

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

SPECIAL MASTER ORDER NO. 15

On March 19, 2018 Defendants filed their Motion, Brief and proposed Order to Enforce Special Master Order No. 13 [‘Defendants’ Enforcement Motion’]. Pursuant to an agreed upon schedule, Plaintiff filed its Answering Brief to this Motion on March 26. Also, on March 26,

non-party Boeing Company filed a brief in opposition to Defendants' Motion to Grant In-House Counsel Access to the 2006 Boeing/Sony License Agreement [the 'Boeing Motion']. Finally, Defendants requested a ruling as to the "parameters of the deposition of Dr. Bims in the EA case" [the 'Dr. Bims Motion'].

A hearing was held on March 30 regarding these three Motions. Following the Hearing, additional filings were made in light of specifics raised in the Hearing. This the Special Master's Ruling on the Motions presented on March 30, 2018. My discussions of the Motions, issues, law and evidence will be brief, as one of these cases is scheduled to go to trial later this month.

Defendants' Enforcement Motion:

Defendants' Motion is premised on their belief that Plaintiff has not conducted a proper search for documents it 'provided in writing to Hamilton Capital' [as required by Special Master Order No. 13], refuses to produce documents that Defendants believe to exist, and prevented Defendants from questioning Plaintiff's expert, Dr. Medvidovic, as to such documents and his pre-filing involvement in this case. Defendants assert that such withheld documents would demonstrate inconsistencies with the expert's current opinions.

Plaintiff's brief categorically states that "Dr. Medvidovic never prepared a written pre-filing analysis; rather his pre-filing analysis was provided orally to Acceleration Bay's counsel." Plaintiff's brief also flatly states that it "...already produced to Defendants all documents it provided to Reed Smith...". As the Hearing Transcript demonstrates, there is some question as to whether all of Plaintiff's counsel emails with Reed Smith were produced. Plaintiff apparently only produced 'substantive' e mail with Reed Smith. [Transcript of Hearing, pp. 40-59]. My prior Order did not permit Plaintiff to so limit production of its communications with Reed Smith regarding possible funding of this litigation.

Much of Plaintiff's defense is based on the parties' Protective Order dated February 22, 2017, which it interprets as the sole guidance on discovery regarding a testifying expert. I read paragraph 15 of the Protective Order more narrowly than Plaintiff does. Plaintiff points out that Dr. Medvidovic's report and his deposition identified the documents that he relied upon for his expert opinion submitted in this litigation. Those documents have been produced. Thus, Plaintiff seems to argue that a testifying expert's deposition should be limited to what his report says and the documents upon which he relies for his report.

However, I do not read this Protective Order as precluding discovery permitted by applicable procedural rules into whatever pre filing evaluation or opinions Dr. Medvidovic may have reached, irregardless of whether he relied upon them for his expert report submitted in this case. The Federal Rules for discovery as to an expert's opinion allows discovery as to how, when and upon what basis he might have reached his initial views of the matter upon which he ultimately delivered his expert opinion. Such discovery provides a possible avenue for cross examination of the expert, which is fair game at trial. Thus, Defendants are entitled to have a further deposition of Dr. Medvidovic as to his analysis of these patents prior to the filing of the litigation. To the extent that he prepared drafts of his expert report or communicated with Plaintiff's counsel about the substance of that report, those communications would be entitled to work product protection.

Defendants seek production of documents given or shown to Reed Smith. This request doesn't appear to involve Dr. Medvidovic, but relates to efforts by Plaintiff's counsel to secure funding for potential litigation over these patents. With respect to his involvement with Hamilton Capital's funding of Plaintiff, "...Dr. Medvidovic never met with or otherwise spoke with anyone at Reed Smith or Hamilton Capital in connection with obtaining funding for these cases",

according to Plaintiff's brief. To the extent that he may have participated in discussions with Reed Smith as to his technical views, there is no evidence that he gave them written documents or has relied on such views in preparing his expert opinion for use at trial which is scheduled in the near future.

Plaintiff's counsel apparently prepared the claims chart discussed with Reed Smith in connection with the firm's efforts to obtain funding for possible litigation involving the patents in this litigation. [Transcript of Hearing, pp. 34-39]. Plaintiff contends that this claims chart is the work product of Plaintiff's counsel; that Plaintiff's law firm made a conscious effort to protect it as work product; that it was the subject of a non-disclosure agreement with Reed Smith; and that it was never given to or left in Reed Smith's possession. I am relying on Plaintiff's counsel as to these facts. If so, I treat the claims chart created by counsel as work product that was not inadvertently waived in meeting with Reed Smith.

However, all written communications between Reed Smith and Plaintiff's counsel regarding possible funding for litigation or evaluation of the patents prior to a signed funding agreement between Plaintiff and Hamilton Capital should be produced. It may be that all such emails and documents have been produced, but Plaintiff needs to affirm that in writing or promptly do so in light of the pending trial. I am not ruling on how Plaintiff should conduct a proper search as its counsel are knowledgeable as to their responsibilities in this regard. In so ruling, I reach no conclusion as to Plaintiff's conduct in discovery to date. Any consideration of fees or sanctions should be deferred.

ORDER: The Defendants' Motion is GRANTED to the extent that [a] Plaintiff shall produce all documents and communications between it and/or its counsel and Reed Smith relating to possible funding of this litigation and/or the patents in this litigation; up and until the

signing of a funding agreement,; and [b] Dr. Medvidovic can be deposed for four hours on any subjects; other than his communications with counsel; and drafts of his expert report that he submitted in the litigation need not be produced.

The Boeing Motion:

With respect to non-party Boeing Company's Opposition to Defendants' Motion to Grant In-House Counsel Access to the 2006 Boeing/Sony License Agreement [the 'Boeing Motion'], the Plaintiff insists that the issue is governed by the parties Protective Order under which Boeing designated this Agreement as "Confidential - Outside Counsel Only". This designation prevents in-house counsel from seeing such documents because of such documents' 'competitive value'. The documents can be shown to in-house counsel only if they were "improperly designated" by Boeing. Boeing's brief argues that its licensing of its extensive library of patents is a significant business, which Boeing strives to protect from competitive misuse.

Defendants counter that there is no basis for this designation by Boeing, Boeing will suffer no competitive disadvantage by disclosure to Defendants' in house counsel, the document will be disclosed in any event at trial, and the document is extremely important to Defendants' in-houses counsel in evaluating the damages claim and advising their clients.

It is difficult to see how Boeing, a major aeronautical company, will suffer competitive harm by disclosure of this 2006 licensing agreement to in-house counsel of companies involved in the video game industry. I note, without criticizing anyone, that I have no Boeing Affidavit as to any competitive harm it might suffer if this Motion is granted. It is reasonable for in-house counsel to know the amount of the license and the scope of the agreement in advising their clients as trial nears.

ORDER: The Defendants' Boeing Motion is GRANTED.

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