

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

SPECIAL MASTER ORDER NO. 12

On October 20, 2017, the parties filed their various motions, as described below. The parties' briefs and papers responsive to the motions were filed on October 30, 2017. On

November 2, 2017, a Hearing was held in Wilmington with telephonic participation by out of town counsel to address all of the motions filed on October 20, 2017.

I will first identify Defendants' motions and their arguments as well as the Plaintiff's responses. A ruling on each motion will follow.

Thereafter, in this Order, I will describe Plaintiff's motions, its arguments and the responses from Defendants to those arguments. A ruling on the Plaintiff's motions will follow.

Time constraints prevent the Special Master from fully setting forth all of his reasons for the following Order. The Hearing was scheduled so that a ruling could be issued prior to Defendants' responsive expert reports, which are due in approximately a week following the Hearing. The Special Master rejected Plaintiff's request to postpone the Hearing until after responsive reports were due, because of the significance of the renewed motions for sanctions and to strike Plaintiff's infringement reports.

* * *

Activision's Renewed Motion for Sanctions and Motion to Strike Acceleration Bay's Infringement Reports.

Activision's motion is based upon its conclusion that Plaintiff's expert reports contain infringement contentions that had not previously been disclosed, allegedly in violation of prior orders of the Special Master. Activision cites Special Master Order No. 3, which was adopted in part by the Court, and Special Master Order No. 6. Activision claims that it has been "ambushed" by Plaintiff because Plaintiff's expert reports identify many new source code modulars not previously identified in Plaintiff's infringement contentions. In addition, Activision states that Plaintiff's expert reports include 9 new infringement arguments that had not been disclosed in any of Plaintiff's infringement contentions. Activision further contends that Plaintiff's expert reports contain unexplained source code citations and cross references that

are in violation of Plaintiff's disclosure obligations. Referring to exhibits, Activision contends that the expert reports contain hundreds of source code citations that are not tied to any analysis. The reports also allegedly contain unexplained cross references.

In Activision's view, the Plaintiff is engaged in a tactic to obfuscate or hide by its source code citations and cross references. The summary provided by the experts do not address specific patents or claims, so that, in the opinion of Activision, there is not an informative summary as required under Special Master Order No. 9. Activision cites its own expert's report on invalidity by comparison, to show that an expert should identify the specific code by pincite to the actual lines of code, quotation and parenthetical explanation, so as to explain how the code functions. By contrast, according to Activision, Plaintiff's expert report have no such clarity or explanation. Activision makes the interesting argument that Plaintiff's expert report should be as intelligible and clear as the expert is likely to be in testifying before the jury at trial.

Plaintiff responds in a thorough and complete manner, with a 30-page brief and hundreds of pages of helpful exhibits. The core of Plaintiff's argument is that its infringement contentions fully support its expert reports and that the law does not justify any exclusion of its expert report under the facts and circumstances in this litigation. Plaintiff writes that experts may cite to additional supporting evidence, such as specific source code, beyond that identified in interrogatory responses and contentions.

Plaintiff points to a number of errors in Activision's brief regarding claims that Plaintiff's expert reports include nine new infringement theories. As an example, Plaintiff refers to Activision's assertion that the "use of an overlay network to connect the participants were not disclosed in Acceleration's Interrogatory Responses." Plaintiff cites to its June 19, 2017 supplemental responses to Interrogatories 7 and 9, in rebuttal. Another example, according to

Plaintiff, is Activision's assertion that Acceleration did not cite any source code in its infringement contentions for Destiny. In its brief, Plaintiff points to its August 25, 2017 filing for Destiny of two infringement claim charts. Contrary to Activision's claim that Plaintiff's reports did not contain an "informative summary" of the expert's opinions, Plaintiff's reports did have a 3-page summary, identifying the asserted claims, the accused products and summarizing opinions including the participant's connections and why the network is incomplete and m-regular.

The Special Master has been through the parties' exhibits to their briefs to evaluate Activision's argument that Plaintiff's experts are presenting new infringement theories. To some extent, Plaintiff's experts are providing additional support and additional source code citations, but they are in support of broad theories disclosed in its infringement contentions. It doesn't appear that Plaintiff's reports contain entirely new theories regarding the participants in the networks, why the networks are m-regular or why the networks are incomplete. Thus it is difficult for Activision to sustain its burden with regard to Plaintiff's expert reports presenting new theories.

Activision complains that Plaintiff's expert reports use cross referencing, in an inappropriate manner. In response, Plaintiff contends that its experts' cross referencing avoids repeating materials for the same claim elements and is necessary because of the page limitations imposed on the expert reports. It is hard to fault with the expert's use of cross referencing, in light of the number of games, extensive source code and over 100 elements involved in the various patents at issue in this litigation.

The law imposes a heavy burden of persuasion on the party that seeks to exclude or strike significant portions of the opposing party's expert report. Cases in this Court, the Third Circuit¹, and in other Federal Courts all resist excluding expert reports, absent a showing of bad faith or other deceptive conduct that puts the moving party under extreme prejudice if exclusion is not granted. The law anticipates that patent litigation is conducted in a number of stages, with consequential conduct at each stage. Early in patent litigation, the plaintiff is under an obligation to disclose its infringement contentions, so that discovery can be taken by the opposing party before expert reports are due. Activision properly points to a number of this Special Master's prior orders for Plaintiff to supplement its infringement contentions. A review of Plaintiff's supplemental responses as to its contentions in the last several months indicates that the Plaintiff has attempted to supplement its contentions. As Plaintiff points out in its brief on this Motion, some of the fact discovery, including even some source code access to Plaintiff, was not available to Plaintiff until after the date for fact discovery cut-off. The Special Master wishes that Plaintiff's interrogatory responses, as to its contentions, would have been more complete at an earlier stage in this litigation, but there is not convincing evidence of any bad faith by Plaintiff.

As the Special Master indicated in certain prior Orders in this litigation, consideration of the sanctions or any penalty imposed upon Plaintiff with regard to its alleged failure to timely disclose its infringement contentions was postponed until after Plaintiff provided its expert reports. The Special Master has thoroughly reviewed all of the Plaintiff's filings, and in particular its expert reports and Activision's arguments with regard to them. While the Plaintiff's expert reports could have been more clearly written, it does not appear that they are

¹ *Meyers v. Pennypack Woods Home Ownership Ass'n*, 559 F.2d 894 (3rd Cir. 1977).

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