

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ACCELERATION BAY LLC)
)
Plaintiff,)
) C.A. No. 16-455-RGA
v.)
)
TAKE-TWO INTERACTIVE SOFTWARE,)
INC., ROCKSTAR GAMES, INC. and)
2K SPORTS, INC.)
)
Defendants.)

J. Caleb Boggs Courthouse
844 North King Street
Wilmington, Delaware

Tuesday, February 4, 2020
10:00 a.m.
Oral Argument

BEFORE: THE HONORABLE RICHARD G. ANDREWS, U.S.D.C.J.

APPEARANCES:

POTTER ANDERSON & CORROON LLP
BY: PHILIP A. ROVNER, ESQUIRE

-and-

KRAMER LEVIN NAFTALIS & FRANKEL
BY: AARON M. FRANKEL, ESQUIRE
BY: PAUL J. ANDRE, ESQUIRE
BY: MARCUS A. COLUCCI, ESQUIRE

For the Plaintiff

1 APPEARANCES CONTINUED:

2 MORRIS NICHOLS ARSHT & TUNNELL LLP
3 BY: JACK B. BLUMENFELD, ESQUIRE
4 BY: STEPHEN J. KRAFTSCHIK, ESQUIRE

4 -and-

5 WINSTON & STRAWN, LLP
6 BY: DAVID P. ENZMINGER, ESQUIRE
7 BY: MICHAEL A. TOMASULO, ESQUIRE
8 BY: LOUIS L. CAMPBELL, ESQUIRE
9 BY: PAUL HAROLD, ESQUIRE

8 -and-

9 TAKE TWO INTERACTIVE SOFTWARE, INC.
10 BY: LINDA ZABRISKIE, ESQUIRE

11 For the Defendants

12 *** PROCEEDINGS ***

13 DEPUTY CLERK: All rise.

14 THE COURT: All right. Please be seated,
15 everyone.

16 So this is the time set for oral argument in
17 Acceleration Bay versus Take-Two, Civil Action Number
18 16-455.

19 Mr. Rovner, good morning. Who have you got with
20 you?

21 MR. ROVNER: Good morning, Your Honor. Phil
22 Rovner from Potter Anderson for plaintiff, Acceleration Bay.
23 And with me from Kramer Levin, Mr. Paul Andre, Aaron
24 Frankel, and Marcus Colucci.

25 THE COURT: All right. Good morning to you all.

1 And Mr. Kraftschik. Oh, Mr. Blumenfeld.

2 Sorry, Mr. Kraftschik put his name down in a
3 different ink, so I figured he was the man.

4 MR. BLUMENFELD: No, I actually put it down for
5 him because he wasn't signed up, but here we go.

6 THE COURT: Well, no good deed goes unpunished.
7 Who have you got with you?

8 MR. BLUMENFELD: Good morning, Your Honor.
9 David Enzminger and Mike Tomasulo from Winston & Strawn.
10 And behind me, Lewis Campbell, Paul Harold also from
11 Winston & Strawn. And Mr. Kraftschik, you already
12 recognized, and Linda Zabriskie who is in-house at Take-Two.

13 THE COURT: Okay. Good morning to all of you.

14 All right. So before we get started here, I
15 just wanted to check and make sure that what I gathered from
16 the briefing is correct which is because of some prior order
17 of mine, the '634 patent is not at issue; right?

18 MR. ENZMINGER: Correct.

19 MR. FRANKEL: That's correct.

20 THE COURT: And we're still only dealing with
21 direct infringement; right?

22 MR. FRANKEL: Correct, Your Honor.

23 THE COURT: Okay. So it wasn't apparent to me,
24 maybe by like the close of business tomorrow, could the
25 plaintiff just submit a letter that states what all the

1 presently asserted claims from the five patents are and also
2 all the limitations that we're going to talk about today in
3 which you have a DOE argument in addition or maybe in place
4 of literal infringement?

5 Do you think you can do that by the close of
6 business tomorrow?

7 MR. FRANKEL: We'll do that, Your Honor.

8 THE COURT: Okay. Thank you, Mr. Frankel.

9 All right. So what I was thinking is to make
10 this something where I get the parties' opposing positions
11 firmly placed in my mind that essentially we sort of break
12 this down into kind of argument by argument, one side then
13 the other side.

14 And I guess actually then, before we go actually
15 any further, if I don't change anything that I said in
16 regards to particularly the Activision case, does that mean
17 that the '344, and '966, and '497 claims are essentially
18 limited to testing?

19 MR. FRANKEL: Your Honor, testing development,
20 but it would be internal --

21 THE COURT: Okay.

22 MR. FRANKEL: -- use by the defendant.

23 THE COURT: All right. But they're limited to
24 use --

25 MR. FRANKEL: Correct.

1 THE COURT: -- if you don't change anything.
2 Okay. All right. So that's good.

3 So why don't we go on to the argument about
4 whether or not there is use for these three patents.

5 MR. ENZMINGER: Your Honor, we have a small
6 slide deck for this issue. May I pass it to the court
7 reporter?

8 THE COURT: Okay. Yes.

9 So I see you've broken the slide decks down
10 argument by argument.

11 MR. ENZMINGER: We have.

12 THE COURT: That's a clever way to make me think
13 it's not too thick.

14 MR. ENZMINGER: Okay. Well, we tried to get
15 them to be as precise as possible, but there are a lot of
16 issues.

17 So the Court has focused on use by internal
18 testing and in the prior two cases we've had, including this
19 one, we've had five rounds of briefing on this particular
20 issue. This is the first time for Take-Two. What we will
21 show you is that the testing for internal use evidence for
22 Take-Two is even weaker than the other two and certainly
23 weaker than in Activision in which the Court found that
24 there was no evidence from which to support a claim by
25 internal use of testing. You granted summary judgment in

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.