to add additional references from the prosecution of the Asserted Patents in the event Acceleration Bay took a position inconsistent with the positions during prosecution. The Scheduling Order does not permit Defendants to exceed the limit of elected references through additional "conditional" elections. In any event, even Defendants' list of such purportedly conditional references did not include Alagar. Ex. 1 (5/6/16 Invalidity Contentions) at 13-14.

prior art to the case on the eve of expert reports and well after the close of fact discovery. D.I. 113 at 3 (Defendants: "The Scheduling Order provided a procedure for Acceleration Bay to elect asserted claims, and procedures for those claims to be litigated. It also provided for reduction of asserted claims, but did not permit the later assertion of additional claims. Acceleration Bay should not be permitted to assert any new claims in these cases."). Because Defendants did not seek leave from the Court to add Alagar to their election of prior art, it is not in the case, Defendants should not be permitted to rely upon it, and Acceleration Bay should not be burdened by providing responsive expert reports addressing the unelected reference.

Defendants cannot show good cause. Defendants waived their opportunity to show good cause by reneging on their agreement to file a request with the Court for leave to amend by no later than October 20, 2017. Ex. 3 at 10/13/17 Email. Nor could Defendants show good cause. During the parties' long delayed meet and confer, Defendants could not identify any basis to justify adding this prior art, other than to suggest that Acceleration Bay's claim construction positions as to the "m-regular" limitation are somehow inconsistent with positions taken by the applicants during prosecution. However, Acceleration Bay provided its claim construction for "m-regular" by no later than the parties' submission of the Joint Claim Construction Chart on April 17, 2017, provided its opening claim construction brief on that term on April 28, 2017 and its final brief on June 2, 2017. Defendants specifically referenced Alagar in their claim construction briefing, served on June 16, 2017. D.I. 186 (Joint Brief) at 21, 64 n.13, 71 n.14. Thus, Defendants were well aware of Alagar long before the close of fact discovery on July 31, 2017. To the extent Defendants believed Acceleration Bay's claim construction positions somehow necessitated the introduction of new prior art in the case, they should have promptly sought leave from the Court to do so. Instead, Defendants waited months until well after the end of fact discovery before unilaterally introducing Alagar.

In addition to Defendants' inexplicable lack of diligence, there is no good cause because it would be highly prejudicial to permit the addition of new prior art at this late stage. The parties served their claim construction positions in April and held the initial *Markman* hearing on July 10, 2017. Fact discovery ended July 31, 2017. D.I. 62 (Scheduling Order). In opposing Acceleration Bay's addition of two claims in May, Defendants argued that it was too prejudicial "with claim construction proceeding and fact discovery well advance" D.I. 145 at 3 (5/5/17 Letter) ("It is too late to start on infringement and invalidity contentions on additional claims after claim construction briefing and at the end of fact discovery. More fundamentally, Defendants have planned their approach to this litigation around the claims Acceleration Bay elected and chose to litigate since 2015."). Similarly, the Court overruled Acceleration Bay's objections to Special Master Order No. 4, finding that Acceleration Bay could not include new products in May and June because "[i]t is too late to be adding more products to the case." D.I. 284. Those arguments apply even more so now five months later in the case to Defendants' attempt to add new prior art issues to the case.

Defendants delayed presentation of this issue to the Court, magnifying the prejudice to Acceleration Bay. Defendants delayed the presentation of this issue to the Court for over a month by first dragging out the meet and confer process, then causing Acceleration Bay to forgo submitting the issue to the Court by agreeing to file a motion for leave to amend, reneging on the

agreed upon deadline and then withdrawing from the entire agreement. Specifically, Acceleration Bay contacted Defendants regarding their improper assertion of Alagar on September 20, 2017, five days after Defendants served their final election of prior art. Ex. 3 at 9/20/17 email. Acceleration Bay requested that Defendants either withdraw the reference or seek leave from the Court to amend their prior art election. Acceleration Bay conferred with Defendants and repeatedly asked Defendants to promptly seek leave from the Court so that the dispute could be resolved well in advance of the deadline for Acceleration Bay to provide its validity report. *Id.* After three weeks of delay and multiple follow ups, Acceleration Bay stated that it would present the issue to the Court unless Defendants promptly filed a motion for leave to amend. *Id.* at 10/12/17 email. On October 13, 2017, the parties reached an agreement that Defendants would file their motion by no later than October 20, 2017 (a full month after Acceleration Bay raised the issue). Based on that agreement, Acceleration Bay refrained from presenting the issue to the Court. On October 20, 2017, Defendants unilaterally announced that they would not file until October 24, 2017, citing for the first time a need to apprise the Court of the issue (despite Acceleration Bay having on multiple occasions requested a joint call to chambers) and the need to submit other filings. *Id.* at 10/20/17 email. On October 23, 2017, Defendants stated they would no longer present to the Court the issue of the election of the Alagar reference based on a newly identified and unrelated alleged deficiency in Acceleration Bay's document production. *Id.* at 10/23/17 email.

Defendants' conduct has been highly prejudicial to Acceleration Bay. With validity rebuttal reports due on November 10, 2017 and Defendants' expert providing an extended discussion of the Alagar reference, Defendants' delay in presenting this issue to the Court has forced Acceleration Bay and its experts to devote resources to responding to prior art that is not properly in the case and was never addressed during fact discovery. Had Defendants simply stated they would not seek leave from the Court, Acceleration Bay could have presented this issue to the Court weeks ago.

Finally, Defendants' approach to this dispute is entirely inconsistent with their demands of Acceleration Bay. The parties recently submitted to the Special Master various disputes regarding the other side's respective expert reports. Given the importance of the issues, Acceleration Bay requested that the hearing be postponed by three weeks so that lead trial counsel, who has a three week jury trial starting at the end of this month, could attend the hearing in person (Defendants previously requested and received adjournments of hearings by several weeks to accommodate conflicts due to the travel of their counsel). Defendants insisted on an expedited hearing, citing the need to have their motions resolved before they served their responsive expert reports so that, to the extent part of their motion is granted, Defendants can refrain from responding to any excluded portions. The exact same consideration applies to the instant dispute, which necessarily will have a significant impact on the scope of Defendants' invalidity expert opinion to which Acceleration Bay will soon need to respond.

For these reasons the Court should confirm that Defendants may not relay on Alagar.

Respectfully,

/s/ Philip A. Rovner

Philip A. Rovner (#3215)

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

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