

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

- - -

1 ACCELERATION BAY LLC, :

2 :
3 :
4 Plaintiff, :

5 v. : C.A. NO.16-453 (RGA)

6 :
7 ACTIVISION BLIZZARD, INC., :

8 Defendant. :

9

10 ACCELERATION BAY LLC :

11 Plaintiff, :

12 v. : C.A. No. 16-454 (RGA)

13 ELECTRONIC ARTS INC., :

14 Defendant. :

15

16 ACCELERATION BAY LLC, :

17 Plaintiff, :

18 v. : C.A. No. 16-455 (RGA)

19 TAKE-TWO INTERACTIVE SOFTWARE, :

20 INC., ROCKSTAR GAMES, INC. and :

21 2K SPORTS, INC., :

22 Defendants. :

Wilmington, Delaware

Tuesday, March 14, 2017 at 2:00 p.m.

TELECONFERENCE

Ellie Corbett Hannum, Registered Merit Reporter

<p style="text-align: right;">Page 2</p> <p>1 BEFORE: SPECIAL MASTER ALLEN M. TERRELL</p> <p>2 ---</p> <p>3 APPEARANCES:</p> <p>4 POTTER ANDERSON & CORROON</p> <p>5 BY: PHILIP ROVNER, ESQ.</p> <p>6 provner@potteranderson.com</p> <p>7 and</p> <p>8 KRAMER LEVIN</p> <p>9 BY: AARON FRANKEL, ESQ.</p> <p>10 afrankel@kramerlevin.com</p> <p>11 (New York, New York)</p> <p>12 Counsel for Plaintiff</p> <p>13 MORRIS, NICHOLS, ARSHT & TUNNELL LLP</p> <p>14 BY: STEPHEN J. KRAFTSCHIK, ESQ.</p> <p>15 skraftschik#mnat.com</p> <p>16 and</p> <p>17 WINSTON & STRAWN LLP</p> <p>18 BY: DAVID P. ENZMINGER, ESQ.</p> <p>19 denzminger@winston.com</p> <p>20 (Menlo Park, California)</p> <p>21 BY: MICHAEL A. TOMASULO, ESQ.</p> <p>22 mtomasulo@winston.com</p> <p>23 (Los Angeles, California)</p> <p>24 Counsel for Defendants</p>	<p style="text-align: right;">Page 4</p> <p>1 would be a fine time to do a roll call.</p> <p>2 SPECIAL MASTER TERRELL: Let's do it this</p> <p>3 way -- and keep in mind as we proceed with this hearing</p> <p>4 when you do want to speak just identify yourself for the</p> <p>5 court reporter's sake.</p> <p>6 I will start. I am Allen Terrell, Special</p> <p>7 Master.</p> <p>8 MR. ROVNER: Your Honor, Phil Rovner from</p> <p>9 Potter Anderson, and with me on the line is Aaron Frankel</p> <p>10 from Kramer Levin in New York.</p> <p>11 SPECIAL MASTER TERRELL: Good afternoon.</p> <p>12 MR. FRANKEL: Good afternoon.</p> <p>13 MR. KRAFTSCHIK: Good afternoon, Your</p> <p>14 Honor, this is Stephen Kraftschik with Morris Nichols,</p> <p>15 and I have on the line with me Mike Tomasulo and David</p> <p>16 Enzlinger.</p> <p>17 SPECIAL MASTER TERRELL: Very good,</p> <p>18 Counsel.</p> <p>19 What I am going to do is first for the</p> <p>20 record identify the motions that are before me. And</p> <p>21 first I will address the first one that came in from</p> <p>22 defendants. Let me step aside and let me just for the</p> <p>23 record note the caption of the case, Acceleration Bay</p> <p>24 LLC, Plaintiff v. Activation Blizzard, Inc., Defendant,</p>
<p style="text-align: right;">Page 3</p> <p>1 - oOo -</p> <p>2 PROCEEDINGS</p> <p>3 - oOo -</p> <p>4 SPECIAL MASTER TERRELL: Hello, Counsel.</p> <p>5 MR. FRANKEL: Hello, Mr. Terrell, how are</p> <p>6 you?</p> <p>7 SPECIAL MASTER TERRELL: I am fine. How</p> <p>8 are things up in Delaware with the storm?</p> <p>9 MR. ROVNER: This is Phil Rovner, not as</p> <p>10 bad as it could have been. It's mostly just slush right</p> <p>11 now.</p> <p>12 SPECIAL MASTER TERRELL: That's what I</p> <p>13 heard.</p> <p>14 MR. FRANKEL: It's bad enough to have</p> <p>15 taken out Jack Blumenfeld, though. He is not going to be</p> <p>16 on the call.</p> <p>17 SPECIAL MASTER TERRELL: When everyone is</p> <p>18 assembled, we will have a roll call, but we first need to</p> <p>19 know that there's a court reporter on the line.</p> <p>20 THE COURT REPORTER: Special Master, this</p> <p>21 is Ellie Corbett Hannum.</p> <p>22 MR. KRAFTSCHIK: Special Master, Stephen</p> <p>23 Kraftschik at Morris Nichols. It's my understanding, and</p> <p>24 I believe we have everyone on the line, so I think now</p>	<p style="text-align: right;">Page 5</p> <p>1 Civil Action No. 16-453 (RGA). On February 27th, I was</p> <p>2 advised that the parties intended to file motions to</p> <p>3 compel, and on March 6th I received the motion to compel</p> <p>4 from defendant to compel further responses to its</p> <p>5 interrogatories 7 and 8, and specifically all accused</p> <p>6 methods, broadcast channels, and networks, including by</p> <p>7 identifying each and every participant and connection of</p> <p>8 such network or broadcast channel and explaining how each</p> <p>9 is alleged to be M-regular and explaining separately for</p> <p>10 each accused network and broadcast channel how each</p> <p>11 accused network or broadcast channel is alleged to the</p> <p>12 limitations of each asserted claim, including with</p> <p>13 specific citations to source code.</p> <p>14 A separate motion was filed by plaintiff</p> <p>15 to compel the Defendant Activision Blizzard to provide</p> <p>16 proposed dates for Rule 30(b)(6) depositions of Destiny</p> <p>17 and the Blizzard Downloader.</p> <p>18 Those are the two motions before me.</p> <p>19 Since then I have had by email a letter request related</p> <p>20 to these motions, and I think we can deal with them at</p> <p>21 the close of the arguments on the pending motions.</p> <p>22 One other thing I just want to thank</p> <p>23 counsel for very promptly bringing this before me with</p> <p>24 very thorough, precise and useful briefs and exhibits,</p>

<p style="text-align: right;">Page 6</p> <p>1 and I do appreciate that.</p> <p>2 So with that in mind I guess, Defendant,</p> <p>3 you filed the first motion. Do you want to begin?</p> <p>4 MR. ENZMINGER: Yes, Special Master, my</p> <p>5 name is David Enzminger. I will be addressing the</p> <p>6 defendants' motion, although I cannot promise my</p> <p>7 colleague, Mr. Tomasulo, won't jump in as he has been</p> <p>8 somewhat closer to the technology issues than I have.</p> <p>9 But we have filed this motion and,</p> <p>10 frankly, I believe this hearing today will be resolved</p> <p>11 with respect to the first motion because the same issue</p> <p>12 permeates the other two issues that you have described.</p> <p>13 And the issue basically is whether in this</p> <p>14 case discovery goes both ways or whether it is only the</p> <p>15 defendants that have to give discovery. The Special</p> <p>16 Master may recall a year ago we had an argument before</p> <p>17 you about contentions and whether the contentions that</p> <p>18 they have provided were sufficient for us to know how to</p> <p>19 prepare witnesses for deposition.</p> <p>20 That order or that issue was resolved with</p> <p>21 the Special Order No. 2, which did two things. One, it</p> <p>22 confirmed agreement with our side that the responses that</p> <p>23 we had received to date were inadequate to state a claim</p> <p>24 for infringement, although it did give notice so that we</p>	<p style="text-align: right;">Page 8</p> <p>1 they are structured.</p> <p>2 Their own experts were deposed in a recent</p> <p>3 IPR proceeding, and they acknowledged that the charts do</p> <p>4 not describe any of this information.</p> <p>5 Now, we provided for Call of Duty, we</p> <p>6 provided the 30(b)(6) deposition and we provided over 90</p> <p>7 hours of source code review to them in connection with</p> <p>8 the prior case. On May 17th, 2016, we gave them the</p> <p>9 deposition that they had requested. By agreement of the</p> <p>10 parties, that made their real contentions, their real</p> <p>11 interrogatory responses due at the beginning of June.</p> <p>12 What happened was, because there was a</p> <p>13 motion to dismiss because the plaintiff, in our view,</p> <p>14 didn't own the patents, which the District Court</p> <p>15 ultimately agreed with, that case was dismissed.</p> <p>16 They went out and acquired new rights and</p> <p>17 filed a new case. And we agreed, because it's the same</p> <p>18 accused products and the same patents, that we would just</p> <p>19 continue the discovery that we had started, and it would</p> <p>20 proceed on an expedited schedule. However, here we sit</p> <p>21 nine months later without a response to those</p> <p>22 interrogatories. The only substantive response that the</p> <p>23 plaintiffs provided in their opposition -- well, they</p> <p>24 provided two responses. The first response was that our</p>
<p style="text-align: right;">Page 7</p> <p>1 could put up witnesses. Thereafter the parties agreed</p> <p>2 that we would provide the 30(b)(6) notices, and then</p> <p>3 within three weeks the plaintiffs would give the</p> <p>4 information and supplement their interrogatory responses</p> <p>5 to provide actual information about the accused networks,</p> <p>6 not computer jargon thrown together accusing all games,</p> <p>7 all pieces of hardware in the system, but what is exactly</p> <p>8 accused by the plaintiff in this case.</p> <p>9 These patents relate to a very, very</p> <p>10 specific network structure where the network can only be</p> <p>11 identified by knowing who are the participants in the</p> <p>12 network. How are they connected? How is the information</p> <p>13 transferred back and forth? And then there are other</p> <p>14 limitations depending on the patents.</p> <p>15 But connections, for example, have to be,</p> <p>16 there have to be at least three connections between every</p> <p>17 participant. And every participant has to be connected</p> <p>18 to exactly the same number of other participants. So</p> <p>19 this is not a peer-to-peer network of when you get a</p> <p>20 bunch of computers together and they all go over the</p> <p>21 Internet and they are all connected somehow in some</p> <p>22 amorphous way. These nets are specific to a network</p> <p>23 structure. And there is nowhere in their interrogatory</p> <p>24 responses, nowhere where they identify the networks, how</p>	<p style="text-align: right;">Page 9</p> <p>1 request was moot because they supplemented it 30 minutes</p> <p>2 before our deadline. But, interestingly, they did not</p> <p>3 provide the Special Master with the document that they</p> <p>4 claimed to be a supplement. And there's a good reason</p> <p>5 for it, because that supplement is as much garbage as the</p> <p>6 700 pages of claim charts that preceded it. It has no</p> <p>7 identification of a network. It has no identification of</p> <p>8 how the network is M-regular. It has no identification</p> <p>9 of what M is. It has no description of how the network</p> <p>10 is connected. It has no description of who the</p> <p>11 participants are.</p> <p>12 It's just more computer jargon -- that says</p> <p>13 we are accusing additional hardware that makes</p> <p>14 connections, without specifying how those connections are</p> <p>15 made, and is a grand total of three pages. So they have</p> <p>16 essentially taken interrogatory responses that were more</p> <p>17 than 800 pages long, 700 and some pages of infringement</p> <p>18 contentions that were deemed to be inadequate, and they</p> <p>19 give us a three-page update without providing any of the</p> <p>20 information we've requested.</p> <p>21 And on this product we already provided</p> <p>22 the deposition. We have already provided a hundred hours</p> <p>23 of source code review, and we are still not getting an</p> <p>24 answer to the question that they were ordered to provide.</p>

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1 So that's what we brought the motion on,
 2 with respect to all odds (sic) there, because what we
 3 need is discovery from the plaintiff. We are being asked
 4 to give wide-ranging discovery, and we don't have
 5 contentions that actually describe what it is they are
 6 accusing.

7 Let me use an analogy. Our clients
 8 develop video games. And, for example, a car, if we were
 9 auto manufacturers and we sold cars, somebody could come
 10 in with a brake patent and say, This kind of braking
 11 structure infringes our patent. Not all brakes do, but
 12 this kind of brake. You sell cars, therefore you
 13 infringe because your car has brakes.

14 That's the level of contention we have
 15 got. They say you sell video games that can be played
 16 over the Internet, therefore there must be some
 17 connections, and we contend those connections infringe
 18 our patents. And they give us 700 pages of contentions
 19 that show screen shots of the games being played, none of
 20 which talk about the network structure. Well, they now
 21 have had nearly a hundred hours of source code review,
 22 they have the 30(b)(6) deposition, and it's time they
 23 give us the information they were ordered to give us
 24 slightly under a year ago.

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1 So that's our motion to compel.
 2 SPECIAL MASTER TERRELL: Okay. Let me ask
 3 you this question. Suppose I rule in your favor and then
 4 the plaintiff says, Well, without further depositions I
 5 can't give you anything more, and suppose I also denied
 6 the plaintiff's motion to compel these two depositions,
 7 what happens next? Where do you go then? Do you have
 8 the basis for a summary judgment? Do you file something
 9 new? I just would like an understanding of the practical
 10 consequences if the plaintiff says they can't give you
 11 anything more.

12 MR. ENZMINGER: I would think there's
 13 certainly a basis for a summary judgment motion. We have
 14 already filed a Rule 11 motion on this issue because the
 15 network structure can be determined without regard to
 16 discovery. And in addition to that, they have had as
 17 much source code review on the Call of Duty product as
 18 they have wanted, and they still aren't giving us a basic
 19 contention of how it is that the product infringes these
 20 patents.

21 SPECIAL MASTER TERRELL: And then related
 22 to that, as we know, the standard for an infringement
 23 chart isn't the most definitive evidence that you go to
 24 the jury with, but it's more than notice requirement. If

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1 they take the position that they didn't need enough to
 2 meet that notice requirement, you disagree, what happens
 3 next?

4 MR. ENZMINGER: Well, we are talking about
 5 two different issues, because we already had the argument
 6 with respect to the Call of Duty game, which is the only
 7 game we are moving on in our motion. We already had,
 8 last April, the argument that they should be entitled to
 9 take discovery, deposition discovery on this product.

10 MR. KRAFTSCHIK: This is Steve Kraftschik.
 11 I am not hearing anything. (Pause.) Now I can hear you.

12 MR. ENZMINGER: Okay.

13 With respect to the Call of Duty product,
 14 which is the only one we have moved on with this motion,
 15 we have already given them the depositions that they said
 16 that they needed for this product. We have already given
 17 them the source code review they claimed that they needed
 18 for this product. So this is not a situation where we
 19 are refusing to give them discovery because they haven't
 20 given us notice of what their contentions are. This is a
 21 situation where we have given them the discovery and they
 22 still won't tell us what their contentions are.

23 SPECIAL MASTER TERRELL: Well, I --
 24 MR. TOMASULO: May I -- I didn't mean to

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1 cut you off, Special Master. This is Mike Tomasulo.
 2 SPECIAL MASTER TERRELL: Go ahead, Mike.
 3 MR. TOMASULO: Two points. One, the issue
 4 of whether their contention has met the local rule
 5 requirement I think is not the grounds of our motion.
 6 The grounds of our motion is to compel compliance with
 7 Special Master Order No. 2 requiring them to supplement
 8 the interrogatories that we propounded, and those
 9 interrogatories are essential to the case. They are the
 10 traditional types of interrogatories that people propound
 11 in a patent case that tell us why we infringe. And there
 12 isn't some restriction on the type of information that
 13 the claim is required to provide.

14 (Speaker joining on the line.)
 15 MR. KRAFTSCHIK: This is Stephen
 16 Kraftschik. I think I got kicked off.

17 SPECIAL MASTER TERRELL: Let me just make
 18 sure that the court reporter is still on the line.

19 THE COURT REPORTER: I am, Special Master.
 20 SPECIAL MASTER TERRELL: Just for the sake
 21 of the court reporter, I know it's sort of frustrating
 22 when you think you may have been kicked off and get back
 23 on, just please give her your name.

24 So, Mr. Tomasulo, I was hearing you. Let

<p style="text-align: right;">Page 14</p> <p>1 me just clarify. I understand the point that your motion 2 is really in furtherance of my Special Order 2 entered in 3 the earlier case. My question to your colleague, and I 4 think he answered it, was, okay, if the plaintiff comes 5 back and says we at this point in time can't tell you 6 anything more, you have all we know to support our 7 infringement claims, but then the plaintiff goes on and 8 says, but we are entitled to continue the case and take 9 more discovery, and we may, after a lot more discovery, 10 be able to supplement the infringement chart, do you have 11 any redress if they take that position? 12 MR. TOMASULO: Well, I think that I 13 wouldn't find that position to be necessarily credible 14 because they are required to identify the network that 15 supposedly infringed the patents. And, again, if we use 16 the brake example, they should at least be able to tell 17 us what model of brakes they are accusing and why those 18 specific models meet the claim limitations. 19 In other words, in this case what the 20 patents are about is about how these computers allegedly 21 connect to form the accused M-regular incomplete network, 22 and then they also have to prove how the other claim 23 limitations are met, which is, for instance, how data is 24 propagated through that network.</p>	<p style="text-align: right;">Page 16</p> <p>1 graph, if they want to do that on the record, I would be 2 pleased to hear it, because we believe they can't do it. 3 And we filed a Rule 11 motion that says that they can't 4 do it. 5 But I think they are not going to make 6 such a representation. I think what they will say is 7 they have given us enough, and we need to wait for expert 8 reports to get any more. 9 SPECIAL MASTER TERRELL: I wanted to ask 10 that question at the conclusion of defendants' opening 11 argument. 12 Why don't I now hear from the plaintiff's 13 motion. 14 MR. TOMASULO: May I make one final point, 15 Special Master? 16 SPECIAL MASTER TERRELL: Please. 17 MR. TOMASULO: You could analogize this 18 to -- there's no different standard that applies here 19 than would apply in a car crash case, and if we said we 20 want to know all of the reasons that you think we caused 21 the car crash. And, of course, they say that our brakes 22 are defective, and we caused the car crash, and move 23 forward. And we can ask: Tell us all the reasons that 24 you think that the car crash has been caused. And that</p>
<p style="text-align: right;">Page 15</p> <p>1 If they want to say that they don't 2 know -- they are unable to do that, if they want to make 3 a representation that they are unable to identify such a 4 network, then that would be, you know -- I would be 5 interested to hear such a representation. But right now 6 what they have done is to put everything into kind of a 7 kludge chart where they identify something approaching, 8 who knows, hundreds of networks, but they don't give the 9 specific membership or the connections or define any of 10 those networks. 11 And so we asked their expert. We said: 12 Do you agree with this proposition that for us to be able 13 to analyze whether there's infringement we need to know, 14 at a minimum, who are the participants, we need to know 15 all of the participants in any specific network that you 16 accuse of infringement, and we need to know how those 17 participants are connected, and how they supposedly form 18 an M-regular graph? And the expert said: Yes. Yes, 19 that's correct. You need to know that information. 20 And so to me, if they want to make the 21 statement on the record that they are unable to identify 22 any type of network and identify all of the participants 23 and all of the connections, and explain how those 24 connections supposedly form an M-regular incomplete</p>	<p style="text-align: right;">Page 17</p> <p>1 includes all of the facts that supposedly -- you know, 2 what is it that we did wrong? 3 There is not a rule that allows someone to 4 withhold discovery until the end of the case or until 5 trial or until expert reports. There just isn't such a 6 rule. 7 SPECIAL MASTER TERRELL: Very good. 8 All right. I think it's time to hear from 9 the plaintiff. I think it's going to be Mr. Frankel; is 10 that right? 11 MR. FRANKEL: That's correct. 12 SPECIAL MASTER TERRELL: And, Mr. Frankel, 13 I appreciate your forbearance during your adversary's 14 argument, and I would appreciate them having the same 15 forbearance as you go forward. 16 So you may proceed, Mr. Frankel. 17 MR. FRANKEL: Thank you. Let me start by 18 saying that the supplemental interrogatory response that 19 we provided for Call of Duty has identified our 20 infringement theory as to that game. And I will get into 21 the specifics, but before I do I just want to talk a 22 little bit about the big picture here, which is the 23 fundamental problem with the way that Acquisitions and 24 the other defendants have been approaching discovery in</p>

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