

EXHIBIT A



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March 15, 2016

VIA EMAIL & CERTIFIED U.S. MAIL

James Hannah
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Kramer Levin Naftalis & Frankel LLP
990 Marsh Road
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Re: *Acceleration Bay LLC v. Take-Two Interactive Software, Inc.*, C.A. No. 15-311-RGA

Dear James,

I write on behalf of Defendants Take-Two Interactive Software, Inc., 2K Sports, Inc., and Rockstar Games, Inc. (collectively, “Take Two”) regarding Plaintiff’s Infringement Contentions (“Contentions”), which you signed. While we are still making our way through them, it is already apparent that the Contentions are entirely deficient. They provide Defendants with no notice of what networks are accused or how those networks allegedly meet the limitations of the claims. Indeed, after demanding and receiving detailed supplemental interrogatory responses regarding the accused networks and after inspecting Take Two’s heavily commented Source Code Materials for the accused products, Plaintiff was apparently unable to cite any evidence at all relating the accused products to key limitations of each asserted patent, including the network topology limitations, the “non-routing table-based” limitations, the port ordering algorithm limitations. These limitations were all added during prosecution to avoid prior art. Plaintiff’s inability to provide evidence or even a credible infringement theory – even after inspecting Take Two’s Source Code Materials – calls into serious question whether Plaintiff and its representatives had an appropriate basis under Fed. R. Civ. Proc. Rule 11 to bring these cases in the first place or has an appropriate basis to maintain them.

Nor can it be said that your Contentions are deficient as to Take Two because you need additional documents or source code. Not only was Plaintiff required to have a basis to bring the case in the first place, the Contentions as to ***all Defendants*** are deficient in many key respects. Plaintiff asked for and received additional time for its Contentions because your team supposedly needed more time to review and understand Defendants’ Source Code Materials. And since that time, your team has collectively spent hundreds of hours reviewing all of the Defendants’ Source Materials and printed hundreds of pages. Yet, none of the Contentions as to any of the Defendants make more than a passing reference to Defendants’ Source Code Materials. Given the fact that all of the Contentions suffer common failings and none of them make more than a passing reference to actual Source Code Materials, it cannot credibly be said that the Contentions as to Take Two are deficient due to the state discovery.

Our concerns about the basis of Plaintiff's claims are amplified by the fact that you signed the Contentions. You are lead counsel for Defendants in the *inter partes* review proceedings, and the Protective Order in this case therefore specifically bars you from viewing Defendants' Source Code Materials. Moreover, we were specifically assured that you would not "be reviewing" materials that have been designated as Source Code Materials under the Protective Order. Yet, the Contentions you signed are all designated as including Source Code Materials under the protective order. And, presumably, as the person signing the Contentions, it was necessary for you to review and understand Defendants' Source Code Materials to ensure that the Contentions have factual and legal legitimacy.

INFRINGEMENT CONTENTIONS

Plaintiff's Contentions are plainly insufficient because they fail to identify where each and every element of each asserted claim is allegedly found in the Accused Products. Plaintiff's Contentions are prejudicial in that they merely parrot claim language, cite documents with no explanation as to their relevance, and in some cases fail to even cite a single document (public or private) for certain limitations. Plaintiff's Contentions span thousands of pages, yet provide no specificity as to what networks are actually being accused or how the accused networks supposedly meet the asserted claim limitations.

Plaintiff was required by the Scheduling Order to provide a "claim chart relating each accused product to the asserted claims each product allegedly infringes." Each and every one of Plaintiff's Contentions are deficient as to each asserted claim, in ways that are so significant that render the entire pleading deficient in its entirety, in violation of the Court's Scheduling Order.

General common failings:

- **Failure to plainly identify what is actually accused.**
 - Five of the six patents are specifically directed to a network of participants (or broadcast channel of computers) where the network is comprised of a group of "participants," and each participant is connected to at "least three neighbor participants" and forms an incomplete m -regular graph where m is at least 3. As explained in greater detail below, the Contentions fail to plainly identify what "network of participants" or "broadcast channel of computers" is actually accused. Indeed, it is impossible to know from the Contentions what network(s) or broadcast channel(s) are actually being accused. Instead of providing a plain and straightforward identification of the accused networks, the Contentions provide broad, muddled and open-ended descriptions. As claimed, the network of participants is defined by the participants and how they are connected. Yet, the Contentions do not give any indication as to what networks are accused, who or what are the participants or the nature of any connections among them (or, for that matter, what networks are not accused). Instead, the Contentions seem to sweepingly suggest that any exchange of data is potentially accused. For instance:
 - Nearly all of the Contentions (as to all Defendants) include the same vague, boilerplate assertion that "the Accused Product creates m -regular topologies of

players when setting up *logical and physical network topologies* for the Accused Product using different networking libraries, SDKs and APIs.” NBA 2K Claim Chart at 18; Grand Theft Auto Five/Grand Theft Auto Online Claim Chart at 92. *See also* FIFA Claim Chart at 27; Call of Duty Claim Chart at 208 (emphasis added).

- Accusing “logical and physical network topologies” set up by an open-ended and undefined set of “libraries, SDKs and APIs” does not provide Defendants adequate notice to litigate their case, in violation of the Scheduling Order. Because the Contentions do not give sufficient indication of what networks or broadcast channels are accused, exactly what participants comprise those networks or broadcast channels and the nature of any supposed connections among the participants, the Contentions are deficient because they fail to provide notice of what is actually accused, why it is accused or otherwise provide Plaintiff’s legal theories in this case.
- Plaintiff’s failure to do so is compounded by the fact that, as Take Two understands the accused networks, none of them meets the basic topology requirements of the Asserted Patents. *See* Supplemental Interrogatory Responses to Common Interrogatory No. 5.
- Plaintiff’s failure to identify exactly what is accused is further compounded by its refusal to provide a substantive response to Defendants’ Common Interrogatory No. 9, which specifically asks Plaintiff to identify with specificity the accused networks.¹
- **Failure to rely on relevant evidence.** Defendants made source code available in December 2015, nearly three months ago. Since that time, Plaintiff has had two experts and multiple technically trained lawyers spend many hours inspecting and printing the relevant source code for the Accused Products. Moreover, Defendants’ Supplemental Interrogatory Responses to Interrogatory Nos. 5 and 9 describe the topologies that govern multiplayer features and cite to the source code that create the structure of those topologies. Yet, Plaintiff’s thousands of pages of claim charts completely ignore this evidence altogether. They do not cite the interrogatory responses or the code that is referred to in those responses. The charts make, at most, passing use of the Source Code Materials. Instead, they are almost entirely composed of publicly available information such as screen shots and third party observations about how the games *might* work. In the case of GTA0, the chart includes a reference to a LinkedIn page, which, of course, is not evidence of any of the complex networking procedures claimed in the patents.
 - I also note that these failings are common to all of the Contentions, not just for those for the accused Take Two products. For instance, the Call of Duty Contentions cite to a 2006 web archive post, but make no effort to explain how that post could be relevant to the operation of the Accused Products, the earliest of which was released in 2014. The vast

¹ Interrogatory No. 9 requires that Plaintiff “Identify with specificity all accused methods, broadcast channels and networks, including by identifying with particularity each and every network and broadcast channel which you contend is m-regular, identifying each and every participant of each such network and broadcast channel.”

majority of the information cited in all of the Contentions for all of the Defendants is irrelevant to the claims and is, as explained below, insufficient on at least two key elements for every asserted claim.

- **Failure to explain the evidence relied upon.** As noted above, Plaintiff’s Contentions are largely comprised of publicly available information such as screen shots and third party observations about the games. In most instances, the evidence cited (such as screen shots) is not explained or mapped specifically to the limitations. Contentions such as these have been found to be inadequate where they rely on “screen shots in lieu of explanatory text” such that the defendant must “guess what particular system (or aspect of a particular system) [plaintiff] is accusing of meeting each limitation.” *Digital Reg. Of Tex., LLC v. Adobe Sys. Inc.*, No. 12-cv-01971, 2013 WL 3361241, at *3-4 (N.D. Cal. July 3, 2013). This is exactly the case here. Indeed, it appears likely that Plaintiff cites to thousands of pages of unexplained screenshots and third party documents due to the fact that evidence produced in this case does not and cannot show infringement. Again, Plaintiff has failed to comply with the Scheduling Order.
- **Failure to rely on any evidence.** For a significant number of limitations across all accused products and asserted patents, Plaintiff cited no evidence whatsoever, merely relying on attorney argument. One or more of the charts contain only attorney argument in support of the following limitations:
 - ‘344 Patent Claims 1-e, 1-f, 4, 5, 11, 13b, 13-c, 13-d, 13-e, 13-f, 13-g, 13-h, 18-d, 18-e;
 - ‘634 Patent Claims 1-d, 1-f, 1-g, 9, 19-c, 19-h;
 - ‘966 Patent Claims 1-d, 1-e, 1-f, 4, 11, 13-f, 13-g, 13-h;
 - ‘147 Patent Claims 1-b, 1-d, 3, 6-b, 11-b, 11-c, 11-d;
 - ‘069 Patent Claims 1-b, 1-d, 1-e, 1-f.
 - ‘497 Patent Claims 1-c, 1-d, 1-e, 1-f, 1-g, 9-a, 9-c, 9-d, 9-e;

Courts have held that contentions are inadequate where (as here) they do not contain evidence but merely parrot the claim language. *See, e.g., H-W Tech., L.C. v. Apple, Inc.*, No. 11-cv-651, 2012 WL 3650597, at *4, *7 (E.D. Tex. Aug. 2, 2012) (patentee ordered to supplement infringement contentions, in part because the contentions “merely recite[d] language from the claims at issue *without providing any support for some of their elements*”) (emphasis added). Thus, this is yet another example of how Plaintiff has failed to comply with the Scheduling Order.

Notable specific deficiencies:

- **‘344, ‘634, ‘069, ‘147, ‘966 Patents: Failure to cite to evidence to support the contention that accused networks meet the topology requirements of any of the asserted claims.** With the exception of the ‘497 patent, all or nearly all of the asserted claims explicitly require that the accused

network have a specific topology – namely, that the network is incomplete and m -regular, where m is the exact number of neighbors of each participant, and m is at least 3.

- Claim 1 of the ‘344 patent, for instance, is directed to a “computer network for providing a game environment for a plurality of participants” and requires that, among other things:
 - “each participant” has “connections to at least three neighbor participants,”
 - “the network is m -regular”
 - “where m is the exact number of neighbor participants of each participant”; and
 - “the number of participants is at least two greater than m thus resulting in a non-complete graph.”
- These limitations were added to claims to overcome examiner rejections and ***are thus central to patentability***. For instance, the Examiner specifically relied on the following argument in allowing the patents to issue:

Figure 1 of the Alagar reference is deceiving in that it coincidentally shows a 4-regular network. However, that is not the typical situation as is clear from a careful review of the Alagar reference. Column 1 of page 238 of the Alagar reference clearly indicates that there is in fact nonregularity in a computer network formed because the number of neighbors is not set at a predetermined number, but rather based upon the particular encountered terrain of the mobile nodes.

Claim 1 as amended requires that the computer network be m regular at substantially all times where there are not new nodes entering or leaving the network. ... For this reason, the claims are allowable over the cited prior art. 9/10/2003 Office Action Response and 10/1/2003 Notice of Allowability.

- Yet, for nearly all of the Accused Products, Plaintiff offers no evidence that these limitations are met but instead, offers only the same boilerplate attorney argument. The treatment of claim element 1-e of the ‘344 patent is exemplary.
 - That element requires Plaintiff to prove that the accused network is “network is m -regular, where m is the exact number of neighbor participants of each participant.” Yet, none of the Contentions for any product contain any evidence suggesting how this limitation is met. In fact, none of the Contentions for this element cite to any confidential documents or source code produced by the Defendants.

- For instance, claim element 1-d of the '344 patents requires that a “participant sends data that it receives from a neighbor participant to its *other* neighbor participants.”
- Plaintiff emphasized the importance of this limitation in arguing for patentability, stating: “*In contrast, by limiting the rebroadcast to ‘other neighbors,’ this reduces the number of messages to be broadcast to $(m-1)N + 1$. For large networks, the saved bandwidth can be significant. For this sole reason alone, Claim 1 has a requirement of ‘other neighbors’ which is not fairly shown in the Alagar reference. Therefore, Claim 1 and all dependent claims therefrom are in condition for allowance.*” 9/10/2003 Office Action Response.
- Yet, the Contentions do not offer any specific evidence as to how this very specific data propagation limitation is met. And, especially for client server topologies, it would seem impossible that this limitation could ever be met, because the communication is inherently back and forth between client and server.
- **‘634 Patent (all claims), ‘069 Patent (all asserted claims): Failure to cite evidence to support contention that the “non-routing table based” limitations are supposedly met.** These claims all include a limitation that the claim be “non-routing table based.” For example, Claim 1 of the ‘634 patent claims “A non-routing table based computer network having a plurality of participants....”
 - These “non-routing table based” limitations were all added by amendment to overcome examiner rejections and the cited prior art and *are thus central to patentability*.
 - Yet, for nearly all of the Accused Products, Plaintiff offers no evidence that these limitations are met but instead, offers only the same boilerplate attorney argument. *See, e.g.* Claim 1 of the ‘634 Patents (NBA 2k Chart at 118-139 (only parroting the claim language, citing irrelevant publicly available documents, and not explaining how the non-routing table limitation is met). This lack of evidence or theory is mirrored in the other Contentions. *See, e.g.* Call of Duty Chart at 286-298; FIFA Chart at 215-225. Moreover, the Contentions fail to even offer attorney argument to explain why the “non-routing table based” limitations are supposedly met.
 - Further, much of the communications apparently accused by Plaintiff are over the internet. Because the internet inherently uses routing tables, it would seem implausible if not impossible for such communication to be “non-routing table based.” Plaintiff’s inability to provide any credible evidence or even an explanation of its theory suggests that Plaintiff does not have any basis for asserting the ‘634 or ‘069 patents at all.
- **‘147 and ‘069 Patents (all asserted claims): Failure to cite evidence to support Contentions that the Accused Products employ the specific methods of adding or deleting a participant from an incomplete m-regular network.** The asserted claims of these two patents recite very specific methods of adding or deleting participants from an m-regular, incomplete network where m is at least

3. The claims were amended to add several very specific limitations to avoid prior art.² Yet, as to all asserted claims, Plaintiff cites no evidence at all as to at least one limitation, rendering its charts deficient.

- As to the '069 patent, no evidence at all is provided for four of the limitations of independent claim 1. ('069 Patent Claim elements 1-b, 1-d, 1-e, 1-f). Because this is the only independent claim asserted, the Contentions are deficient as to all asserted claims.
- As to the '147 patent, for at least one element of every asserted claim, the Contentions provide no evidence whatsoever. For one or both of the Contentions as to NBA2k and GTA0, the Contentions provide no evidence at all for the following limitations: Claim elements 1-b, 1-d, 3, 6-b, 11-b, 11-c, 11-d. Claims 1, 6 and 11 are the only independent claims asserted. Thus, the Contentions are deficient as to all asserted claims.
- **'344 Patent, '634 Patent, '966 Patent, '069 Patent – “Participant” limitations.** For each and every limitation of the Asserted Patents that involves “participants,” Plaintiff does not explain who or what the participants are. For instance, Plaintiff merely argues that “[t]he Accused Product meets the recited claim language because it provides a computer network in which each participant sends to each of its neighbors only one copy of the data.” But it is unclear if “participant” means an end-user, a server, or something different, because again for many limitations, no actual evidence is cited. *See, e.g.,* Grand Theft Auto Five/Grand Theft Auto Online Chart at '344 Patent Claim 11; Call of Duty Chart at '069 Patent Claim 1-f; FIFA Chart at '069 Patent Claim 1-f.
 - Again, not only is this information required by the Scheduling Order, we also specifically asked for it via Defendants' Interrogatory No. 9, which asks Plaintiff to “[i]dentify with specificity all accused methods, broadcast channels and networks, including by identifying with particularity each and every network and broadcast channel which you contend is m-regular, *identifying each and every participant of each such network and broadcast channel.*” *See* Defendants' Interrogatory No. 9 (emphasis added).
 - Plaintiff's failure to provide this basic information deprives Defendants of notice as to what conduct is actually accused in this case.
- **'497 Patent (all claims): Failure to cite evidence to support contention that the algorithm and port reordering limitations are supposedly met.** The key limitations of this patent are elements 1-f and 1-g in Plaintiff's charts, which require use of a “a port ordering algorithm” to “identify the call-in

² For example, the bolded limitations were added to Claim 1 of the '147 Patent avoid the prior art:

- when the first computer decides to disconnect from the second computer, the first computer sends a disconnect message to the second computer, *said disconnect message including a list of neighbors of the first computer*; and
- when the second computer receives the disconnect message from the first computer, the second computer broadcasts a connection port search message on the broadcast channel to find a third computer to which it can connect *in order to maintain an m-regular graph, said third computer being one of the neighbors on said list of neighbors.*

port” and further require that “the communications ports selected by the port ordering algorithm may be re-ordered.” Asserted claim 9 includes similar limitations in elements and 9-d and 9-e.

- These two sets of limitations were added by amendment to overcome examiner rejections and the cited prior art. 6/14/2004 Office Action Response.
- Yet, for GTA0, the Contentions include no evidence whatsoever as to at least 2 elements of all asserted claims, because the Contentions cite to no evidence for Claim elements 1-e, 1-f, and 1-g and 9-d and 9-e. The material cited for NBA 2K for these elements lacks any explanation and does not appear to support the contention that NBA 2k includes those elements.
 - These deficiencies in these Contentions mirror the deficiencies of the Contentions as to the other Defendants. *See, e.g.*, FIFA Chart at ‘497 Patent Claim 1-f (citing no evidence, instead parroting the claim language and adding “[t]esting of the Accused Product is consistent with the above contention.”).
- Plaintiff’s inability to provide any evidence (in the case of GTA0) or credible evidence (in the case of NBA 2K) suggests that it does not have any basis for asserting the ‘497 patent at all.

PROTECTIVE ORDER PROSECUTION BAR

Given your role as lead counsel in the *inter partes* review proceedings involving the Asserted Patents, we are troubled by your apparent role in preparing and signing the Infringement Contentions. The Protective Order provides:

“Any attorney, consultant, witness, or other person who views RESTRICTED CONFIDENTIAL – SOURCE CODE material prior to trial shall not participate, directly or indirectly, in any patent application prosecution or any post-grant review proceeding for the particular technology field at issue in the patents-in-suit, nor consult with attorneys or experts participating in any such prosecution or post-grant review proceeding.”

Most of the Contentions are specifically designated as including Source Code Materials under the Protective Order. Your signature on the Contentions constitutes a representation that you read the pleading (which was designated as containing source code) and made a reasonable inquiry into the factual and legal legitimacy of the pleading. *Vehicle Operations Techns. LLC v. American Honda Motor Co., Inc.*, 67 F. Supp. 3d 637, 649 (D. Del. 2014) (J. Andrews). Therefore, having “viewed” such materials, pursuant to the protective order you are no longer permitted to “participate, directly or indirectly,” in any of the *inter partes* review proceedings regarding the Asserted Patents.

Nor could this be considered an oversight. Earlier this year, your consultant Andy Jian was caught using his cell phone in the source code review room, in violation of the Protective Order. Your colleague, Mr. Frankel, refused to provide an explanation or even assurances that Plaintiff’s counsel was in compliance

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& STRAWN

James Hannah
March 15, 2016
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with the Protective Order. Among other things, we specifically asked that Plaintiff's counsel provide a representation that "Mr. Jian and the source code review team are complying with the protective order" and explain "how your firm is segregating source code material and communications between the source code review team and IPR counsel." Mr. Frankel refused to provide even these basic assurances. (2/8/2016 email from Frankel to Tomasulo). Shortly thereafter, we specifically requested that, given your role as lead IPR counsel, you be removed from the pleadings in the District Court cases to prevent you from having even inadvertent access to Defendants' confidential Source Code Materials. Mr. Frankel responded that Plaintiff refused to withdraw you from the pleadings in this case but did represent that you would not "be reviewing materials designated RESTRICTED CONFIDENTIAL – SOURCE CODE." 2/23/16 Email from Frankel to Tomasulo. Yet, less than ten days later, you signed the "Initial Claim Charts," which include, by your own designation, Source Code Materials. These events give us great concern about the security of Defendants' source code materials.

CONCLUSION

Accordingly, we request that:

- (1) Unless Plaintiff provides proper supplemental Infringement Contentions as to all asserted claims and proper responses to Interrogatory Nos. 7 and 9 within a week, it stipulate to noninfringement and dismiss all claims against Defendants with prejudice; and
- (2) That you and anyone else who had a role in preparing the Contentions withdraw from the IPR proceedings.

Finally, Defendants intend to seek their attorneys' fees for having to defend this case at the appropriate time.

Very truly yours,

/s/

Michael A. Tomasulo

MAT/m

cc: Paul J. Andre, Lisa Kobialka, Hannah Lee, Aaron Frankel, Phil Rovner, Jack Blumenfeld

EXHIBIT B

CONFIDENTIAL – OUTSIDE COUNSEL ONLY

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ACCELERATION BAY LLC,)	
)	
Plaintiff,)	
	)	C.A. No. 16-454 (RGA)
v.)	
	)	CONFIDENTIAL –
ELECTRONIC ARTS INC.,	)	OUTSIDE COUNSEL ONLY
)	
Defendant.)	

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

DEFENDANTS’ BRIEF IN SUPPORT OF THEIR MOTION (“A”) TO COMPEL COMPLIANCE WITH SPECIAL MASTER ORDER NO. 2 AND SANCTIONS

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August 16, 2017

Electronic Arts Inc. (“EA”) and Take-Two Interactive Software, Inc., Rockstar Games, Inc., and 2K Sports, Inc. (“Take-Two”) (collectively “Defendants”) move for the following:

1. An order precluding Plaintiff from accusing of infringement any broadcast channel, any method, or any “part” of the so-called networks;
2. An order precluding Plaintiff from arguing that the Accused Games practice the Broadcasting Limitations as described in elements 1-c, 1-d, 13-e, and 13-f in the ’344 and ’966, and claim 22 of the ’634 patent charts;
3. An order precluding Plaintiff from arguing that the Accused Games practice the Connect or Disconnect Limitations as described in elements 1-b, 1-e, and 1-f of the ’069 patent chart and elements 1-b, 1-c, 11-b, and 11-c of the ’147 patent chart;
4. An order precluding Plaintiff from asserting infringement under the doctrine of equivalents; and
5. An order precluding Plaintiff from asserting any factual allegations other than those specifically cited in its responses to Interrogatory Nos. 7 and 9.

In the alternative, EA and Take-Two move for an order that clarifies that the portion of Special Master Order No. 6 (C.A. No. 16-453, D.I. 227) regarding Interrogatory Nos. 7 and 9 applies in each of its cases. Specifically, Special Master Order No. 6 states, “if Plaintiff’s expert reports set forth infringement contentions that had not been previously disclosed, it may be appropriate to reconsider Defendants’ motion for sanctions and appropriate relief.” Plaintiff does not agree that Special Master Order No. 6 applies to EA and Take-Two or even that these Defendants should be on the same procedural footing as Activision.

I. Procedural History

In April 2016, in the prior cases, Defendants Activision, EA, and Take-Two moved for supplemental responses to Interrogatory Nos. 7 and 9 regarding Plaintiff’s infringement allegations.

On April 19, 2016, the Special Master granted Defendants' Motions to these two interrogatories and entered Order No. 2, which required that "Plaintiff shall provide further responses to interrogatories 7 and 9 as soon as reasonably possible."

In June 2016, the cases were dismissed and refiled. The Scheduling Order in these cases confirms that the Special Master Orders in the prior cases apply in these cases. Motion practice continued as to the insufficiency of Plaintiff's responses to these interrogatories.

On April 28, 2017, Activision moved for compliance with Special Master Orders for supplemental responses to Interrogatory Nos. 7 and 9.

On May 19, 2017, the Special Master entered Order No. 3, granting Activision's motion, explaining that "With the parties scheduled for a July 10, 2017 claim construction ("Markman") hearing, it is appropriate for Plaintiff to be as specific as possible to its infringement claims in its supplemental interrogatory responses." Special Master Order No. 3 states:

Plaintiff shall provide as full, clear and complete responses as possible at that time to Interrogatories 7 and 9 that:

1. Identify, individually and with specificity, all accused methods, broadcast channels and networks, including by separately identifying each and every participant and connection for each such network or broadcast channel and explaining how each is alleged to be m-regular and incomplete;
2. Provide a separate infringement chart for each accused method, network and broadcast that demonstrates how each accused method step is allegedly performed by Activision and how each accused network and broadcast channel is alleged to meet each limitation of each asserted claim; and
3. If Plaintiff contends that any accused method, network or broadcast channel allegedly infringes any asserted claim under the doctrine of equivalents, Plaintiff must identify the elements of each limitation not literally present and identify the structures of or methods used by the Accused Games that Plaintiff alleges to be equivalent to any such elements that are not literally present in the Accused Games.

* * *

As set forth above, the Special Master is ordering Plaintiff to supplement its responses to a number of interrogatories in a specific and complete manner. Interrogatory response obligations continue as new discovery proceeds and supplemental responses are appropriate.

D.I. 155 (Special Master Order No. 3) at 7.

On June 7, 2017, EA and Take-Two filed their motion seeking an order that parallels Special Master Order No. 3 in each of their cases.

On June 9, Plaintiff objected to Special Master Order No. 3 “to the extent Defendants claim it requires Acceleration Bay to . . . [f]urther supplement Interrogatories 7 and 9 to further disclose Acceleration Bay’s infringement allegations as to Activision by effectively requiring full infringement expert reports months before they are to be provided under the Scheduling Order and in the midst of fact discovery.” D.I. 172 at 1-2.

On June 20, 2017, the Special Master entered Special Master Order No. 4, which stated:

Plaintiff’s responsive brief evidences the communications the parties have had on this topic. Those email communications convince me that plaintiff intends to provide supplemental interrogatory responses to these defendants, to the same extent that it will do so for defendant Activision pursuant to Special Master Order No. 3, subject to any objections that plaintiff may file with the Court as to Special Master Order No. 3. Plaintiff represents that it will supplement its responses by the agreed upon date of July 7, 2017. There is merit to respecting the efforts of the parties to resolve disputes without bringing motions before the Court. At this time, this motion appears to be premature.

D.I. 185 at 6.

On June 23, 2017, the Court overruled Plaintiff’s objections and confirmed Special Master Order No. 3 and confirmed that the Special Master may issue rulings regarding discovery sanctions. D.I. 193.

On July 5, 2017, Activision filed a motion to compel compliance with Special Master Order No. 3 and sanctions precluding Plaintiff from setting forth infringement allegations that were not disclosed in Plaintiff’s responses to Interrogatory Nos. 7 and 9.

On July 11, 2017, Plaintiff served its supplemental responses to Interrogatory Nos. 7 and 9 to EA and Take-Two. Exs. A-1 to A-7.

On July 17, 2017, the Special Master entered Special Master Order No. 6, which stated:

This motion was filed by Defendant Activision Blizzard, Inc., but at this stage all Defendants have concerns that they have not received adequate infringement contentions from Plaintiff.

* * *

[I]f Plaintiff's expert reports set forth infringement contentions that had not been previously disclosed, it may be appropriate to reconsider Defendants' motion for sanctions and appropriate relief.

D.I. 227 (Special Master Order No. 6) at 6–7.

Then, EA and Take-Two attempted to avoid bringing this motion by requesting Plaintiff to represent that Special Master Order No. 6 would also apply to EA and Take-Two. Plaintiff refused to do so. And despite having moved for and taken substantial additional technical discovery, Plaintiff has not supplemented its responses to Interrogatory Nos. 7 and 9 beyond the supplements provided on July 11.

Fact discovery closed on July 31, 2017.

II. Plaintiff's Responses Ignore The Special Master's Orders.

A. Plaintiff Has Violated Special Master Order No. 2 And Therefore Should Be Precluded From Using Its Expert Reports To Cure Its Discovery Deficiencies.

Special Master Order No. 2 granted Defendants' Motion to Compel and required Plaintiff to supplement its responses to Interrogatory Nos. 7 and 9. To avoid the entry of Special Master Order No. 3 in the cases against EA and Take Two, Plaintiff affirmed in writing to the Special Master that it would supplement its interrogatories to EA and Take-Two consistent with the terms of Special Master Order No. 3.

Plaintiff's responses carefully sidestep the fundamental issue in the case. Among other things, Special Master Order No. 3 clarified what was required by the claims, Interrogatory Nos. 7 and 9, and Special Master Order No. 2: defining exactly what networks and broadcast channels are accused and how they are supposedly m-regular and incomplete. The patent claims use graph theory to claim the alleged inventions, requiring the claimed network to be "m-regular" and incomplete. A traditional definition for a graph is a set of vertices and a set of edges. *See* Ex. A-8 (Graph Theory (1997)) at 1; Ex. A-9 (Introduction to Graph Theory (1993)) at 19. In common parlance, to draw the graph, you need to know the nodes (or dots) and you need to know which dots have lines (edge) between them and which do not. Without that basic information, it is impossible to determine the properties of the graph, or in common parlance, what the graph "looks like."

As applied to a network, to determine whether any specific accused network, or broadcast channel, meets the limitations of the claim, Plaintiff needs to identify the complete set of participants of the network (the set of vertices) and the complete set of connections (the set of edges) that connect them. Thus, Special Master Order No. 3 required Plaintiff to "[i]dentify, *individually and with specificity*, all accused methods, broadcast channels and networks including by separately identifying each and every participant and connection for each such network or broadcast channel and explaining how each is alleged to be m-regular and incomplete." D.I. 155 (Special Master Order No. 3) at 6–7 (emphasis added). In other words, the Order required, for each accused network or broadcast channel, that Plaintiff provide the "edge set" and the "node set." Even Plaintiff's own expert confirmed that this is the *bare minimum* required to identify an accused network. Ex. A-14 (Bims Dep. Tr.) at 201–02 (testifying that "to determine whether any specific broadcast channel meets the m-regular topology requirement

where m is at least 3, we need to know who the members of the broadcast channel are and the complete set of edges [*i.e.* connections] that connect those members”).

Plaintiff’s responses do not identify any graph at all. As explained in more detail below, instead of identifying any accused network in this manner, the responses identify categories of nodes (aka participants) and types of connections (the edges). As just one example, the responses state that the “participants” are “application programs, running on player consoles (PC, Xbox, or Playstation), [REDACTED] Ex. A-1 at 38, and “connections” are “data links,” *id.* at 39. Based on this information, no graph is disclosed. Defining a network in this way does not indicate which nodes are connected and which are not connected. These responses do not comply with the letter or spirit of the claims or Special Master Order Nos. 2 or 3. From the information provided, it is impossible to discern what network(s)/broadcast channel(s) is actually accused, or how they are supposedly composed. Simply put, this is no answer at all.

The deficiencies are all the more striking and all the more prejudicial because, as Plaintiff has long known all along, Defendants use well known client server and full networks that are specifically outside the scope of the claims. Last year, EA and Take-Two both served detailed discovery responses, which explained that their products do not infringe because the products use conventional client-server or full mesh network topologies, and directed Plaintiff to the source code that supports their positions. *See* Exs. A-12 (EA’s Responses) and A-13 (Take-Two’s Responses). All depositions have confirmed these basic facts. Yet, Plaintiff has never accounted for these facts in its interrogatory responses despite being required to do so by the Federal Rules. *See* Fed. R. Civ. P. 33(b)(3) and 26(e). Instead of accounting for these facts, Plaintiff needlessly prolonged these cases and submitted reams of inscrutable interrogatory responses. Fact discovery is now closed and Plaintiff’s interrogatory responses are still deficient.

Fact discovery is over and Plaintiff's final supplemental interrogatory responses served July 11 provide none of the specificity required by the Order and identify no graph at all. The responses also do not identify any broadcast channel or method. *See infra* Section II.B. Plaintiff only purportedly identifies a single "network" for each Accused Game. *See* Exs. A-2 to A-4 (Plaintiff's charts for the "FIFA Network," "NHL Network," and "PvZ Network") and Exs. A-6 to A-7 (Plaintiff's charts for the "NBA 2K Network" and "GTAO Network"). These so-called networks are not accused networks, but every computer process involved (both directly and indirectly) with the Accused Games. *See infra* Section II.C. As noted above, the responses do not provide the "node set" and "edge set" information that Special Master Order No. 3 required.

Indeed, there is no substantive difference between Plaintiff's current discovery responses and the responses previously deemed non-compliant back in 2015. Plaintiff's supplemental responses are nothing more than recycled rearrangements of the non-compliant responses, causing Defendants to move yet again for compliant responses. *See* Exs. A-10 (Comparing Responses for EA) and A-11 (Comparing Responses for Take-Two).

Rather than disclose the bases for its claims—as required by the order—Plaintiff seeks to ambush Defendants by withholding those bases until it provides its expert reports. Plaintiff's litigation-by-ambush is antithetical to the Federal Rules and has greatly prejudiced Defendants' ability to prepare their defense. *See INVISTA N. Am. S.a.r.l. v. M & G USA Corp.*, 2013 WL 3216109, at *5 (D. Del. June 25, 2013) (finding a misleading and incomplete interrogatory response was "highly prejudicial" and striking a supplement). Defendants have been forced to file multiple motions to compel basic infringement contentions that have yielded multiple court orders but no substantive response. *Ware v. Rodale Press, Inc.*, 322 F.3d 218, 223 (3d Cir. 2003)

(noting the prejudice from “fil[ing] motions in response to the strategic discovery tactics of an adversary”).

Plaintiff’s repeated failures to give basic infringement positions warrant precluding Plaintiff from curing its deficiencies with its expert reports. *See* Fed. R. Civ. P. 37. Plaintiff should be precluded from making any contentions that it has not already substantiated in its responses. *See* Proposed Order. At the very least, Plaintiff should be precluded from accusing any broadcast channel, method, or any “part” of the so-called networks of infringement. Further, as discussed below, preclusionary sanctions should also apply to many limitations of the Asserted Claims as well. *See infra* Sections II.D–G.

In the alternative, Defendants request that the Special Master clarify that Order No. 6 applies to EA and Take-Two. Judicial economy favors this approach so that there is a clear record of what has been ordered in each case. As noted in Special Master Order No. 6, the motion leading to that order “was filed by Defendant Activision Blizzard, Inc., but at this stage all Defendants have concerns that they have not received adequate infringement contentions from Plaintiff.” D.I. 227 (Special Master Order No. 6) at 6. All Defendants are concerned because Plaintiff has taken a uniform approach of withholding the same categories of information in its responses to Interrogatory Nos. 7 and 9. Thus the Special Master’s findings and determinations in Order No. 6 should also expressly apply to EA and Take-Two.

EA and Take-Two attempted to avoid bringing this motion by requesting Plaintiff to represent that Special Master Order No. 6 would also apply to EA and Take-Two. Plaintiff refused to do so, and is taking the position that Special Master Order No. 6 does not apply to EA and Take-Two. Although Special Master Order No. 6 did not grant Activision’s request for

sanctions at the time, Order No. 6 outlined the circumstances for when preclusionary sanctions would be appropriate:

[I]f Plaintiff’s expert reports set forth infringement contentions that had not been previously disclosed, it may be appropriate to reconsider Defendants’ motion for sanctions and appropriate relief.

D.I. 227 (Special Master Order No. 6) at 6–7. Thus EA and Take-Two each request an order confirming that Plaintiff’s expert reports are bound to the responses it has served. Having refused to even agree that the terms of Order No. 6 apply equally to all Defendants, Plaintiff should also pay the expenses incurred by EA and Take-Two for filing this motion.

B. Plaintiff Does Not Identify Any Broadcast Channel.

The patents are about “broadcast channels.” The term “broadcast channel” is a claim limitation in 13 of the 21 asserted claims, and in all asserted claims of four of the six patents. Many of the asserted claims require a “plurality of broadcast channels.” *See infra* Appendix of Claims. One of those patents (’147 patent) is even titled “Leaving A Broadcast Channel.”¹

Plaintiff promised to comply with Special Master Order No. 3’s requirement that it specifically identify and separately chart all accused broadcast channels. Plaintiff did neither. Instead of complying with the Special Master’s Order, Plaintiff raised a new objection, arguing to the Court that it is “unclear how” the broadcast channels can be separately identified. D.I. 172 (Plaintiff’s Objections to Special Master Order No. 3) at 8. This overruled objection² is an astounding admission of Plaintiff’s inability to articulate infringement as to all 13 claims, which

¹ The Asserted Patents make clear that broadcast channels are separately identified by a “channel type (e.g., application name) and channel instance (e.g., session identifier)...” ’344 patent at 18:2-5.

² The Court overruled Plaintiff’s objections on June 23, 2017. D.I. 193.

require operations performed on or to the specific m-regular incomplete structure of the broadcast channel.³

The overruled objection also directly contradicts the testimony of Plaintiff's own expert, who explained that the relief ordered in Special Master Order No. 3 was the correct way to identify a broadcast channel. Ex. A-14 (Bims Dep. Tr.) at 201-02 (testifying that "to determine whether any specific broadcast channel meets the m-regular topology requirement where m is at least 3, we need to know who the members of the broadcast channel are and the complete set of edges [*i.e.* connections] that connect those members").

If Plaintiff is "unclear how" it can identify a broadcast channel now that fact discovery is closed, then either Plaintiff should dismiss the four patents that require a broadcast channel or Plaintiff should be precluded from alleging that the Accused Games include the claimed broadcast channels.

³ Nor is this the first time that Acceleration and its experts could not identify this key limitation in a claim chart. Dr. Bims testified that he could not identify any broadcast channel that was m-regular and incomplete even though he had prepared a chart that supposedly showed that this limitation was met for the accused Destiny game operating on the Sony Platform. Despite having said that it was "highly likely that the Sony products [running the Accused Product Destiny] are practicing the invention," he could not identify a single broadcast channel meeting the m-regular topology limitation:

[MR. TOMASULO]: So what can you – can you identify a broadcast channel that meets – where you can identify all of the participants on all of the edges and show how it is m-regular or m is at least 3? Is it in your chart?

A. No, it's not in the chart.

Q. Okay. Can you do it sitting here today, identify just one broadcast channel where you can identify all the participants and explain why it meets that topology requirement?

A. At this time, no.

Ex. A-14 (Bims Dep. Tr.) at 202:24-203:9; *see also id.* at 90:3-9, 188-204.

C. Plaintiff Still Has Not Properly Identified And Charted Each Accused Network.

Special Master Order Nos. 2 and 3 required Plaintiff to identify *each accused network*. D.I. 155 (Special Master Order No. 3) at 6–7 (“Identify, individually and with specificity, all accused methods, broadcast channels and networks,” and “[p]rovide a separate infringement chart for each.”). Plaintiff does not even attempt to comply with this Order. Instead, Plaintiff just renames each of its charts to add the word “network” to the title, *e.g.*, renaming the FIFA 15 and 16 charts from “FIFA” to the “FIFA Network.” Thus, Plaintiff’s responses are the same as before, and still deficient.

Further, Plaintiff does not identify any, let alone each, *accused* network. Instead, Plaintiff calls every possible computer and computer process involved with the operation of each Accused Game a “network.” Plaintiff does not appear to allege that the entire network has the claimed m-regular and incomplete topology. Rather, Plaintiff’s position appears to be that an unidentified part of the so-called network is m-regular and incomplete. Plaintiff was ordered to identify and chart each of these accused networks separately. Plaintiff did not do that. Instead of identifying the “participants” of each accused network, Plaintiff lists *every* player computer, server, and computer process as *possible* participants. The responses never indicate which participants are supposedly connected or how those connections are made, which Plaintiff’s own expert concedes is essential to evaluating infringement. *See* Ex. A-14 (Bims Dep.) 201:21–202:20.

Electronic Arts. Plaintiff’s interrogatory responses are facially insufficient, even under its own standard, because it has failed to chart each network separately. Plaintiff’s interrogatory responses purport to accuse six EA games of infringement: FIFA 15 and 16, NHL 15 and 16, and

Plants v. Zombies 1 and 2.⁴ Different games of the same series cannot be played together, *e.g.*, a player with FIFA 15 cannot play with a player with FIFA 16. And Plaintiff accuses versions of these games that run on different and distinct platforms: “Playstation 3, Playstation 4, Xbox One, and Xbox 360 versions.” *See* Exs. A-2 to A-4 (first page). For the FIFA and Plants v. Zombies games, Plaintiff is also accusing the “PC Windows” version. *See* Exs. A-2 and A-3 (first page). Based on Plaintiff’s infringement charts, platform-specific characteristics allegedly fulfill certain limitations, *e.g.*, Plaintiff relies on Microsoft Xbox documents. *See, e.g.*, Ex. A-2 (FIFA) at 14, 33, 92, 93, 95, 99, 101, 103 (citing Microsoft documents). There are no corresponding Sony Playstation documents. If there was only one network at issue for each game per platform, then there are at least 26 different and distinct networks that are collectively at issue. Yet, Plaintiff provides only three charts: the purported “FIFA Network,” “NHL Network,” and “PvZ Network.”

These three charts obscure the number of networks that are actually accused. The sum of Plaintiff’s infringement allegation is that the accused network is “a logical overlay network” somewhere within Plaintiff’s so-called network. *See* Ex. A-1 at 9-10, 18-19, 27-28, 35-36. Plaintiff says these logical overlay networks are made up of logics, but provides no explanation for what set of “logics” would constitute an accused logical overlay network, or if each logic should constitute its own accused network. *See* Ex. A-1 at 39, 41, 43-44. A response compliant with the order would have at least defined each set of so-called logics and charted each “logical overlay network” separately because that is the only way to determine infringement.

⁴ Acceleration actually accuses eight EA games because its charts purportedly relate to FIFA 17 and NHL 17 as well, but the Special Master denied Acceleration’s attempt to introduce those games into the case.

As illustrated in the table below, Plaintiff’s responses do not even attempt to identify the participants and the connections that make the purported broadcast channel m-regular and incomplete. Instead of identifying the “participants” of each network and broadcast channel, Plaintiff lists *every* player computer, server, and “application program” involved in gameplay as *possible* “participants.” And, instead of identifying which and how the participants are supposedly connected, Plaintiff only identifies a category of connections, stating that “data links” somehow provides the “connections.” Even if “data links” were a known term, this does not identify the connection set – the information required to determine which nodes are connected, and which are not. This is no answer at all.

“Connections”		
“FIFA Network”	“NHL Network”	“PVZ Network”
<p><i>The FIFA software application program participants are connected to each other through gameplay data links.</i> The gameplay datalinks are implemented by the UDP and TCP protocols which establish the underlying network connections. [REDACTED]</p>	<p><i>The NHL software application program participants are connected to each other through gameplay data links.</i> The gameplay datalinks are implemented by the UDP and TCP protocols which establish the underlying network connections. [REDACTED]</p>	<p><i>The PvZ software application program participants are connected to each other through gameplay data links.</i> The gameplay datalinks are implemented by the UDP and TCP protocols which establish the underlying network connections. [REDACTED]</p>

Ex. A-1 at 36-44 (emphasis added, internal citation omitted).

Take-Two. Plaintiff’s interrogatory responses accuse four Take-Two games of infringement: NBA 2K15, NBA 2K16, Grand Theft Auto V, and Grand Theft Auto Online. Different games of the same series cannot be played together, *e.g.*, a player with NBA 2K15 cannot play with a player with NBA 2K16. And, Acceleration accuses the versions of these games that run on different and distinct platforms, including Xbox 360, Xbox One, PlayStation

3, PlayStation 4, and PC. *See* Ex. A-6 to A-7 (first page). Based on Plaintiff's infringement charts, platform-specific characteristics allegedly fulfill certain limitations, e.g., Plaintiff relies on Microsoft Xbox documents. *See, e.g.*, Ex. A-6 (NBA 2K) at 17-18, 56-57, 75-77, 78-80. There are no corresponding Sony Playstation documents. Therefore, even if there is only one network at issue for each game per platform, there are at least 20 distinct networks that are collectively at issue. Yet, Plaintiff only provides two charts, one for GTA products and one for NBA2K products. *See* Exs. A-6 and A-7. Thus, Plaintiff's interrogatory responses are facially insufficient, even under their own standard, because Plaintiff has failed to chart each accused network separately.

As with EA, these two charts obscure the number of networks that are actually accused. The sum of Plaintiff's infringement allegation is that the accused network is a logical overlay somewhere within Plaintiff's so-called network. *See* Ex. A-5 at 5-6, 20, 27-28, 30. Plaintiff says these logical overlays are made up of logics, but provides no explanation for what set of "logics" would constitute an accused logical overlay network, or if each logic should constitute its own accused network. *See id.* A response compliant with the order would have at least defined each set of so-called logics and charted each "logical overlay" separately because that is the only way to determine infringement.

As with EA, the Take-Two charts also do not attempt to identify the participants and the connections that make the purported broadcast channel m-regular and incomplete. Instead of identifying the "participants" of each network and broadcast channel, Acceleration lists *every* player computer, server, and "application program" involved in gameplay as *possible* "participants." And, instead of identifying which and how the participants are supposedly connected, Acceleration alleges that the "Rockstar Protocol" (for GTA) and the purported

NBA2K “Mesh Network” somehow provides the “connections.” Again, this is insufficient to determine the graphical properties of the accused network and is no answer at all.

“Connections”	
NBA2K “Mesh Network”	GTA “Rockstar Protocol Networks”
<div style="background-color: black; width: 100%; height: 80px; margin-bottom: 5px;"></div> <p>Those connections use a protocol developed by Take-Two which overlays industry standard protocols IP, TCP and UDP protocols.</p>	<div style="background-color: black; width: 100%; height: 80px; margin-bottom: 5px;"></div> <p>The Rockstar Protocol Network client computer participants will also connect to relay server participants using the Rockstar Protocol.</p>

Id. at 27 and 30 (emphasis added, internal citation omitted).

D. Plaintiff Still Has Not Explained Or Cited To Evidence Showing How The M-Regular Incomplete Topology Limitations Are Supposedly Met.

Plaintiff still has not provided *any* evidence explaining how an accused network or broadcast channel is *both* m-regular *and* incomplete.

Electronic Arts. For each of the accused EA games, Plaintiff’s description of the network’s m-regularity is entirely conclusory. Plaintiff’s sole substantive allegation relating to the m-regular limitation is that the network is designed to work “optimally” and “not overloaded” and, therefore, the network happens to be m-regular.



“M-Regular”		
FIFA	NHL	PVZ
<p>The FIFA Network is m-regular because it includes logics rules that govern the selective distribution of gameplay data to certain participants through, [REDACTED]</p> <p>These logics rules ensure that gameplay data is <i>optimally</i></p>	<p>The NHL Network is m-regular because it includes logics rules that govern the selective distribution of gameplay data to certain participants through, [REDACTED]</p> <p>These logics rules ensure that gameplay data is <i>optimally</i></p>	<p>The PvZ Network is m-regular because it includes game logic rules that limit the data that is sent to participants. These logics rules, including proximity-based game logic and session logic, ensure that the distribution of gameplay data is <i>optimal</i> and that any</p>

<p>distributed so that no participant or server is <i>overloaded</i>. The logics rules will establish an equal number of connections for each participant and determine what gameplay data will be distributed to such participants based on different criteria such as the participant’s location or the participant’s membership in a specific team. Because the number of connections are the same for each participant in a stable state, the network m-regular.</p>	<p>distributed so that no participant or server is <i>overloaded</i>. The logics rules will establish an equal number of connections for each participant and determine what gameplay data will be distributed to such participants based on different criteria such as the participant’s location or the participant’s membership in a specific team. Because the number of connections are the same for each participant in a stable state, the network m-regular.</p>	<p>given participant is not <i>overloaded</i>. This includes setting the optimal or maximum number of neighboring participants to which any participant may connect to resulting in an m-regular network because each participant reaches an optimal or maximum number of connections to other participants.</p>
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Ex. A-1 at 41 and 44 (emphasis added, internal citations omitted). The evidence cited by Plaintiff does not support the allegation of the existence of such a “maximum” or “optimal” preset, but even if it did, Plaintiff’s charts are completely devoid of any explanation as to how this alleged “maximum” or “optimal” setting results in an m-regular network or what the m-regular network looks like in terms of its participants, their connections, or even the value of “m.” See Ex. A-15.

Plaintiff’s description of the network’s incompleteness is also entirely conclusory. Plaintiff just asserts that the network is incomplete.

“Incomplete”		
FIFA	NHL	PVZ
<p>The FIFA Network is incomplete because not all participants are able to connect to each other. Logics rules are applied to ensure that each participant maintains the current state of the game without overloading any server or participant. [REDACTED]</p>	<p>The NHL Network is incomplete because not all participants are able to connect to each other. Logics rules are applied to ensure that each participant maintains the current state of the game without overloading any server or participant. [REDACTED]</p>	<p>The PvZ Network is incomplete because not all participants are able to connect to each other. Game logics rules, including proximity-based game logics and session logics, are applied to build an incomplete network and facilitate the optimal distribution of</p>

		<p>gameplay data, file data (e.g., relating to screen shots), network messages (e.g., a request to load a new level) and VoIP data to participants.</p>
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Ex. A-1 at 41 and 44 (internal citations omitted). Yet again, Plaintiff says nothing more than “the software somehow does it” without explanation or specifics.

Worse, Plaintiff provides no explanation for how a network or broadcast channel can be both m-regular and incomplete. If, as Plaintiff contends, there is some software that causes some broadcast channel or network to maintain an m-regular and incomplete structure, there would be modules of source code that would control that function, but Plaintiff provides nothing of the sort. In other words, after three orders compelling Plaintiff to provide supplemental infringement contentions, the most Plaintiff can say is that the accused EA games are a complicated system and therefore must infringe. This is unacceptable.

Moreover, Plaintiff’s responses are completely divorced from the reality of the accused games. This is not allowed under the Federal Rules, which require Plaintiff to answer the interrogatory “fully” and to supplement its responses if they are “incomplete or incorrect.” *See* Fed. R. Civ. P. 33(b)(3) and 26(e). The accused FIFA 15 game is a good example. FIFA 15 can be played in numerous modes. Ex. A-13 at 3. Many of those modes are for play either as a single player, one player against another player, or four or fewer players. *Id.* As Plaintiff knows, none of these game modes can remotely meet the m-regular and incomplete limitations because there is simply not enough players. For the limited game modes in FIFA 15 that have the possibility of more than four players but not a requirement of more than four players, those game

modes use a client server topology in which all information from each player is sent to a central server which distributes game play information directly to each of the players. *Id.* at 3-4. That’s not an m-regular and incomplete network. Indeed, the Asserted Patents specifically recognize that client server technology is different and that the Asserted Patents are supposed to be providing inventions better than client server. *See e.g.*, Exs. A-21 – A-22.

Although EA has explained how FIFA 15 operates repeatedly in Interrogatory responses, witness testimony, and documents, Plaintiff’s position with regard to these facts is not clear. Indeed, the paragraph quoted above regarding the “FIFA Network,” which is a term made up by Plaintiff, does not address these key points at all.

Take-Two. As with its response to EA, Acceleration has provided only conclusory assertions that the accused Take-Two products use an m-regular network. Plaintiff’s sole substantive allegation relating to the m-regular limitation is that the network is designed to be “optimal” and, therefore, the network happens to be m-regular.

“M-Regular”	
NBA2K	GTA
<p>The Mesh Network is m-regular because it provides for <i>optimal</i> distribution of gameplay data. Game sessions are optimized to handle a limited number of connections between application programs. These rules will establish an equal amount of connections for each participant and determine what gameplay data will be distributed to such participants based on different criteria, forming m-regular networks. This ensures that no particular server or network is overloaded at a given time. For example, there may be 60 participants in a virtual park, where the 60 participants are divided into sub-groups of 6 players in 3 on 3 games. Each such participant will be directly connected to the 5 other participants in their sub-game, and only indirectly receive data for other sub-games via</p>	<div style="background-color: black; width: 100%; height: 100px; margin-bottom: 5px;"></div> <p>For example, in one configuration, there maybe [sic] two peer relays and six peers totaling eight peer applications which are the participants. In this scenario, the eight participants are connected to exactly four other participants rendering the network incomplete and m-regular. Additionally, the proximity rules, object-ownership rules, and event broadcast rules described above also make the network m-regular by setting the same or <i>optimal</i> amount of connections between peer applications which make the</p>

<p>quarternion [sic] data (data representing the in-game characters rather than “button presses”), rendering the network m-regular.</p>	<p>network m-regular in the steady state. For example, when the players are geographically dispersed through the gameplay area, the proximity connection rules will make the network m-regular.</p>
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Ex. A-5 at 28-29 and 31-32 (emphasis added, internal citations omitted). The evidence Plaintiff cited to does not support any “optimal” number of connections, the existence of a regular and incomplete network, or even the value of “m.” *See* Ex. A-16. For NBA2K, Plaintiff alleged that the “optimal distribution of gameplay data” creates an m-regular network, without any explanation as to how it does so. In its only example, which describes “virtual park,” where there may be up to 60 participants, Plaintiff simply claims that the participants are divided into sub-groups of six and will be connected to the five other participants. *See* Ex. A-5 at 31. Not only does Plaintiff fail to provide any support for this assertion, it ignores the fact that the players are only connected to the server, not each other, and thus this alleged formation never actually occurs. *See* Ex. A-12 at 3-4. Likewise, for GTA, the evidence Plaintiff cited does not support its alleged “optimal number of connections” that forms an m-regular network. *See* Ex. A-12 at 4-5.

Plaintiff’s assertion that the network is non-complete is also conclusory. Plaintiff’s substantive allegation relating to the incomplete limitation is that:

<p style="text-align: center;">“Incomplete”</p>	
<p>NBA2K</p>	<p>GTA</p>
<p>The Mesh Network is incomplete because not all participants are able to directly connect due to connection problems.</p> <p>The Mesh Network is further incomplete because the sessions are optimized to handle only a limited number of connections between application programs. NBA2K includes situations where only certain participants are connected by the Mesh Network to share data to limit network traffic and improve</p>	<p>The Rockstar Protocol Network is incomplete because not all participants are able to directly connect, requiring relaying through other participants in the network.</p> <p>The Rockstar Protocol Network is further incomplete because, to prevent the network from being overloaded and to provide better gaming experience, GTA uses proximity rules, object ownership rules, and event broadcast rules to prevent the direct exchange of messages between certain participants. Depending on the</p>

<p>performance. ...</p> <p>The Mesh Network will only directly exchange gameplay, voice chat data and connectivity data between the participants in a particular sub-game (e.g., those playing a 3 on 3 game).</p>	<p>proximity of players (within the game environment) and ownership of objects within the game (i.e., the assignment to a specific participant of responsibility for distribution of data for a specific object, such as a car), general game data are sent and received by some (but not all) participants.</p>
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Ex. A-5 at 28 and 31 (internal citations omitted). As with EA, Plaintiff simply alleges that the software somehow performs this step, without explanation or specifics.

Also, Plaintiff provides no explanation for how a network or broadcast channel can be both m-regular *and* incomplete. Take-Two provided Plaintiff with its source code more than a year and a half ago, yet Plaintiff's analysis here is devoid of any support with respect to any source code portions or files that actually perform the limitations. Plaintiff's grossly deficient responses thus violate Special Master Order No. 2 compelling supplementation of its infringement contentions. It is alarming that in possession of all the information Take-Two provided, the most Plaintiff can do is obfuscate the issue and claim that within the intricacies of accused Take-Two products, these steps must be performed somewhere, and therefore the games infringe.

As described above with respect to EA games, the accused Take-Two products only use topologies that the Asserted Patents specifically recognize as different. *See* Exs. A-21 – A-22. For example, Take-Two has repeatedly explained that GTA uses a full mesh topology for its multiplayer networking, where one player is selected to be “host” responsible for the object, and everyone near that object connects to each other, thus forming a full mesh. *See* Ex. A-12 at 4. This is confirmed by Take-Two's discovery responses, source code made available, and testimonies of its technical witnesses. *See e.g.*, Ex. A-12. Plaintiff's responses do not address

these facts, in contravention of the Federal Rules, and do not address the key limitations of the asserted claims.

E. Plaintiff Still Has Not Explained Or Cited To Evidence Demonstrating How The Broadcasting Limitations Are Supposedly Met.

As explained in prior motions to compel, three of the Asserted Patents require the use of a very specific method of sending data to all participants in the broadcast channel. The claims require that data be broadcast to neighbor participants and *then* rebroadcast by the initial recipients: first, a participant sends data to *each* of its (at-least-three) neighbor participants; and second, *each* of those neighbor participants forwards the data to *each* of its (at-least-two) “other” neighbor participants (the “Broadcasting Steps”).⁵

Electronic Arts. The discovery responses still do not say how the accused EA games supposedly perform those two steps. As with the prior deficient charts, the discovery responses simply allege that messages are “relayed” in the network without identifying any participants (required by the claims) or identifying to whom the data is sent (also required by the claims), or that the information is sent at least twice (also required). *See* Ex. A-17. These allegations, even if true, do not allege that the Broadcasting Limitations are met. The ability to relay a message says nothing at all about whether each participant receives the message and then rebroadcasts it to each of its other neighbors. Indeed, nearly every communication network ever constructed has had the ability to relay messages. Merely saying a participant *can* relay information through other participants says nothing at all about whether the required structure and steps of the asserted patents are found in the Accused Games.

⁵ Acceleration has designated the Broadcasting Steps as elements 1-c, 1-d, 13-e, and 13-f in the ’344 and ’966 patent charts. *See, e.g.*, A-2.

Further, for the reasons explained above, having each node resend the messages makes no sense in the context of the accused EA games. Again, using FIFA 15 as an example, having the recipient node resend the messages makes no sense in the single and two-player modes. *See* Ex. A-13. Having the recipient node forwarding messages also makes no sense in the situation of three or more players. *See Id.* In that case, the game is governed by the client server. *See Id.* The game server is the only computer that sends or receives gameplay data to the players. The players are not directly connected to each other. *See Id.*

Take-Two. Likewise, Acceleration’s discovery responses do not explain how the accused Take-Two games supposedly perform the broadcasting (“flooding”) steps. As with the prior deficient charts, the discovery responses simply allege that data is distributed among the participants in the network, without identifying any of the required key limitations set forth by the asserted claims, including a participant sending data to **each** of its (at-least three) neighbor participants, and then, **each** of those neighbor participants forwards the data to each of its (at-least two) “other” neighbor participants. Ex. A-18. As discussed above, even if this allegation were true, it does not allege that the flooding limitations are met. The ability to distribute a message does not address whether **each** participant rebroadcasts the message received to **each** of its other neighbors.

As Take-Two has repeatedly explained, the accused GTA products use a full mesh topology, whereby the players are connected to every other player in its group who is near the object, and information is sent directly to everyone connected. *See* Ex. A-12. Accordingly, there is no need to perform the claimed flooding step. As for the accused NBA2K products, the games use a dedicated server whereby the relay server collects the controller inputs from all the

consoles, aggregates them into a single packet, and retransmits that data to *all* the consoles. *See Id.* As such, the consoles or players do not perform the required flooding step.

F. Plaintiff Still Has Not Explained Nor Cited Evidence Demonstrating How Key Claim Limitations Are Supposedly Met For The “Connect / Disconnect Claims.”

Special Master Order Nos. 2 and 3 required Plaintiff to identify all accused methods and then chart them separately. Plaintiff failed on both accounts. In its answer to Interrogatory No. 9, Plaintiff *does not identify any methods at all, even though Special Master Order No. 3 specifically required it.* This alone merits preclusion. That preclusion is appropriate is confirmed by the fact that Plaintiff’s charts contain no evidence that would suggest that the Accused Games practice the claimed Connect and Disconnect methods. *See, e.g.,* Exs. A-19 to A-20.

For instance, to obtain the ’147 “Disconnect Patent,” Applicants added specific limitations that must be performed when a participant disconnects from the claimed m-regular network. *See* Appendix of Claims. The claimed method requires, among other things, that (1) the first computer sends a “disconnect message” that includes a “list of neighbors” of the disconnecting (first) computer, and that (2) upon receipt of that disconnect message, the second computer “broadcasts” a message on the broadcast channel to (3) find a third computer to maintain the m-regular graph, and that (4) the third computer must be one from that list of neighbors identified in the prior message sent by the disconnecting computer. *Id.* Plaintiff’s supplemental responses cite no evidence or explanation showing that the Accused Games perform these steps. They only parrot back the claim language. *See, e.g.,* Exs. A-19 to A-20.

Similarly, to obtain the ’069 “Connect Patent,” the applicants had to add detailed method steps as to how a participant joins an m-regular network, requiring, in part, that (1) the seeking participant contacts a fully connected portal computer, (2) the portal computer sends an edge

connection request to a number of randomly selected neighbor participants, and (3) connecting the seeking participant to the randomly selected neighbor participants. *See* Appendix of Claims. Plaintiff's charts still have no explanation or evidence at all as to these critical method steps and again only parrot the claim language. Exs. A-19 to A-20. Plaintiff's inability to identify how these key limitations are met warrants preclusion barring it from attempting to do so later.

G. Plaintiff Has Still Not Explained Its Allegations Under The Doctrine Of Equivalents.

Plaintiff's responses still provide no explanation of infringement under the "doctrine of equivalents," despite the Special Master's express Order. The Order required that "[i]f Plaintiff contends that any accused method, network or broadcast channel allegedly infringes any asserted claim under the doctrine of equivalents, Plaintiff must identify the elements of each limitation not literally present and identify the structures of or methods used by the Accused Games that Plaintiff alleges to be equivalent to any such elements that are not literally present in the Accused Games." D.I. 155 at 7. Plaintiff merely parrots the claim language and asserts that Activision uses equivalents. *See* Exs. A-2 to A-4; A-6 to A-7. Disregarding a clear, direct, and express Order is sanctionable. Plaintiff has flouted the order and should be precluded from asserting the doctrine of equivalents.

III. Plaintiff Should Be Sanctioned, Including By Being Precluded From Introducing New Evidence Or Theories.

Fact discovery is closed. Yet Plaintiff refuses to comply with an order that it respond to simple interrogatories seeking its infringement contentions, and this refusal prejudices Defendants. Sanctions should include, at a minimum, an award of expenses and the preclusion of any evidence or theories that Plaintiff has not yet disclosed.

The Special Master is "specifically authorize[d] ... to decide any sanctions issues that are encompassed in or permitted by the Federal Rules of Civil Procedure relating to discovery" and

“may by order impose on a party any noncontempt sanction provided by Rule 37 or 45.” D.I. 158 at 2 (citing and quoting Fed. R. Civ. P. 53(c)(2)). The Special Master’s “input on a request for sanctions” is “of significant assistance” to the district court. *Id.* The Special Master has available the full panoply of discovery sanctions to compel compliance with his orders. Fed. R. Civ. P. 37(b)(2)(A) (setting forth a non-exclusive list of possible sanctions). Some sanctions, including the award of fees and exclusion of certain non-disclosed evidence, are mandatory unless the non-compliance was substantially justified or harmless. *See* Fed. R. Civ. P. 37.

First, expenses must be awarded.⁶ Plaintiff has not complied with Special Master Order No. 2 or fulfilled its promise to provide supplemental discovery as set for in Special Master Order No. 3. Plaintiff offers no credible reason for refusing to agree that the terms of Special Master Order No. 6 apply with equal force to EA and Take Two. Whenever a party disobeys a discovery order, “the court must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney’s fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.” Fed. R. Civ. P. 37(b)(2)(C) (requiring fees “[i]nstead of or in addition to” other sanctions); *see also* *McLaughlin v. Phelan Hallinan & Schmieg, LLP*, 756 F.3d 240, 249 (3d Cir. 2014). But an award of expenses and fees alone cannot cure the prejudice to Defendants, and thus additional sanctions should be imposed. Collectively, Defendants have had to bring these motions to compel basic infringement contentions at least six times and still Plaintiff refuses to comply.

Second, “[t]he exclusion of non-disclosed evidence is ‘mandatory under Rule 37(c)(1) unless non-disclosure was justified or harmless.’” *Rossi v. City of Chicago*, 790 F.3d 729, 738 (7th Cir. 2015) (citation omitted). This automatic and mandatory exclusion applies where “a

⁶ If the Special Master finds in EA and Take-Two’s favor, they will submit the expenses it has incurred from Plaintiff’s failures.

party fails to provide information or identify a witness as required by Rule 26(a) or (e)” (Fed. R. Civ. P. 37(c)(1)), including where a party has failed to supplement a discovery response “as ordered by the court” (Fed. R. Civ. P. 26(e)(1)). Plaintiff bears the burden of showing that its non-disclosure is justified or harmless. *See United States ex rel. Tennessee Valley Auth. v. 1.72 Acres of Land in Tennessee*, 821 F.3d 742, 752 (6th Cir. 2016). But plainly there is no justification for Plaintiff’s failure to provide a basis for its infringement allegations by the close of fact discovery. And that failure has already prejudiced Defendants by withholding from them a framework to guide their fact discovery and to prepare their expert reports.

Even if these sanctions were not mandatory, the Special Master should use his discretion to impose them for the same reasons. Plaintiff’s repeated failures to provide responses as ordered and the prejudice worked by this failure on Defendants justify sanctions. The prejudice to Defendants from Plaintiff’s refusal to comply with the orders takes multiple forms. Defendants have been forced to waste their resources filing multiple motions to compel. This prejudice is itself sufficient to warrant sanctions, as the Third Circuit “ha[s] construed prejudice to include the burden that a party must bear when forced to file motions in response to the strategic discovery tactics of an adversary.” *Ware v. Rodale Press, Inc.*, 322 F.3d 218, 223 (3d Cir. 2003) (holding that “failure to provide timely and specific information as to damages” was a discovery violation justifying exclusion of evidence and dismissal of the claim under Rule 37). Furthermore, Plaintiff’s “failure to provide timely and specific information” has “imped[ed] [Defendants’] ability to prepare a full and complete defense.” *Id.*; *see also McLaughlin v. Phelan Hallinan & Schmieg, LLP*, 756 F.3d 240, 249 (3d Cir. 2014) (finding prejudice because the “noncompliance impacted the parties’ investigation of the facts and caused additional briefing”).

Delaware courts under Rule 37(b)(2)(A) have awarded expenses and precluded non-compliant parties from introducing undisclosed matters to support their claims. *Nat'l Fire & Marine Ins. Co. v. Robin James Const., Inc.*, 478 F. Supp. 2d 660, 663 (D. Del. 2007) (awarding attorney's fees when a party had failed to comply with discovery orders); *Transportes Aereos de Angola v. Ronair, Inc.*, 104 F.R.D. 499 (D. Del. 1985) (precluding noncompliant party from introducing evidence or testimony on issues where it refused to answer interrogatories "fully and forthrightly"); *Coca-Cola Bottling Co. of Shreveport v. Coca-Cola Co.*, 110 F.R.D. 363, 367 (D. Del. 1986) (prohibiting a party from 1) rebutting any facts the court established against it from this sanction, and 2) introducing designated matters that support its claims and defenses into evidence).

Defendants thus request the Special Master again order that Plaintiff be precluded from introducing evidence in support of its infringement allegations, enter a discovery stay until compliance, or impose monetary sanctions. *See, e.g., Geovector Corp. v. Samsung Elecs. Co.*, 2017 WL 76950, at *8 (N.D. Cal. Jan. 9, 2017) (striking plaintiff's infringement contentions and staying discovery); *Guzik Tech. Enters., Inc. v. Western Digital Corp.*, 2013 WL 6227626, at *10 (N.D. Cal. Nov. 22, 2013) ("[Plaintiff's] failure to submit a claim chart in response to Interrogatory No. 12 unfairly prejudices [defendant's] ability to substantively prepare for trial and warrants exclusion of late-added infringement theories."); *Volumetrics Med. Imaging, L.L.C. v. Toshiba Am. Med. Sys., Inc.*, 2011 WL 2600718, at *9 (M.D.N.C. Jun. 29, 2011) (prohibiting plaintiff from making infringement allegations at trial for failing to comply with an order to adequately respond to an interrogatory requiring a claim chart showing how Accused Games allegedly infringed).

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August 16, 2017

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APPENDIX OF CLAIMS

'966 Patent Claim 1	1-a. A computer network for providing an information delivery service for a plurality of participants,
	1-b. each participant having connections to at least three neighbor participants,
	1-c. wherein an originating participant sends data to the other participants by sending the data through each of its connections to its neighbor participants and
	1-d. wherein each participant sends data that it receives from a neighbor participant to its other neighbor participants,
	1-e. further wherein the network is m-regular, where m is the exact number of neighbor participants of each participant and
	1-f. further wherein the number of participants is at least two greater than m thus resulting in a non-complete graph.

'966 Patent Claim 13 (emphasis added)	13-a. An information delivery service comprising:
	13-b. a plurality of <i>broadcast channels</i> , each <i>broadcast channel</i> for distributing information relating to a topic,
	13-c. each of the <i>broadcast channels</i> for providing said information related to a topic to a plurality of participants,
	13-d. each participant having connections to at least three neighbor participants,
	13-e. wherein an originating participant sends data to the other participants by sending the data through each of its connections to its neighbor participants and
	13-f. wherein each participant sends data that it receives from a neighbor participant to its neighbor participants,
	13-g. further wherein the network is m-regular, where m is the exact number of neighbor participants of each participant and
	13-h. further wherein the number of participants is at least two greater than m thus resulting in a non-complete graph;
	13-i. means for identifying a <i>broadcast channel</i> for a topic of interest; and
	13-j. means for connecting to the identified <i>broadcast channel</i> .

'344 Patent Claim 1	1-a. A computer network for providing a game environment for a plurality of participants,
	1-b. each participant having connections to at least three neighbor participants,
	1-c. wherein an originating participant sends data to the other participants by sending the data through each of its connections to its neighbor participants and
	1-d. wherein each participant sends data that it receives from a neighbor participant to its other neighbor participants,
	1-e. further wherein the network is m-regular, where m is the exact number of neighbor participants of each participant and
	1-f. further wherein the number of participants is at least two greater than m thus resulting in a non-complete graph.

'344 Patent Claim 13 (emphasis added)	13-a. A distributed game system comprising:
	13-b. a plurality of <i>broadcast channels</i> , each <i>broadcast channel</i> for playing a game,
	13-c. each of the <i>broadcast channels</i> for providing game information related to said game to a plurality of participants,
	13-d. each participant having connections to at least three neighbor participants,
	13-e. wherein an originating participant sends data to the other participants by sending the data through each of its connections to its neighbor participants and
	13-f. wherein each participant sends data that it receives from a neighbor participant to its neighbor participants,
	13-g. further wherein the network is m-regular, where m is the exact number of neighbor participants of each participant and
	13-h. further wherein the number of participants is at least two greater than m thus resulting in a non-complete graph;
	13-i. means for identifying a <i>broadcast channel</i> for a game of interest;
	13-j. and means for connecting to the identified <i>broadcast channel</i>

<p>'634 Patent Claim 19 (emphasis added)</p>	<p>19-a. A non-routing table based computer-readable medium containing instructions for controlling communications of a participant of a broadcast channel within a network, by a method comprising:</p>
	<p>19-b. locating a <i>portal computer</i>;</p>
	<p>19-c. requesting the located <i>portal computer</i> to provide an indication of neighbor participants to which the participant can be connected; receiving the indications of the neighbor participants; and</p>
	<p>19-d. establishing a connection between the participant and each of the indicated neighbor participants,</p>
	<p>19-e. wherein a connection between the <i>portal computer</i> and the participant is not established,</p>
	<p>19-f. wherein a connection between the <i>portal computer</i> and the neighbor participants is not established,</p>
	<p>19-g. further wherein the network is m-regular and m-connected, where m is the number of neighbor participants of each participant, and</p>
	<p>19-h. further wherein the number of participants is at least two greater than m thus resulting in a non-complete graph.</p>

<p>'069 Patent Claim 1</p>	<p>1-a. A computer-based, non-routing table based, non-switch based method for adding a participant to a network of participants, each participant being connected to three or more other participants, the method comprising:</p>
	<p>1-b. identifying a pair of participants of the network that are connected</p>
	<p>1-c. wherein a seeking participant contacts a fully connected <i>portal computer</i>,</p>
	<p>1-d. which in turn sends an edge connection request to a number of randomly selected neighboring participants to which the seeking participant is to connect;</p>
	<p>1-e. disconnecting the participants of the identified pair from each other; and</p>
	<p>1-f. connecting each participant of the identified pair of participants to the seeking participant.</p>

'147 Patent Claim 1	1-a. A method of disconnecting a first computer from a second computer, the first computer and the second computer being connected to a broadcast channel, said broadcast channel forming an m-regular graph where m is at least 3, the method comprising:
	1-b. when the first computer decides to disconnect from the second computer, the first computer sends a disconnect message to the second computer, said disconnect message including a list of neighbors of the first computer;
	1-c. and when the second computer receives the disconnect message from the first computer, the second computer broadcasts a connection port search message on the broadcast channel to find a third computer to which it can connect in order to maintain an m-regular graph,
	1-d. said third computer being one of the neighbors on said list of neighbors.

'147 Patent Claim 11	11-a. A computer-readable medium containing instructions for controlling disconnecting of a computer from another computer, the computer and the other computer being connected to a broadcast channel, said broadcast channel being an m-regular graph where m is at least 3, comprising:
	11-b. a component that, when the computer decides to disconnect from the other computer, the computer sends a disconnect message to the other computer, said disconnect message including a list of neighbors of the computer;
	11-c. and a component that, when the computer receives a disconnect message from another computer, the computer broadcasts a connection port search message on the broadcast channel to find a computer to which it can connect in order to maintain an m-regular graph,
	11-d. said computer to which it can connect being one of the neighbors on said list of neighbors.

'497 Patent Claim 1	1-a. A method in a computer for locating a computer through which to connect to a network, the method comprising:
	1-b. providing an identification of a <i>portal computer</i> or a plurality of <i>portal computers</i> , the <i>portal computer</i> or the plurality of <i>portal computers</i> having a communications port or communications ports with a call-in port being enabled for communications when the <i>portal computer</i> or the plurality of <i>portal computers</i> is in a state to coordinate the connection of a seeking computer to the network,
	1-c. wherein the call-in port is a type of communications port;
	1-d. selecting the communications port or communications ports of the <i>portal computer</i> or the plurality of <i>portal computers</i> and attempting to communicate with the selected communications port or communications ports until communications with the call-in port is successful,
	1-e. wherein a port ordering algorithm is used to identify the call-in port, and
	1-f. wherein the communications ports selected by the port ordering algorithm may be re-ordered; and
	1-g. using the call-in port to request that the <i>portal computer</i> or the plurality of <i>portal computers</i> coordinate the connecting of the seeking computer to the network.

'497 Patent Claim 9	9-a. A component in a computer system for locating a call-in port of a <i>portal computer</i> , comprising:
	9-b. means for identifying the <i>portal computer</i> , the <i>portal computer</i> having a dynamically selected call-in port for communicating with other computers;
	9-c. means for identifying the call-in port of the identified <i>portal computer</i> by repeatedly trying to establish a connection with the identified <i>portal computer</i> through contacting a communications port or communications ports until a connection is successfully established;
	9-d. means for selecting the call-in port of the identified <i>portal computer</i> using a port ordering algorithm; and
	9-e. means for re-ordering the communications ports selected by the port ordering algorithm.
	1-f. wherein the communications ports selected by the port ordering algorithm may be re-ordered; and
	1-g. using the call-in port to request that the <i>portal computer</i> or the plurality of <i>portal computers</i> coordinate the connecting of the seeking computer to the network.

CERTIFICATE OF SERVICE

I hereby certify that on August 16, 2017, copies of the foregoing were caused to

be served upon the following in the manner indicated:

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EXHIBIT C

Campbell, Louis L

From: Lin, David K.
Sent: Friday, December 29, 2017 9:55 AM
To: Winston Video Game DE Team
Subject: FW: Acceleration Bay / Activision 16-453 / Electronic Arts 16-454 / Take-Two 16-455 - Proposed Supplemental Claim Construction Order

From: Frankel, Aaron
Sent: Friday, December 29, 2017 9:54:49 AM (UTC-08:00) Pacific Time (US & Canada)
To: Tomasulo, Mike; Colucci, Marcus A.; Lin, David K.; Masullo, JC; Enzlinger, David P.; Cheng, Gino; Netikosol, Joe; Enns, Krista M.; Sommer, Andrew R.; Barry, Kathleen B.; JBlumenfeld@MNAT.com; skraftschik@MNAT.com; Webb, Dan K.; Murray, Michael M.; Dunham, Thomas M.
Cc: Andre, Paul; Kobialka, Lisa; Hannah, James; Lee, Hannah; provner@potteranderson.com; Choa, Jonathan A. (jchoa@potteranderson.com)
Subject: RE: Acceleration Bay / Activision 16-453 / Electronic Arts 16-454 / Take-Two 16-455 - Proposed Supplemental Claim Construction Order

Mike:

We are looking into your email and will provide a response in the future. Happy holidays.

Regards,
Aaron

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From: Tomasulo, Mike [MTomasulo@winston.com]
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Subject: [EXTERNAL] RE: Acceleration Bay / Activision 16-453 / Electronic Arts 16-454 / Take-Two 16-455 - Proposed Supplemental Claim Construction Order

Counsel,

I am again following up on this.

We have made this request now by phone, when we met and conferred on this topic, and also three times by email.

Please let us have your substantive position this week.

Best,

Mike

Michael A. Tomasulo

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Subject: RE: Acceleration Bay / Activision 16-453 / Electronic Arts 16-454 / Take-Two 16-455 - Proposed Supplemental Claim Construction Order

Counsel, following up on this. We request a response and a meet and confer this week. Best, Mike

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Subject: RE: Acceleration Bay / Activision 16-453 / Electronic Arts 16-454 / Take-Two 16-455 - Proposed Supplemental Claim Construction Order

Counsel:

Following up on our conversation yesterday, Defendants request that Acceleration Bay stipulate to invalidity regarding the asserted computer readable media claims. As you know, the Phase 1 Claim Construction Order adopted Defendants' construction verbatim and ruled that "computer readable medium" (term 27) is "**any medium for storing or transporting computer readable instructions**, including memory, storage devices, **carrier waves**, and communications links." The law on the issue is clear that if a claim covers an ineligible subject matter, such as a transitory, propagating signal, which includes carrier waves, then the claim is invalid. *See, e.g., Mentor Graphics Corp.*, 851 F.3d at 1294; *Kinglite Holdings Inc. v. Micro-Star Int'l Co. Ltd.*, C.A. No. 14-03009-JVS, 2016 WL 4205356, at *15-18 (C.D. Cal. May 26, 2016).

Counsel for Plaintiff confirmed this specifically at the hearing:

[PLAINTIFF COUNSEL]: The dispute here is the scope of computer-readable medium, which is our position is that in the context of the claims and the specification, it should be limited to non-fleeting medium.

THE COURT: Do you agree [if] this includes fleeting medium such as carrier waves, that the claims are ineligible?

[PLAINTIFF COUNSEL]: The short answer is yes. (TR. 65-66)

The Court considered and rejected all of Plaintiff's arguments and adopted Defendants' construction verbatim. Thus, as Plaintiff acknowledged at the hearing, because the claims include "fleeting medium such as carrier waves," they are patent ineligible.

If Plaintiff is unwilling to stipulate to invalidity, please advise as to the grounds for maintaining these claims and please advise whether Plaintiff will agree to a method to present the issue to the Court in the near term. We would be willing to include in the stipulation reasonable language to confirm Plaintiff's right to challenge the claim construction in the Federal Circuit.

Best regards,

Mike

Michael A. Tomasulo

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LLP

From: Colucci, Marcus A. [<mailto:MColucci@KRAMERLEVIN.com>]

Sent: Thursday, December 21, 2017 12:17 PM

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Subject: Acceleration Bay / Activision 16-453 / Electronic Arts 16-454 / Take-Two 16-455 - Proposed Supplemental Claim Construction Order

Counsel,

Attached for your review is a draft copy of a Proposed Supplemental Construction Order. The Court's memorandum identifies claims that are no longer asserted and does not always include the dependent claims. The attached draft, however, has been updated to identify the currently asserted claims, including dependent claims.

Regards,
Marcus

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Associate

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EXHIBIT D

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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

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

Expert Report of Christine S. Meyer, Ph.D.

October 10, 2017

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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I. Introduction

A. Professional Qualifications and Experience

1. I am an economist and Managing Director at National Economic Research Associates, Inc. (“NERA”). NERA is a firm of consulting economists that was founded in 1961 and provides research and analysis in economics, including analysis in the areas of competition, regulation, and finance. I joined the firm in 2000 and have worked since then mainly in the areas of the economics of antitrust analysis, intellectual property, and the evaluation of commercial damages. I have conducted analyses, written expert reports related to and testified about numerous antitrust issues, including relevant market and market power in both litigation and merger contexts. I have testified as an expert witness in the Federal Court of Canada, United States District Court, the Supreme Court of the State of New York, and the High Court of Justice in England.
2. Since joining NERA, I have analyzed economic issues in a wide variety of cases involving economic damages arising from, among other claims, false advertising, patent infringement, trademark infringement, breaches of contract, and antitrust injury. I have calculated lost profits and damages and reasonable royalties in patent infringement matters. I have written articles and book chapters about damages and have been asked to speak about damages on numerous occasions, including by the U.S. Federal Trade Commission in its hearings entitled, “The Evolving IP Marketplace.” I have been involved in many cases involving a variety of technologies across a broad range of industries, including gaming, entertainment, electronics, and consumer products.
3. I received my bachelor’s degree with a concentration in economics from the United States Military Academy at West Point and my Ph.D. in economics from the

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Massachusetts Institute of Technology. I taught economics and statistics at Bentley College and Colgate University. A list of my prior testimony and publications can be found in my curriculum vitae, which is appended to this report as **Exhibit 1**.

B. Retention and Assignment

4. Plaintiff Acceleration Bay, LLC (“Acceleration Bay”) alleges that Defendants Take-Two Interactive Software, Inc. (“Take-Two” or “the Defendant”), Rockstar Games, Inc. (“Rockstar”), and 2K Sports, Inc. (“2K”) (collectively “the Defendants”) have infringed on U.S. Patent No. 6,701,344 (“the ‘344 Patent”), U.S. Patent No. 6,714,966 (“the ‘966 Patent”), U.S. Patent No. 6,732,147 (“the ‘147 Patent”), U.S. Patent No. 6,829,634 (“the ‘634 Patent”), U.S. Patent No. 6,910,069 (“the ‘069 Patent”), and U.S. Patent No. 6,920,497 (“the ‘497 Patent”) (collectively the “Patents-in-Suit”).¹
5. NERA has been retained by Kramer Levin Naftalis & Frankel LLP, counsel for Acceleration Bay, to estimate a reasonable royalty for the Patents-in-Suit, should the Court find the Patents-in-Suit valid, enforceable, and infringed by the Defendants. For the purposes of my calculation of a reasonable royalty, I have assumed that the Patents-in-Suit are valid, enforceable, and have been infringed by Defendants.
6. NERA is being compensated for the time that I spend on this matter at my standard hourly rate of \$675. NERA is being compensated for the time spent by additional staff members working under my direction at NERA’s customary hourly rates.² Neither my compensation nor NERA’s is dependent on the outcome of this litigation.

¹ Complaint for Patent Infringement, *Acceleration Bay LLC v. Take-Two Interactive Software, Inc., Rockstar Games, Inc., and 2K Sports, Inc.*, June 17, 2016 (“Complaint”), ¶¶ 1, 16.

² In addition, NERA is separately reimbursed for reasonable out-of-pocket expenses.

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C. Information Considered

7. In preparing this report, I (or economists working under my direction) have reviewed information from a variety of sources. These include, for example: (a) documents filed with the Court by the parties; (b) documents produced by the parties; (c) deposition testimony; (d) information from publicly available sources. I have also had conversations with John Garland, Acceleration Bay’s Vice President of Licensing³ and the following individuals who I understand are serving as technical experts: Dr. Ricardo Valerdi,⁴ Dr. Harry Bims,⁵ Dr. Nenad Medvidovic,⁶ and Dr. Michael Mitzenmacher.⁷ Lastly, I have relied on my experience and training as an applied microeconomist.
8. All of the materials reviewed are listed in this report and in **Exhibit 2**. The specific information upon which I have relied is cited in the footnotes of the text and the exhibits. I expressly reserve the right to supplement my opinions as well as update any charts, tables, and exhibits should any additional information become available to me or the correction of inadvertent errors leads me to change my opinions.
9. I may use the materials that I have identified, as well as other information that has been or may be produced during the course of this case, to support my testimony at deposition

³ Interview with John Garland, September 5, 2017 (“Garland Interview”).

⁴ Interview with Dr. Ricardo Valerdi, September 20, 2017 (“Dr. Valerdi Interview”); Expert Report of Dr. Ricardo Valerdi Regarding Cost Estimates, October 6, 2017 (“Dr. Valerdi Report”).

⁵ Interview with Dr. Harry Bims, September 20, 2017 (“Dr. Bims Interview”), Expert Report of Dr. Harry Bims Regarding Technology of U.S. Patent Nos. 6,701,344; 6,829,634; 6,732,147; 6,714,966; 6,920,497; 6,910,069, October 6, 2017 (“Dr. Bims Report”).

⁶ Interviews with Dr. Nenad Medvidovic, August 29, 2017 and September 19-20, 2017 (“Dr. Medvidovic Interview”).

⁷ Interview with Dr. Michael Mitzenmacher, September 19, 2017 (“Dr. Mitzenmacher Interview”); Expert Report of Michael Mitzenmacher, Ph. D., Regarding Infringement by Take-Two Interactive Software, Inc., Rockstar Games, Inc., and 2K Sports, Inc., of U.S. Patent Nos. 6,732,147; 6,920,497; 6,910,069 (“Dr. Mitzenmacher Report”), October 5, 2017.

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and at trial. Additionally, I may use demonstrative materials based on this information and my analyses to support that testimony.

D. Summary of Opinion

10. My work in this matter is ongoing. Accordingly, I expressly reserve the right to supplement these opinions, if warranted, based on, for example, the receipt of additional relevant information, or if additional research or reflection leads me to change my opinion.
11. Based on the information available to me and my analysis to date, I have reached the following principal conclusions:
 - a. Because there are no comparable licenses for the Patents-in-Suit, a hypothetical negotiation for a license to the Patents-in-Suit in this matter would likely have relied on other indicators of value for the same and similar technologies, most notably verdicts in the relevant gaming and networking industry;
 - b. Furthermore, a hypothetical negotiation in this matter would have also considered the substantial use of and significant benefits conferred by the patented technology; the importance of multi-player functionality to the accused products; the lack of viable, acceptable non-infringing alternatives to the patented technologies; and the sizeable costs the Defendants would have had to incur to even attempt to implement a network that would allow it to continue to offer the infringing games without the use of the patented technology;
 - c. On the basis of these facts, the increasing importance of networking solutions that allows for the multiplayer functionality, lowered costs, efficiency and continuity for each of the infringing games and the importance of the patented technology to

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the Defendants' profitability, a lump sum royalty, based on a royalty rate of \$2.10 per user, and apportioned to account for the portion of value that the patented technologies provide to the infringing products result in damages of \$19 million through FY2017 if the jury were to find that all products at issue infringed all of the Patents-in-Suit as alleged.

- d. It is most likely that, at the time of the hypothetical negotiation, the parties would have desired a license for the life of the Patents-in-Suit with regard to the products and functionality at issue. A lump sum royalty results in a discounted net present value of \$50 million for forward-looking FY2018-FY2023 royalty payments if the jury were to find that all of the accused products and all future versions of the products infringed all of the Patents-in-Suit as alleged.
- e. A lump sum royalty for all the Patents-in-Suit and all accused products, based on both past sales and projected future sales of the infringing products, results in a discounted net present value of \$69 million for sales from the date at which damages begin to accrue to patent expiry.
- f. If the jury were to find that only a subset of the Patents-in-Suit are valid and infringed or that only a subset of the products at issue infringe the Patents-in-Suit, my report provides the methodology and calculations to determine the appropriate damages amount.

II. Case Background

A. Parties

- 12. Acceleration Bay is a Delaware limited liability corporation based in California. It invests in companies that develop and deploy patented technology to disseminate technological

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advancements. Acceleration Bay also works with inventors, research institutions, and companies to market new technology through licensing, research, and development programs. It generates revenues in part from investment funds and licensing operations.⁸

The Patents-in-Suit were assigned by The Boeing Company (“Boeing”) to Acceleration Bay on December 10, 2014 (“the Assignment Date”).⁹ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

13. Take-Two develops, publishes, and markets interactive games and entertainment across video game consoles, personal computers, and mobile devices. Headquartered in New York City, it primarily develops and publishes its products through its wholly-owned labels Rockstar, which was founded in 1998, and 2K, which was founded in 2005.¹⁰ While Grand Theft Auto is the most iconic franchise developed and published by Rockstar, the label has also produced other notable franchises such as Max Payne and

⁸ “Acceleration Bay: Investment Strategy,” *Acceleration Bay*, available at <http://joe-ward-vxiz.squarespace.com/portfolio/>, accessed on August 8, 2017 (“Acceleration Bay Investment Strategy”); Complaint, ¶¶ 2-4.

⁹ The Boeing Company also assigned U.S. Patent No. 7,412,537 to Acceleration Bay in addition to the Patents-in-Suit (“Patent Assignment Cover Sheet: EPAS ID PAT3253683,” *USPTO*, available at <https://assignment.uspto.gov/patent/index.html#/patent/search/resultAssignment?id=35099-365>).

¹⁰ Form 10-K for the period ending March 31, 2017, Take-Two Interactive Software, Inc. (“Take-Two 2017 10-K”), p. 2; “Take-Two Interactive,” *Take-Two Interactive*, available at <https://www.take2games.com/>, accessed August 29, 2017.

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Red Dead.¹¹ In addition to NBA 2K, 2K has also published successful franchises BioShock and Sid Meier’s Civilization.¹² In total, Take-Two is the owner of 22 proprietary brands.¹³

B. Patents-in-Suit

1. The ‘344 Patent

14. The ‘344 Patent, entitled DISTRIBUTED GAME ENVIRONMENT, was issued to Fred B. Holt and Virgil E. Bourassa on March 2, 2004.¹⁴ I understand that the ‘344 Patent “is generally directed towards systems for an effective broadcast technique in a game environment using a regular network. By implementing such a broadcast technique, the system is able to provide a broadcast channel using an underlying network system that sends messages on a point to point basis, providing efficiency and reliability to a gaming environment.”¹⁵ I further understand that the ‘344 Patent will expire on September 21, 2021.

2. The ‘966 Patent

15. The ‘966 Patent, entitled INFORMATION DELIVERY SERVICE, was issued to Fred B. Holt and Virgil E. Bourassa on March 30, 2004.¹⁶ I understand that the ‘966 Patent “is generally directed towards systems for providing an information delivery service using a regular network. One of the ways this is accomplished is by sending data through

¹¹ Take-Two 2017 10-K, p. 2.

¹² Take-Two 2017 10-K, p. 2.

¹³ Take-Two 2017 10-K, p. 2.

¹⁴ Complaint, ¶ 17, Exhibit 1.

¹⁵ Complaint, ¶ 19; Dr. Medvidovic Interview; Dr. Medvidovic Report, p. 17.

¹⁶ Complaint, ¶ 20, Exhibit 2.

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neighbor participants.”¹⁷ I further understand that the ‘966 Patent will expire on September 21, 2021.

3. The ‘147 Patent

16. The ‘147 Patent, entitled LEAVING A BROADCAST CHANNEL, was issued to Fred B. Holt and Virgil E. Bourassa on May 4, 2004.¹⁸ I understand that the ‘147 Patent “is generally directed towards methods and systems for leaving a broadcast channel. One of the ways this is accomplished is by sending messages to a second computer, so that the second computer can connect to a third computer to maintain a regular network.”¹⁹ I further understand that the ‘147 Patent will expire on July 20, 2022.

4. The ‘634 Patent

17. The ‘634 Patent, entitled BROADCASTING NETWORK, was issued to Fred B. Holt and Virgil E. Bourassa on December 7, 2004.²⁰ I understand that the ‘634 Patent “is generally directed towards systems for broadcasting data across a regular network. One of the ways this is accomplished is by sending data received from neighbor participants to other neighbor participants. This creates reliability in the regular network.”²¹ I further understand that the ‘634 Patent will expire on August 7, 2022.

5. The ‘069 Patent

18. The ‘069 Patent, entitled JOINING A BROADCAST CHANNEL, was issued to Fred B. Holt and Virgil E. Bourassa on June 21, 2005.²² I understand that the ‘069 Patent “is generally directed towards methods for adding a participant to a network without placing

¹⁷ Complaint, ¶ 22.

¹⁸ Complaint, ¶ 23, Exhibit 3.

¹⁹ Complaint, ¶ 25.

²⁰ Complaint, ¶ 26, Exhibit 4.

²¹ Complaint, ¶ 28.

²² Complaint, ¶ 29, Exhibit 5.

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a high overhead on the underlying network. One of the ways this is accomplished is by identifying a pair of participants that are connected to the network, disconnecting the identified pair from each other, and then connecting a seeking participant to the identified pair.”²³ I further understand that the ‘069 Patent will expire on July 9, 2022.

6. The ‘497 Patent

19. The ‘497 Patent, entitled CONTACTING A BROADCAST CHANNEL, was issued to Fred B. Holt and Virgil E. Bourassa on July 19, 2005.²⁴ I understand that the ‘497 Patent “is generally directed towards methods and systems for contacting a broadcast channel. One of the ways this is accomplished is by the seeking computer using a selected call-in port to request that the portal computer coordinate the connection of the seeking computer.”²⁵ I further understand that the ‘497 Patent will expire on August 20, 2022.

C. Infringing Products

20. The infringing products (also referred to as “accused products” or “accused games”) are electronic games (also referred to as “video games” or “games”) and video game expansions²⁶ played on various platforms (also referred to as “video game consoles”), including: computers²⁷ and Microsoft’s Xbox video game consoles.²⁸ Specifically, the

²³ Complaint, ¶ 31.

²⁴ Complaint, ¶ 32, Exhibit 6.

²⁵ Complaint, ¶ 34.

²⁶ A video game expansion builds onto an existing world in a previous game to add additional content for players. (“From Expansion Packs to DLC: The Evolution of Additional Video Game Content,” *The Artifice*, available at <https://the-artifice.com/expansion-packs-dlc-evolution-additional-video-game-content/>, accessed on September 13, 2017.)

²⁷ Two types of computers are Macintosh (“Mac”) and Personal Computer (“PC”). Apple introduced its first Mac computer on January 24, 1984. (“The Mac turns 30: a visual history,” *The Verge*, available at <https://www.theverge.com/2014/1/24/5340320/the-mac-turns-30-a-visual-history> accessed on August 23, 2017.) PCs use Windows operating system. (“Mac vs. PC,” *Diffen*, available at http://www.diffen.com/difference/Mac_vs_PC, accessed on August 23, 2017). The first PC, also known as the IBM Personal Computer, was introduced in 1981.

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infringing products are games issued under the video game franchises Grand Theft Auto and NBA 2K.²⁹ [REDACTED]

[REDACTED]

[REDACTED]

21. Grand Theft Auto, the first game released in the Grand Theft Auto franchise, is a game where players attempt to complete missions stealing cars to advance in rank in the criminal underworld.³¹ It was first released in October 1997 by Take-Two on MS-DOS and PC.³² Grand Theft Auto V, a subsequent game in the franchise, has sold over 80 million copies since its release four years ago.³³ Since its initial launch, the Grand Theft Auto franchise has released subsequent games including the following accused games:³⁴

(“Timeline of Computer History,” *Computer History Museum*, available at <http://www.computerhistory.org/timeline/computers/>, accessed on September 14, 2017.)

²⁸ Xbox was developed and marketed by Microsoft Corporation and first launched on November 14, 2001 in the U.S. (and later released on February 22, 2002 in Japan). (“The History of the Xbox,” *Digital Trends*, available at <https://www.digitaltrends.com/gaming/the-history-of-the-xbox/>, accessed on August 22, 2017.) Microsoft current platform products include Xbox 360 and Xbox One. (“Xbox One vs Xbox 360 – Is it time to upgrade?” *Trusted Reviews*, available at <http://www.trustedreviews.com/opinion/xbox-one-vs-360-2899789>, accessed on August 23, 2017.)

²⁹ Complaint, ¶¶ 8, 11, 12; **Exhibit 3**.

³¹ “Grand Theft Auto,” *IGN*, available at <http://www.ign.com/games/grand-theft-auto-1/ps-151>, accessed on August 30, 2017.

³² “Fury at ‘blast a cop’ game,” *Daily Mirror*, December 3, 1997; “Grand Theft Auto Series,” *Lifewire*, available at <https://www.lifewire.com/grand-theft-auto-series-812461>, accessed on September 15, 2017.

³³ “Grand Theft Auto V’s Popularity Should Be Declining. It’s Not Says Take-Two CEO,” *Fortune*, available at <http://fortune.com/2017/08/02/grand-theft-auto-popularity-sales/>, accessed on August 30, 2017.

³⁴ Complaint, Exhibit 7; Dr. Medvidovic Interview; Dr. Medvidovic Report, p.30.

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- a. Grand Theft Auto V was first released on September 17, 2013 on PC, Xbox 360, and Xbox One.³⁵ The game gives players the opportunity to switch between three lead players, explore new terrain, plan heists, and play a variety of activities.³⁶
 - b. Grand Theft Auto Online was released on October 1, 2013 on PC, Xbox 360, and Xbox One.³⁷ [REDACTED]
[REDACTED]
[REDACTED] The game is an open-world multiplayer game set in San Andreas.³⁹
22. NBA 2K, the first game released in the NBA 2K franchise, is a game where players have the opportunity to play as popular basketball players and lead their team to victory.⁴⁰ It was first released on November 10, 1999 on Dreamcast.⁴¹ Since its initial launch, the NBA 2K franchise has released subsequent games including the following accused games:⁴²

³⁵ Release date is the earliest release date across available platforms. **Exhibit 3.**

³⁶ “Rockstar Games® Announces Grand Theft Auto V® Now Available,” *Take Two Interactive Software, Inc.*, September 17, 2013, available at <http://ir.take2games.com/phoenix.zhtml?c=86428&p=irol-newsArticle&ID=1855348>.

³⁷ Release date is the earliest release date across available platforms. **Exhibit 3.**

³⁹ “Grand Theft Auto Online Review,” IGN, October 22, 2013, available at <http://www.ign.com/articles/2013/10/22/grand-theft-auto-online-review>, accessed on August 14, 2017.

⁴⁰ “NBA 2K,” *IGN*, available at <http://www.ign.com/games/nba-2k>, accessed on August 30, 2017.

⁴¹ “NBA 2K (1997),” *Moby Games*, available at <http://www.mobygames.com/game/dreamcast/nba-2k/release-info>, accessed on August 30, 2017.

⁴² Complaint, Exhibit 8; Dr. Medvidovic Interview.

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a. NBA 2K15 was first released on October 7, 2014 on PC, Xbox 360, and Xbox One.⁴³ The game provides new modes, and increased realistic on and off court action.⁴⁴

b. NBA 2K16 was released on September 29, 2015 on PC, Xbox 360, and Xbox One.⁴⁵ The game offers increased dynamism and realism as well as a new, MyCareer mode.⁴⁶

c. [REDACTED]

[REDACTED] According to a page on the 2K Support website, the multiplayer modes for NBA2K16 include MyLEAGUE Online (an online capable mode which allows for up to 30 human users per league), MyTEAM (an online mode that allows players to create and customize their own

⁴³ I understand that accused platforms include PC, Xbox 360, and Xbox One. I calculate damages only for these accused platforms. Therefore, I identify only if the accused products were available on one of these three platforms in my report.

Release date is the earliest release date across available platforms. **Exhibit 3.**

⁴⁴ “NBA® 2K15 Season Tips-Off Today,” Take Two Interactive Software, Inc., October 7, 2014, available at <http://ir.take2games.com/phoenix.zhtml?c=86428&p=irol-newsArticle&ID=1974730>.

⁴⁵ Release date is the earliest release date across available platforms. **Exhibit 3.**

⁴⁶ “NBA® 2K16 Season Starts Today,” Take Two Interactive Software, Inc., September 29, 2015, available at <http://ir.take2games.com/phoenix.zhtml?c=86428&p=irol-newsArticle&ID=2091318>.

[REDACTED]

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franchise), The Gauntlet (a new way to play MyTeam involving head to head matches of 3 v 3 gameplay), Play Now Online (1v1 online games), and MyPARK(where you take your MyPlayer character online to join one of three MyPARK communities to play with others in 2 on 2, 3 on 3, or 5 on 5 games).⁵⁰

D. Overview of Technology

23. Networking is the practice of connecting two or more computing devices, such as platforms like PCs and Xboxes, together to share data over a common medium, such as the internet.⁵¹ Online multiplayer features of games use networks to connect gamers and their platforms to each other.⁵² Two common types of networks or architectures are client-server networking and peer-to-peer networking.⁵³ Client-server networks connect each platform to a single centralized server that stores data.⁵⁴ In peer-to-peer networking, all connected platforms share equivalent responsibility for processing data;⁵⁵ each platform is connected to another or multiple other platforms and processes a different

⁵⁰ AB-TT 002758-62 at 59-60.

⁵¹ “What is Computer Networking?” *Lifewire*, available at <https://www.lifewire.com/what-is-computer-networking-816249>, accessed on September 7, 2017 (“What is Computer Networking?”); “What is Computer Networking?” *University of Nevada, Reno*, available at <https://www.unr.edu/cse/prospective-students/what-is-networking>, accessed on September 7, 2017; Dr. Bims Report, p. 5; Expert Report of Dr. Eric Cole Regarding Technology Tutorial, September 20, 2017 (“Dr. Cole Report”), p. 5.

⁵² “Introduction to Online Gaming,” *Lifewire*, available at <https://www.lifewire.com/g00/introduction-to-online-gaming-817747?i10c.referrer=https%3A%2F%2Fwww.google.com%2F>, accessed on September 15, 2017.

⁵³ “What is Computer Networking?”; Dr. Cole Report, p. 10.

⁵⁴ “Introduction to Client Server Networks,” *Lifewire*, available at <https://www.lifewire.com/introduction-to-client-server-networks-817420>, accessed on September 14, 2017; Yahyavi, Amir and Bettina Kemme, “Peer-to-Peer Architectures for Massively Multiplayer Online Games: A Survey,” *ACM Computing Surveys*, 46(1), October 2013 (“Yahyavi and Kemme”), p. 9:2.

⁵⁵ Yahyavi and Kemme; “Introduction to Peer-to-Peer Networks,” *Lifewire*, available at <https://www.lifewire.com/introduction-to-peer-to-peer-networks-817421>, accessed on September 13, 2017.

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portion of data, thus eliminating the need for centralized servers and network administrators typically found in client-server networks.⁵⁶ Peer-to-peer networks therefore reduce cost and, because they use direct connections between players, provide faster response times.⁵⁷

24. The layout or structure of connected devices is referred to as the topology.⁵⁸ There are several different types of network topologies as well as hybrids of those types. In a mesh topology, unlike other topologies, communication can take any of several possible paths from source to destination in the network.⁵⁹ In a full mesh network, each device, which is defined as a “node,” is directly connected to every other node in the network.⁶⁰ These types of networks are capable of managing high-volume traffic due to the large number of connections between nodes.⁶¹ They also have a high “fault tolerance,” which is the ability for a network to continue smooth data transmission even after one of its components fails.⁶² However, full mesh topology systems can also be expensive to construct and implement as they comprise of many network links, which require constant

⁵⁶ Yahyavi and Kemme; “Peer-to-Peer versus a Client-Server,” *DEW Associates Corporation*, available at <http://www.dewassoc.com/support/networking/serverpeer.htm>, accessed on September 14, 2017 (“Peer-to-Peer versus a Client-Server”).

⁵⁷ Yahyavi and Kemme, p. 9:2; “Peer-to-Peer versus a Client-Server.”

⁵⁸ “Introduction to Computer Network Topology,” *Lifewire*, available at <https://www.lifewire.com/computer-network-topology-817884>, accessed on September 21, 2017, (“Introduction to Computer Network Topology”).

⁵⁹ Introduction to Computer Network Topology; Dr. Cole Report, p. 10.

⁶⁰ Introduction to Computer Network Topology; “What Are Network Topologies,” *Webopedia*, available at http://www.webopedia.com/quick_ref/topologies.asp, accessed on September 13, 2017; Dr. Bims Report, p. 7.

⁶¹ “Advantages and Disadvantages of Using Mesh Topology,” *Networking Basics*, available at <http://www.networking-basics.net/mesh-topology/>, accessed on September 13, 2017 (“Advantages and Disadvantages of Using Mesh Topology”).

⁶² “Mesh Topology,” *The Network Encyclopedia*, available at <http://www.thenetworkencyclopedia.com/entry/mesh-topology/>, accessed on September 15, 2017.

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supervision.⁶³ In a partial mesh or incomplete network, some platforms connect only indirectly to others. An example of an incomplete network is an m -regular network.⁶⁴

1. M-regular Network

25. The m -regular network is an incomplete network arranged in a specific manner where each connected participant (“node”) has the same m number of neighboring participants with which it is connected.⁶⁵ The m -regular network may provide more flexibility in terms of connecting players when servers for games get congested during “peak” hours.⁶⁶ This particular arrangement of connections can help ensure that “no node is overloaded,” since each node is connected to the same number of neighboring nodes, thus resulting in an “evenly-distributed multiplayer game.”⁶⁷ Peer-to-peer m -regular networks also provide cheaper alternatives of providing connectivity across different regions, as it may reduce the need for companies to invest in infrastructure costs to build more central servers.⁶⁸ Additionally, m -regular networks do not limit the amount of possible participants.

⁶³ “Advantages and Disadvantages of Using Mesh Topology”; Dr. Bims Report, p. 7.

⁶⁴ Introduction to Computer Network Topology; Dr. Medvidovic Interview; Dr. Medvidovic Report, pp. 16-17; Dr. Bims Report, pp. 7, 10-11.

⁶⁵ “United States Patent 6,701,344,” *USPTO Patent Full-Text and Image Database*, available at <http://patft.uspto.gov/netacgi/nph-Parser?Sect1=PTO1&Sect2=HITOFF&d=PALL&p=1&u=%2Fnethtml%2FPTO%2Fsrchnu.htm&r=1&f=G&l=50&s1=6701344.PN.&OS=PN/6701344&RS=PN/6701344>, accessed on September 7, 2017; Dr. Medvidovic Interview; Dr. Medvidovic Report, pp. 21-22.

⁶⁶ Dr. Medvidovic Interview.

⁶⁷ Complaint, Exhibit 8, pp. 30-31.

⁶⁸ Dr. Medvidovic Interview; Dr. Bims Interview; Dr. Bims Report, pp. 16-17.

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2. Patents-in-Suit and Multiplayer Feature

26. The Patents-in-Suit “are directed to computer network technology overlaying an underlying network connecting participants.”⁶⁹ The m-regular network provides a method of connecting players online, resulting in generally better reliability, scalability, and cost-savings. The Patents-in-Suit enable “large-scale, unlimited online collaborations with numerous participants continually joining and leaving” an application such as multiplayer online games (also referred to as “online multiplayer” or “multiplayer games”).⁷⁰ [REDACTED]

27. For personal computers, games with multiplayer capabilities were first released over 20 years ago.⁷² For non-PC gaming consoles, however, the multiplayer feature became widespread more recently. In 2002, Microsoft’s Xbox Live launched and became “the first online gaming platform to gain any real traction” and was viewed by some as “the birth of online console gaming.”⁷³ Due to the rapid improvement of internet technology,

⁶⁹ Dr. Bims Report, p. 9. The ‘344, ‘966, ‘634, and ‘147 Patents all require m-regular networks with m being equal to at least three. *See*, Dr. Bims Report, pp. 14-15. Because m must be at least three, there must be at least five participants. The Accused Products each include at least one server participant, so there must be at least 4 individual user participants. The ‘069 Patent requires that a participant have at least three connections, so there must be at least four participants (e.g., one server and three individual users). *See*, Dr. Bims Report, p. 15.

The ‘497 Patent covers a broader scope where the networks are not limited to being m-regular. *See*, Dr. Bims Report, p. 16.

⁷⁰ Dr. Bims Report, p. 8; Dr. Bims Interview. [REDACTED]

⁷² “Infographic: A Massive History of Multiplayer Online Gaming,” *PCMag*, available at <https://www.pcmag.com/article2/0,2817,2390917,00.asp>, accessed on September 14, 2017.

⁷³ “The Rise of Online and Multiplayer Gaming,” *Plusnet Community*, available at <https://community.plus.net/t5/Plusnet-Blogs/The-Rise-of-Online-and-Multiplayer-Gaming/ba-p/1321205>, accessed on September 14, 2017; “The Rise and Fall and Rise Again

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multiplayer has become an increasingly popular and “integral” game feature.⁷⁴ Upon the Xbox 360’s launch in 2005, Xbox Live released an updated version of its online service and has attracted over 30 million registered users as of January 2011.⁷⁵ Beginning in 2005, multiplayer became “an integral part of the [gaming] experience” due to the rise of games that increasingly featured more robust multiplayer capabilities.⁷⁶ This trend has continued, as more companies shifted a heavier focus towards multiplayer game features. For example, Call of Duty: Modern Warfare, released in 2007, has primarily featured multiplayer capabilities, while its single-player campaigns became a secondary feature.⁷⁷ Furthermore, as recently as 2015, major video game developers such as EA, Take-Two, and Activision have all released games solely focusing on the multiplayer feature.⁷⁸

of Local Multiplayer,” *US Gamer*, available at <http://www.usgamer.net/articles/the-rise-and-fall-and-rise-again-of-local-multiplayer>, accessed on September 6, 2017.

⁷⁴ “How To Game The Video Game Industry,” *Investopedia*, available at <http://www.investopedia.com/articles/investing/061115/how-game-video-game-industry.asp>, accessed on September 13, 2017; “The History of Gaming: An Evolving Community,” *Tech Crunch*, available at <https://techcrunch.com/2015/10/31/the-history-of-gaming-an-evolving-community/>, accessed on September 6, 2017 (“History of Gaming”), p. 8.

⁷⁵ “The History Of Online Console Gaming,” *Digital Spy*, available at <http://www.digitalspy.com/gaming/news/a296482/the-history-of-online-console-gaming/>, accessed on September 13, 2017; History of Gaming, p. 4.

⁷⁶ History of Gaming, pp. 8-9.

⁷⁷ “Rocky Mountain Gamer: Have multiplayer games gone too far?” *Daily Camera Art & Variety*, available at http://www.dailycamera.com/variety/ci_27164246/multiplayer-video-games, accessed on August 29, 2017 (“Rocky Mountain Gamer”); History of Gaming, p. 8.

⁷⁸ “5 Video Games With No Single-Player Campaigns,” *Entertainment Cheat Sheet*, available at <https://www.cheatsheet.com/entertainment/5-video-games-with-no-single-player-campaigns.html/?a=viewall>, accessed on September 6, 2017 (“5 Video Games With No Single-Player Campaigns”). According to this source, Titanfall, Evolve, and Call of Duty: Black Ops III are multiplayer-only games. Call of Duty: Black Ops III was released by Activision; Titanfall was released by EA; and Evolve was released by Take-Two. See, **Exhibit 3**; “TITANFALL,” *Titanfall*, available at <https://www.titanfall.com/titanfall>, accessed on September 13, 2017; “Evolve,” *Take-Two Interactive*, available at https://www.take2games.com/games/index.php?game_id=320, accessed on September 13, 2017; “Titanfall Game Information,” *Titanfall*, available at <https://www.titanfall.com/titanfall/game-info>, accessed on September 15, 2017.

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28. Video game trade associations such as the Entertainment Software Association (“ESA”) have also acknowledged the increasing importance of multiplayer capabilities. In 2015, the ESA found that 54 percent of gamers engage in multiplayer games at least once per week.⁷⁹ Further highlighting the “continued importance of multiplayer features,” the ESA made similar conclusions in its 2017 video game industry report, as “53 percent of the most frequent gamers play online with others at least once a week and spend an average of six hours.”⁸⁰
29. Take-Two has demonstrated the importance of the multiplayer feature in its games dating back to at least 2008.⁸¹ Take-Two’s two accused franchises, Grand Theft Auto and NBA 2K, both contain multiplayer features and are both ranked among the top-selling video game franchises.⁸² The Grand Theft Auto franchise is listed by both The Gamer and

⁷⁹ “Essential Facts About The Computer And Video Game Industry,” *Entertainment Software Association*, p. 7, available at <http://www.theesa.com/wp-content/uploads/2015/04/ESA-Essential-Facts-2015.pdf> (“Essential Facts”); “How To Game The Video Game Industry,” *Investopedia*, available at <http://www.investopedia.com/articles/investing/061115/how-game-video-game-industry.asp>, accessed on September 13, 2017.

⁸⁰ “Research: The state of the video game industry in 2017,” *Developer*, available at <https://www.developer-tech.com/news/2017/apr/21/research-state-video-game-industry-2017/>, accessed on September 13, 2017; Essential Facts, p. 8, available at http://www.theesa.com/wp-content/themes/esa/assets/EF2017_Design_FinalDigital.pdf, accessed on September 13, 2017.

⁸¹ Defendants Take-Two Interactive Software, Inc., Rockstar Games, Inc., and 2K Sports, Inc.’s Objections and Responses to Plaintiff Acceleration Bay LLC’s First Set of Party-Specific Interrogatories (Nos. 1-7) (“Take-Two’s Objections and Responses Nos. 1-7”), p. 16.

⁸² “NBA 2K15: Overview of Game Modes,” 2K, available at <https://support.2k.com/hc/en-us/articles/203843933-NBA-2K15-Overview-of-Game-Modes>, accessed on September 7, 2017; “NBA 2K16 Lets You Fully Design a Team, Go Online for 5-on-5 Matches,” *Game Spot*, available at <https://www.gamespot.com/articles/nba-2k16-lets-you-fully-design-a-team-go-online-fo/1100-6429340/>, accessed on September 7, 2017; “NBA 2K16: 2K Sports Announces Massive New Additions to MyLeague and My GM,” *Bleacher Report*, available at <http://bleacherreport.com/articles/2551504-nba-2k16-2k-sports-announces-massive-new-additions-to-myleague-and-mygm>, accessed on September 7, 2017; “GTA Online,” *IGN*, available at http://www.ign.com/wikis/gta-5/GTA_Online?objectid=20019838, accessed on September 7, 2017.

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Forbes as one of the top grossing and selling video game franchises of all-time.⁸³ Indeed, “[GTA] Online is now the default GTA game ...” and everyone at Rockstar who worked on the original single player game, GTA V, are now all working on GTA Online; “GTA Online is Rockstar’s priority.”⁸⁴ Forbes considers GTA Online “arguably the most successful MMO since World of Warcraft.”⁸⁵ GTA Online reached over 33.8 million players across more than 3.8 million crews worldwide within a year after its release in October of 2013.⁸⁶ In addition, Take-Two reported that “[r]oughly 70% of Internet-connected Grand Theft Auto V users have played Grand Theft Auto Online, and the active user base continues to grow ...”⁸⁷

30. Take-Two emphasized the value of Grand Theft Auto Online in its press releases, highlighting various benefits of multiplayer such as working “cooperatively with friends,” “participat[ing] in activities and ambient events,” and “compet[ing] in traditional game modes with the entire community.”⁸⁸ The value of the multiplayer

⁸³ “Top 15 Highest Grossing Video Game Franchises Of All Time,” *The Gamer*, available at <http://www.thegamer.com/top-15-highest-grossing-video-game-franchises-of-all-time/>, accessed on September 6, 2017; “The Best-Selling Videogame Franchises,” *Forbes*, available at https://www.forbes.com/2006/08/02/bestselling-video-games-cx_de_0802mario.html, accessed on September 6, 2017.

⁸⁴ “GTA 5 is dead, long live GTA Online,” VG24/7, available at <https://www.vg247.com/2015/09/23/gta-5-is-dead-long-live-gta-online/>, accessed on October 9, 2017.

⁸⁵ “Why ‘GTA Online’ Makes Me A Bit Worried About ‘Red Dead Redemption 2’,” *Forbes*, available at <https://www.forbes.com/sites/insertcoin/2016/10/17/why-gta-online-makes-me-a-bit-worried-about-red-dead-redemption-2/#6c70940e1a4b>, accessed on October 9, 2017.

⁸⁶ “GTA Online Census: The Story So Far,” *Rockstar Games*, available at <http://www.rockstargames.com/newswire/article/52349/gta-online-census-the-story-so-far>, accessed on October 10, 2017 (“GTA Online Census”).

⁸⁷ “Take-Two Interactive Software, Inc. Q1 2016 Earnings Call,” *Nasdaq*, available at <http://www.nasdaq.com/aspx/call-transcript.aspx?StoryId=3426056&Title=take-two-interactive-software-ttwo-strauss-h-zelnick-on-q1-2016-results-earnings-call-transcript>, accessed on October 9, 2017.

⁸⁸ TTWO0024305-09 at 05.

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feature in Grand Theft Auto is further exemplified by the recognition it has received in the industry. It is considered to be the best multiplayer game by multiple awards and news outlets, including the BAFTA Awards and IGN.⁸⁹ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

31. In addition, NBA 2K15 is listed by Forbes as one of the “Top Ten Best-Selling Video Games of 2014,” and NBA 2K16 is listed by Game Spot as one of the top selling video games of 2015.⁹² [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

⁸⁹ “Last of Us, Tearaway, Grand Theft Auto V Win Big At The BAFTA Awards,” *gameinformer*, available at <http://www.gameinformer.com/b/news/archive/2014/03/13/last-of-us-tearaway-win-big-at-the-bafta-awards.aspx>, on accessed September 7, 2017; “Best Xbox 360 Multiplayer Game,” *IGN Best of 2013*, available at http://www.ign.com/wikis/best-of-2013/Best_Xbox_360_Multiplayer_Game, accessed on September 18, 2017;

[REDACTED]

⁹² “The Top Ten Best-Selling Video Games of 2014,” *Forbes*, available at <https://www.forbes.com/sites/erikkain/2015/01/19/the-top-ten-best-selling-video-games-of-2014/#9b2b75b82cf7>, accessed on September 6, 2017 (“The Top Ten Best-Selling Video Games of 2014”); “Top Ten Best-Selling US Games of 2015 and December Revealed,” *Game Spot*, available at <https://www.gamespot.com/articles/top-ten-best-selling-us-games-of-2015-and-december/1100-6433845/>, accessed on September 7, 2017 (“Top Ten Best-Selling US Games of 2015 and December Revealed”).

[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED] Indeed, “two of Visual Concepts’ top ten engineers spent the entire *NBA 2K15* development cycle working on network infrastructure” because *NBA 2K14*, the previous iteration of the franchise, had a “lackluster online infrastructure” and “network issues seriously hampered access to all of its modes.”¹⁰² In an Earnings Call in February of 2016, Take-Two announced that *NBA 2K16* was “poised

[REDACTED]

¹⁰¹ TTWO0024233-78 at 37.

¹⁰² “NBA 2k15 team looks to rebound from an off year by listening to the fans,” Polygon, available at <https://www.polygon.com/2014/9/25/6840561/nba-2k15-preview-ps4-xbox-one-pc-mycareer-mylgm>, accessed on October 9, 2017.

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to become the most successful release in the history of [their] industry-leading basketball series” recording sales that were “up double-digits versus the same period last year.”¹⁰³

Additionally, at the same call, it was announced that during the third quarter, recurrent spending on NBA 2K grew 72% year-over-year” which was driven in part by online play.¹⁰⁴ “After getting numerous complaints from online gamers, NBA 2k15 will now be equipped with upgraded servers for gamers to play online.”¹⁰⁵

33. GTA V has sold more than 80 million copies as of May 2017.¹⁰⁶ GTA V had hit 75 million units as of Take-Two’s Feb 2017 earnings call.¹⁰⁷ Over 33.8 M GTA Online players globally as of Oct. 2014 (1-year after its release).¹⁰⁸ NBA2K15 sold over 7 million units as of Take-Two’s May 2015 earnings call.¹⁰⁹ [REDACTED]

¹⁰³ Take-Two Interactive Software, Inc. Q3 2016 Earnings Call,” *Nasdaq*, available at <http://www.nasdaq.com/aspx/call-transcript.aspx?StoryId=3862806&Title=take-two-interactive-software-ttwo-strauss-h-zelnick-on-q3-2016-results-earnings-call-transcript>, accessed on October 9, 2017 (“TT Q3 2016 Earnings Call”).

¹⁰⁴ TT Q3 Earnings Call.

¹⁰⁵ “NBA 2k15 Release Date: Upgraded Servers, Euroleague Expansion And Kevin Durant Gets Set For Late 2014 Reveal; Full Lineup Of New Teams Listed Here,” *KPopStarz*, available at <http://www.kpopstarz.com/articles/92600/20140523/nba-2k15-release-date.htm>, accessed on October 9, 2017.

¹⁰⁶ “Grand Theft Auto 5 sales top 80 million”, *Polygon*, available at <https://www.polygon.com/2017/5/23/15680482/grand-theft-auto-5-sales-80-million>, accessed on October 10, 2017; “GTA 5 Ships 80 Million Units,” *Gamespot*, available at <https://www.gamespot.com/articles/gta-5-ships-80-million-units/1100-6450282/>, accessed on October 9, 2017.

¹⁰⁷ “Take-Two Interactive Software, Inc. Q3 2017 Earnings Call,” *Nasdaq*, available at <http://www.nasdaq.com/aspx/call-transcript.aspx?StoryId=4043598&Title=take-two-interactive-software-ttwo-q3-2017-results-earnings-call-transcript>, accessed on October 9, 2017.

¹⁰⁸ GTA Online Census.

¹⁰⁹ “Take-Two Interactive Software, Inc. Q4 2015 Earnings Call,” *Nasdaq*, available at <http://www.nasdaq.com/aspx/call-transcript.aspx?StoryId=3193936&Title=take-two-interactive-software-ttwo-strauss-h-zelnick-on-q4-2015-results-earnings-call-transcript>, accessed on October 9, 2017.

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mimic a real-world licensing negotiation that both parties willingly enter with the understanding that the Patents-in-Suit are valid and infringed by the Defendants. This is embodied in *Georgia-Pacific* factor 15: “The amount that a licensor (such as the patentee) and a licensee (such as the infringer) would have agreed upon (at the time the infringement began) if both had been reasonably and voluntarily trying to reach an agreement; that is, the amount which a prudent licensee who desired, as a business proposition, to obtain a license to manufacture and sell a particular article embodying the patented invention would have been willing to pay as a royalty and yet be able to make a reasonable profit and which amount would have been acceptable by a prudent patentee who was willing to grant a license.”¹¹⁵

37. I follow that method here, understanding that not all of the factors may be relevant to a particular calculation of a reasonable royalty, and some factors may be more important than others. While I consider all the factors, I find that certain factors are more indicative of what the parties would have considered, as I discuss further below.
38. Properly constructed, the hypothetical negotiation reflects the relevant expectations and market factors that would have affected a real world licensing negotiation on the eve of the first infringement. For example, the construction of the hypothetical negotiation takes into account, among other things: the expectations of the negotiating parties regarding future sales of, and profits from, the infringing products (and possibly related products); the expected costs imposed on the licensor that flow from the license; and the availability

¹¹⁵ I understand that the court in *Georgia-Pacific* set forth a set of 15 factors that may affect the outcome of a hypothetical negotiation for a license to an infringed patent. *See, Georgia-Pacific Corp. v. United States Plywood Corp.*, 318 F. Supp. 1116, 1120 (S.D.N.Y. 1970).

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of, and risks associated with, reasonable potential alternatives, if any, that might have enabled the licensee to avoid the infringement.

39. In a real-world negotiation, either party has the option of walking away from the negotiating table if the costs of the proposed license exceed the benefits of reaching an agreement. Assuming, after consideration of these costs and benefits, there is a range of feasible outcomes whereby both parties can benefit from the licensing agreement, other factors, including the relative bargaining powers of the two sides, dictate if one party gets relatively more of the benefit of the bargain or if the parties share the benefits equally. If this condition holds (i.e., there are mutual gains from licensing that the negotiation serves to allocate), then the hypothetical negotiation framework can be applied.¹¹⁶
40. Given this framework, a starting point for the determination of a reasonable royalty is an assessment of the benefits and costs to each of the relevant parties as a result of the license envisioned in the hypothetical negotiation. The benefits to the licensor of granting a license are the royalty payments that it can expect to receive from the licensee. When a licensor competes with a potential licensee, the costs to the licensor of entering into the license agreement may include both perceived costs associated with facing a stronger competitor in the marketplace and a reduction in profits from reduced sales or prices as a result of competition from the licensed products. For example, the licensee could create a perfect technical substitute to the licensor's product. Under certain market structures, each sale of the licensee's product could then be expected to cause a lost sale of the

¹¹⁶ However, if the expected costs of licensing from Acceleration Bay exceed the expected benefits to Take-Two from taking a license, there is no range of feasible outcomes whereby both parties can benefit from the license. A reasonable royalty must be at least equal to the expected cost to Acceleration Bay of granting the license contemplated in the hypothetical negotiation.

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licensor's product. A licensee's product may also be expected to affect the profits that the licensor derives from sales of products that do not practice the licensed patents, or a licensor may incur costs by virtue of lost licensing opportunities or other effects of the license on other potential license negotiations. In short, there are many ways in which a license could affect the licensor's expected future profits.

41. The costs to the licensee are the royalty payments it must make to the licensor in exchange for the right to practice the technology covered by the patent. The benefits to the licensee of striking a bargain are the additional profits it expects to earn by using the patented technology as compared to the expected profits associated with developing, relying upon, and using the next-best, available non-infringing alternative ("NIA"), to the extent one is available. At the time of the hypothetical negotiation (which, as I have described above, is the relevant point of reference for this analysis), the licensee may have had no known alternative to the patented invention available to it that would have allowed it to still make, in the but-for world, some or all of the infringing sales that it actually made. It may also be the case that an alternative was theoretically possible at that time, but had not been proven to be commercially viable by the licensee. In any event, when considering the availability and financial impact of turning to a NIA, the full economic cost of relying on that alternative (relative to using the patented invention) should be assessed. The costs for the NIA (assessed relative to what they would be if the patented invention were used) may include, for example, the incremental cost of producing the product at issue and the incremental expected future sales (and commensurate profits) of the product. Furthermore, the assessment of these costs should account for different risks due to different levels of uncertainty between the patented

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invention and available NIAs in terms of, for example, production costs, product and commercial viability, and consumer acceptability. The costs must also account for the full opportunity cost of the alternative as a result of, for example, a delay in the product being available for sale as a result of necessary additional development work, product testing, and regulatory approvals, among other factors.

42. The royalty rate that exactly compensates the licensor for its costs of licensing represents the minimum royalty that the licensor would be willing to accept in the negotiation. The value of the incremental benefits (i.e., additional profits) to the licensee from using the patented technology represents the maximum royalty that the licensee would be willing to pay. These points form the respective “reservation prices” of the parties to enter the license and, if the licensee’s reservation price exceeds the licensor’s reservation price, these two amounts define the negotiating (or bargaining) range for the royalty associated with the license. Royalties within this range can leave both parties better off for having negotiated the license than either party would be by walking away from the bargaining table.
43. In practice, both in actual license negotiations and in the calculation of damages, there is often uncertainty surrounding the factors that determine the parties’ reservation prices, including, for example, uncertainty about the feasibility and profitability of alternatives, uncertainty about sales and profit levels, and the interaction of other factors, in addition to infringement, that may contribute to the gains to the licensee from the infringement. Therefore, defining the end points of the bargaining range with precision is often not possible. Furthermore, in a real-world licensing negotiation, one would not expect the final royalty to be precisely at the boundary points of the bargaining range as each end

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point leaves one of the parties indifferent between striking a bargain and walking away from the negotiating table. In a real-world negotiation, the final royalty typically would allow both parties to expect to earn some additional profit and thereby benefit from reaching an agreement.¹¹⁷

44. After assessing the endpoints of the bargaining range, I evaluate where on that range a reasonable royalty would fall. If both parties can benefit from a negotiated outcome that falls within the range, I assess market-based information to determine the royalty that would most likely emerge from a negotiation. Existing license agreements can be useful in providing information on what similarly situated parties determined to be a reasonable split of a bargaining range. Depending on the circumstance of the negotiation, in particular, how the endpoints of the bargaining range are expressed, a reasonable royalty can take on different possible forms. For example, a royalty may be a single lump sum payment, multiple milestone payments, a running (percentage or dollar) rate on some base (e.g., sales revenue or a measure of profits), or a combination of forms.

B. The Date of the Hypothetical Negotiation

45. Under the hypothetical negotiation framework, the negotiation is assumed to take place on the eve of first infringement. My understanding is that first infringement takes place on the latter of the date that either the patent was assigned to Acceleration Bay (i.e., the

¹¹⁷ This outcome presumes that there is a range of possible royalty amounts that allow such an outcome. As I have described above, for purposes of the hypothetical negotiation this may not be true. The CAFC has affirmed the principle that reasonable royalty damages can exceed an infringer's economic gains from infringement. *See for example, Rite-Hite Corporation, et al. v. Kelley Company, Inc.*, 56 F.3d 1538, 1554 (Fed. Cir. 1995); *Monsanto Co. v. Ralph*, 382 F.3d 1374, 1384 (Fed. Cir. 2004); *Mars, Inc. v. Coin Acceptors, Inc.*, 527 F.3d 1359, 1374 (Fed. Cir. 2008).

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Assignment Date, December 10, 2014) or the date in which the defendants made, used, sold, or offered for sale a device that allegedly infringed the Patents-in-Suit.

46. Upon instructions from counsel, I have assumed that the date of the hypothetical negotiation for all products is April 13, 2015, the filing date of this action and the start of the period for which Acceleration Bay seeks damages.^{118,119}

C. Defendant’s Maximum Willingness to Pay

47. The highest amount that the Defendants would be willing to pay for a license to the Patents-in-Suit is the lesser of the incremental profits associated with the patented invention, namely, the profits associated with the sales of the infringing products and the cost of the Defendant’s next best alternative that avoids infringement of the Patents-in-Suit, which the Defendants did not pursue. If the cost of the next best alternative were higher than the incremental profits then the Defendants would only be willing to pay an amount up to the incremental profits as it would be more advantageous to stop selling the

¹¹⁸ The start date of the telemetry data provided was April 15, 2015. Therefore, I conservatively begin calculating damages on this date. However, in the event that the Defendant provides additional information, I reserve the right to update my findings.

¹¹⁹ I understand that there is a disagreement about the date of the hypothetical negotiation. Specifically, I understand that the Defendants have represented that the hypothetical negotiation dates could be earlier given when Defendants’ products “generally had multiplayer functionality,” which Defendants’ claim would be no later than 2008. (Take-Two’s Objections and Responses Nos. 1-7, Interrogatory No. 5). The Defendants do not explain what it interprets or how it defines “multiplayer functionality” or how each of the products integrated or used that functionality. I also understand that at least some of the accused versions of the games were not in existence in the same form as they are currently accused. However, should the Defendants provide further explanation regarding their proposed alternative date, I reserve the right to address any adjustments that should be made to my analysis.

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product otherwise. On the contrary, if the incremental profits were higher than the cost of the next best alternative, the Defendants would have no incentive to pay more than the cost of the next best alternative. I examine both of these in the remainder of this section.

48. In situations where a patented technology is a necessary input for a product and licensees of the patent need to invest heavily in order to design, manufacture, market and/or sell the product, a licensee might be concerned about what is known as *holdup* by the patent owner after it has made such investments. Under these circumstances, a licensee of the necessary technology may have reduced flexibility and bargaining power vis-a-vis the patent owner since the patent owner can deny the licensee's use of its investments by withholding access to the patent. The threat of holdup may give patent owners in these situations leverage to negotiate royalties in excess of their true economic contributions.¹²⁰ Aware of this potential, my approach, which I describe in the last section of my report, specifically mitigates the potential for holdup.

1. Profits from Infringing Products

49. Although the Defendants have not provided complete information on the profits of the infringing products during the period of infringement, I estimate those profits, when possible, based on the information that was produced and publicly available information as necessary.¹²¹

¹²⁰ See for example, Lemley, Mark A. and Carl Shapiro, "Patent Holdup and Royalty Stacking," Texas Law Review, 85(1991), 2007 ("Lemley and Shapiro").

¹²¹ **Exhibit 4A-Exhibit4F.**

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

2. Potential Non-Infringing Alternatives

a. Alternatives Proposed by the Defendant

51. The Defendants have offered several alleged NIAs or design arounds that they claim “could use to modify or as an alternative to the Accused Products to avoid infringement.”¹²⁴ However, I am not aware that the Defendants have attempted to actually design around any of the asserted patents. In fact, the Defendants have stated that they first became aware of the Patents-in-Suit through the complaint filed by Acceleration Bay.¹²⁵

52. The specific alternatives proposed by the Defendants are:¹²⁶

- a. “similar products available before April 15, 2015;”¹²⁷
- b. “any games that use the [Plaintiff] disclaimed client-server or full mesh topologies;”¹²⁸

¹²² **Exhibit 4A-Exhibit4C**; My estimate is a conservative estimate of total incremental profit to date because the Defendants did not provide profit information for the accused products in the Grand Theft Auto and NBA 2K franchises for any period beyond March 2016.

¹²³ **Exhibit 4D-Exhibit4F**.

¹²⁴ Take-Two’s Objections and Responses Nos. 1-7, p. 8.

¹²⁵ Take-Two’s Responses to Plaintiff Acceleration Bay LLC’s First Set of Common Interrogatories (Nos. 1-4), C.A. No. 15-311(RGA), January 10, 2016, p. 10.

¹²⁶ Take-Two’s Objections and Responses Nos. 1-7, pp. 10-11.

¹²⁷ Take-Two’s Objections and Responses Nos. 1-7, p. 10.

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- c. “network topologies with m-less than 3. Accordingly, another non-infringing alternative would include network topologies with m equal to 2;”¹²⁹
 - d. “[a]ll non m-regular topologies;”¹³⁰
 - e. “other multiplayer game networking engines that include services necessary for operating a multiplayer game” such as RakNet.¹³¹
53. Dr. Medvidovic and Dr. Mitzenmacher have indicated that the Defendant’s proposed items are not viable NIAs or design arounds to the Patents-in-Suit. The Defendants have not provided proof of analysis which shows that these items are both feasible and non-infringing.¹³² Specifically, with regard to each individual proposed alternative, I have the following understanding.
- a. Although sales of products available prior to April 13, 2015 are not accused in this lawsuit, I understand that the fact that the products are not accused does not indicate that the products did not incorporate the patented technology. I further understand that the date of first infringement is a legal matter, and not necessarily informative of the use of the invention enabled by the Patents-in-Suit prior to April 13, 2015.
 - b. Similarly, I understand that any games that use “disclaimed client-server or full mesh topologies”¹³³ are not necessarily NIAs or work-arounds to the invention

¹²⁸ Take-Two’s Objections and Responses Nos. 1-7, p. 10.

¹²⁹ Take-Two’s Objections and Responses Nos. 1-7, p. 10.

¹³⁰ Take-Two’s Objections and Responses Nos. 1-7, p. 10.

¹³¹ Take-Two’s Objections and Responses Nos. 1-7, pp. 10-11.

¹³² Dr. Medvidovic Interview; Dr. Medvidovic Report, pp. 153-157; Dr. Mitzenmacher Interview; Dr. Mitzenmacher Report, pp. 158-161.

¹³³ Take-Two’s Objections and Responses Nos. 1-7, p. 10.

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enabled by the Patents-in-Suit and used in the infringing products.¹³⁴ Moreover, I understand that full mesh networks are, at times inefficient so it is not evident that the infringing products would maintain the current level of performance. Lastly, it is my understanding that Acceleration Bay has not “disclaimed client-server or full mesh topologies”.

- c. I understand that m-less than three networks are comprised of m-regular networks where m is equal to either one or two. I understand that an m-regular network where m is equal to 1 does not exist, as it is essentially a one-on-one connection. In m-regular networks where m is equal to two, each node connects to its two neighbors such that all nodes are arranged to form a ring shape. As a result, it may be necessary for communication to be shared across every single node before reaching its intended destination. I understand that these networks are very slow and are therefore, from a practical standpoint, not feasible as non-infringing alternatives or workarounds to the invention enabled by the Patents-in-Suit.¹³⁵
- d. First, not all of the patents require an m-regular network.¹³⁶ Second, I understand that the Defendants’ reference to “[a]ll non m-regular topologies”¹³⁷ is vague.¹³⁸ This proposed non-infringing alternative apparently includes all partial-mesh topologies that are not m-regular, all full-mesh topologies as well as a number of other topologies such as bus, ring (m-regular where m is equal to 2), star, and

¹³⁴ Dr. Medvidovic Interview; Dr. Medvidovic Report, p. 155.

¹³⁵ Dr. Medvidovic Interview; Dr. Medvidovic Report, pp. 155-157; Dr. Bims Interview; Dr. Bims Report, pp. 23-24.

¹³⁶ Dr. Medvidovic Interview; Dr. Medvidovic Report, pp. 156; Dr. Bims Interview; Dr. Bims Report, p. 24.

¹³⁷ Take-Two’s Objections and Responses Nos. 1-7, p. 10; Dr. Medvidovic Interview; Dr. Medvidovic Report, pp. 154-157.

¹³⁸ Dr. Bims Interview; Dr. Bims Report, pp. 2, 25.

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tree.¹³⁹ The Defendants have simply proposed a broad strategy, not a specific architecture.¹⁴⁰ Third, a non m-regular network may have an increased propensity for inefficiency or latency due to load balancing problems.¹⁴¹

- e. RakNet, a “game networking engine,”¹⁴² is a technology for cross-platform applications that operate across network types.¹⁴³ I understand that it has not been shown by any party that RakNet does not infringe the Patents-in-Suit.¹⁴⁴

b. Cost of a Potential Alternative

- 54. While Dr. Medvidovic and Dr. Mitzenmacher have indicated to me that they are not aware of any NIA to the Patents-in-Suit,¹⁴⁵ Dr. Valerdi has indicated to me that he has provided conservative estimates for the cost of developing and maintaining software to develop a new networking platform for the infringing products or accused franchises in the event that an NIA to the Patents-in-Suit were possible.¹⁴⁶ Dr. Valerdi has also

¹³⁹ Introduction to Computer Network Topology; Dr. Medvidovic Interview; Dr. Medvidovic Report, pp. 154-157.

¹⁴⁰ Dr. Medvidovic Interview; Dr. Medvidovic Report, p. 155.

¹⁴¹ Dr. Medvidovic Interview; Dr. Medvidovic Report, pp. 155-156.

¹⁴² “RakNet,” *gamesindustry.biz*, available at <http://www.gamesindustry.biz/articles/raknet-selected-by-socom-maker-slant-six-games-for-a-hush-hush-new-project>, accessed on September 15, 2017. A game networking engine is a “networking library with an API specifically addressing the needs of game networking.” See, “GNE – Game Networking Engine,” *Gillius’s Programming*, available at <http://gillius.org/gne/>, accessed on September 13, 2017.

¹⁴³ “Oculus VR Acquires Game-Networking Engine RakNet,” *OVR News*, available at <http://www.ovrnews.com/oculus-vr-acquires-game-networking-engine-raknet/>, accessed on September 13, 2017; “Oculus VR buys open source game networking systems provider RakNet,” *Tech Times*, available at <http://www.techtimes.com/articles/9956/20140710/oculus-vr-buys-open-sources-game-networking-systems-provider-raknet.htm>, accessed on September 23, 2017; “Supported Platforms,” *Jenkins Software*, available at <http://www.jenkinssoftware.com/platforms.html>, accessed on September 23, 2017.

¹⁴⁴ Dr. Medvidovic Interview; Dr. Medvidovic Report, p. 155.

¹⁴⁵ Dr. Medvidovic Interview; Dr. Medvidovic Report, pp. 153-157; Dr. Mitzenmacher Interview; Dr. Mitzenmacher Report, pp. 158-161.

¹⁴⁶ Dr. Valerdi Interview; Dr. Valerdi Report, pp. 3, 12-13.

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indicated to me that his cost estimate for the new software is based on a conservative, systematic methodology which takes into account, among other things, the type of software being created, the lines of code¹⁴⁷ for that software, as well as the personnel cost needed to create that new software. Moreover, Dr. Valerdi has indicated to me that it is possible for the Defendants to experience cost savings when developing a subsequent game and he therefore accounts for that in his estimate.¹⁴⁸

55. Dr. Valerdi has indicated to me that his cost estimate is conservative for several reasons. First, although his estimate is based on a client-server network, he has not accounted for the cost of the hardware necessary for such a network such as the cost of servers, bandwidth, or any other cost that would be specific to the hardware.¹⁴⁹ Although it may be difficult to estimate the additional cost for the hardware, I recognize that servers alone can be costly, much less any additional hardware costs.¹⁵⁰ Moreover, Dr. Valerdi has indicated that his estimate does not account for several risks that may be associated with developing the software for the infringing products.¹⁵¹ First, it is my understanding from speaking with Dr. Valerdi that there may be product delays due to issues with the time needed to develop the software.¹⁵² In my experience, product delays can have a potentially negative, non-trivial impact on the success or revenues of a product. Among other possibilities, product delays can result in delayed revenues, if not decreased sales. Second, in conversations with Dr. Medvidovic and Dr. Mitzenmacher, I have learned that

¹⁴⁷ Dr. Valerdi has indicated to me that he has made reasonable efforts to account for comments in the code to arrive at his cost estimates (Dr. Valerdi Interview).

¹⁴⁸ Dr. Valerdi Interview.

¹⁴⁹ Dr. Valerdi Interview.

¹⁵⁰ *See for example*, Yahyavi and Kemme, p. 9:11.

¹⁵¹ Dr. Valerdi Interview.

¹⁵² Dr. Valerdi Interview.

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any work-around to the Patents-in-Suit may result in additional negative impacts on the player experience, including, but not necessarily limited to, latency.¹⁵³ Third, based on my understanding that development of an NIA may not be feasible,¹⁵⁴ it is possible that the Defendants could fail to produce an NIA. This could either result in further development costs if further attempts were made by the Defendants to develop an NIA or the inability to sell the accused products.

56. Dr. Valerdi has calculated the cost estimates associated with the alternative software for the infringing products¹⁵⁵ as presented in **Exhibit 5A** and **Exhibit 5B**.¹⁵⁶ Dr. Valerdi has provided one cost estimate for the development of the software as well as a separate cost estimate for maintenance of the software for each accused product or franchise, assuming an NIA were possible.

57. The conservative estimates by Dr. Valerdi, taking into account only a portion of the necessary costs and not accounting for the risk of delay or failure, further reinforce that an NIA, even if one were to be technologically feasible, would have been unlikely to be economically viable at the time of the hypothetical negotiation. Hence, while the maximum willingness of the Defendants to pay a royalty is likely to have been quite high, it is necessary to rely on other indicators of value available in the marketplace to determine a reasonable royalty in this matter.

¹⁵³ Dr. Medvidovic Interview; Dr. Medvidovic Report, p. 156; Dr. Mitzenmacher Interview; Dr. Mitzenmacher Report, pp. 160-161.

¹⁵⁴ Dr. Medvidovic Interview; Dr. Medvidovic Report, pp. 158-161; Dr. Mitzenmacher Interview; Dr. Mitzenmacher Report, pp. 158-161.

¹⁵⁵ Dr. Valerdi has, on occasion, grouped the products by franchise as seen in **Exhibit 5A** and **Exhibit 5B**; **Exhibit 5A** reflects a “conservative estimate” by Dr. Valerdi.

¹⁵⁶ Dr. Valerdi Interview.

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D. Acceleration Bay’s Minimum Willingness to Accept

58. The lowest amount that Acceleration Bay would be willing to accept to provide a license to the Patents-in-Suit is the cost that it would bear by licensing the patents. These costs include a reduction in the expected profits Acceleration Bay stands to make from licensing its patents to competitors of the Defendants. [REDACTED]

[REDACTED]

[REDACTED]¹⁵⁷ If, by allowing Take-Two to sell products based on the patented technology, Acceleration Bay’s other potential licensees might experience reduced sales or reduced expected future sales, this could lead to reduced licensing revenue to Acceleration Bay. Acceleration Bay would take this into account when negotiating a license for the Patents-in-Suit. However, I am unable to quantify this amount, which might be considerable.

E. Determination of Reasonable Royalty Damages

59. A reasonable royalty for the Patents-in-Suit, bounded by the relevant bargaining range outlined above, would have resulted from a hypothetical negotiation between Acceleration Bay and the Defendants. Based on my analysis of the relevant bargaining range as outlined above, a reasonable royalty for the Defendants’ infringement can be determined. I describe this determination below, including a consideration of the *Georgia-Pacific* factors.

¹⁵⁷ Deposition of John Garland, June 6, 2017, pp. 20:15-21:7; Garland Interview.

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¹⁶³ Rocky Mountain Gamer.
¹⁶⁴ Rocky Mountain Gamer.
¹⁶⁵ “5 Video Games With No Single-Player Campaigns.”.
¹⁶⁶ **Exhibit 3.**
¹⁶⁷ **Exhibit 3.**

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¹⁷⁷ Sony 2006 Annual Report, p. 6.

¹⁷⁸ Sony 2006 Annual Report, p. 6.

¹⁷⁹ I understand that the versions of the infringing products which are available on the PlayStation platforms are not themselves accused products; **Exhibit 3**.

¹⁸¹ [REDACTED]

Approximately 20.5 million Sony consoles were sold in 2005, equivalent to a market share of 47.5 percent. Microsoft market share in 2005 was 11.9 percent or 5.1 million consoles (=20.5 million / 0.475 * 0.119) (“Global Games Consoles,” *DataMonitor*, August 2006, pp.8, 12). Platform sales of Xbox 360 and Xbox One were 0.93 million units and 8.6 million units in 2015, respectively. Total platform sales for 2015 were 42.4 million units. (“Global unit sales of current generation video game consoles from 2008 to 2016 (in million units),” *VGChartz*, January 2017).

¹⁸² This relates to the types of consideration in *Georgia-Pacific* factor 3.

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71. In the rest of this section, I first describe the terms of each agreement. I then use the agreements to assess the Defendants’ general approach to licensing. Last, I identify which of these licenses, if any, provide any insights regarding the reasonable royalty in this case and discuss the implications of those insights.

a. Terms of Licenses and Settlement Agreements

72. I have summarized the licenses and settlement agreements in **Exhibit 6**. I provide a brief description of some of the key terms of each agreement below, in chronological order.

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C. Comparable Licenses and Settlement Agreements

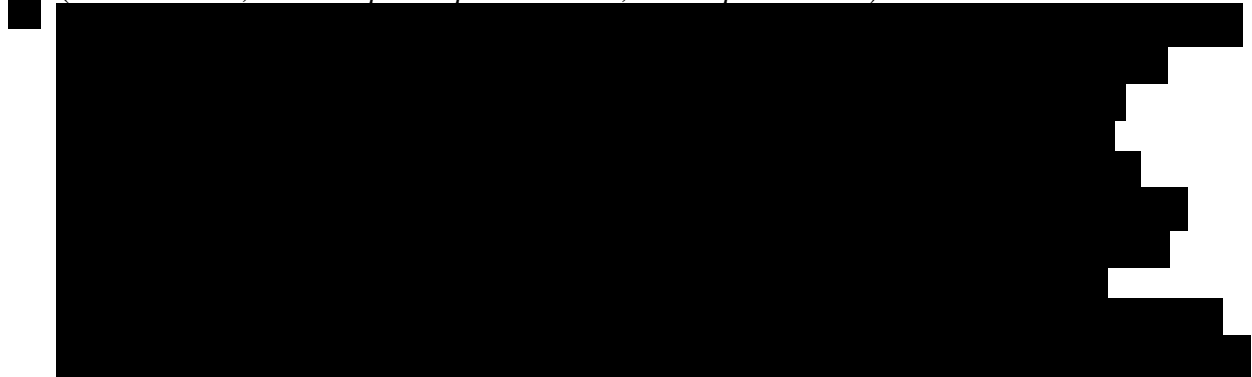
- 79. In determining which licenses and settlement agreements are comparable or, at a minimum, provide some insights regarding the hypothetical negotiation in this matter, several important factors must be considered.

[REDACTED]

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- a. First, agreements with technology that is vastly different from the technology at issue in this matter are generally not useful in generating insights because it is not possible to compare the relative values of technologies that are so disparate.
- b. Second, licenses that are far apart in time from the hypothetical negotiation are less relevant than licenses that were signed close to the date of the hypothetical negotiation because at least some factors, such as macroeconomic conditions and the state of the industry, are more comparable.
- c. Third, license agreements that arise from a settlement or agreement not to sue may or may not be considered comparable to a hypothetical license because of the myriad of considerations that might be relevant when two parties agree to enter into a license concurrent with the settling of existing litigation.¹⁹⁷ Such considerations can include, for example, the desire to avoid legal fees (by either the plaintiff or defendant); the time and effort involved in litigation; the uncertainty and risk of litigation; and the financial position of the parties that would impact the ability to engage in litigation, and some of these types of considerations are explicitly mentioned by the parties in the signed agreements that I have reviewed for this case.¹⁹⁸ In addition, because

¹⁹⁷ *Prism Techs. LLC v. Sprint Spectrum L.P., DBA Sprint PCS*, Case Nos. 2016-1456, 2016-1457, 2017 WL 877221, United States Court of Appeals, Federal Circuit, March 6, 2017 (“*Prism Techs, LLC v. Sprint Spectrum L.P., DBA Sprint PCS*”).



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validity and infringement of the Patents-in-Suit is assumed in the context of a hypothetical negotiation, royalty rates in settlement licenses may understate the royalty rate that would have resulted from a hypothetical negotiation in which this uncertainty did not exist. For these reasons, these settlement agreements are often “tainted by the coercive environment of patent litigation.”¹⁹⁹ However, in certain circumstances, as described in the *Prism v. Sprint* case, settlement agreements may serve as appropriate benchmarks depending on the circumstances of the agreement, particularly when a settlement license includes patents that were previously litigated or when the settlement is reached after most or all of the discovery in the case has taken place such that much of the uncertainty (such as, for example, claim construction and discovery of financial information) has been resolved.²⁰⁰

d. Implications of these licenses for the determination of reasonable royalty damages

80. Dr. Bims states that “it is [his] opinion that the agreements identified by Defendant are not comparable to the technology of the Asserted Patents.”²⁰¹ Specifically, he notes that these agreements are not related in subject and “are not directed to networking, distribution of content over networks, matchmaking for connecting to a network for a particular game or topic of interest or receiving content from network.”²⁰² Based on the

¹⁹⁹ *LaserDynamics, Inc. v. Quanta Computer, Inc.*, Case Nos. 2011-1440 and 2011-1470, United States Court of Appeals, Federal Circuit, August 30, 2012.

²⁰⁰ *Prism Techs. LLC v. Sprint Spectrum L.P., DBA Sprint PCS; see also, ResQNet.com, Inc. v. Lansa, Inc.*, Case Nos. 2008-1365, 2008-1366, 2009-1030., United States Court of Appeals, Federal Circuit, February 5, 2010.

²⁰¹ Dr. Bims Report, p. 25.

²⁰² Dr. Bims Report, p. 25.

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economic analysis above, and Dr. Bims’ opinion regarding the technology, none of the license agreements in this matter are directly comparable and none of them tend to indicate an established royalty rate in the industry.

3. The nature and scope of the license, as exclusive or non-exclusive; or as a restricted or non-restricted in terms of territory or with respect to whom the manufactured product may be sold

81. It is unlikely that Acceleration Bay would have granted the Defendants an exclusive license. In general, a non-exclusive license is less valuable to the licensee because a non-exclusive license does not give the licensee the right to be the sole practitioner of the patented technology. However, I do not expect that Acceleration Bay would have granted the Defendants an exclusive license. I understand that at the time of the hypothetical negotiation, Acceleration Bay would be simultaneously (or nearly thereof) negotiating additional license agreements or pursuing litigation with at least two other parties that its claims have also infringed on the Patents-in-Suit.²⁰³ Moreover, this is consistent with the licenses and settlement & license agreements identified by Take-Two as allegedly “comparable or relevant agreements for purposes of a reasonable royalty analysis of damages”²⁰⁴ as all of them are non-exclusive.²⁰⁵ Thus, no further adjustment is needed for this *Georgia-Pacific* factor.

²⁰³ “Acceleration Bay LLC v. Activision Blizzard Inc.,” *Law360*, available at https://www.law360.com/cases/576425e33b73967f7b000001?article_sidebar=1, accessed on September 16, 2017 (“Acceleration Bay LLC v. Activision Blizzard Inc.”); “Acceleration Bay LLC v. Electronic Arts Inc.,” *Law360*, available at <https://www.law360.com/cases/576425e53b73967f7b000002>, accessed on September 16, 2017 (“Acceleration Bay LLC v. Electronic Arts Inc.”); “Acceleration Bay LLC v. Take-Two Interactive Software, Inc. et al,” *Law360*, available at <https://www.law360.com/cases/576425e63b73967f7b000003>, accessed on September 16, 2017 (“Acceleration Bay LLC v. Take-Two Interactive Software, Inc. et al”).

²⁰⁴ Take-Two’s Objections and Responses Nos. 1-7, pp. 7-8.

²⁰⁵ **Exhibit 6.**

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82. Unrestricted licenses tend to be more valuable to the licensee than restricted licenses because a restricted license limits the ability of the licensee to use the technology to generate profits. The Defendants’ games have been and continue to be sold worldwide.²⁰⁶ I understand that worldwide sales infringe the U.S. patent by virtue of the claims of infringement. I also understand that, this is consistent with the licenses and settlement & license agreements identified by Take-Two as “comparable or relevant agreements for purposes of a reasonable royalty analysis of damages”²⁰⁷ as nearly all of them are worldwide.²⁰⁸

4. **The licensor’s established policy and marketing program to maintain his patent monopoly by not licensing others to use the invention or by granting licenses under special conditions designed to preserve that monopoly**
5. **The commercial relationship between licensor and the licensee, such as, whether they are competitors in the same territory in the same line of business; or whether they are inventor and promoter**

83. *Georgia-Pacific* factors 4 and 5 are similar in nature, and therefore, I discuss them together here. Acceleration Bay “is a technology incubator that partners with inventors, corporations and entrepreneurs to accelerate growth in creating innovative companies.”²⁰⁹ Acceleration Bay’s business model is to invest, support, and disseminate technological investments.²¹⁰ Acceleration Bay accomplishes this through obtaining investments “to

²⁰⁶ NBA 2K and Grand Theft Auto are both sold outside of the U.S. (Defendants Take-Two Interactive Software, Inc., Rockstar Games, Inc., and 2K Sports, Inc. July 31, 2017 Supplemental Responses to Acceleration Bay LLC’s First Set of Common Interrogatories (No.3) and Second Set of Common Interrogatories (No. 6) (“Take-Two’s Responses to No. 3 and No. 6”), pp. 4-8).

²⁰⁷ Take-Two’s Objections and Responses Nos. 1-7, pp. 7-8.

²⁰⁸ **Exhibit 6.**

²⁰⁹ Complaint, ¶3.

²¹⁰ “Acceleration Bay Mission,” *Acceleration Bay*, available at <http://joe-ward-vxiz.squarespace.com/acceleration-bay-mission/>, accessed on September 12, 2017.

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support deployment of patent technology”, “acquir[ing] equity in companies [...] deploying patented technology”, and “[p]romot[ing] the use of the patented technology by offering royalty-free licenses for start-up companies.”²¹¹ Acceleration Bay “invests in and supports companies,” “collaborates with inventors and research institutions to analyze and identify important technological problems,” and brings solutions to fruition.²¹² To my knowledge, Acceleration Bay does not produce video games and is not a competitor to the Defendants and thus has an incentive to license the Patents-in-Suit. In addition, given that Acceleration Bay is accusing at least three defendants of patent infringement. Acceleration Bay recognizes the value of licensing the Patents-in-Suit.²¹³ This is already accounted for in my royalty.

6. The effect of selling the patented specialty in promoting sales of other products of the licensee; the existing value of the invention to the licensor as a generator of sales of his non-patented items; and the extent of such derivative or conveyed sales

84. The Defendants are able to generate sales of additional products that may not be directly enabled by the Patents-in-Suit but are still related to the accused products. Take-Two has earned revenue through the sales of merchandise and apparel designed with themes and trademarks from the accused products. The Defendants also offered add-ons and microtransactions for gamers to purchase additional content in games.²¹⁴

²¹¹ “Investment Strategy,” *Acceleration Bay*, available at <http://joe-ward-vxiz.squarespace.com/portfolio/>, accessed on August 8, 2017.

²¹² Complaint, ¶¶ 3-4.

²¹³ *Acceleration Bay LLC v. Activision Blizzard Inc.*; *Acceleration Bay LLC v. Electronic Arts Inc.*; *Acceleration Bay LLC v. Take-Two Interactive Software, Inc. et al.*

²¹⁴ Microtransactions, also known as “in-app purchases,” provide players access to extra game modes and customizable additions such as outfits and weapons in exchange for money. *See*, “How microtransactions conquered the video games industry,” *METRO Gaming*, available at <http://metro.co.uk/2014/01/28/like-taking-sweets-from-a-gamer-the-numbers-behind-the-hugely-popular-apps-4279836/>, accessed September 12, 2017; “Microtransactions are

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85. The Grand Theft Auto franchise incorporates microtransactions as part of game play. Strauss Zelnick, CEO of Take-Two's parent company said: "[j]ust a few years ago when we put out a product no matter how big, we put out a hit, we collected our money, we went on to the next [game]. Now [what] we're finding is we're creating recurrent consumer spending and we have the gift that keeps on giving."²¹⁵ Gamers can purchase Shark Cards in order to gain in-game currency.²¹⁶ By 2014 Grand Theft Auto V had reached more than \$30 million in microtransaction revenue with players buying weapons, vanity items, vehicles, among other purchases.²¹⁷ By 2016, Grand Theft Auto Online had earned roughly \$500 million in microtransactions.²¹⁸ In addition to in-game purchases, Take-Two's subsidiary, Rockstar Games, also sells Grand Theft Auto merchandize and music.²¹⁹ Fans can buy hats, posters, apparel, figurines, lighters, sleeping bags, and even

seeping into console gaming, and it makes me feel bad," *techradar*, available at <http://www.techradar.com/news/gaming/microtransactions-are-seeping-into-console-gaming-and-it-shows-no-sign-of-slowing-1306494>, accessed September 12, 2017.

²¹⁵ Eddie Makuch, "GTA 5's online mode is the "gift that keeps on giving," Take-Two says about its monetary opportunity," *Game Spot*, available at <https://www.gamespot.com/articles/gta-5-s-online-mode-is-the-gift-that-keeps-on-giving-take-two-says-about-its-monetary-opportunity/1100-6418882/>, accessed on September 16, 2017. GTA Online's revenue from in-game microtransactions is counted as part of my revenue base in **Exhibit 4A- Exhibit 4F**. GTA Online's revenue comes from the sale on virtual currency (Moskovitz Deposition, pp. 97:5-98:2).

²¹⁶ "Grand Theft Auto Online: Shark Cash Cards (PC)," *Rockstar Warehouse*, available at https://www.rockstarwarehouse.com/store/tk2rstar/en_US/pd/productID.317353200, accessed on September 16, 2017.

²¹⁷ "How will publishers tackle the \$2.5 billion digital console market?" *Super Data*, available at <https://www.superdataresearch.com/digital-console-brief/>, accessed on September 16, 2017.

²¹⁸ Paul Tassi, "GTA Online's \$500M In Microtransactions Could Mean A Very Different 'GTA 6,'" *Forbes*, available at <https://www.forbes.com/sites/insertcoin/2016/04/14/gta-onlines-500m-in-microtransactions-could-mean-a-very-different-gta-6/#396f6eff3c6d>, accessed on September 16, 2017.

²¹⁹ "Home," *Rockstar Warehouse*, available at <https://www.rockstarwarehouse.com>, accessed on September 16, 2017.

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beach balls with official Grand Theft Auto branding.²²⁰ In addition, the award-winning soundtracks for the Grand Theft Auto franchise are also available for sale on the website.²²¹

86. Base games for 2K are priced at \$59.99, but depending on the year, they sell premium products for \$99, which includes add-on content, digital offerings, and virtual currency. However, customers can also purchase virtual currency outside of the premium product package online through Microsoft and Sony.²²² Take-Two's franchise NBA 2K also incorporates microtransactions in the game. In addition to retail revenue, Take-Two receives digital revenue from game downloads and virtual currency.²²³ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

87. Take-Two's franchise NBA 2K also incorporates microtransactions in the game. Gamers are "able to spend real money...should they wish to accumulate the in-game currency at

²²⁰ "Apparel & Accessories," *Rockstar Warehouse*, available at https://www.rockstarwarehouse.com/DRHM/store?Action=list&SiteID=tk2rstar&Locale=en_US&ThemeID=38225800&Env=BASE&categoryID=67821100&size=146&startIndex=0&sort=t2ReleaseDate%20descending,displayName%20ascending, accessed on September 16, 2017; "Body Bag Sleeping Bag," *Rockstar Warehouse*, available at https://www.rockstarwarehouse.com/store/tk2rstar/en_US/pd/productID.300626400, accessed on September 16, 2017.

²²¹ "How will publishers tackle the \$2.5 billion digital console market?" *Super Data*, available at <https://www.superdataresearch.com/digital-console-brief/>, accessed on September 16, 2017; "Downloadable Music," *Rockstar Warehouse*, available at <https://www.rockstarwarehouse.com/store/tk2rstar/html/pbPage.downloadablemusic/>, accessed on September 16, 2017.

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an accelerated rate,” which can then be spent on additional content like apparel, animations, and opening packs.²²⁶ Virtual currency can be purchased on a tiered system, meaning that larger blocks of currency are sold at a discounted price.²²⁷ The value of any one virtual currency changes throughout the game cycle and is dependent upon “the number of earned versus purchased virtual currency.”²²⁸ This was a growing portion of Take-Two’s business. For the 2016 release, “revenue from recurrent consumer spending (defined as virtual currency, downloadable add-on content and online games) grew 39 percent year-over-year and represented 51 percent of Non-GAAP digital revenues (20 percent of total).”²²⁹

88. To calculate damages in this matter, I have only specifically considered the accused products that use Acceleration Bay’s patented technology, according to the allegations of infringement in this matter. In the event that the Defendants provide further information, I reserve the right to update my findings accordingly.

7. The duration of the patent and term of the license

89. It is reasonable to assume that Acceleration Bay and the Defendants would have agreed to a license that covers any current and future infringing product for the remaining life of the Patents-in-Suit. Based on the date of hypothetical negotiation, as stated above in

²²⁶ “What is VC and how does it work?” *2K Support*, available at <https://support.2k.com/hc/en-us/articles/210838517-What-is-VC-and-how-does-it-work->, accessed on September 16, 2017. NBA 2K’s revenue from in-game microtransactions is possibly accounted for as part of “Digital (Inc VC)” in TTWO0023852, which is counted as part of my revenue base in **Exhibit 4A-Exhibit 4F**. Because Take Two has not provided further details regarding its data, I am unable to fully confirm this. However, in the event that the Defendants provide further information, I reserve the right to update my findings.

²²⁹ James Brightman, “NBA 2K16, GTA V drive \$55m profit for Take-Two,” *gamesindustry.biz*, available at <http://www.gamesindustry.biz/articles/2015-11-05-nba-2k16-gta-v-drive-usd55m-profit-for-take-two>, accessed on September 16, 2017.

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Section III.B of my report, 6.4-7.4 years remain of the term of licenses. The Patents-in-Suit have the following duration and total terms:

- a. The '344 Patent was issued on March 2, 2004 and expires September 21, 2021, for a term of approximately 17.6 years; 6.4 years from the date of the hypothetical negotiation.²³⁰
- b. The '966 Patent was issued on May 30, 2004 and expires September 21, 2021, for a term of approximately 17.3 years; 6.4 years from the date of the hypothetical negotiation.²³¹
- c. The '147 Patent was issued on May 4, 2004 and expires July 20, 2022, for a term of approximately 18.2 years; 7.2 years from the date of the hypothetical negotiation²³²
- d. The '634 Patent was issued December 7, 2004 and expires August 7, 2022, for a term of approximately 17.7 years; 7.3 years from the date of the hypothetical negotiation²³³
- e. The '069 Patent was issued June 21, 2005 and expires July 9, 2022, for a term of approximately 17.1 years; 7.2 years from the date of the hypothetical negotiation.²³⁴

²³⁰ The expiry date of the patent is discussed above in Section II.B of my report; The '344 Patent.

²³¹ The expiry date of the patent is discussed above in Section II.B of my report; The '966 Patent.

²³² The expiry date of the patent is discussed above in Section II.B of my report; The '147 Patent.

²³³ The expiry date of the patent is discussed above in Section II.B of my report; The '634 Patent.

²³⁴ The expiry date of the patent is discussed above in Section II.B of my report; The '069 Patent.

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f. The ‘497 Patent was issued July 19, 2005 and expires August 20, 2022, for a term of approximately 17.1 years; 7.4 years from the date of the hypothetical negotiation.²³⁵

90. This is already accounted for in my royalty calculations.

8. The established profitability of the product made under the patent; its commercial success; and its current popularity

91. The commercial success of the infringing products is demonstrated by their high sales and high profitability. It is further evidenced by their popularity as well as the recognition and positive reception they have received in the industry, as many news outlets and industry reports have rankings and awards to commend the infringing products.

[REDACTED]

93. In general, video games have low marginal costs after the games have been developed,²⁴⁰ and high initial fixed costs during development, as “items, levels and visual effects have

²³⁵ The expiry date of the patent is discussed above in Section II.B of my report; The ‘497 Patent.

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become more intricate and detailed,” requiring developers to invest more into artists and game designers.²⁴¹ [REDACTED]

[REDACTED]

94. The fact that Take-Two willingly invested so much towards the fixed development costs of each of its two franchises shows how it perceives these franchises to be commercially successful. Not only did Take-Two heavily invest into the initial development of each game, it also invested long-term in each franchise’s future. The continued launch of successive games,²⁴⁴ also speaks to the commercial success of the products. First, this pattern demonstrates that Take-Two expects the franchises to be commercially successful over the long term as it is willing to put forth large initial development costs for games within the same franchise, within a year apart in the case of the NBA 2K franchise.

[REDACTED]

²⁴⁰ Cowen, Tyler and Alex Tabarrok. *Modern Principles of Economics*. New York: Worth Publishers, 2010 (“Cowen and Tabarrok”), p. 228.

²⁴¹ “Why video games are so expensive to develop,” *The Economist*, available at <https://www.economist.com/blogs/economist-explains/2014/09/economist-explains-15>, accessed September 12, 2017; “The economics of the video games industry,” *JRC European Commission*, available at <http://innovation-regulation2.telecom-paristech.fr/wp-content/uploads/2011/10/JPS-videogame-economics-paris-13-09-2011.pdf>, accessed September 12, 2017; Cowen and Tabarrok, p. 228.

[REDACTED]

²⁴⁴ **Exhibit 3.**

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[REDACTED]

95. The commercial success of the accused products is also evident in the recognition received from the industry. As previously discussed, the Grand Theft Auto and NBA 2K franchises have great value to the Defendants’ customers. Both franchises have been consistently critically acclaimed and regarded in the industry as among the top rated.
96. In particular, Grand Theft Auto V was awarded “Best Overall Action Game” by IGN’s Best of 2013.²⁴⁶ Additionally, for Grand Theft Auto’s multiplayer component, GameTrailers awarded Grand Theft Auto Online as the “Best Multiplayer” in 2013.²⁴⁷ NBA 2K15 is listed by Forbes as one of the “Top Ten Best-Selling Video Games of 2014,” and NBA 2K16 is listed by Game Spot as one of the top selling video games of 2015.²⁴⁸
97. As discussed here and throughout the report, the accused products with infringing game modes and benefits attributable to the Patents-in-Suit have enjoyed considerable marketplace success and profits for Take-Two. However, since substantial commercial success of video game products in general was presumably a factor in the verdict and

[REDACTED]

²⁴⁶ “Best Overall Action Game,” *IGN*, available at http://www.ign.com/wikis/best-of-2013/Best_Overall_Action_Game, accessed on September 18, 2017.

²⁴⁷ “Game of the Year Awards 2013 – Best Multiplayer Game,” *GameTrailers*, available at <https://www.youtube.com/watch?v=TDu3Nz79BPc>, accessed on September 19, 2017, at 3:16.

²⁴⁸ “The Top Ten Best-Selling Video Games of 2014”; “Top Ten Best-Selling US Games of 2015 and December Revealed.”

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license agreements that I discussed earlier in the report, no further adjustment is needed for this *Georgia-Pacific* factor.

9. The utility and advantages of the patented property over the old modes or devices, if any, that are used for working out similar results

10. The nature of the patented invention; the character of the commercial embodiment of it as owned and produced by the licensor; and the benefits to those who have used the invention

98. *Georgia-Pacific* factors 9 and 10 are similar in nature, and therefore, I discuss them together here. I discuss several of the elements relevant to these factors in previous sections of my report. Dr. Medvidovic and Dr. Mitzenmacher have indicated that the Patents-in-Suit, as a whole, enable a reliable, fast, and cost-effective multiplayer network.²⁴⁹ Dr. Bims also opines that “the Asserted Patents provide significant benefits for network-based multiplayer gaming functionality, by enabling a multiplayer game experience that is stable, scalable, reliable and efficient.”²⁵⁰ In addition, Dr. Medvidovic and Dr. Mitzenmacher have also indicated that they are not aware of any alleged viable NIA and that potential NIAs may not perform comparably to the invention enabled by the Patents-in-Suit.²⁵¹ To the extent that an NIA is even feasible, Dr. Valerdi has indicated that it would be very costly to develop.²⁵²

99. I also discuss the Defendants’ use of the invention enabled by the Patents-in-Suit, as it has enabled the commercial sale of infringing products.²⁵³ In short, not only have the

²⁴⁹ Dr. Medvidovic Interview; Dr. Medvidovic Report, pp. 15-16; Dr. Mitzenmacher Interview; Dr. Mitzenmacher Report, pp. 160-161; *See, Section III.C.* of my report.

²⁵⁰ Dr. Bims further discussed these benefits in more detail as well. Dr. Bims Report, p. 1.

²⁵¹ Dr. Medvidovic Interview; Dr. Medvidovic Report, pp. 153-157; Dr. Mitzenmacher Interview; Dr. Mitzenmacher Report, pp. 158-161; *See, Section III.C.* of my report.

²⁵² Dr. Valerdi Report, pp. 12-13.

²⁵³ *See* discussion of other *Georgia-Pacific* factors in **Section III.E.** of this report, including but not limited to, *Georgia-Pacific* factor 8 and 11.

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infringing products been highly commercially successful, but the commercial embodiment of the invention (namely the multiplayer feature, efficiency, and solving of latency issues), has played a prominent role in the infringing products. Moreover the multiplayer feature has been highly recognized by industry on many instances.

100. Defendants recognize the importance of the patented technology. For example, In Defendant’s 10-K for the fiscal year that ended in March 2017, Take-Two acknowledge the importance of connectivity to its “business, financial condition and operating results.”²⁵⁴ In addition, Take-Two acknowledged that “[a]ny significant system or network disruption could have a negative impact on our business. ... We rely on the efficient and uninterrupted operation of complex information technology systems and networks”.²⁵⁵
101. In addition, Take-Two has also stated in their 10-K that “[w]e expect a significant portion of our games to be on-line enabled in the future, and therefore we must project our future server needs and make advance purchases of servers or server capacity to accommodate expected business demands. If we underestimate the amount of server capacity our business requires or if our business were to grow more quickly than expected, our customers may experience service problems, such as slow or interrupted gaming access. Insufficient server capacity may result in decreased sales, a loss of our customer base and adverse consequences to our reputation.”²⁵⁶ Defendants provide customer services support via the Internet to help customers troubleshoot GTA Online connection issues, such as getting disconnected, problems with matchmaking and staying connected to other

²⁵⁴ AB-TT 004344-504 at 353.

²⁵⁵ AB-TT 004344-504 at 355.

²⁵⁶ AB-TT 004344-504 at 359.

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players.²⁵⁷ Defendants have a GTA Online server status web page that tells customers whether there is an outage or scheduled maintenance going on.²⁵⁸ Take-Two also offers customer service support for customers who experience issues with the operating of their products, such as having difficulty connecting to online games. Customer support is offered via phone or Internet through their 2K Support Website. They may also communicate potential issues, such as connectivity issues, to customers over social media.²⁵⁹

11. The extent to which the infringer has made use of the invention; and any evidence probative of the value of that use

102. The Defendants’ use of the invention is evident in the number of games released with the multiplayer feature across several franchises as well as the feature’s prominence within those games. Moreover, the fact that there are forthcoming product launches that continue to incorporate and develop the multiplayer feature is evidence that the Defendants perceive continued value in that feature.
103. Multiplayer capability in games is highly valuable to Take-Two. Multiplayer features have increasingly become prominent in the Defendants’ games and franchises since at least 2008.²⁶⁰ The Grand Theft Auto franchise, for example, heavily features multiplayer in Grand Theft Auto Online. Moreover, the first game with multiplayer capabilities in the franchise dates back to 2008.²⁶¹ The value of the multiplayer feature in the Grand Theft

²⁵⁷ TTWO0023859-66.

²⁵⁸ TTWO0023859-66.

²⁶⁰ Take-Two’s Objections and Responses Nos. 1-7, p. 16.

²⁶¹ “Grand Theft Auto V: Xbox 360,” *Amazon.com*, available at <https://www.amazon.com/Grand-Theft-Auto-V-Xbox-360/dp/B0050SYILE?th=1>, accessed on September 15, 2017. Grand Theft Auto IV for Xbox was released April 29, 2008, and already included multiplayer capabilities: “Grand Theft Auto IV: Xbox 360,” *Amazon.com*,

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Auto franchise is further exemplified by the recognition it has received in the industry, as it is considered to be the best multiplayer game by many awards and news outlets, including the BAFTA Awards and IGN.²⁶²

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

105. Grand Theft Auto V’s multiplayer component, Grand Theft Auto Online, has been lauded by the media and investors for its “strong continued digital growth” by “still setting revenue highs in its fourth year of operations.”²⁶⁶ [REDACTED]

[REDACTED]

[REDACTED]

106. Further demonstrating the value of multiplayer is the fact that both of Defendants’ accused franchises plan to prominently feature and develop it in their future releases. The online multiplayer version of Grand Theft Auto has been crucial to the success of the

available at <https://www.amazon.com/Grand-Theft-Auto-IV-Xbox-360/dp/B000FRU1UM?th=1>, accessed on September 15, 2017.

²⁶² TTW00024233-78 at 37.

[REDACTED]

²⁶⁶ Take-Two surges 12% to record as Wall Street gushes over success of ‘Grand Theft Auto’ online,” *CNBC*, available at <https://www.cnn.com/2017/08/03/take-two-surges-11-percent-to-record-on-success-of-grand-theft-auto-online.html>, accessed September 18, 2017.

[REDACTED]

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franchise and has “transformed” the activities of Rockstar Games.²⁶⁸ Grand Theft Auto Online remains popular due to the continued support from its developers through frequent updates.²⁶⁹ Since 2013, Grand Theft Auto Online has continuously released new developments and updates to its gameplay.²⁷⁰ Recently, Grand Theft Auto Online was updated to include a new multiplayer mode, which includes new missions for teams of up to six players.²⁷¹ Additionally, another update that was released in 2017 was a new multiplayer mode that allows players to race each other online.²⁷² NBA 2K18, recently released on September 15, 2017, demonstrates NBA 2K’s commitment to developing multiplayer through “The Neighborhood,” a new multiplayer mode touted to be NBA 2K’s “bid to redefine online sports experience in video games.”²⁷³

²⁶⁸ “Take-Two: ‘Ideally, we will have at least one triple-A title every year’,” *GamesIndustry.biz*, available at <http://www.gamesindustry.biz/articles/2017-07-21-take-two-ideally-we-will-have-at-least-one-triple-a-title-every-year>, accessed September 18, 2017.

²⁶⁹ “GTA 6 release date, latest news, story info and wish list,” *Trusted Reviews*, available at <http://www.trustedreviews.com/news/gta-6-release-date-news-gameplay-story-trailers-and-wishlist-2993074>, accessed on September 18, 2017.

²⁷⁰ “GTA Online Capture Update Now Available,” *Rockstar Games*, available at <http://www.rockstargames.com/newswire/article/51990/gta-online-capture-update-coming-tomorrow.html>, accessed on September 18, 2017.

²⁷¹ “New in GTA Online: The Dewbauchee Vagner Supercar, Dawn Raid mode, Independence Day Moc Liveries & More,” *Rockstar Games*, available at <http://www.rockstargames.com/newswire/article/60233/New-in-GTA-Online-The-Dewbauchee-Vagner-Supercar-Dawn-Raid-Mode-Indepe>, accessed on September 18, 2017; “‘GTA Online’ update brings new multiplayer mode in patriotic swag,” *Engadget*, available at <https://www.engadget.com/2017/06/30/gta-online-dawn-raid-dewbauchee-vagner/>, accessed on September 18, 2017.

²⁷² “GTA Online: Tiny Racers Out Now,” *Rockstar Games*, available at <http://www.rockstargames.com/newswire/article/60188/GTA-Online-Tiny-Racers-Out-Now>, accessed on September 18, 2017.

²⁷³ “NBA 2K18 Gets a Huge Social Space with The Neighborhood,” *Twinfinite*, available at <http://twinfinite.net/2017/09/nba-2k18-the-neighborhood/>, accessed on September 18, 2017.

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12. The portion of the profit or of the selling price that may be customary in the particular businesses or in comparable businesses to allow for the use of the invention or analogous inventions

107. As I discussed above, I would not describe the licenses produced by Defendants as having established a “customary” price for the technology at issue.²⁷⁴

108. I understand that Uniloc sued Take-Two, Activision, and Electronic Arts, Inc. (“EA”) for infringement of the ‘216 Patent.²⁷⁵ I understand that this technology, while a different patent from the Patents-in-Suit also relates to networking in the context of video games. The technology embedded in the patent does not cover actual game play but enables security of download and gives access to network to the game players.²⁷⁶ Thus, it is at least worthwhile to consider what insights might be drawn from this litigation.

²⁷⁴ See, **Section III.E.2** for detailed description of licenses identified by the defendant. See, Plaintiffs’ First Amended Complaint for Patent Infringement, *Uniloc USA, Inc. and Uniloc Luxembourg S.A. v. Take-Two Interactive Software, Inc. and 2K Games, Inc.*, Case No. 6:12-CV-01013-LED, United States District Court for the Eastern District of Texas, January 3, 2013; see also, Plaintiffs’ Original Complaint for Patent Infringement, *Uniloc USA, Inc. and Uniloc Luxembourg S.A. v. Activision Blizzard, Inc.*, Case No. 6:13-CV-00256-LED, United States District Court for the Eastern District of Texas, March 21, 2013; see also, Plaintiffs’ Original Complaint for Patent Infringement, *Uniloc USA, Inc. and Uniloc Luxembourg S.A. v. Electronic Arts, Inc.*, Case No. 6:13-CV-00259, United States District Court for the Eastern District of Texas, March 21, 2013; see also, Verdict Form, *Uniloc USA, Inc. and Uniloc Luxembourg S.A. v. Electronic Arts, Inc.*, Case No. 6:13-CV-00259-RWS, United States District Court for the Eastern District of Texas, December 5, 2014; see also, Order of Dismissal with Prejudice, *Uniloc USA, Inc. et al. v. Activision Blizzard, Inc.*, Case No. 6:13-CV-00256-LED, United States District Court for the Eastern District of Texas, January 14, 2015; see also, Order, *Uniloc USA, Inc. and Uniloc Luxembourg S.A. v. Electronic Arts, Inc.*, Case No. 6:13-CV-00259-RWS, United States District Court for the Eastern District of Texas, January 11, 2016; see also, Order, *Uniloc USA, Inc. and Uniloc Luxembourg S.A. v. Take-Two Interactive Software, Inc. and 2K Games, Inc.*, Case No. 6:12-CV-01013-RWS, United States District Court for the Eastern District of Texas, January 5, 2017.

²⁷⁶ Jury Trial Transcript at 33:21-44:15, *Uniloc USA, Inc. and Uniloc Luxembourg S.A. v. Electronic Arts, Inc.*, Case No. 6:13-CV-00259-RWS, United States District Court for the Eastern District of Texas, December 3, 2014 (“Uniloc Jury Trial Transcript”); Dr. Bims Interview.

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109. The case involving EA went to trial, where the jury found that EA's Origin Entitlements infringed Uniloc's patent and awarded roughly \$4.9 million in damages from a reasonable royalty.²⁷⁷ I understand that after the jury verdict the parties settled and that the terms of that settlement were not disclosed in this case.²⁷⁸ From the EA case, it appears that the jury accepted the plaintiff's expert's damages amount. I understand that the expert determined an amount of total damage due to be around \$4.6 million (with an additional amount of approximately \$.3 million for prejudgment interest) based on his reliance of a license agreement between Microsoft and Uniloc for \$82.3 Million, in which approximately \$42 Million of that was attributed to Uniloc's '216 patent. When dividing \$42 million by the total number of units sold by Microsoft, the expert determined that a reasonable royalty in the Microsoft matter was approximately 11 ½ cents per unit.²⁷⁹ The expert then applied a rates of 20 cents per unit for EA's downloads and discs and a rate of 11 ½ cent per unit to EA's subscriptions, based on his analysis of the value of the patented technology for downloads and discs versus subscriptions.²⁸⁰ One additional relevant piece of testimony by the expert was an assessment that internal EA documents found that 60% of a game's value is attributed to multiplayer functionality.²⁸¹

²⁷⁷ Verdict Form, *Uniloc USA, Inc. and Uniloc Luxembourg S.A. v. Electronic Arts, Inc.*, Case No. 6:13-CV-00259-RWS, United States District Court for the Eastern District of Texas, December 5, 2014.

²⁷⁸ Order, *Uniloc USA, Inc. and Uniloc Luxembourg S.A. v. Electronic Arts, Inc.*, Case No. 6:13-CV-00259-RWS, United States District Court for the Eastern District of Texas, January 11, 2016.

²⁷⁹ Uniloc Jury Trial Transcript at 33:21-44:15.

²⁸⁰ The higher rate for EA, as compared with Microsoft, was due to the fact that users of EA games created an ongoing relationship with EA and accessed the platform on a continuous basis whereas users of Microsoft's products only used the infringing technology once at the beginning of their play. *See also*, Uniloc Jury Trial Transcript at 33:21-44:15.

²⁸¹ Uniloc Jury Trial Transcript at 33:21-44:15.

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110. Based on the following technical and economic factors, related to the *Georgia-Pacific* factors, the Uniloc verdict provides valuable insights regarding a reasonable royalty in this matter:

- a. The date of the verdict was shortly before the hypothetical negotiation date;
- b. The technology at issue is in the same general technological area, namely networking for video-gaming;²⁸² Indeed, Dr. Bims has opined that “the Asserted Patents and Uniloc’s ‘216 Patent both allow network access to the games, and utilization of a network that allows for game play.”²⁸³
- c. The jury verdict was reached after all discovery was completed and after a trial;
- d. The jury verdict was based on hypothetical negotiation and an assumption of validity and infringement, as would be the case in the hypothetical negotiation in this matter;²⁸⁴
- e. The licensor (Uniloc) was in a similar position vis-à-vis EA as Acceleration Bay is vis-à-vis the Defendants in this matter. Uniloc has sued several defendants, and the granting of a license to one entity might cause it to expect to lose potential licensing revenues from another entity;²⁸⁵ and
- f. The licensee (EA) was, like the Defendant, a manufacturer and developer of video games.²⁸⁶

111. However, the Uniloc jury verdict differs in one very important way from the technology at issue in this case, even though they are both in the same general space. The technology

²⁸² This relates to Georgia-Pacific factor 10.

²⁸³ Dr. Bims Report, p. 27.

²⁸⁴ This relates to Georgia-Pacific factor 15.

²⁸⁵ This relates to Georgia-Pacific factor 5.

²⁸⁶ This relates to Georgia-Pacific Factor 8.

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in the Uniloc patent related to activations and discrete communications within the network.²⁸⁷ By contrast, the patent in this matter relates to the underlying network configuration and, as such, relates to a greater number of actions and activities by the user and within the network.²⁸⁸ Dr. Bims has indicated that “the scope of the Asserted Patents is broader” than the ‘216 patent.²⁸⁹ Additionally, although the Uniloc verdict was a lump sum dollar amount, the trial testimony indicates that it was based on an amount applied per unit, making it possible to adjust for the difference in the nature, scope and value of the technology, the number of infringing products, and the difference in the duration of the hypothetical license.²⁹⁰ I discuss later how these differences can be addressed quantitatively such that the Uniloc verdict can inform a hypothetical negotiation in this matter.

112. In addition, I have similarly incorporated the cost of a potential NIA,²⁹¹ as estimated by Dr. Valerdi, into my analysis. I discuss my understanding of his methodology in **Section III.C** of my report. To the extent that the cost estimates provided by Dr. Valerdi reflect the ‘price’ of an NIA, I already account for this in my analysis.

13. The portion of the realizable profit that should be credited to the invention as distinguished from non-patented elements, the manufacturing process, business risks or significant features or improvements added by the infringer

113. Realizable profits must take into account the risks that businesses incur and are thus not solely a reflection of the value of the invention. As previously stated, production of video

²⁸⁷ Dr. Bims Interview; Dr. Bims Report, pp. 25-26.

²⁸⁸ This relates to Georgia-Pacific factors 9, 10, 11, and 13; Dr. Bims Report, pp. 25-28.

²⁸⁹ Dr. Bims Report, p. 27.

²⁹⁰ This relates to Georgia-Pacific factors 7 and 11.

²⁹¹ As discussed earlier, Dr. Medvidovic and Dr. Mitzenmacher do not believe there is a viable NIA.

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games requires companies to take on high fixed input costs, while marginal costs are relatively low.²⁹² However, these high fixed costs “increase risks”²⁹³ for businesses, as fixed costs always have to be paid, regardless of income.²⁹⁴ Businesses must “clear the fixed-cost hurdle,” otherwise they will “get into trouble.”²⁹⁵ Higher fixed costs can therefore lead to higher risk.²⁹⁶

114. Aside from multiplayer features, both of the accused franchises provide other benefits that also influence demand for their games. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Similarly, non-patented game elements were

presumably present in the jury verdict I have indicated. As such, the verdict may shed

²⁹² Cowen and Tabarrok, p. 228.

²⁹³ “The Concept of Operating Leverage,” *Noble Research Institute*, available at <https://www.noble.org/news/publications/ag-news-and-views/1998/may/the-concept-of-operating-leverage/>, accessed on September 22, 2017.

²⁹⁴ “Calculate Business Risk Using These Financial Ratios,” *the balance*, available at <https://www.thebalance.com/how-to-calculate-business-risk-393472>, accessed on September 22, 2017; “How does operating leverage affect business risk?” *Investopedia*, available at <http://www.investopedia.com/ask/answers/050515/how-does-operating-leverage-affect-business-risk.asp>, accessed on September 22, 2017.

²⁹⁵ “‘Invest in what you know’ says the legendary Peter,” *Morningstar*, available at <http://news.morningstar.com/articlenet/article.aspx?id=908>, accessed on September 22, 2017 (“‘Invest in what you know’”).

²⁹⁶ See also ‘Invest in what you know.’

[REDACTED]

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some light on the hypothetical negotiation at issue in this case. Therefore, no further adjustment is needed for this *Georgia-Pacific* factor.

14. The opinion testimony of qualified experts

115. I have considered the expert reports of Acceleration Bay's technical experts Dr. Valerdi, Dr. Bims, and Dr. Cole in forming my opinions. I have also considered interviews with Dr. Valerdi, Dr. Bims, Dr. Medvidovic, and Dr. Mitzenmacher.

15. The amount that a licensor (such as the patentee) and a licensee (such as the infringer) would have agreed upon (at the time the infringement began) if both had been reasonably and voluntarily trying to reach an agreement; that is, the amount which a prudent licensee—who desired, as a business proposition, to obtain a license to manufacture and sell a particular article embodying the patented invention—would have been willing to pay as a royalty and yet be able to make a reasonable profit and which amount would have been acceptable by a prudent patentee who was willing to grant a license

116. The entirety of my report is based on a hypothetical negotiation framework. I have outlined the elements of the framework above, and I calculate a reasonable royalty based on that framework below.

IV. Calculations

A. Overview

117. A reasonable royalty for the Patents-in-Suit bounded by the relevant bargaining range outlined above would have resulted from a hypothetical negotiation between Acceleration Bay and the Defendant. Based on my analysis of the relevant bargaining range as outlined above, a reasonable royalty for Defendant's infringement can be determined. I describe this determination below.

118. Based on the license agreements that I reviewed, the royalty would likely be structured as a lump sum amount, calculated as a dollar-per-unit royalty rate multiplied by an

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appropriate royalty base.²⁹⁹ In this case, the royalty rate would be modelled on the rate determined by the jury in the Uniloc verdict, adjusted to reflect differences in the *Georgia-Pacific* factors as between that verdict and the circumstances of the hypothetical negotiation in this matter. The appropriate royalty base is a measure of units, apportioned to account for the fact that only a portion of the usage of the video games may be attributable to the multiplayer modes, which are enabled by the Patents-in-Suit.

B. Reasonable Royalty Rate

119. I have estimated a reasonable royalty for the infringing products based on my analysis of the Uniloc verdict as discussed earlier in my report.
120. For the technical and economic reasons discussed previously, I consider the Uniloc verdict to have valuable insights regarding a reasonable royalty in this matter. However, as I have also noted, the jury verdict differs in one very important way from the technology at issue in this case, even though they are both in the same general space.
121. Whereas the Uniloc patent covers registration control to regulate access, the scope of the Patents-in-Suit is broader:³⁰⁰
- a. the technology of the ‘344 and ‘966 Patents is used every time players participate in an infringing multiplayer session of one of the infringing products;

²⁹⁹ As I discuss in detail below, Take Two has not produced complete data on units sold during the infringing period and for the relevant geographies despite requests from Acceleration Bay. *See*, Take-Two’s Responses to No. 3 and No. 6, pp. 2-3.

In particular, the measure of units produced for the NBA and GTA V games includes only disks, not downloads of the game. Furthermore, the measure of units for the NBA and GTA V games only includes disks sold in the US or manufactured in the US. Because the alleged infringement relates to all games sold worldwide, the measure of units produced by Take Two is not usable as a basis for calculating damages. As a result of the lack of relevant data production, I use a reasonable proxy for units, namely the number of unique users of the games during the infringing periods, data for which the Defendants did produce in discovery.

³⁰⁰ Dr. Bims Report, p. 27.

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- b. the ‘634 Patent is used when a player accesses matchmaking services for one of the infringing products;
 - c. the ‘147 Patent is used when a player is disconnected from one of these networks for the infringing products;
 - d. the ‘069 Patent is used when a player is added to a network for one of the infringing products; and
 - e. the ‘497 Patent is used when a player uses a port ordering algorithm to access matchmaking services for one of the Accused Products.
122. As stated in Dr. Bims’ Report, “the Patents-in-Suit are implicated every time a player uses one of the infringing modes of the Accused Products”³⁰¹ whereas the Uniloc patent “only provides for initial activation” of the game.³⁰² Dr. Bims also opines that the Patents-in-Suit have “significantly greater” value than the Uniloc patent “given that the complimentary functionalities provided by each of the [Patents-in-Suit] are regularly used for multiplayer game sessions of the [infringing products], rather than just once or for an occasional transaction.”³⁰³ As a result, Dr. Bims opines that, from the perspective of the technical expert in this matter, the “relative value” of the Patents-in-Suit is in the “range of 6 to 15 times the value” of the Uniloc patent.³⁰⁴
123. For the technical and economic reasons already discussed, namely the date of the verdict; the technology at issue; the timing and basis of the jury verdict; the similar positions of both Uniloc and Acceleration Bay; that the Defendant, like EA, is a manufacturer and developer of video games; and the opinion of Dr. Bims as well as my conversations with

³⁰¹ Dr. Bims Report, p. 28.

³⁰² Dr. Bims Report, p. 28.

³⁰³ Dr. Bims Report, p. 28.

³⁰⁴ Dr. Bims Report, p. 28.

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all of the other technical experts in this case, it is my opinion that Uniloc is both informative in determining a reasonable royalty in this matter and that the value of the Patents-in-Suit is considerably higher than that of the Uniloc patent. Specifically, the economic evidence as discussed throughout this report is consistent with the range of value stated by Dr. Bims.

124. As such, I estimate a reasonable royalty to be in the range of \$2.10 per user. My estimate is based in part on the Uniloc jury verdict and in part on the relative value opined by Dr. Bims. As discussed earlier in my report, the jury verdict which apparently accepted the plaintiffs' expert's damages estimation of 20 cents per unit is informative of the economic value of the Uniloc patent. In addition, Dr. Bims' opinion regarding the value of the Patents-in-Suit, as viewed by the technical expert in this case, together with my analysis of the *Georgia-Pacific* factors and all of the other information and evidence that I have reviewed, indicates that a reasonable royalty in this case is equal to 20 cents multiplied by the midpoint of the range of values determined by Dr. Bims (i.e., 10.5 times).
125. Despite a request to provide data on game sales, the Defendant has failed to provide data that I can use for my analysis.³⁰⁵ [REDACTED]

305

[REDACTED]

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- a. I understand that four of the Patents-in-Suit, specifically the ‘344, ‘966, ‘634, and ‘147 patents, pertain to an m-regular network where m is greater than or equal to three.³⁰⁹ As such it is reasonable to expect that the apportionment within the ‘344, ‘966, ‘634, and ‘147 Patents should be similar.
 - b. I also understand that the ‘069 Patent may pertain to instances where each participant is connected to three or more participants, although the network need not be m-regular. This will always be the case for a network that is regular where m is greater than or equal to 3.³¹⁰
 - c. I understand that the ‘497 Patent pertains to networks that are not necessarily m-regular and without a minimum number of participants.³¹¹
127. Since the ‘069 Patent and the ‘497 Patent are inclusive of broader types of m-regular and non m-regular networks respectively, they are likely to be at least as valuable as the ‘344, ‘966, ‘634, and ‘147 patents. However, to be conservative with regard to the ‘069 and the ‘497 Patents, for purposes of determining a royalty per patent, I reasonably assume that all of the Patents-in-Suit contribute equally to the overall royalty rate. Thus a reasonable royalty rate per patent is 35 cents per user.

■ [REDACTED]

[REDACTED]

[REDACTED]

³⁰⁹ Dr. Medvidovic Interview; Dr. Medvidovic Report pp. 21-22,32-35,143-144; Dr. Mitzenmacher Interview; Dr. Mitzenmacher Report, pp. 36.

³¹⁰ Dr. Medvidovic Interview; Dr. Medvidovic Report, pp. 28; Dr. Mitzenmacher Interview; Dr. Mitzenmacher Report, pp. 134-135.

³¹¹ Dr. Medvidovic Interview; Dr. Medvidovic Report, pp. 21-22; Dr. Mitzenmacher Interview; Dr. Mitzenmacher Report, p. 31.

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313 **Exhibit 3.**

314 PC may include PC and Mac; **Exhibit 3.**

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336 **Exhibit 7.**

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[REDACTED]

5. Infringing Modes

140. As discussed earlier, Grand Theft Auto V’s non-online mode is limited to single player and is not accused of infringement of the Patents-in-Suit.³³⁷ As also discussed earlier, I understand that Grand Theft Auto Online is always online and always multiplayer.³³⁸ As such, I understand that all unique users of Grand Theft Auto Online infringe the ‘497 Patent. As discussed earlier, I also understand that at least all unique users in the category “Jobs with 4 or more players” infringe on the Patents-in-Suit.³³⁹
141. I understand that unique users of the NBA 2K accused products, as identified by specific modes infringe on the Patents-in-Suit. Specifically, I understand that the modes identified in **Exhibit 8** infringe the Patents-in-Suit and the ‘497 Patent.
142. I then estimate the number unique users who infringe on some or all of the Patents-in-Suit based on the telemetry data and my understanding of the infringing modes or “Jobs”.³⁴⁰

³³⁷ See, **Section IV.C.1** of my report.

³³⁸ See, **Section IV.C.1** of my report.

³³⁹ See, **Section IV.C.1** of my report.

³⁴⁰ **Exhibit 9.** I have also been asked by counsel to calculate a separate estimate of damages under the assumption that the Grand Theft Auto telemetry data is limited only to fiscal year 2016. Aside from this assumption, my analysis is based on the same methodology described in this report and the exhibits.

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³⁴² [REDACTED] “GTA 6 and Beyond: Rockstar has ’45 Years Worth of Ideas,” *IGN*, available at <http://www.ign.com/articles/2013/10/03/gta-6-and-beyond-rockstar-has-45-years-worth-of-ideas>, accessed on October 3, 2017; “Rockstar came close to making Grand Theft Auto: Tokyo,” *Tech Radar*, available at <http://www.techradar.com/news/gaming/rockstar-came-close-to-making-grand-theft-auto-tokyo-1317622>, accessed on October 3, 2017.

[REDACTED]

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[REDACTED]

145. Furthermore, all analyst reports that I use³⁴⁷ recognize and emphasize the importance of the NBA 2K and Grand Theft Auto games to Take-Two’s strong performance.³⁴⁸

³⁴⁶ I am not aware that analyst reports specific to video game developers, such as Take Two, typically project the number of users of a company’s product.

³⁴⁷ In addition to the analyst reports that I use to calculate average growth rates in **Exhibit 10**, I have also reviewed an analyst reports from Credit Suisse AG and Piper Jaffray & Co. The growth rate for fiscal year 2017, as reported by Credit Suisse AG, is nearly ten times greater than the average growth rate of the Brean Capital, LLC, Jefferies Group LLC, and Macquarie Group analyst reports. The growth rate for fiscal year 2017, as reported by Piper Jaffray & Co., is about five times greater than the average growth rate of the Brean Capital, LLC, Jefferies Group LLC, and Macquarie Group analyst reports. To be conservative, I do not use the growth rates from Credit Suisse AG or Piper Jaffray & Co. as part of my average growth rate calculations. *See, Exhibit 10.*

³⁴⁸ According to Brean Capital, LLC, the expected release of Grand Theft Auto V for PC as well as the “improved monetization” of Grand Theft Auto Online point to higher earnings per share for Take-Two for fiscal year 2016. *See, Mitchell, Todd, "GTA V for PC Delayed Again, but Heists Confirmed," Brean Capital, LLC, February 25, 2015, pp.1-2.* According to Macquarie Group, Grand Theft Auto V is a “blockbuster title” and Grand Theft Auto Online “has been the single-largest contributor to digital revenues since the title’s

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Because none of these analyst reports provide franchise or game-specific projections, the growth rates reflect overall expected growth across all games. Nevertheless, because the analysts specifically mention the accused games as drivers of growth and because company-specific growth rates are the best publicly available information on Take-Two's projected sales growth, it is reasonable to assume that such growth rates would have informed a hypothetical negotiation as related to royalties on future sales. As such, in the event that Take-Two provides further information relevant to this matter, I reserve the right to update my findings accordingly.

[REDACTED]

D. Apportionment

147. It is my understanding that, in determining reasonable royalty damages, it is generally required that royalties be based on the value of the smallest saleable patent-practicing unit ("SSPPU"). In other words, a royalty established in litigation should not be based upon the entire value of a multi-component product that encompasses both the smallest saleable patent-practicing unit and the other non-patented components and features. The

launch." *See*, Schachter, Ben and John Merric, "Take-Two Interactive: F3Q: Another 10mm Units of GTA," Macquarie Group, February 3, 2015, p. 2.

According to Jefferies Group LLC, Take-Two's strong results in February 2015 was "[d]riven by [k]ey [c]onsole [t]itles GTA V and NBA 2K15." *See*, Fitzgerald, Brian, Brian Pitz, and Timothy O'Shea, "Take-Two Interactive Software (TTWO): Strong Results Driven by Key Console Titles GTA V and NBA 2K15," Jefferies Group LLC, February 3, 2015, p. 1.

³⁴⁹ As noted earlier, I do not use the growth rates from Credit Suisse AG or Piper Jaffray & Co. as part of my average growth rate calculations.

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royalty paid should be a reasonable proportion of the market price of the smallest saleable unit.

148. In this case, it is my understanding that the use of the multiplayer feature with m equal to three or more in the infringing products is the SSPPU, so the relevant question is how the revenues from the accused product should be apportioned to accurately reflect only the portion that is due to the Patents-in-Suit. This concept is embodied in *Georgia-Pacific* factor 11 and *Georgia-Pacific* factor 13 respectively stated below:

The extent to which the infringer has made use of the invention; and any evidence probative of the value of that use.

The portion of the realizable profit that should be credited to the invention as distinguished from non-patented elements, the manufacturing process, business risks, or significant features or improvements added by the infringers.

149. As discussed earlier, I am able to count the number of unique users who infringe on the Patents-in-Suit using the telemetry data provided by the Defendant and my understanding of the infringing modes or “Jobs”.

E. Reasonable Royalty Damages

150. With estimates of reasonable royalty and a royalty base³⁵⁰ for the duration of each patent,³⁵¹ I now calculate reasonable royalty damages using unique users of the infringing products from the date of the hypothetical negotiation through the date of the last patent expiry.³⁵²

³⁵⁰ **Exhibit 11A and Exhibit 11B.**

³⁵¹ **Exhibit 12.**

³⁵² **Exhibit 13.**

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³⁵³ **Exhibit 14,**
³⁵⁴ WACC is a calculation of a firm's cost of capital in which each category of capital (e.g. common stock, preferred stock, bonds, etc.) is weighted by its percentage of total capital. WACC is used as the discount rate applied to future cash flows for calculating a business' net present value, and it is often used in the financial modeling of internal investments. *See*, "Weighted Average Cost Of Capital – WACC," *Investopedia*, available at <http://www.investopedia.com/terms/w/wacc.asp>, accessed September 25, 2017; "Definition of WACC," *Corporate Finance Institute*, available at <https://corporatefinanceinstitute.com/resources/knowledge/finance/what-is-wacc-formula/>, accessed September 25, 2017.

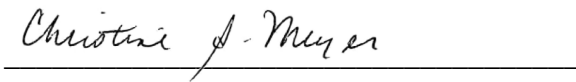
³⁵⁵ **Exhibit 15; Exhibit 16.** I also estimate damages in **Exhibit 15-N** and **Exhibit 16-N** under the possibility that the telemetry data is only specific to fiscal year 2016.

³⁵⁶ **Exhibit 15; Exhibit 16.**

³⁵⁷ **Exhibit 15; Exhibit 16.**

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Signed this 10th day of October, 2017:

A handwritten signature in cursive script, reading "Christine J. Meyer", is written above a solid horizontal line.

Christine Meyer, Ph.D.



EXHIBIT 1

Christine Meyer, Ph.D.
Managing Director

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CHRISTINE MEYER, Ph.D. **Managing Director**

Featured as one of *Global Competition Review's* “Women in Antitrust,” Dr. Christine Meyer is considered one of the foremost testifying economists in the areas of complex commercial litigation involving intellectual property, antitrust claims, and commercial damages.

In the area of intellectual property, Dr. Meyer has analyzed damages and provided expert testimony concerning issues arising from patent, trademark, and copyright infringement, the misappropriation of trade secrets, and breaches of contract. She has considerable expertise in analyzing lost profits, reasonable royalties, price erosion, commercial success, and irreparable harm. Dr. Meyer has analyzed economic issues in a wide range of industries, with much of her recent work involving pharmaceuticals. She has been retained on behalf of both branded and generic firms in matters that have included small molecule as well as biologic products. Her work has also included the valuation of patents, licenses, and potential business acquisitions.

In cases involving antitrust issues, Dr. Meyer has evaluated the competitive effects of mergers and acquisitions, the volume of commerce for criminal investigations, and antitrust claims and damages in cases involving alleged resale price maintenance, monopolization, and price discrimination. In addition, Dr. Meyer has also written, testified, and presented white papers and expert reports to the U.S. Federal Trade Commission (FTC) and U.S. Department of Justice.

Dr. Meyer has testified as an expert witness in bench and jury trials in state and federal courts in the United States—including the Southern District of New York and the Southern District of California—and Canada, and before the High Court of Justice of England and Wales. She has also written articles and book chapters about patent infringement damages, and has been asked to speak about economic issues related to intellectual property on numerous occasions, including by the FTC in its hearings entitled, “*The Evolving IP Marketplace*.”

Dr. Meyer earned her PhD in economics from the Massachusetts Institute of Technology, and a BS in economics from the United States Military Academy at West Point.

Christine Meyer, Ph.D

Education

Massachusetts Institute of Technology

Ph.D., Economics, 1995

United States Military Academy, West Point

B.S., Economics, 1988

Professional Experience

NERA Economic Consulting

2016- Managing Director

2015-2016 Senior Vice President

2006-2015 Vice President

2002-2006 Senior Consultant

2000-2002 Consultant

Colgate University

1999-2000 Visiting Assistant Professor

Taught courses in Statistics and Introductory Economics.

Bentley College

1995-1999 Assistant Professor

Taught courses in Statistics, Macroeconomics, Money and Banking, and the Economics of Race and Gender for undergraduate and graduate students.

Data Resources, Inc.

1995-1999 Consultant

Wrote several industry studies for the *U.S. Industry and Trade Outlook*, a Department of Commerce publication. Consulted on local macroeconomic forecasts.

Massachusetts Institute of Technology

1993-1995 Head Teaching Assistant

Taught courses in Macroeconomics.

1992 Research Assistant

Developed Fortran programs for Professor Jerry Hausman.

United States Army

1990-1991 First Lieutenant

Assistant Battalion Operations Officer and Platoon Leader, 101st Military Police

Christine Meyer, Ph.D

Company. Fort Campbell, Kentucky and Operation Desert Shield and Desert Storm, Saudi Arabia and Iraq.

1988-1990 Second Lieutenant
Platoon Leader and Executive Officer, Headquarters Company, Law Enforcement Command, Fort Campbell, Kentucky.

Office of Management and Budget, Personnel Policy Branch
1987 Summer Intern
Analyzed military pay and recruiting.

Honors and Professional Activities

Associate Editor of ABA Section of Antitrust Law, *Antitrust Magazine*, 2013-present

Global Competition Review's 100 "Women in Antitrust", 2009

Patricia Roberts Harris Award for Excellence in Pro Bono, Fried Frank, Harris, Shriver & Jacobson LLP, 2004

The Legal Aid Society Pro Bono Award for Assistance to Victims of the World Trade Center Tragedy, 2002

Rauch Faculty Enrichment Grant, Bentley College, 1997

Summer Research Grant, Bentley College, 1996 and 1997

National Science Foundation Scholarship, 1992-1994

Army Commendation Medal and Army Achievement Medal, 1990-1991

Testimony (2013 – 2017)

Expert report and deposition testimony, *Shuffle Tech International, LLC, et al., v. Scientific Games Corporation, et al.*, United States District Court for the Northern District of Illinois Eastern Division, July 25 and September 26, 2017.

Expert report and deposition testimony, *Finjan, Inc. v. Symantec Corp.*, United States District Court Northern District of California Oakland Division, July 31 and September 6, 2017.

Arbitration, *In The Matter of FMC Corporation and Willowood Sulfentrazone, LLC and Willowood, LLC*, American Arbitration Association, May 4, 2017.

Expert report and deposition, *Finjan, Inc. v. Blue Coat Systems, LLC*, United States District Court, Northern District of California San Jose Division, March 29 and May 8, 2017

Christine Meyer, Ph.D

Expert report and deposition testimony *Eli Lilly and Company and ICOS Corporation v. Actavis Laboratories UT, Inc., et al.*, United States District Court for the Eastern District of Virginia, Alexandria Division, March 13, April 27, 2017.

Expert report and deposition testimony in *Larry Pitt & Associates v. Lundy Law, LLP and L. Leonard Lundy*, United States District Court Eastern District of Pennsylvania, February 9 and March 27, 2017

Expert report, supplemental report, deposition testimony and testimony in *Russell Slifer v. CG Technology, L.P.*, United States District Court Southern District of New York, November 7, December 28, 2016, January 4, January 12 and 13, 2017.

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Exhibit 2

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Exhibit 3
Take-Two Release Dates of Accused Products

Franchise or Game	Accused Infringing Platforms¹			Release Date²
	PC	Xbox 360	Xbox One	
(a)	(b)	(c)	(d)	(e)
<u>Grand Theft Auto³</u>				
Grand Theft Auto V	X	X	X	September 17, 2013
Grand Theft Auto Online	X	X	X	October 1, 2013
<u>NBA 2K</u>				
NBA 2K15	X	X	X	October 7, 2014
NBA 2K16	X	X	X	September 29, 2015

Notes: All franchises are bolded and underlined. All games are bolded.

¹ Accused infringing platforms are: PC, Xbox 360, and Xbox One. "X" indicates a product is accused of infringing.

² If multiple release dates exist across platforms, the earliest release date is shown on this table.

³ I understand that games which are played on both Mac and PC of the Grand Theft Auto franchises are accused of infringing.

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Exhibit 8
Take-Two NBA 2K Infringing Game Modes

Game Mode (a)	Infringing ¹	
	All Patents-in-Suit (b)	The '497 Patent (c)
2K Pro Am	X	X
All Star 3Pt		X
All Star Dunk		X
Blacktop		X
Franchise	X	X
My Team	X	X
MyCAREER	X	X
MyCOURT	X	X
MyGM		X
MyLEAGUE		X
MyPARK	X	X
MyPlayer	X	X
MyTEAM		X
Online AllStars	X	X
Online Allstars	X	X
Online Crew	X	X
Online Fantasy Battle		X
Online Head To Head		X
Online Head to Head		X
Online Heroes		X
Online League		X
Online My Team		X
Online MyLeague		X
Online MyPlayer Blacktop	X	X
Online MyTeam		X
Online Team Up	X	X
Play Now Online		X
Playoff		X
Playoffs		X
Practice		X
Quick Game	X	X
Season		X
Training Camp		

Note: An "X" indicates that the associated game mode infringes the specified patent(s).

Source: I have been provided a list of infringing game modes by counsel.

[REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
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Exhibit 12

Patent Infringement

Patent	Expiration Date ¹	Hypothetical Negotiation Date through		
		FY21 ²	FY22 ³	FY23 ⁴
----- (Percent) -----				
(a)	(b)	(c)	(d)	(e)
6,701,344 ('344)	September 21, 2021	100 %	47 %	- %
6,714,966 ('966)	September 21, 2021	100	47	-
6,732,147 ('147)	July 20, 2022	100	100	30
6,829,634 ('634)	August 7, 2022	100	100	35
6,910,069 ('069)	July 9, 2022	100	100	27
6,920,497 ('497)	August 20, 2022	100	100	39

Notes: This exhibit is not specific to any particular franchise.

¹ I understand the expiration dates of the patents are as stated above. *See*, Meyer Report, Section II.B.

Take-Two defines fiscal year as April 1 through March 31 (Deposition of Hannah Sage, July 12, 2017, p. 19:21-24).

² The terms of the Patents-in-Suit all extend beyond FY21. Therefore, 100% of the period between the Hypothetical Negotiation Date and the end of FY21 is infringing.

³ The '344 and '966 Patents expire on September 21, 2021. Therefore, only the period between April 1, 2021 through September 21, 2021 is infringing for FY22 for these two patents. I calculated the percentage of the fiscal year that lies within the infringing period.

⁴ The '147, '634, '069, and '497 Patents expire in the FY23. Therefore, only the period between April 1, 2022 through the expiration date is infringing for these patents. I calculated the percentage of the fiscal year that lies within the infringing period for each patent. The '344 and '966 Patents would have already expired by FY23. Therefore, none of FY23 is part of the infringing period for these two patents.

Sources: Deposition of Hannah Sage, July 12, 2017, p. 19:21-24; Meyer Report, Section II.B.

[REDACTED]

[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
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EXHIBIT E

CONFIDENTIAL – OUTSIDE COUNSEL ONLY

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ACCELERATION BAY LLC,)	
)	
Plaintiff,)	
	)	C.A. No. 16-453 (RGA)
v.)	
	)	CONFIDENTIAL –
ACTIVISION BLIZZARD, INC.	)	OUTSIDE COUNSEL ONLY
)	
Defendant.)	
<hr/>		
ACCELERATION BAY LLC,)	
)	
Plaintiff,)	
	)	C.A. No. 16-454 (RGA)
v.)	
	)	CONFIDENTIAL –
ELECTRONIC ARTS INC.,	)	OUTSIDE COUNSEL ONLY
)	
Defendant.)	
<hr/>		
ACCELERATION BAY LLC,)	
)	
Plaintiff,)	
	)	C.A. No. 16-455 (RGA)
v.)	
	)	CONFIDENTIAL –
TAKE-TWO INTERACTIVE SOFTWARE,	)	OUTSIDE COUNSEL ONLY
INC., ROCKSTAR GAMES, INC. and)	
2K SPORTS, INC.,)	
)	
Defendants.)	

**DEFENDANTS’ BRIEF IN SUPPORT OF THEIR MOTION (“E”) TO PRECLUDE
PLAINTIFF FROM ARGUING THAT THE DATE OF THE HYPOTHETICAL
NEGOTIATION IS ANY DATE OTHER THAN THE DATE THE PLAINTIFF SERVED
ITS RESPECTIVE COMPLAINTS ON DEFENDANTS**

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July 5, 2017

Defendants move to preclude Acceleration from arguing that the date of the hypothetical negotiation is any date other than the date Plaintiff *served* the respective Complaints on each Defendant, as stated in Plaintiff's Court-Ordered interrogatory response. Defendants' motion is based on Acceleration's failure to comply with Special Master Order No. 3 requiring a proper response to Party Specific Interrogatory No. 2. Plaintiff made no serious effort to comply with this Order, and Defendants simply ask that the Plaintiff be required to live with its response, regardless of the impact that may later have on Plaintiff's case.

Substantively, this motion is familiar because Defendants previously moved to compel Acceleration to provide responses to Party Specific Interrogatory No. 2, which requests that Acceleration provide the date of the hypothetical negotiation (i.e. date of first alleged infringement) and the factual bases for this date. Defendants pointed out that this disclosure was essential to giving them a full and fair opportunity to rebut the contended date and to conduct discovery surrounding this date (e.g., related to a reasonable royalty at the time). After briefing and oral argument, Special Master Order No. 3 granted Defendants' motion to compel without qualification.

Acceleration responded subject to objections, which it filed with the district court. Acceleration's response was that the date of the hypothetical negotiation was the date Acceleration served the respective Complaints on each Defendant. Acceleration's objections to the district court were overruled, and Plaintiff has indicated that it is not supplementing its response to Party Specific Interrogatory No. 2.

Given that there is less than a month to complete fact discovery and Acceleration is refusing to provide a proper response Party Specific Interrogatory No. 2, Acceleration should have to live with its response and should be precluded from arguing that the date of the hypothetical negotiation is any date other than the date Acceleration *served* the respective Complaints on each Defendant, regardless of any future impact that may have on Acceleration's ability to present its damages case.

I. Acceleration Has Refused to Comply With the Special Master Order No. 3 To Disclose a Hypothetical Negotiation Date

Acceleration's plea of compliance flies in the face of both the letter and spirit of Special Master Order No. 3. The Federal Circuit has repeatedly recognized that: "[i]n general, the date of the hypothetical negotiation is the date that the infringement began." *LaserDynamics, Inc. v. Quanta Computer, Inc.*, 694 F.3d 51, 75 (Fed. Cir. 2012). Further, the court has "been careful to distinguish the hypothetical negotiation date from other dates that trigger infringement liability." *Id.*; *see also Wang Laboratories, Inc. v. Toshiba Corp.*, 993 F.2d 858, 870 (Fed. Cir. 1993) (explaining that the reasonable royalty is to be based on rate that would have hypothetically been negotiated on the date infringement began even if that date is prior to the date from which the infringer was given notice of infringement and even if that initial date precedes that cutoff date that the infringer will be liable for damages under the six year limitation period of 35 U.S.C.A. § 286). In other words, the date of the hypothetical negotiation is not the date that might trigger infringement liability.

Making no serious attempt to identify a hypothetical negotiation date, Acceleration contends that for purposes of the hypothetical negotiation for the reasonable royalty, infringement began with the service of the complaints in the predecessor cases. Ex. E-1, 13; Ex. E-2, 13; Ex. E-3, 13. Acceleration argues that it would be too burdensome for it to identify any date prior to the service dates. As explained, that is not the law. It is obviously absurd to contend that the dates of first infringement are, in all cases, the same dates Acceleration happened to file complaints against three different companies for more than a dozen products. Further, Acceleration has accused several products released prior to the service date of infringement. For example, World of Warcraft was first released in 2004 and the Blizzard downloader Acceleration accuses of infringement was released by 2010.

II. Acceleration’s Conduct Warrants Preclusion.

The Special Master is “specifically authorize[d] ... to decide any sanctions issues that are encompassed in or permitted by the Federal Rules of Civil Procedure relating to discovery” and “may by order impose on a party any noncontempt sanction provided by Rule 37 or 45.” D.I. 158 at 2 (citing and quoting Fed. R. Civ. P. 53(c)(2)). The Special Master’s “input on a request for sanctions” is “of significant assistance” to the district court. *Id.* The Special Master has available the full panoply of discovery sanctions to compel compliance with his orders. Fed. R. Civ. P. 37(b)(2)(A) (setting forth a non-exclusive list of possible sanctions). When imposing discretionary sanctions, “factors to be considered in evaluating propriety of sanctions for failure to comply with discovery are extent of party’s personal responsibility, history of dilatoriness, whether attorney’s or party’s conduct was willful or in bad faith, meritoriousness of claim, prejudice to other party, and appropriateness of alternative sanctions.” *Ali v. Sims*, 788 F.2d 954, 957 (3d Cir. 1986).

“The exclusion of non-disclosed evidence is ‘mandatory under Rule 37(c)(1) unless non-disclosure was justified or harmless.’” *Rossi v. City of Chicago*, 790 F.3d 729, 738 (7th Cir. 2015) (citation omitted). This automatic and mandatory exclusion applies where “a party fails to provide information or identify a witness as required by Rule 26(a) or (e),” (Fed. R. Civ. P. 37(c)(1)), including where a party has failed to supplement a discovery response “as ordered by the court,” (Fed. R. Civ. P. 26(e)(1)). Acceleration bears the burden of showing that its non-disclosure is justified or harmless. *See U.S. ex rel. Tennessee Valley Auth. v. 1.72 Acres of Land In Tennessee*, 821 F.3d 742, 752 (6th Cir. 2016). Acceleration has no basis for asserting a date of first infringement that is the date the respective Complaints were *served*.

Even if precluding Acceleration from arguing any other date was not a mandatory sanction, the Special Master should use his discretion to impose them for the same reasons. Acceleration’s failure to supplement its responses and the prejudiced worked by this failure on Defendants justifies a preclusion sanction. Defendants are severely prejudiced by Acceleration’s refusal to comply with the Special Master Order No. 3 and provide a response to Party Specific Interrogatory No. 2. In addition to having to file this second motion to compel, Defendants will not have an opportunity to take discovery concerning the time period under which the hypothetical negotiation would have occurred. Defendants won’t have the opportunity to develop evidence concerning other potential parties negotiating for a license at that time.

This prejudice is itself sufficient to warrant sanctions, as the Third Circuit “ha[s] construed prejudice to include the burden that a party must bear when forced to file motions in response to the strategic discovery tactics of an adversary.” *Ware v. Rodale Press, Inc.*, 322 F.3d 218, 223 (3d Cir. 2003) (holding that “failure to provide timely and specific information as to damages” was a discovery violation justifying exclusion of evidence and dismissal of the claim under Rule 37). Furthermore, Acceleration’s “failure to provide timely and specific information” has “imped[ed] [Activision’s] ability to prepare a full and complete defense.” *Id.*

Delaware courts under Rule 37(b)(2)(A) have precluded non-compliant parties from introducing undisclosed matters into support their claims. *Transportes Aereos de Angola v. Ronair, Inc.* 104 F.R.D. 499 (D. Del. 1985) (precluding noncompliant party from introducing evidence or testimony on issues where it refused to answer interrogatories “fully and forthrightly”); *Coca-Cola Bottling Co. of Shreveport v. Coca-Cola Co.*, 110 F.R.D. 363, 367 (D. Del. 1986) (prohibiting a party from 1) rebutting any facts the court established against it from this sanction, and 2) introducing designated matters that support its claims and defenses into evidence).

Defendants recognize that as a result of this requested preclusion, Plaintiff may not have a damages theory. Indeed, as explained above, the case law requires that the party seeking damages provide a date for the hypothetical negotiation. Defendants intend to argue that any damages theory based on a hypothetical negotiation of the date of service is not supportable and should be stricken. Plaintiff is represented by savvy patent counsel and long ago retained a damages expert. It certainly has had every opportunity to provide the date of the hypothetical negotiation and has not taken this discovery obligation seriously. The prejudice to Defendants from not having Plaintiff’s position on this critical issue warrants preclusion and potential exclusion of Plaintiff’s damages model.

Accordingly, Defendants request that the Special Master preclude Plaintiff from arguing that the date of the hypothetical negotiation (i.e. the date of first infringement) is any date other than the date that Acceleration *served* its respective Complaints on Defendants.

MORRIS, NICHOLS, ARSHT & TUNNELL LLP

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July 5, 2017

CERTIFICATE OF SERVICE

I hereby certify that on July 5, 2017, copies of the foregoing were caused to be

served upon the following in the manner indicated:

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/s/ Stephen J. Kraftschik
Stephen J. Kraftschik (#5623)

EXHIBIT E-1

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

ACCELERATION BAY LLC,)	
)	
Plaintiff,)	
)	
v.	)	C.A. No. 16-454 (RGA)
)	
ACTIVISION BLIZZARD, INC.,)	
Defendant.)	
)	
)	

**PLAINTIFF ACCELERATION BAY LLC’S FIRST SUPPLEMENTAL OBJECTIONS &
RESPONSES TO DEFENDANT ACTIVISION BLIZZARD, INC.’S
FIRST SET OF PARTY SPECIFIC INTERROGATORIES (NOS. 1, 2, 4)**

Plaintiff Acceleration Bay LLC (“Acceleration Bay” or “Plaintiff”) hereby further responds to the First Set of Party Specific Interrogatories (Nos. 1, 2 and 4) (the “Interrogatories”) of Defendant Activision Blizzard, Inc. (the “Defendant” or “Activision”) as follows:

RESERVATION OF RIGHTS AND GENERAL OBJECTIONS

Plaintiff incorporates by reference the Reservation of Rights and General Objections set forth in its Responses to Defendant’s First Set of Interrogatories, served on March 30, 2017.

SUPPLEMENTAL OBJECTIONS AND RESPONSES

ACTIVISION INTERROGATORY NO. 1:

Identify and describe Plaintiff’s damages from Defendant’s alleged infringement assuming a finding of infringement and validity including but not limited to a royalty, a royalty rate, and a royalty base. Include in you answer the following information: (a) a detailed description of the methodology for determining the damages; (b) all facts and reasons that Plaintiff contends it should be awarded more than a reasonable royalty; (c) the largest amount of damages that Plaintiff will seek from a jury for any infringement found by Defendant; and (d) the

identity of the owner or assignee of the Asserted Patents and the licensor or potential licensor at the time damages are determined.

RESPONSE TO ACTIVISION INTERROGATORY NO. 1:

Plaintiff objects to this Interrogatory to the extent it calls for a legal conclusion. Plaintiff objects to this Interrogatory to the extent it is comprised of multiple subparts, which Plaintiff will count against Defendant's limit. Plaintiff objects to this Interrogatory to the extent it seeks information beyond Plaintiff's actual knowledge, custody, or control. Plaintiff objects to this Interrogatory to the extent it is incomprehensible or ambiguous, particularly as to what is meant by "should be awarded more than a reasonable royalty." Plaintiff objects to this Interrogatory to the extent it seeks information protected by the attorney-client privilege, the work product doctrine, or any other applicable law, privilege, doctrine, or immunity. Plaintiff objects to this Interrogatory to the extent it seeks information within Defendant's possession, custody, or control, or to the extent it seeks information in the public domain. Plaintiff objects to this Interrogatory as unintelligible, overly broad, unduly burdensome, and ambiguous, including, *inter alia*, the terms "including but not limited to," "detailed description of the methodology," "all facts and reasons," and "the identity of the owner or assignee of the Asserted Patents and the licensor or potential licensor at the time the damages are determined."

Plaintiff objects to this Interrogatory as premature because it seeks disclosure of documents, information, and expert testimony subject to the schedule in this action. Specifically, the Scheduling Order provides that Plaintiff will serve an expert report on damages after the completion of fact discovery. Plaintiff incorporates by reference into this response the expert report it will serve on damages.

Subject to and without waiving the foregoing general and specific objections, and to the extent Plaintiff understands this Interrogatory, Plaintiff responds as follows:

Plaintiff seeks all damages to which it is entitled under U.S. patent laws, including 35 U.S.C. § 284, arising from Defendant's infringement. Plaintiff seeks damages in an amount adequate to compensate for the infringement, which includes, but is not limited to, a reasonable royalty for the use of the invention, together with interest and costs fixed by the Court.

Additionally, Plaintiff seeks an accounting of all infringing sales and revenues.

Plaintiff also seeks an award of attorneys' fees and expenses associated with the present action under 35 U.S.C. § 285, as well as enhanced damages under 35 U.S.C. § 284. Such costs, fees, and expenses cannot be computed at the present time and depend on a variety of factors, such as the length and intensity of the litigation and the positions that Defendant take. Plaintiff incorporates by reference its response to Interrogatory No. 3.

It is not possible at this time for Plaintiff to make a finalized computation of damages (or to identify with specificity documents reasonably available that relate to categories of damages) absent further investigation, discovery, and disclosure by Defendant, particularly because much of the information necessary to make such a computation is in the possession of Defendant, and may require expert analysis. For example, Plaintiff is seeking discovery from Defendant as to the revenues generated by Defendant's infringing activities, the number of users, licenses and subscriptions provided for the infringing products, as well as any cost savings realized by Defendant through their infringement and Defendant's past licensing practices. Information related to the users and their gameplay activities, and the details regarding the design, structure, operation, features, development and testing of its multiplayer and networking functionality, without geographic limitation is relevant. Such information includes any protocols, APIs,

libraries, and SDKs that are used by peers, clients, hosts, nodes, or servers in the network to distribute messages, game data, voice data, chat data, management data, and QoS data for the accused products around the world. Moreover, Defendant's patent infringement is ongoing and the amount of damages to which Plaintiff is entitled continues to grow. Accordingly, Plaintiff reserves the right to set forth and modify its damages theories and calculations as appropriate as the litigation progresses and in view of information Defendant provides in this case, as well as anticipated expert opinions and factual information provided related to damages.

Plaintiff's investigation of this matter is ongoing and it will comply with Fed. R. Civ. P. 26(e) should additional information become known to it.

SUPPLEMENTAL RESPONSE TO ACTIVISION INTERROGATORY NO. 1:

Plaintiff objects to this Interrogatory to the extent it calls for a legal conclusion. Plaintiff objects to this Interrogatory to the extent it is comprised of multiple subparts, including (1) disclosure of a royalty, a royalty rate, and a royalty base; (2) a detailed description of the methodology for determining the damages; (3) all facts and reasons that Plaintiff contends it should be awarded more than a reasonable royalty; (4) the largest amount of damages that Plaintiff will seek from a jury for any infringement found by Defendant; and (5) the identity of the owner or assignee of the Asserted Patents and the licensor or potential licensor at the time damages are determined. Plaintiff will count this interrogatory as five interrogatories against Defendant's limit. Plaintiff objects to this Interrogatory to the extent it seeks information beyond Plaintiff's actual knowledge, custody, or control. Plaintiff objects to this Interrogatory to the extent it is incomprehensible or ambiguous, particularly as to what is meant by "should be awarded more than a reasonable royalty." Plaintiff objects to this Interrogatory to the extent it seeks information protected by the attorney-client privilege, the work product doctrine, or any

other applicable law, privilege, doctrine, or immunity. Plaintiff objects to this Interrogatory to the extent it seeks information within Defendant’s possession, custody, or control, or to the extent it seeks information in the public domain. Plaintiff objects to this Interrogatory as unintelligible, overly broad, unduly burdensome, and ambiguous, including, *inter alia*, the terms “including but not limited to,” “detailed description of the methodology,” “all facts and reasons,” and “the identity of the owner or assignee of the Asserted Patents and the licensor or potential licensor at the time the damages are determined.”

Plaintiff objects to this Interrogatory as premature because it seeks disclosure of documents, information, and expert testimony subject to the schedule in this action. Specifically, the Scheduling Order provides that Plaintiff will serve an expert report on damages after the completion of fact discovery. Plaintiff incorporates by reference into this response the expert report it will serve on damages.

Plaintiff provides this supplemental response to Defendant’s Interrogatory pursuant to the Special Master’s May 19, 2017 Order subject to the objections thereto Plaintiff will file with the Court.

Subject to and without waiving the foregoing general and specific objections, and to the extent Plaintiff understands this Interrogatory, Plaintiff responds as follows:

Plaintiff’s Damages Theories:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Plaintiff is actively seeking discovery on each of these theories and conferring with its damages expert, who will address them, along with the factors set forth in *Georgia Pacific Corp. v. United States Plywood Corp.*, 318 F. Supp. 1116 (S.D.N.Y. 1970), in an expert report after the close of fact discovery.

[REDACTED]

[REDACTED] Such costs, fees, and expenses cannot be computed at the present time and depend on a variety of factors, such as the length and intensity of the litigation and the positions that Defendant take. Plaintiff incorporates by reference its response to Interrogatory No. 3.

Relevant Evidence:

Plaintiff's damages will be based on evidence developed during discovery and at trial. Such evidence will include the confidential information of the parties' documents, testimony of fact witnesses and expert testimony. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Relevant information is also included in the deposition testimony and exhibits to those depositions taken in this litigation (and any relevant deposition or trial testimony in other litigations that contains relevant information), including but not limited to the depositions of Activision’s witnesses. *See, e.g.*, Griffith Tr. 246:19-253:9, 57:10-60:4; Dawson Tr. 116:10-119:12, 132:11-132:25, 159:13-159:15, 161:13-162:13, 162:23-163:24; Yaney Tr. 18-19, 112-114; Wolfson Tr. 54:2-57:10, 84:1-85:3, 115:25-116:18, 119:3-14, 150:14-152:4, 155:10-156:3, 165:23-166:18, 167:18-168:24. It is also expected that the upcoming depositions of Tony Hsu, Andy Yoon, Rob Kostich, Andrew Amadi and Neal Hubbard will be relevant to damages. Activision identified these witnesses as being knowledgeable regarding sales, marketing, financial matters, revenue and costs for the Accused Products.

Based on discovery to date, Plaintiff identifies the following exemplary documents in which damages related information is included, including revenue information, server usage information and marketing materials: Defendant’s Response and any supplemental responses to

Plaintiff's Common Interrogatory Nos. 2, 3, 7; ATVI0024805-846; ATVI0027728; ATVI0024803-04; ATVI0027728-31; ATVI0027358-60; ATVI0029908-946; ATVI0029962-986; ATVI0029414-870; ATVI0029686-734; ATVI0030009-51; ATVI0024187-24660; BUNGIE_AB000001 at 26-29, 88, 93.

Defendants have not provided updated financial documents for first quarter of 2017 and have not provided any financial data for the updated versions of its products identified of infringement on February 13, 2017, which are the subject of a pending motion to compel. Defendant has yet to produce information regarding the number of users, cost saving, connections, networks, and sessions, which are also part of Plaintiff's damages case. Lastly, as Defendant produced data in spreadsheets without adequate explanation or key, Acceleration Bay will need additional information from Defendant to properly analyze the data.

Royalty, Royalty Rate and Royalty Base and Methodology For Determining

Damages: [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Plaintiff will seek guidance from its expert as to an appropriate apportionment and royalty rate. [REDACTED]


[REDACTED]

[REDACTED] Plaintiff cannot calculate the total royalty without knowing the total base (which Defendant has not provided), the apportionment amount (which is a subject of expert opinion) and royalty rate (which is a subject of expert opinion and ongoing discovery). Plaintiff specifically objects to Special Master Order No. 3 to the extent it requires disclosure of this information at this time.

All facts and reasons that Plaintiff contends it should be awarded more than a reasonable royalty: Plaintiff incorporates by reference its response to Interrogatory No. 3, which sets forth the basis for its claim for enhanced damages, attorneys' fees and expenses associated with the present action under 35 U.S.C. §§ 284, 285. Specifically, Defendant's infringement is willful at least as of June 17, 2016, the filing date of the complaint in this case, if not earlier, because Defendant continued to infringe after being put on notice of their infringement after the first case was filed in 2015, *Acceleration Bay LLC v. Activision Blizzard, Inc.*, Case No. 15-cv-00228-RGA (D. Del. 2015). Defendant's ongoing infringement, the substantive weakness of its positions, particularly after the PTAB decisions on the asserted patents, and its failure to cooperate in discovery renders this case exceptional under 35 U.S.C. § 285.

Acceleration Bay's costs, fees, and expenses cannot be computed at the present time and depend on a variety of factors, such as the length and intensity of the litigation and the positions that Defendant take.

The largest amount of damages that Plaintiff will seek from a jury for any infringement found by Defendant: Plaintiff cannot determine the largest amount of damages that it will seek from a jury for Defendant's infringement at least because (1) Defendant's infringement is ongoing and continues to increase, (2) Defendant has not provided any discovery on the Accused Products identified in Plaintiff's February 13, 2017 Updated Identification of Accused Products, and (3) Plaintiff cannot calculate the total royalty without knowing the total base (which Defendant has not provided), the apportionment amount (which is a subject of expert opinion) and royalty rate (which is a subject of expert opinion and ongoing discovery).



[REDACTED]
[REDACTED]
[REDACTED] Plaintiff will seek additional damages through the remaining lifetime of the patent.

The identity of the owner or assignee of the Asserted Patents and the licensor or potential licensor at the time damages are determined: This subpart of the interrogatory is unclear, as Plaintiff is the owner the Asserted Patents, the assignee of the Asserted Patents from Boeing, and the licensor for damages purposes. [REDACTED]
[REDACTED]
[REDACTED]

Given the state of discovery and that expert reports are not due until after the close of fact discovery, Plaintiff objects to the Special Master's Order to the extent it requires a further response to this Interrogatory at this time.

Plaintiff's investigation of this matter is ongoing and it will comply with Fed. R. Civ. P. 26(e) should additional information become known to it.

ACTIVISION INTERROGATORY NO. 2:

Identify the date on which Plaintiff contends the hypothetical license negotiation should be deemed to have commenced, the full factual basis for that contention, including the product or products on which Plaintiff bases its contention, the specific features that Plaintiff contends are present in those product or products that were not present in prior products; and the documents that support Plaintiff's answer or to which You referred in preparing Your answer.

RESPONSE TO ACTIVISION INTERROGATORY NO. 2:

Plaintiff objects to this Interrogatory to the extent it is premature because it seeks disclosure of documents, information, and expert testimony subject to the schedule in this action. Plaintiff objects to this Interrogatory to the extent it seeks irrelevant information, particularly with respect to unnamed “prior products” or products not at issue in this case. Plaintiff objects to this Interrogatory to the extent it is comprised of multiple subparts, which Plaintiff will count against Defendant’s limit. Plaintiff objects to this Interrogatory to the extent it calls for a legal conclusion. Plaintiff objects to this Interrogatory to the extent it seeks information protected by the attorney-client privilege, the work product doctrine, or any other applicable law, privilege, doctrine, or immunity. Plaintiff objects to this Interrogatory to the extent it seeks information within Defendant’s possession, custody, or control, or to the extent it seeks information in the public domain. Plaintiff objects to this Interrogatory as vague, indefinite, overly broad, unduly burdensome, and ambiguous, including, *inter alia*, the terms “the full factual basis for that contention, including the product or products on which Plaintiff bases its contention, the specific features that Plaintiff contends are present in those product or products that were not present in prior products; and the documents that support Plaintiff’s answer or to which You referred in preparing Your answer.”

Subject to and without waiving the foregoing general and specific objections, and to the extent Plaintiff understands this Interrogatory, Plaintiff responds as follows:

The hypothetical license negotiation date is the date on which Defendant’s infringement began. Plaintiff requires further investigation, discovery, and disclosure by Defendant, particularly because the information necessary for identification of when Defendant’s infringement began is in the possession of Defendant, and may require expert analysis. Plaintiff

incorporates its Initial Claim Charts and Supplemental Claim Charts and its February 13, 2017 Updated Identification of Accused Products in response to this Interrogatory.

Plaintiff's investigation of this matter is ongoing and it will comply with Fed. R. Civ. P. 26(e) should additional information become known to it.

SUPPLEMENTAL RESPONSE TO ACTIVISION INTERROGATORY NO. 2:

Plaintiff objects to this Interrogatory to the extent it is premature because it seeks disclosure of documents, information, and expert testimony subject to the schedule in this action. Plaintiff objects to this Interrogatory to the extent it seeks irrelevant information, particularly with respect to unnamed "prior products" or products not at issue in this case. Plaintiff objects to this Interrogatory to the extent it is comprised of multiple subparts, which Plaintiff will count against Defendant's limit. Plaintiff objects to this Interrogatory to the extent it calls for a legal conclusion. Plaintiff objects to this Interrogatory to the extent it seeks information protected by the attorney-client privilege, the work product doctrine, or any other applicable law, privilege, doctrine, or immunity. Plaintiff objects to this Interrogatory to the extent it seeks information within Defendant's possession, custody, or control, or to the extent it seeks information in the public domain. Plaintiff objects to this Interrogatory as vague, indefinite, overly broad, unduly burdensome, and ambiguous, including, *inter alia*, the terms "the full factual basis for that contention, including the product or products on which Plaintiff bases its contention, the specific features that Plaintiff contends are present in those product or products that were not present in prior products; and the documents that support Plaintiff's answer or to which You referred in preparing Your answer."

Plaintiff provides this supplemental response to Defendant's Interrogatory pursuant to the Special Master's May 19, 2017 Order subject to the objections thereto Plaintiff will file with the Court.

Subject to and without waiving the foregoing general and specific objections, and to the extent Plaintiff understands this Interrogatory, Plaintiff responds as follows:

[REDACTED]

Plaintiff's investigation of this matter is ongoing and it will comply with Fed. R. Civ. P. 26(e) should additional information become known to it.

ACTIVISION INTERROGATORY NO. 4:

Identify and describe all products by Sony including but not limited to all versions of the Sony PlayStation gaming system and each and every game that can be played on a Sony gaming system that Plaintiff contends infringe the Asserted Patents.

RESPONSE TO ACTIVISION INTERROGATORY NO. 4:

Plaintiff objects to this Interrogatory as unintelligible, particularly as to what is meant by "all products by Sony." Plaintiff objects to this Interrogatory to the extent it calls for a legal

conclusion. Plaintiff objects to this Interrogatory to the extent it seeks information protected by the attorney-client privilege, the work product doctrine, or any other applicable law, privilege, doctrine, or immunity. Plaintiff objects to this Interrogatory to the extent it seeks information within Defendant's possession, custody, or control, or to the extent it seeks information in the public domain. Plaintiff objects to this Interrogatory as vague, indefinite, overly broad, unduly burdensome, and ambiguous, including, *inter alia*, the terms "all products by Sony including but not limited to all versions of the Sony PlayStation gaming system and each and every game that can be played on a Sony gaming system that Plaintiff contends infringe the Asserted Patents."

Pursuant to the foregoing general and specific objections, Plaintiff cannot answer the interrogatory as written.

SUPPLEMENTAL RESPONSE TO ACTIVISION INTERROGATORY NO. 4:

Plaintiff objects to this Interrogatory as unintelligible, particularly as to what is meant by "all products by Sony." Plaintiff objects to this Interrogatory to the extent it calls for a legal conclusion. Plaintiff objects to this Interrogatory to the extent it seeks information protected by the attorney-client privilege, the work product doctrine, or any other applicable law, privilege, doctrine, or immunity. Plaintiff objects to this Interrogatory to the extent it seeks information within Defendant's possession, custody, or control, or to the extent it seeks information in the public domain. Plaintiff objects to this Interrogatory as vague, indefinite, overly broad, unduly burdensome, and ambiguous, including, *inter alia*, the terms "all products by Sony including but not limited to all versions of the Sony PlayStation gaming system and each and every game that can be played on a Sony gaming system that Plaintiff contends infringe the Asserted Patents."

Plaintiff provides this supplemental response to Defendant's Interrogatory pursuant to the Special Master's May 19, 2017 Order subject to the objections thereto Plaintiff will file with the Court.

Pursuant to the foregoing general and specific objections, Plaintiff responds as follows:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Plaintiff's investigation of this matter is ongoing and it will comply with Fed. R. Civ. P. 26(e) should additional information become known to it.

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Dated: June 2, 2017

By: /s/ Philip A. Rovner
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CERTIFICATE OF SERVICE

I, Philip A. Rovner, hereby certify that, prior to 6 p.m. on June 2, 2017, the within document was served on the following counsel as indicated:

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Philip A. Rovner

EXHIBIT E-2

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

ACCELERATION BAY LLC,)	
)	
Plaintiff,)	
)	
v.	)	C.A. No. 16-454 (RGA)
)	
ELECTRONIC ARTS INC.,)	
)	
Defendant.)	
_____)	

PLAINTIFF ACCELERATION BAY LLC’S FIRST SUPPLEMENTAL OBJECTIONS AND RESPONSES TO DEFENDANT ELECTRONIC ARTS INC.’S FIRST SET OF PARTY SPECIFIC INTERROGATORIES (NOS. 1, 2, 4)

Plaintiff Acceleration Bay LLC (“Acceleration Bay” or “Plaintiff”) hereby further responds to the First Set of Party Specific Interrogatories (Nos. 1, 2 and 4) (the “Interrogatories”) of Defendant Electronic Arts Inc. (the “Defendant”) as follows:

RESERVATION OF RIGHTS AND GENERAL OBJECTIONS

Plaintiff incorporates by reference the Reservation of Rights and General Objections set forth in its Responses to Defendant’s First Set of Interrogatories, served on March 30, 2017.

SUPPLEMENTAL OBJECTIONS AND RESPONSES

EA INTERROGATORY NO. 1:

Identify and describe Plaintiff’s damages from Defendant’s alleged infringement assuming a finding of infringement and validity including but not limited to a royalty, a royalty rate, and a royalty base. Include in you answer the following information: (a) a detailed description of the methodology for determining the damages; (b) all facts and reasons that Plaintiff contends it should be awarded more than a reasonable royalty; (c) the largest amount of damages that Plaintiff will seek from a jury for any infringement found by Defendant; and (d) the

identity of the owner or assignee of the Asserted Patents and the licensor or potential licensor at the time damages are determined.

RESPONSE TO EA INTERROGATORY NO. 1:

Plaintiff objects to this Interrogatory to the extent it calls for a legal conclusion. Plaintiff objects to this Interrogatory to the extent it is comprised of multiple subparts, which Plaintiff will count against Defendant's limit. Plaintiff objects to this Interrogatory to the extent it seeks information beyond Plaintiff's actual knowledge, custody, or control. Plaintiff objects to this Interrogatory to the extent it is incomprehensible or ambiguous, particularly as to what is meant by "should be awarded more than a reasonable royalty." Plaintiff objects to this Interrogatory to the extent it seeks information protected by the attorney-client privilege, the work product doctrine, or any other applicable law, privilege, doctrine, or immunity. Plaintiff objects to this Interrogatory to the extent it seeks information within Defendant's possession, custody, or control, or to the extent it seeks information in the public domain. Plaintiff objects to this Interrogatory as unintelligible, overly broad, unduly burdensome, and ambiguous, including, *inter alia*, the terms "including but not limited to," "detailed description of the methodology," "all facts and reasons," and "the identity of the owner or assignee of the Asserted Patents and the licensor or potential licensor at the time the damages are determined."

Plaintiff objects to this Interrogatory as premature because it seeks disclosure of documents, information, and expert testimony subject to the schedule in this action. Specifically, the Scheduling Order provides that Plaintiff will serve an expert report on damages after the completion of fact discovery. Plaintiff incorporates by reference into this response the expert report it will serve on damages.

Subject to and without waiving the foregoing general and specific objections, and to the extent Plaintiff understands this Interrogatory, Plaintiff responds as follows:

Plaintiff seeks all damages to which it is entitled under U.S. patent laws, including 35 U.S.C. § 284, arising from Defendant's infringement. Plaintiff seeks damages in an amount adequate to compensate for the infringement, which includes, but is not limited to, a reasonable royalty for the use of the invention, together with interest and costs fixed by the Court.

Additionally, Plaintiff seeks an accounting of all infringing sales and revenues.

Plaintiff also seeks an award of attorneys' fees and expenses associated with the present action under 35 U.S.C. § 285, as well as enhanced damages under 35 U.S.C. § 284. Such costs, fees, and expenses cannot be computed at the present time and depend on a variety of factors, such as the length and intensity of the litigation and the positions that Defendant take. Plaintiff incorporates by reference its response to Interrogatory No. 3.

It is not possible at this time for Plaintiff to make a finalized computation of damages (or to identify with specificity documents reasonably available that relate to categories of damages) absent further investigation, discovery, and disclosure by Defendant, particularly because much of the information necessary to make such a computation is in the possession of Defendant, and may require expert analysis. For example, Plaintiff is seeking discovery from Defendant as to the revenues generated by Defendant's infringing activities, the number of users, licenses and subscriptions provided for the infringing products, as well as any cost savings realized by Defendant through their infringement and Defendant's past licensing practices. Information related to the users and their gameplay activities, and the details regarding the design, structure, operation, features, development and testing of its multiplayer and networking functionality, without geographic limitation is relevant. Such information includes any protocols, APIs,

libraries, and SDKs that are used by peers, clients, hosts, nodes, or servers in the network to distribute messages, game data, voice data, chat data, management data, and QoS data for the accused products around the world. Moreover, Defendant's patent infringement is ongoing and the amount of damages to which Plaintiff is entitled continues to grow. Accordingly, Plaintiff reserves the right to set forth and modify its damages theories and calculations as appropriate as the litigation progresses and in view of information Defendant provides in this case, as well as anticipated expert opinions and factual information provided related to damages.

Plaintiff's investigation of this matter is ongoing and it will comply with Fed. R. Civ. P. 26(e) should additional information become known to it.

SUPPLEMENTAL RESPONSE TO EA INTERROGATORY NO. 1:

Plaintiff objects to this Interrogatory to the extent it calls for a legal conclusion. Plaintiff objects to this Interrogatory to the extent it is comprised of multiple subparts, including (1) disclosure of a royalty, a royalty rate, and a royalty base; (2) a detailed description of the methodology for determining the damages; (3) all facts and reasons that Plaintiff contends it should be awarded more than a reasonable royalty; (4) the largest amount of damages that Plaintiff will seek from a jury for any infringement found by Defendant; and (5) the identity of the owner or assignee of the Asserted Patents and the licensor or potential licensor at the time damages are determined. Plaintiff will count this interrogatory as five interrogatories against Defendant's limit. Plaintiff objects to this Interrogatory to the extent it seeks information beyond Plaintiff's actual knowledge, custody, or control. Plaintiff objects to this Interrogatory to the extent it is incomprehensible or ambiguous, particularly as to what is meant by "should be awarded more than a reasonable royalty." Plaintiff objects to this Interrogatory to the extent it seeks information protected by the attorney-client privilege, the work product doctrine, or any

other applicable law, privilege, doctrine, or immunity. Plaintiff objects to this Interrogatory to the extent it seeks information within Defendant’s possession, custody, or control, or to the extent it seeks information in the public domain. Plaintiff objects to this Interrogatory as unintelligible, overly broad, unduly burdensome, and ambiguous, including, *inter alia*, the terms “including but not limited to,” “detailed description of the methodology,” “all facts and reasons,” and “the identity of the owner or assignee of the Asserted Patents and the licensor or potential licensor at the time the damages are determined.”

Plaintiff objects to this Interrogatory as premature because it seeks disclosure of documents, information, and expert testimony subject to the schedule in this action. Specifically, the Scheduling Order provides that Plaintiff will serve an expert report on damages after the completion of fact discovery. Plaintiff incorporates by reference into this response the expert report it will serve on damages.

Plaintiff provides this supplemental response to Defendant’s Interrogatory pursuant to the Special Master’s May 19, 2017 Order subject to the objections thereto Plaintiff will file with the Court.

Subject to and without waiving the foregoing general and specific objections, and to the extent Plaintiff understands this Interrogatory, Plaintiff responds as follows:

Plaintiff’s Damages Theories:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Plaintiff is actively seeking discovery on each of these theories and conferring with its damages expert, who will address them, along with the factors set forth in *Georgia Pacific Corp. v. United States Plywood Corp.*, 318 F. Supp. 1116 (S.D.N.Y. 1970), in an expert report after the close of fact discovery.

[REDACTED]

[REDACTED] Such costs, fees, and expenses cannot be computed at the present time and depend on a variety of factors, such as the length and intensity of the litigation and the positions that Defendant take. Plaintiff incorporates by reference its response to Interrogatory No. 3.

Relevant Evidence: Plaintiff's damages will be based on evidence developed during discovery and at trial. Such evidence will include the confidential information of the parties' documents, testimony of fact witnesses and expert testimony. [REDACTED]

[REDACTED]

[REDACTED]

Relevant information is also included in the deposition testimony and exhibits to those depositions taken in this litigation (and any relevant deposition or trial testimony in other litigations that contains relevant information), including but not limited to the deposition of EA’s witnesses. *See, e.g.*, Lo Tr. 130:22-23, 131:22-132:5; Smith Tr. 22:1-23:3, 97:13-17, 98:18-99:8, Poon Tr. 14:10-15, 42:4-10, 115:20-116:15; Price Tr. 20:1-21:1, 23:17-24:5, 42:8-43:4, 44:22-45:18, 79:3-80:21, 88:4-90:12, 94:5-95:19, 112:12-115:19, 119:13-121:5, 125:1-126:4. Plaintiff also expects that the upcoming depositions of Brian Huber, Nick Channon and Defendant’s 30(b)(6) designees will be relevant to damages. Defendant identified these witnesses as being knowledgeable regarding the functionality, sales, marketing, financial matters, revenue and costs for the Accused Products.

Based on discovery to date, Plaintiff identifies the following exemplary documents in which damages related information is included, including revenue and unit data, forecasts, usage

information and marketing materials: Defendant's Response and any supplemental responses to Plaintiff's Common Interrogatory Nos. 2, 3, 7; EA0024408, EA0024417-26, EA0024497, EA003400-07, EA0030905-982, EA0032972-992; EA0034008-11; EA32180-251, EA0030199-982; AB-EA 003949-575; EA0023147-536.

Defendants have not provided updated financial documents for 2017 and have not provided any financial data for the updated versions of the products identified of infringement on February 13, 2017, which are the subject of a pending motion to compel. Defendant has also yet to produce information regarding the cost savings and network costs related to the Accused Products. While it appears that Defendant recently produced spreadsheets that appear to contain information regarding at least some of the number of users and sessions, it appears that information for all of the Accused Products has not been provided and the time frame for such data has been limited. In addition, the data was produced without adequate explanation or information regarding what is contained in such spreadsheets, as such additional information from Defendant is required to properly analyze the data.

Royalty, Royalty Rate and Royalty Base and Methodology For Determining

Damages: [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Plaintiff will seek guidance from its expert as to an appropriate apportionment and royalty rate. [REDACTED]

[REDACTED]

[REDACTED] Plaintiff cannot calculate the total royalty without knowing the total base (which Defendant has not provided), the apportionment amount (which is a subject of expert opinion)

and royalty rate (which is a subject of expert opinion and ongoing discovery). Plaintiff specifically objects to Special Master Order No. 3 to the extent it requires disclosure of this information at this time.

All facts and reasons that Plaintiff contends it should be awarded more than a reasonable royalty: Plaintiff incorporates by reference its responses to Interrogatory No. 3, which set forth the basis for its claim for enhanced damages, attorneys' fees and expenses associated with the present action under 35 U.S.C. §§ 284, 285. Specifically, Defendant's infringement is willful at least as of April 28, 2010, if not earlier, because Defendant continued to infringe after being put on notice of its infringement when agents for Boeing informed Defendant of the asserted patents, discussed their scope, and emailed Defendant a summary of the asserted patents that related those patents to multiplayer games. *See* ATI03477-79; ATI-02249-51; *see also* the May 3, 2017 Deposition of Steve Caliguri (e.g., rough draft transcript at pp. 196-205). Additionally, Defendant continued to infringe after being further informed of its infringement when the first case was filed on March 30, 2015 and served on March 31, 2015: *Acceleration Bay LLC v. Electronic Arts, Inc.*, Case No. 15-cv-00282-RGA (D. Del. 2015). Defendant's ongoing infringement, the substantive weakness of its positions, particularly after the PTAB decisions on the asserted patents, and its failure to cooperate in discovery (e.g., requiring Plaintiff to file multiple motions to compel, withholding access to source code, withholding core technical documents, and producing large volumes of highly relevant documents shortly before Fed. R. Civ. P. 30(b)(6) depositions when those documents should have been produced early in the case) render this case exceptional under 35 U.S.C. § 285.

Such costs, fees, and expenses cannot be computed at the present time and depend on a variety of factors, such as the length and intensity of the litigation and the positions that Defendant take.

The largest amount of damages that Plaintiff will seek from a jury for any infringement found by Defendant: Plaintiff cannot determine the largest amount of damages that it will seek from a jury for Defendant's infringement at least because (1) Defendant's infringement is ongoing and continues to increase, (2) Defendant has not provided any discovery on the Accused Products identified in Plaintiff's February 13, 2017 Updated Identification of Accused Products, and (3) Plaintiff cannot calculate the total royalty without knowing the total base (which Defendant has not provided), the apportionment amount (which is a subject of expert opinion) and royalty rate (which is a subject of expert opinion and ongoing discovery).

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Plaintiff will seek additional damages through the remaining lifetime of the patent.

The identity of the owner or assignee of the Asserted Patents and the licensor or potential licensor at the time damages are determined: This subpart of the interrogatory is unclear, as Plaintiff is the owner the Asserted Patents, the assignee of the Asserted Patents from Boeing, and the licensor for damages purposes. [REDACTED]

[REDACTED]

[REDACTED]

Given the state of discovery and that expert reports are not due until after the close of fact discovery, Plaintiff objects to the Special Master's Order to the extent it requires a further response to this Interrogatory at this time.

Plaintiff's investigation of this matter is ongoing and it will comply with Fed. R. Civ. P. 26(e) should additional information become known to it.

EA INTERROGATORY NO. 2:

Identify the date on which Plaintiff contends the hypothetical license negotiation should be deemed to have commenced, the full factual basis for that contention, including the product or products on which Plaintiff bases its contention, the specific features that Plaintiff contends are present in those product or products that were not present in prior products; and the documents that support Plaintiff's answer or to which You referred in preparing Your answer.

RESPONSE TO EA INTERROGATORY NO. 2:

Plaintiff objects to this Interrogatory to the extent it is premature because it seeks disclosure of documents, information, and expert testimony subject to the schedule in this action. Plaintiff objects to this Interrogatory to the extent it seeks irrelevant information, particularly with respect to unnamed "prior products" or products not at issue in this case. Plaintiff objects to this Interrogatory to the extent it is comprised of multiple subparts, which Plaintiff will count against Defendant's limit. Plaintiff objects to this Interrogatory to the extent it calls for a legal conclusion. Plaintiff objects to this Interrogatory to the extent it seeks information protected by the attorney-client privilege, the work product doctrine, or any other applicable law, privilege, doctrine, or immunity. Plaintiff objects to this Interrogatory to the extent it seeks information within Defendant's possession, custody, or control, or to the extent it seeks information in the public domain. Plaintiff objects to this Interrogatory as vague, indefinite, overly broad, unduly

burdensome, and ambiguous, including, *inter alia*, the terms “the full factual basis for that contention, including the product or products on which Plaintiff bases its contention, the specific features that Plaintiff contends are present in those product or products that were not present in prior products; and the documents that support Plaintiff’s answer or to which You referred in preparing Your answer.”

Subject to and without waiving the foregoing general and specific objections, and to the extent Plaintiff understands this Interrogatory, Plaintiff responds as follows:

The hypothetical license negotiation date is the date on which Defendant’s infringement began. Plaintiff requires further investigation, discovery, and disclosure by Defendant, particularly because the information necessary for identification of when Defendant’s infringement began is in the possession of Defendant, and may require expert analysis. Plaintiff incorporates its Initial Claim Charts and Supplemental Claim Charts and its February 13, 2017 Updated Identification of Accused Products in response to this Interrogatory.

Plaintiff’s investigation of this matter is ongoing and it will comply with Fed. R. Civ. P. 26(e) should additional information become known to it.

SUPPLEMENTAL RESPONSE TO EA INTERROGATORY NO. 2:

Plaintiff objects to this Interrogatory to the extent it is premature because it seeks disclosure of documents, information, and expert testimony subject to the schedule in this action. Plaintiff objects to this Interrogatory to the extent it seeks irrelevant information, particularly with respect to unnamed “prior products” or products not at issue in this case. Plaintiff objects to this Interrogatory to the extent it is comprised of multiple subparts, which Plaintiff will count against Defendant’s limit. Plaintiff objects to this Interrogatory to the extent it calls for a legal conclusion. Plaintiff objects to this Interrogatory to the extent it seeks information protected by

the attorney-client privilege, the work product doctrine, or any other applicable law, privilege, doctrine, or immunity. Plaintiff objects to this Interrogatory to the extent it seeks information within Defendant’s possession, custody, or control, or to the extent it seeks information in the public domain. Plaintiff objects to this Interrogatory as vague, indefinite, overly broad, unduly burdensome, and ambiguous, including, *inter alia*, the terms “the full factual basis for that contention, including the product or products on which Plaintiff bases its contention, the specific features that Plaintiff contends are present in those product or products that were not present in prior products; and the documents that support Plaintiff’s answer or to which You referred in preparing Your answer.”

Plaintiff provides this supplemental response to Defendant’s Interrogatory pursuant to the Special Master’s May 19, 2017 Order subject to the objections thereto Plaintiff will file with the Court.

Subject to and without waiving the foregoing general and specific objections, and to the extent Plaintiff understands this Interrogatory, Plaintiff responds as follows:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Plaintiff's investigation of this matter is ongoing and it will comply with Fed. R. Civ. P. 26(e) should additional information become known to it.

EA INTERROGATORY NO. 4:

Identify and describe all products by Sony including but not limited to all versions of the Sony PlayStation gaming system and each and every game that can be played on a Sony gaming system that Plaintiff contends infringe the Asserted Patents.

RESPONSE TO EA INTERROGATORY NO. 4:

Plaintiff objects to this Interrogatory as unintelligible, particularly as to what is meant by "all products by Sony." Plaintiff objects to this Interrogatory to the extent it calls for a legal conclusion. Plaintiff objects to this Interrogatory to the extent it seeks information protected by the attorney-client privilege, the work product doctrine, or any other applicable law, privilege, doctrine, or immunity. Plaintiff objects to this Interrogatory to the extent it seeks information within Defendant's possession, custody, or control, or to the extent it seeks information in the public domain. Plaintiff objects to this Interrogatory as vague, indefinite, overly broad, unduly burdensome, and ambiguous, including, inter alia, the terms "all products by Sony including but not limited to all versions of the Sony PlayStation gaming system and each and every game that can be played on a Sony gaming system that Plaintiff contends infringe the Asserted Patents."

Pursuant to the foregoing general and specific objections, Plaintiff cannot answer the interrogatory as written.

SUPPLEMENTAL RESPONSE TO EA INTERROGATORY NO. 4:

Plaintiff objects to this Interrogatory as unintelligible, particularly as to what is meant by "all products by Sony." Plaintiff objects to this Interrogatory to the extent it calls for a legal conclusion. Plaintiff objects to this Interrogatory to the extent it seeks information protected by

the attorney-client privilege, the work product doctrine, or any other applicable law, privilege, doctrine, or immunity. Plaintiff objects to this Interrogatory to the extent it seeks information within Defendant’s possession, custody, or control, or to the extent it seeks information in the public domain. Plaintiff objects to this Interrogatory as vague, indefinite, overly broad, unduly burdensome, and ambiguous, including, inter alia, the terms “all products by Sony including but not limited to all versions of the Sony PlayStation gaming system and each and every game that can be played on a Sony gaming system that Plaintiff contends infringe the Asserted Patents.”

Plaintiff provides this supplemental response to Defendant’s Interrogatory pursuant to the Special Master’s May 19, 2017 Order subject to the objections thereto Plaintiff will file with the Court.

Pursuant to the foregoing general and specific objections, Plaintiff responds as follows:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Plaintiff's investigation of this matter is ongoing and it will comply with Fed. R. Civ. P. 26(e) should additional information become known to it.

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Dated: June 2, 2017

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CERTIFICATE OF SERVICE

I, Philip A. Rovner, hereby certify that, prior to 6 p.m. on June 2, 2017, the within document was served on the following counsel as indicated:

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By: /s/ Philip A. Rovner
Philip A. Rovner

EXHIBIT E-3

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

ACCELERATION BAY LLC,)	
)	
Plaintiff,)	
)	
v.	)	C.A. No. 16-454 (RGA)
)	
Take-Two Interactive Software, Inc. et al)	
Defendant.)	
)	
)	

**PLAINTIFF ACCELERATION BAY LLC’S FIRST SUPPLEMENTAL OBJECTIONS &
RESPONSES TO DEFENDANT TAKE-TWO INTERACTIVE SOFTWARE, INC.’S
FIRST SET OF PARTY SPECIFIC INTERROGATORIES (NOS. 1, 2, 4)**

Plaintiff Acceleration Bay LLC (“Acceleration Bay” or “Plaintiff”) hereby further responds to the First Set of Party Specific Interrogatories (Nos. 1, 2 and 4) (the “Interrogatories”) of Defendant Take-Two Interactive Software, Inc. et al. (the “Defendant” or “Take Two”) as follows:

RESERVATION OF RIGHTS AND GENERAL OBJECTIONS

Plaintiff incorporates by reference the Reservation of Rights and General Objections set forth in its Responses to Defendant’s First Set of Interrogatories, served on March 30, 2017.

SUPPLEMENTAL OBJECTIONS AND RESPONSES

TAKE TWO INTERROGATORY NO. 1:

Identify and describe Plaintiff’s damages from Defendant’s alleged infringement assuming a finding of infringement and validity including but not limited to a royalty, a royalty rate, and a royalty base. Include in you answer the following information: (a) a detailed description of the methodology for determining the damages; (b) all facts and reasons that Plaintiff contends it should be awarded more than a reasonable royalty; (c) the largest amount of

damages that Plaintiff will seek from a jury for any infringement found by Defendant; and (d) the identity of the owner or assignee of the Asserted Patents and the licensor or potential licensor at the time damages are determined.

RESPONSE TO TAKE TWO INTERROGATORY NO. 1:

Plaintiff objects to this Interrogatory to the extent it calls for a legal conclusion. Plaintiff objects to this Interrogatory to the extent it is comprised of multiple subparts, which Plaintiff will count against Defendant's limit. Plaintiff objects to this Interrogatory to the extent it seeks information beyond Plaintiff's actual knowledge, custody, or control. Plaintiff objects to this Interrogatory to the extent it is incomprehensible or ambiguous, particularly as to what is meant by "should be awarded more than a reasonable royalty." Plaintiff objects to this Interrogatory to the extent it seeks information protected by the attorney-client privilege, the work product doctrine, or any other applicable law, privilege, doctrine, or immunity. Plaintiff objects to this Interrogatory to the extent it seeks information within Defendant's possession, custody, or control, or to the extent it seeks information in the public domain. Plaintiff objects to this Interrogatory as unintelligible, overly broad, unduly burdensome, and ambiguous, including, *inter alia*, the terms "including but not limited to," "detailed description of the methodology," "all facts and reasons," and "the identity of the owner or assignee of the Asserted Patents and the licensor or potential licensor at the time the damages are determined."

Plaintiff objects to this Interrogatory as premature because it seeks disclosure of documents, information, and expert testimony subject to the schedule in this action. Specifically, the Scheduling Order provides that Plaintiff will serve an expert report on damages after the completion of fact discovery. Plaintiff incorporates by reference into this response the expert report it will serve on damages.

Subject to and without waiving the foregoing general and specific objections, and to the extent Plaintiff understands this Interrogatory, Plaintiff responds as follows:

Plaintiff seeks all damages to which it is entitled under U.S. patent laws, including 35 U.S.C. § 284, arising from Defendant's infringement. Plaintiff seeks damages in an amount adequate to compensate for the infringement, which includes, but is not limited to, a reasonable royalty for the use of the invention, together with interest and costs fixed by the Court.

Additionally, Plaintiff seeks an accounting of all infringing sales and revenues.

Plaintiff also seeks an award of attorneys' fees and expenses associated with the present action under 35 U.S.C. § 285, as well as enhanced damages under 35 U.S.C. § 284. Such costs, fees, and expenses cannot be computed at the present time and depend on a variety of factors, such as the length and intensity of the litigation and the positions that Defendant take. Plaintiff incorporates by reference its response to Interrogatory No. 3.

It is not possible at this time for Plaintiff to make a finalized computation of damages (or to identify with specificity documents reasonably available that relate to categories of damages) absent further investigation, discovery, and disclosure by Defendant, particularly because much of the information necessary to make such a computation is in the possession of Defendant, and may require expert analysis. For example, Plaintiff is seeking discovery from Defendant as to the revenues generated by Defendant's infringing activities, the number of users, licenses and subscriptions provided for the infringing products, as well as any cost savings realized by Defendant through their infringement and Defendant's past licensing practices. Information related to the users and their gameplay activities, and the details regarding the design, structure, operation, features, development and testing of its multiplayer and networking functionality, without geographic limitation is relevant. Such information includes any protocols, APIs,

libraries, and SDKs that are used by peers, clients, hosts, nodes, or servers in the network to distribute messages, game data, voice data, chat data, management data, and QoS data for the accused products around the world. Moreover, Defendant's patent infringement is ongoing and the amount of damages to which Plaintiff is entitled continues to grow. Accordingly, Plaintiff reserves the right to set forth and modify its damages theories and calculations as appropriate as the litigation progresses and in view of information Defendant provides in this case, as well as anticipated expert opinions and factual information provided related to damages.

Plaintiff's investigation of this matter is ongoing and it will comply with Fed. R. Civ. P. 26(e) should additional information become known to it.

SUPPLEMENTAL RESPONSE TO TAKE TWO INTERROGATORY NO. 1:

Plaintiff objects to this Interrogatory to the extent it calls for a legal conclusion. Plaintiff objects to this Interrogatory to the extent it is comprised of multiple subparts, including (1) disclosure of a royalty, a royalty rate, and a royalty base; (2) a detailed description of the methodology for determining the damages; (3) all facts and reasons that Plaintiff contends it should be awarded more than a reasonable royalty; (4) the largest amount of damages that Plaintiff will seek from a jury for any infringement found by Defendant; and (5) the identity of the owner or assignee of the Asserted Patents and the licensor or potential licensor at the time damages are determined. Plaintiff will count this interrogatory as five interrogatories against Defendant's limit. Plaintiff objects to this Interrogatory to the extent it seeks information beyond Plaintiff's actual knowledge, custody, or control. Plaintiff objects to this Interrogatory to the extent it is incomprehensible or ambiguous, particularly as to what is meant by "should be awarded more than a reasonable royalty." Plaintiff objects to this Interrogatory to the extent it seeks information protected by the attorney-client privilege, the work product doctrine, or any

other applicable law, privilege, doctrine, or immunity. Plaintiff objects to this Interrogatory to the extent it seeks information within Defendant’s possession, custody, or control, or to the extent it seeks information in the public domain. Plaintiff objects to this Interrogatory as unintelligible, overly broad, unduly burdensome, and ambiguous, including, *inter alia*, the terms “including but not limited to,” “detailed description of the methodology,” “all facts and reasons,” and “the identity of the owner or assignee of the Asserted Patents and the licensor or potential licensor at the time the damages are determined.”

Plaintiff objects to this Interrogatory as premature because it seeks disclosure of documents, information, and expert testimony subject to the schedule in this action. Specifically, the Scheduling Order provides that Plaintiff will serve an expert report on damages after the completion of fact discovery. Plaintiff incorporates by reference into this response the expert report it will serve on damages.

Plaintiff provides this supplemental response to Defendant’s Interrogatory pursuant to the Special Master’s May 19, 2017 Order subject to the objections thereto Plaintiff will file with the Court.

Subject to and without waiving the foregoing general and specific objections, and to the extent Plaintiff understands this Interrogatory, Plaintiff responds as follows:

Plaintiff’s Damages Theories:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Plaintiff is actively seeking discovery on each of these theories and conferring with its damages expert, who will address them, along with the factors set forth in *Georgia Pacific Corp. v. United States Plywood Corp.*, 318 F. Supp. 1116 (S.D.N.Y. 1970), in an expert report after the close of fact discovery.

[REDACTED]

[REDACTED] Such costs, fees, and expenses cannot be computed at the present time and depend on a variety of factors, such as the length and intensity of the litigation and the positions that Defendant take. Plaintiff incorporates by reference its response to Interrogatory No. 3.

Relevant Evidence: Plaintiff's damages will be based on evidence developed during discovery and at trial. Such evidence will include the confidential information of the parties' documents, testimony of fact witnesses and expert testimony. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Relevant information is also included in the deposition testimony and exhibits to those depositions taken in this litigation (and any relevant deposition or trial testimony in other litigations that contains relevant information), including but not limited to the depositions of Take Two's witnesses. *See, e.g.*, Baca Tr. at 66:18-75:2, 84:5-84:22, 146:21-147:9, 147:18-148:25, 183:5-12, 185:1-189:17, 190:2-5; Walter Tr. at 59:21-64:22, 74:16-76:1, 125:16-126:4, 130:3-131:24, 161:11-163:20, 207:11-209:7. Plaintiff also expects that the upcoming depositions of Hannah Sage, Daniel Yelland, John Hynd, Josh Moskovitz, Chris Larson and Jason Argent will be relevant to damages. Defendant identified these witnesses as being knowledgeable regarding the functionality, sales, marketing, financial matters, revenue and costs for the Accused Products.

Based on discovery to date, Plaintiff identifies the following exemplary documents in which damages related information is included, including revenue information, usage

information and marketing materials: Defendant's Response and any supplemental responses to Plaintiff's Common Interrogatory Nos. 2, 3, 7; TTWO0023852-54; TTWO0022743-44; AB-TT 002638-655; AB-TT 002825; AB-TT 002850-52; AB-TT 002624-25; TTWO0022642-41.

Defendants have not provided updated financial documents for 2017 and have not provided any financial data for the updates versions of the products identified of infringement on February 13, 2017, which are the subject of a pending motion to compel. Defendant has yet to produce information regarding the number of users, cost saving, connections, networks, and sessions, which are also part of Plaintiff's damages case. Lastly, as Defendant produced data in spreadsheets without adequate explanation or key, Acceleration Bay will need additional information from Defendant to properly analyze the data.

Royalty, Royalty Rate and Royalty Base and Methodology For Determining

Damages: [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Plaintiff will seek guidance from its expert as to an appropriate apportionment and royalty rate. [REDACTED]

[REDACTED]

[REDACTED] Plaintiff cannot calculate the total royalty without knowing the total base (which Defendant has not provided), the apportionment amount (which is a subject of expert opinion) and royalty rate (which is a subject of expert opinion and ongoing discovery). Plaintiff specifically objects to Special Master Order No. 3 to the extent it requires disclosure of this information at this time.

[REDACTED]

[REDACTED] Plaintiff will seek additional damages through the remaining lifetime of the patent.

The identity of the owner or assignee of the Asserted Patents and the licensor or potential licensor at the time damages are determined: This subpart of the interrogatory is unclear, as Plaintiff is the owner the Asserted Patents, the assignee of the Asserted Patents from Boeing, and the licensor for damages purposes. [REDACTED]

[REDACTED]

[REDACTED]

Given the state of discovery and that expert reports are not due until after the close of fact discovery, Plaintiff objects to the Special Master's Order to the extent it requires a further response to this Interrogatory at this time.

Plaintiff's investigation of this matter is ongoing and it will comply with Fed. R. Civ. P. 26(e) should additional information become known to it.

TAKE TWO INTERROGATORY NO. 2:

Identify the date on which Plaintiff contends the hypothetical license negotiation should be deemed to have commenced, the full factual basis for that contention, including the product or products on which Plaintiff bases its contention, the specific features that Plaintiff contends are present in those product or products that were not present in prior products; and the documents that support Plaintiff's answer or to which You referred in preparing Your answer.

RESPONSE TO TAKE TWO INTERROGATORY NO. 2:

Plaintiff objects to this Interrogatory to the extent it is premature because it seeks disclosure of documents, information, and expert testimony subject to the schedule in this action.

Plaintiff objects to this Interrogatory to the extent it seeks irrelevant information, particularly with respect to unnamed “prior products” or products not at issue in this case. Plaintiff objects to this Interrogatory to the extent it is comprised of multiple subparts, which Plaintiff will count against Defendant’s limit. Plaintiff objects to this Interrogatory to the extent it calls for a legal conclusion. Plaintiff objects to this Interrogatory to the extent it seeks information protected by the attorney-client privilege, the work product doctrine, or any other applicable law, privilege, doctrine, or immunity. Plaintiff objects to this Interrogatory to the extent it seeks information within Defendant’s possession, custody, or control, or to the extent it seeks information in the public domain. Plaintiff objects to this Interrogatory as vague, indefinite, overly broad, unduly burdensome, and ambiguous, including, *inter alia*, the terms “the full factual basis for that contention, including the product or products on which Plaintiff bases its contention, the specific features that Plaintiff contends are present in those product or products that were not present in prior products; and the documents that support Plaintiff’s answer or to which You referred in preparing Your answer.”

Subject to and without waiving the foregoing general and specific objections, and to the extent Plaintiff understands this Interrogatory, Plaintiff responds as follows:

The hypothetical license negotiation date is the date on which Defendant’s infringement began. Plaintiff requires further investigation, discovery, and disclosure by Defendant, particularly because the information necessary for identification of when Defendant’s infringement began is in the possession of Defendant, and may require expert analysis. Plaintiff incorporates its Initial Claim Charts and Supplemental Claim Charts and its February 13, 2017 Updated Identification of Accused Products in response to this Interrogatory.

Plaintiff's investigation of this matter is ongoing and it will comply with Fed. R. Civ. P. 26(e) should additional information become known to it.

SUPPLEMENTAL RESPONSE TO TAKE TWO INTERROGATORY NO. 2:

Plaintiff objects to this Interrogatory to the extent it is premature because it seeks disclosure of documents, information, and expert testimony subject to the schedule in this action. Plaintiff objects to this Interrogatory to the extent it seeks irrelevant information, particularly with respect to unnamed "prior products" or products not at issue in this case. Plaintiff objects to this Interrogatory to the extent it is comprised of multiple subparts, which Plaintiff will count against Defendant's limit. Plaintiff objects to this Interrogatory to the extent it calls for a legal conclusion. Plaintiff objects to this Interrogatory to the extent it seeks information protected by the attorney-client privilege, the work product doctrine, or any other applicable law, privilege, doctrine, or immunity. Plaintiff objects to this Interrogatory to the extent it seeks information within Defendant's possession, custody, or control, or to the extent it seeks information in the public domain. Plaintiff objects to this Interrogatory as vague, indefinite, overly broad, unduly burdensome, and ambiguous, including, *inter alia*, the terms "the full factual basis for that contention, including the product or products on which Plaintiff bases its contention, the specific features that Plaintiff contends are present in those product or products that were not present in prior products; and the documents that support Plaintiff's answer or to which You referred in preparing Your answer."

Plaintiff provides this supplemental response to Defendant's Interrogatory pursuant to the Special Master's May 19, 2017 Order subject to the objections thereto Plaintiff will file with the Court.

Subject to and without waiving the foregoing general and specific objections, and to the extent Plaintiff understands this Interrogatory, Plaintiff responds as follows:

[REDACTED]

Plaintiff's investigation of this matter is ongoing and it will comply with Fed. R. Civ. P. 26(e) should additional information become known to it.

TAKE TWO INTERROGATORY NO. 4:

Identify and describe all products by Sony including but not limited to all versions of the Sony PlayStation gaming system and each and every game that can be played on a Sony gaming system that Plaintiff contends infringe the Asserted Patents.

RESPONSE TO TAKE TWO INTERROGATORY NO. 4:

Plaintiff objects to this Interrogatory as unintelligible, particularly as to what is meant by "all products by Sony." Plaintiff objects to this Interrogatory to the extent it calls for a legal conclusion. Plaintiff objects to this Interrogatory to the extent it seeks information protected by the attorney-client privilege, the work product doctrine, or any other applicable law, privilege, doctrine, or immunity. Plaintiff objects to this Interrogatory to the extent it seeks information

within Defendant's possession, custody, or control, or to the extent it seeks information in the public domain. Plaintiff objects to this Interrogatory as vague, indefinite, overly broad, unduly burdensome, and ambiguous, including, inter alia, the terms "all products by Sony including but not limited to all versions of the Sony PlayStation gaming system and each and every game that can be played on a Sony gaming system that Plaintiff contends infringe the Asserted Patents."

Pursuant to the foregoing general and specific objections, Plaintiff cannot answer the interrogatory as written.

SUPPLEMENTAL RESPONSE TO TAKE TWO INTERROGATORY NO. 4:

Plaintiff objects to this Interrogatory as unintelligible, particularly as to what is meant by "all products by Sony." Plaintiff objects to this Interrogatory to the extent it calls for a legal conclusion. Plaintiff objects to this Interrogatory to the extent it seeks information protected by the attorney-client privilege, the work product doctrine, or any other applicable law, privilege, doctrine, or immunity. Plaintiff objects to this Interrogatory to the extent it seeks information within Defendant's possession, custody, or control, or to the extent it seeks information in the public domain. Plaintiff objects to this Interrogatory as vague, indefinite, overly broad, unduly burdensome, and ambiguous, including, inter alia, the terms "all products by Sony including but not limited to all versions of the Sony PlayStation gaming system and each and every game that can be played on a Sony gaming system that Plaintiff contends infringe the Asserted Patents."

Plaintiff provides this supplemental response to Defendant's Interrogatory pursuant to the Special Master's May 19, 2017 Order subject to the objections thereto Plaintiff will file with the Court.

Pursuant to the foregoing general and specific objections, Plaintiff responds as follows:

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OF COUNSEL:

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Dated: June 2, 2017

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CERTIFICATE OF SERVICE

I, Philip A. Rovner, hereby certify that, prior to 6 p.m. on June 2, 2017, the within document was served on the following counsel as indicated:

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EXHIBIT F

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IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE DISTRICT OF DELAWARE

- - -

ACCELERATION BAY LLC, : CIVIL ACTION
Plaintiff, :
vs. :
ACTIVISION BLIZZARD, INC., :
a Delaware Corporation, :
Defendant. : NO. 15-228 (RGA)

----- :
ACCELERATION BAY LLC, : CIVIL ACTION
Plaintiff, :

vs. :
ELECTRONIC ARTS INC., :
Defendant. : NO. 15-282 (RGA)

----- :
ACCELERATION BAY LLC, : CIVIL ACTION
Plaintiff, :

vs. :
TAKE-TWO INTERACTIVE :
SOFTWARE, INC., ROCKSTAR :
GAMES, INC. and 2K SPORTS, :
INC., :
Defendants. : NO. 15-311 (RGA)

Wilmington, Delaware
Friday, February 12, 2016
3:42 o'clock, p.m.

- - -

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

Valerie J. Gunning
Official Court Reporter

1 APPEARANCES:

2 POTTER, ANDERSON & CORROON LLP
3 BY: JONATHAN A. CHOA, ESQ.

4 -and-

5 KRAMER LEVIN NAFTALIS & FRANKEL LLP
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12 BY: JACK B. BLUMENFELD, ESQ. and
13 STEPHEN J. KRAFTSCHIK, ESQ.

14 -and-

15 WINSTON & STRAWN LLP
16 BY: MICHAEL A. TOMASULO, ESQ.
17 (Los Angeles, California)

18 Counsel for Defendants

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1 Special Master, and you said, don't put us in the penalty
2 box?

3 MR. BLUMENFELD: That was this case.

4 THE COURT: All right. I wasn't sure. I'm
5 going to have to give myself more credit for being able to
6 spot the penalty players than I gave myself credit for.

7 All right. So I read the various letters, and
8 it seems like maybe the first thing to do is just talk about
9 this question of whether or not we're going to be doing
10 depositions before the plaintiff has infringement
11 contentions.

12 So Mr. Kramer?

13 MR. FRANKEL: Aaron Frankel, your Honor.

14 THE COURT: Mr. Frankel from Kramer. Okay.
15 Sorry about that.

16 Mr. Frankel. So defendants say, and frankly,
17 while I've never had to think about it, I don't think that
18 it accords with my own experience that normally, depositions
19 at this stage, in order to do infringement contentions,
20 that's not -- well, depositions at this stage for whatever
21 purpose, it's kind of unusual, so why should you be the
22 exception?

23 MR. FRANKEL: Well, your Honor, you know, we're
24 here because we've been having a lot of difficulty getting
25 the discovery that we need to move the case forward, and

1 PROCEEDINGS

2
3 (Proceedings commenced in Chambers, beginning at
4 3:42 p.m.)

5
6 THE COURT: All right. Good afternoon. Please
7 be seated.

8 So these are some discovery issues in
9 Acceleration Bay versus Activision Blizzard, Civil
10 Action No. 15-228 plus the two other cases with the same
11 plaintiff.

12 Mr. Choa?

13 MR. CHOA: Good afternoon, your Honor. With me
14 is Aaron Frankel from Kramer Levin.

15 MR. FRANKEL: Good afternoon.

16 THE COURT: All right. Good afternoon.
17 Mr. Blumenfeld?

18 MR. BLUMENFELD: Good afternoon, your Honor.
19 Jack Blumenfeld for all three defendants with Mike Tomasulo,
20 who is from Winston & Strawn in Los Angeles, and Steve
21 Kraftschik from Morris Nichols.

22 THE COURT: All right. Do you remember,
23 Mr. Blumenfeld, and I would ask both sides, but in the event
24 I'm recalling Mr. Rovner, so that there was a case sometime
25 not too long ago where I said I'd like to refer this to a

1 frankly, at this point the infringement contentions are due
2 in about two weeks. We're probably going to need nine
3 depositions or more given the number of defendants and
4 products.

5 We're not going to be able to get all of those
6 depositions --

7 THE COURT: Why do you need to do depositions?

8 MR. FRANKEL: Well, depositions in the case.
9 I'm not --

10 THE COURT: Oh, you mean somewhere in history?

11 MR. FRANKEL: Yes. You know --

12 THE COURT: To come.

13 MR. FRANKEL: Given the very limited core
14 technical production that we've been given, we thought it
15 would be helpful to --

16 THE COURT: I thought two of these three had
17 given you like too much.

18 MR. FRANKEL: They've given us a lot of source
19 code and we appreciate that. What we have not gotten is
20 relevant documents explaining the network topology and we're
21 working with the source code.

22 It would have been helpful to have the
23 depositions to expedite that source code review. It would
24 have been helpful to have the depositions to give more
25 substantive infringement contentions. But given where we

1 are in the case with the contentions due in two weeks, what
2 we really want to do is get these depositions scheduled so
3 that we can move forward in the case.

4 There are a number of --

5 THE COURT: Well, you say "get these depositions
6 scheduled so you can move forward in the case," you mean
7 within the next two weeks?

8 MR. FRANKEL: No. I don't think that's possible
9 anymore. And, you know, frankly, I think the --

10 THE COURT: Well, and so if it's a case that you
11 are going -- if you are going to do the infringement
12 contentions first, why -- you need me to schedule the
13 depositions?

14 MR. FRANKEL: Well, your Honor, we do. We
15 requested these depositions -- I don't need you to pick the
16 dates for us, but six weeks ago we requested the
17 depositions.

18 THE COURT: But isn't their whole argument as to
19 whether or not that you should get the infringement
20 contentions first, and so to the extent that they are
21 dragging their feet -- I don't mean that negatively, they're
22 dragging their feet because they don't have the infringement
23 contentions. Once you get them the infringement
24 contentions, I have every reason to believe they will be
25 perfectly reasonable in scheduling whatever depositions need

1 to be scheduled. Am I wrong?

2 MR. TOMASULO: If we have credible infringement
3 contentions that gives us an idea of how to present a
4 witness, then, no. Then, yes, no, you're not wrong.

5 THE COURT: Okay. All right. And so I heard
6 the word credible in there. I think I understand, more or
7 less, what you mean by that.

8 So I did check the order. I'm sorry to be late
9 here. I did check the scheduling order, which I thought
10 imagined contentions, one set at one time and one set at
11 another time.

12 Was I misreading that in my haste?

13 MR. FRANKEL: Well, that's correct, your Honor,
14 but the infringement contentions, given what has developed
15 in the case, are due on March 2nd, and the issue that we
16 have is we'd like to get these depositions done by the
17 end of March given all the other deadlines that are coming
18 up.

19 For example, we're about two-and-a-half months
20 away from the start of claim construction process. We have
21 to exchange --

22 THE COURT: Why don't we do this. You're going
23 to get your infringement contentions in for everything that
24 you are doing by March, did you say 2nd?

25 MR. FRANKEL: Correct.

1 THE COURT: Okay. So is there any reason why
2 corporate representatives can't be lined up with a proper
3 set of -- can't be scheduled in April?

4 MR. TOMASULO: Well, your Honor, may I sort of
5 take a step back and sort of talk to you a little bit about
6 where we are?

7 THE COURT: Well, you know, you can, you know,
8 use your judgment.

9 MR. TOMASULO: So in my judgment, it would be
10 helpful just to set the table with no more than three or
11 four minutes of sort of what this case is about and what our
12 challenge is.

13 THE COURT: Okay.

14 MR. TOMASULO: The case is about network
15 architecture, network in infrastructure. So there are two
16 real species of how you configure can network. One is
17 client server.

18 And a client server is if we -- you know, if you
19 were the server and we were all clients, we could only
20 communicate to and from you. Couldn't communicate directly
21 to each other. If Aaron needed to send me a message,
22 it would go to you and then back to me. That's client
23 server.

24 Then the other species is peer to peer. This
25 case is about peer to peer, special species of peer to peer.

1 Their patent is directed to a way of configuring a
2 peer-to-peer network that had the following characteristics.
3 It has been to be incomplete, meaning that not each one of
4 us would have a connection to every other one of us. So
5 that is what it means, incomplete. A complete would mean
6 that you were connected to each and every person in the room
7 with a direct connection, so if you needed to send a message
8 to me, you could do so without routing it through anyone
9 else.

10 Incomplete means you can't do that. And it also
11 needs to be regular. And that means that you're connected
12 to the same number of people that you are connected to and
13 so on, and we're all connected to the exact same number, and
14 that's the degree of regularity.

15 And then the third component is that the
16 regularity has to be three or greater. In other words, if
17 we just made a circle, we would be two regular. You would
18 be connected to me, and you would be connect to your Honor,
19 and that would be two regular. And so this patent excludes
20 two regular. It has to be three regular and incomplete or
21 greater.

22 So we've looked, and so they've accused our
23 multiplayer network. So the way a multiplayer network works
24 is if there are different players playing a video game in
25 different places, they have to be able to get information to

10

1 and from each other.

2 So we've looked at the multiplayer networks.
3 It's a relatively small part of how these games work. They
4 allow the transmission. So when I jiggle my controller,
5 then that transmission gets communicated to another console
6 that then communicates those activities to that console. So
7 it's not like large amounts of data on are being sent. It's
8 just the jiggles of the controller by and large.

9 So we've investigated, and we've produced source
10 code. We've produced the documents that we have that are
11 relevant to these features. And what our challenge is, is
12 that what we see is that by and large, these games are
13 either almost all client server or in the case of let's
14 say I'm playing a game, I can play a head-to-head soccer
15 game.

16 If I was playing against your clerk, our
17 computers would make a direct connection, so that would be a
18 one regular network and that would be plainly outside what
19 we interpret the patent to be, because the patent, it
20 excludes that type of a just a one regular network, or a
21 client server. The patent specifically excludes a client
22 server.

23 So our games, they don't -- what we see when we
24 try to figure out, you know, what to produce to them --
25 we're not trying to be difficult, but what we see, we've

11

1 given them is how our network is configured, and what our
2 network is configured is either client server or a
3 head-to-head game, or in the case of one of those video
4 games, it's configured as, the optimal configuration is it
5 tries to be a fully connected mesh plus a client server.

6 So in that game, if your clerk was the
7 designated as a host, we would all try to establish a
8 connection to the host, and then we would also try to
9 establish connections to each other. But then that would
10 either be incomplete or a -- it would be incomplete or
11 irregular. Again, outside what we understand the patent to
12 be.

13 So we've provided the information about the
14 multiplayer network, and we don't know what else they're
15 looking for, and that's why we've asked, tell us. Like, if
16 the there's a network that you think is infringing, identify
17 the network. What are the characteristics? Who are the
18 players? Don't just make us guess.

19 So I mean they presumably had a very specific
20 reason in mind when they filed this case, and they should be
21 able to say, well, we are looking at the network that
22 includes, you know, we've determined that it's incomplete.

23 THE COURT: Well, it sounds like Mr. Frankel
24 says March 2nd or before, but probably on March 2nd, all
25 will be revealed.

12

1 MR. TOMASULO: Well, maybe, maybe not, because
2 one of the things that we are starting to see is an
3 expansion into unaccused areas. So, for instance, their
4 first set of document requests, or the first set of
5 interrogatories was they served in late December directed to
6 technical issues didn't really mention a specific server to
7 server concept. And then now they're starting to expand
8 into what we would say is an unaccused area in the
9 complaint, which is back-end servers.

10 And so I don't know, you know. Again, we just
11 said, what -- you know, for instance, if you take the idea
12 of the Take-Two source code, well, we've given you what we
13 think is relevant and we've told you how a player is added
14 to a network, how a player is dropped from the network, how
15 the network is configured.

16 THE COURT: So let me just ask: Why are they
17 asking you for irrelevant stuff, do you think?

18 MR. TOMASULO: Well, are you asking me to
19 speculate why they want it?

20 THE COURT: I'm asking because, you know, my
21 presumption is based on what you say about the patent, what
22 you are saying is back-end stuff doesn't matter. So I'm
23 saying, and I might in a minute ask Mr. Frankel, why are you
24 asking for this stuff? But I can imagine what his answer is
25 going to be.

13

1 Why do you think he's asking for this stuff if
2 it's clearly irrelevant?

3 MR. TOMASULO: Exploratory, because it places a
4 large burden on us. I don't know.

5 I think it would -- I don't want to -- let me
6 say the only answer I can come up with is that it's
7 exploratory, because I mean, when I talk --

8 THE COURT: Well, basically, what you are saying
9 about the patents are, other than this exploration leap,
10 anything worthwhile?

11 MR. TOMASULO: Well, I don't know if it can or
12 can't. I'm not saying -- what I'm saying is that the patent
13 lawsuit does not give them a license to explore --

14 THE COURT: No, no. I understand that, but, you
15 know, I'm always -- okay.

16 So, in any event --

17 MR. TOMASULO: I'm sorry.

18 THE COURT: If you have a little more
19 background, go ahead. You know, what I'm getting, even
20 though I'm sure there are people in this room who are
21 getting more is, you say, we don't infringe.

22 MR. TOMASULO: Well, that is what I'm -- that is
23 my conclusion, and without infringement contentions, you
24 know, let me put it to you this way.

25 THE COURT: But so he said he's going to provide

1 infringement contentions, so we're now into what happens
2 after he has providing infringement contentions. Right?

3 MR. TOMASULO: Correct. So if the case is as I
4 described it, then we could provide a witness. If the case
5 is about something that they want to explore, then I don't
6 know how to prepare a witness.

7 THE COURT: Well, so --

8 MR. TOMASULO: That gets to the topics.

9 THE COURT: So, all right. And why do you
10 say you've got this great big hurry to get these depositions
11 in?

12 MR. FRANKEL: Yes. I would just like to, you
13 know, briefly respond to these issues.

14 The first point is the hurry is, we have people
15 reviewing source code now without the benefit of documents,
16 and having the depositions will make the source code review
17 more efficient and more effective. Beyond that, we have a
18 number of deadlines that are coming up in the case. The
19 case is a year old at this point, and among those deadlines
20 are picking the ESI search terms for e-mail discovery.
21 Again, we are two-and-a-half months away from starting the
22 claim construction process and then there are other
23 deadlines coming up, and there are a lot of depositions that
24 we need to take.

25 We have given very detailed complaints. They

1 like that.

2 But it does not make sense to me to be reviewing
3 30(b)(6) topics until the case is defined by infringement
4 contentions. So get the infringement contentions in, meet
5 and confer. You know, the defendants will get you witnesses
6 when you have an understanding of what these witnesses are
7 going to be testifying about.

8 MR. TOMASULO: Thank you, your Honor.

9 MR. FRANKEL: Your Honor, if I could just ask
10 one question briefly.

11 The defendants have filed motions for -- have
12 filed petitions for enter partes review.

13 THE COURT: Okay.

14 MR. FRANKEL: And I imagine in the unlikely
15 event that those petitions are granted, they may consider a
16 motion to stay.

17 THE COURT: That's true.

18 MR. FRANKEL: We have been trying --

19 THE COURT: Or I mean I assume that's true. In
20 fact, haven't you filed such a motion already?

21 MR. TOMASULO: No.

22 THE COURT: I thought you said --

23 MR. FRANKEL: No. They have not moved to stay
24 the case.

25 THE COURT: Or maybe you filed a notice.

1 are not the six page pro forma complaints that identify the
2 features. His description of the technology that we're
3 interested in is the technology that we're interested in.
4 That's what we've talked about in our meet and confers.

5 If you take a look at the topics, they are
6 specific and they are directed to those issues. And the one
7 point he mentioned about the situation where there's a
8 network of servers that appears, that is described in the
9 complaint, and I've identified those paragraphs to
10 defendants' counsel.

11 So we think they've been given fair notice of
12 what our theory is and we're going to give our infringement
13 contentions, and we don't want to wait until April or May to
14 start this process.

15 We gave them specific topics --

16 THE COURT: All right.

17 MR. FRANKEL: Yes.

18 THE COURT: Well, so, you get them the
19 infringement contentions on March 2nd. You know, you can't
20 really schedule depositions until you have them. After you
21 get them the infringement contentions, since you both seem
22 to understand what the architecture is, talk to each other.
23 Relate, you know, because I also understand part of their
24 complaint is, you know, your 30(b)(6) topics are too general
25 or too vague, or they don't know what they are, something

1 MR. TOMASULO: We filed a notice. I think we
2 are required to file a notice, so we did do that.

3 THE COURT: Well, good that you did.

4 MR. BLUMENFELD: Some Judges require it.

5 THE COURT: Okay. I don't think I actually do,
6 but I do like to know about such things.

7 But, in any event, you're unlikely to be making
8 any motions until you see how -- until six months go by,
9 more or less, right, and that you either get an inclusion
10 decision or not?

11 MR. TOMASULO: We -- I don't know when we'll
12 make such a motion, but I think what he's going to ask is
13 that if we don't hold it against them that he -- the status
14 of taking depositions.

15 THE COURT: Well, I would say -- you know, I
16 actually --

17 MR. TOMASULO: And I don't have --

18 THE COURT: So just on that topic, I did look at
19 the docket, because I thought part of what you said,
20 Mr. Frankel, was that the defendants had noticed four
21 depositions.

22 MR. FRANKEL: The defendants noticed four
23 depositions, and a month ago when we were here, agreed to
24 proceed with these depositions.

25 THE COURT: Well, but just in terms of noticing

1 the depositions, I looked at the docket in one of these
2 cases. I didn't see any depositions noticed. Did you
3 actually notice them?

4 MR. TOMASULO: We noticed them for far out with
5 the expectation. Three of them were as to -- we all thought
6 that they were all listed clients of yours. We really
7 wanted to get the depositions started. We put the documents
8 out, but we didn't have any intention of negotiating dates,
9 which is what I had advised counsel I would do.

10 THE COURT: Okay. And so, Mr. Frankel, you said
11 you don't want me to hold it against you when the motion for
12 a stay comes, if it comes. That the case is in its early
13 stages because you would like it to be in later stages. Is
14 that right?

15 MR. FRANKEL: Well, we have made the most
16 diligent efforts possible, your Honor, to proceed with these
17 depositions.

18 THE COURT: Okay. All right. Well, I certainly
19 do believe just based on the reference in the letters to
20 80 hours reviewing one defendants' source code and 70 hours
21 reviewing other, whatever exactly it was, I think there's a
22 record that you have been doing something.

23 All right. So another thing that is on the --
24 well, what else would you like to talk about?

25 MR. FRANKEL: Your Honor, I believe the next

1 this, and they pick and claw and you fight them, and so far,
2 I have not ever actually seen it turn out very well for the
3 defendant.

4 What is the problem with giving them a
5 greater -- more access?

6 MR. TOMASULO: Well, first of all, it's not. I
7 mean, we don't believe that we've withheld relevant
8 information, so there's a degree of proportionality.

9 One, it's very expensive for us to collect and
10 produce it. We have to have someone sit in there while they
11 inspect it.

12 So --

13 THE COURT: But you have to have them sit in
14 there and inspect it whether they inspect a hundred files or
15 a hundred thousand files. Admittedly, the hundred thousand
16 files might take a little longer, but my impression is it
17 does not take a thousand times longer. It just takes -- you
18 know, they did it apparently the other two people in
19 80 hours.

20 MR. TOMASULO: Which is already an exceptionally
21 long amount of time, your Honor.

22 THE COURT: Yes, but, you know, and I'm not -- I
23 mean, that's how you have chosen to make the initial
24 productions. I understand maybe you didn't have much
25 choice, but I don't think anyone thinks looking at source

1 issue in the letter briefs was the Take-Two source code.

2 On this point, we've not received a single
3 technical document from Take-Two. Obviously, we have not
4 received --

5 THE COURT: Well, you received a hundred files
6 of source code; right?

7 MR. FRANKEL: We've been given access to a very
8 limited subset of the source code. Our complaint and our
9 correspondence and in our meet and confers with the
10 defendants, we have identified numerous functions and
11 aspects of the game that are not included in the source
12 code, and that makes it very difficult to take the game,
13 which we can play test, and follow that functionality
14 through the source code and find it and understand how it
15 works.

16 THE COURT: All right.

17 MR. FRANKEL: The --

18 THE COURT: Hold on. Is it Mr. Tomasulo?

19 MR. TOMASULO: Yes, it is, your Honor.

20 THE COURT: Okay. Mr. Tomasulo, two of the
21 three defendants you represent seem to have provided lots of
22 source code, and Take-Two seems to have taken the opposite
23 approach of only providing what they think is relevant.

24 And my experience to date with the only provide
25 what you think is relevant is we have lots of meetings like

1 code is quick.

2 MR. TOMASULO: If you know what you are looking
3 for, it typically is. For instance, in all the prior cases
4 that Activision has produced its Blizzard source code, which
5 is admittedly large, the longest anybody has ever looked at
6 it is four days. Usually two days and then another two
7 days.

8 But let me address the Take-Two issue, really,
9 because what the other two clients did isn't really
10 relevant.

11 THE COURT: Even though it gives you --
12 gives me at least some idea that maybe what's reasonably
13 possible?

14 MR. TOMASULO: I understand that. And let me
15 address that issue head-on.

16 There are two distinctions that I want to make
17 about how these games work. Okay?

18 THE COURT: Okay.

19 MR. TOMASULO: So take a game like World of
20 Warcraft. That's only an online game and it's only a
21 multiplayer game. So it's what's called a massively
22 multiplayer role-playing game. So that means there could be
23 many, many people throughout a geographic area and there is
24 no single player mode. It's not a cartridge game where you
25 can put it into your Sony PlayStation and play it by

1 yourself. You only play online with other players. So the
2 entirety of it is, in fact, an online game.

3 Call of Duty, no one would really buy Call of
4 Duty for its single player mode. The single player mode is
5 very modest. You know, a skilled player can make it all the
6 way through the single player campaign of a game in maybe a
7 day or two. And so then you buy it to do the online aspects
8 of the game.

9 And then if you contrast that with Grand Theft
10 Auto, grand theft ought is an enormous game, and it's
11 primarily a single-player game online that was only recently
12 introduced.

13 Grand Theft Auto is famous for being one of
14 the being largest single player games. It would take a
15 skilled player to reach 150 hours to reach the end of the
16 campaign. Someone like me who is not a skilled player, I
17 would never actually be able to complete a single player
18 mode.

19 And so the way these games are built is the vast
20 majority of the code has to do the constructed virtual
21 reality. Its art assets. It's physics. It's how do you
22 make something fly through the air. How do you make facial
23 expressions work, and things like that? It has nothing to
24 do with how the game is played in a multiplayer mode.

25 What happens for multiplayer mode is sort of as

1 out stuff that should be there and doesn't appear to be
2 there, and then you have to produce it, and then he has to
3 come back. I mean, it certainly builds up his cost, or it
4 seems to build up the plaintiff's cost in these things. So
5 that's my concern with what you're doing.

6 Mr. Frankel, is there something short of
7 producing, you know, eight million files that would satisfy
8 you?

9 MR. FRANKEL: Well, we're not interested in the
10 artwork, your Honor, but the issue is, if I could just
11 briefly provide a little more background about how Grand
12 Theft Auto works.

13 For example, I can explain why it would really
14 be most efficient for everyone to have the full code. And I
15 am here because our review team is really struggling to
16 trace through this very limited subset of the code. That's
17 why we've raised this issue.

18 We have identified already a number of missing
19 items and functionality. We've not been given access to
20 that code.

21 For example, in Grand Theft Auto --

22 THE COURT: Well, give me an idea, to the extent
23 you can, and it's not going to mean anything to me. But
24 just for the record, I mean, what kind of thing has your
25 team identified as missing that you have told him about?

1 I described. And so if you take the instance of MBA 2K,
2 just a very small aspect of it is how multiplayer works.
3 You are playing a basketball game. You know, there's ten of
4 us playing a basketball game and I designated myself to be
5 LeBron or Allen Iverson, or whoever. And I jiggle my
6 controller, and so that data from my controller is then sent
7 to a central server from Take-Two.

8 And then 60 times a second, all of the data that
9 has come from all of those ten players goes through a
10 central server and then it's rebroadcast out to the other
11 ten players.

12 And so that's all at it is. It's just taking
13 these jiggles of the controller, very small amount. There's
14 about six or eight ways you can maneuver your controller,
15 and then whenever you do that, it goes back and forth to the
16 server.

17 And that's the only aspect of the game that
18 really matters to this case, is how does that data go back
19 and forth. And so you don't need the art asset. You don't
20 need all of these other things, because they're just not
21 relevant to that function, which is, you know, what I think
22 he has acknowledged is the accused function.

23 THE COURT: So the thing that has come up before
24 when people have done the piecemeal approach is that he will
25 identify, you don't have X or Y or, you know, he will figure

1 MR. FRANKEL: Okay. So you're playing Grand
2 Theft Auto. You're driving a car around. And there are
3 other people in the world who are real humans, not
4 non-player characters, and there's an exchange of data, and
5 that can change when you get closer to them. And then if
6 you decide, I want to do a special mission, we're going to
7 go rob a bank, that changes the game mode, and the system
8 will then go and look for partners in other copies of the
9 world, pull you all together, put you into a special mission
10 where you can go rob a bank or go parachuting. And there
11 are all -- those are just a handful of examples of a dozen
12 or more types of different game modes where people can
13 interact. And we don't have the source code for any of
14 that.

15 And in the basketball --

16 THE COURT: Yes. So hold on a minute.

17 MR. FRANKEL: Yes.

18 THE COURT: What do you say about that, Mr.
19 Tomasulo?

20 MR. TOMASULO: Well, your Honor, I disagree with
21 what he is saying. First of all, we asked that, you know,
22 what is it that's accused that the source code, and it's in
23 two e-mails, and the second one we received a response,
24 we're at an impasse. What we said is, we've given you code
25 that we think governs these features, and if there's a

1 feature that's accused, in other words, a network or some
2 specific part of how you build this network and that it's
3 relevant to the patent, I said, the patent is relatively
4 restricted to just this configuration of a specific type of
5 peer to peer and regular, incomplete network, tell us what
6 that feature is and we'll get you that code, or at least
7 let's start there.

8 I mean, but we never even got a conversation
9 like that. We never got a response. What we got was a list
10 of modules, or a list of features that the game had, but we
11 never -- and there's no declaration from their two source
12 code experts. Either one of them could have said, this is a
13 feature that's important to us and we don't understand how
14 it works. Is there some code or a document that explains
15 that? That's one thing.

16 The other thing is, may I show you what the code
17 that we produced looks like?

18 THE COURT: It's not going to mean anything to
19 me, but, sure, go ahead.

20 MR. TOMASULO: I mean, there's a -- there's I
21 think a notion that has been created potentially
22 inadvertently, or inadvertently, that the code is somehow
23 not a technical document that a normal person who is skilled
24 in this area could understand.

25 Aaron, I've shown him these, not that I really

1 Electronic Arts and Activision were able to produce the
2 entire code for their accused games, and you're -- Take-Two,
3 is not?

4 MR. TOMASULO: Well, those companies have had to
5 do it in other cases, and so in the case of Activision, they
6 actually have a paralegal that is -- that, you know, is an
7 e-discovery specialist that is capable of going and getting
8 the code, putting it on a source code review computer,
9 supervising the actual review process. And it is a burden.
10 I mean, somebody has to sit there with them. In our case,
11 we have to pay a paralegal to do that.

12 THE COURT: Well, instead you're paying lawyers
13 to come here and argue about it. You know, either do this.
14 Either -- well, let me just ask, because sometimes there are
15 attachments I have not looked at.

16 Did you submit a declaration saying it will
17 cost, you know, \$2 million to compile this code -- "compile"
18 is probably a bad word, but to gather this code and make it
19 available on the source code computer?

20 MR. TOMASULO: What we produced was declarations
21 from the engineers that said that, you know, these are the
22 five areas that we understand the case to be about and we've
23 produced the code that reveals those file areas. And so
24 that is the level of specificity. So if you -- did you see
25 those?

1 understand them either. But what you can see is that what
2 they look like is, they have a lot of written words that are
3 explanations of how this code works, and if you printed all
4 of the code that we gave them, they would have over
5 3,000 pages of very small print just like that.

6 And they -- for example, the plaintiff has
7 produced no documents at all other than the file wrappers,
8 and a few screen shots -- I mean, they've produced zero
9 documents.

10 And so --

11 THE COURT: What documents are you expecting
12 them to produce?

13 MR. TOMASULO: Maybe the agreement to purchase
14 the patent. We had to get that from Boeing.

15 What I'm saying is we produced what we think is
16 relevant, and that there isn't a requirement that we go
17 beyond that. And what we asked was just for articulation
18 that was tied to the patent, just something straightforward
19 as saying, here's the type of network that we're interested
20 in and we want to know the topology of it and then we could
21 find the code for that. And then, you know, they don't have
22 to spend another 80 hours looking code.

23 THE COURT: Well, they don't seem to mind
24 spending the 80 hours. And so do you have an explanation as
25 to why -- you've said thinks games are different. Why

1 THE COURT: I got stuff that's printed out, so I
2 don't have attachments.

3 MR. TOMASULO: Let me direct you, for instance.
4 What is this exhibit?

5 MR. KRAFTSCHIK: I think it's DX-13, is the
6 declaration of the 2K engineer.

7 And the main part of what he states in Paragraph
8 5, that he collected code about how a player connects to the
9 network for multiplayer game play, how an IP address or port
10 are located, the network topology, how game play information
11 is distributed to the players, and how a player leaves the
12 network. And those are the features of the six patents.

13 And he says, I believe that the code that was
14 collected is sufficient for one skilled in this area to
15 understand these aspects of the multiplayer networking
16 technology.

17 And so I think that they should -- they have not
18 met their burden to justify the expense and the risk of
19 creating another copy of this source code when they have not
20 even identified --

21 THE COURT: Well, see, that's what I'm trying to
22 understand, is to make this game work, doesn't all of the
23 source code have to be in one server or one, wherever you
24 put source code? I mean, it's not like you have to go and
25 get a few lines from Alaska and a few lines from Maine and

1 some from Florida, is it?
 2 MR. TOMASULO: The game would -- I don't know.
 3 I mean, their requests go well beyond just the code for the
 4 game itself. They want all of the developer kits that have
 5 ever been provided to us.
 6 THE COURT: Well, let's just talk about the code
 7 for the game itself.
 8 Do you want -- does the code for the game itself
 9 get you what you need?
 10 MR. FRANKEL: We would be very happy to start
 11 with the code for the game itself. Based on my experience
 12 as a software engineer, that will exist in the source code
 13 repository. It should take a matter of hours or less to put
 14 it on a laptop.
 15 The laptop stays in counsel's --
 16 THE COURT: All right.
 17 MR. FRANKEL: -- office.
 18 THE COURT: All right. I got the rest of it.
 19 MR. FRANKEL: Yes.
 20 THE COURT: So I'm not going to accept
 21 Mr. Frankel as an expert just yet. But what he says kind of
 22 accords with my sense that -- do you disagree with what he
 23 said in terms of just the name?
 24 MR. TOMASULO: Just the name is not what they've
 25 asked for. They've asked for a lot of other things. What

1 THE COURT: Right. Which is what makes me
 2 dubious about asking the engineers, give us what we need,
 3 because they are not really incentivized to be diligently
 4 thinking like Mr. Frankel's team, to figure out what exactly
 5 it is they need. I mean, this has got to be for the
 6 engineers a very annoying task. It is not a high priority.
 7 MR. TOMASULO: It's extremely disconcerting for
 8 them to not understand the case. That's for sure. And it's
 9 extremely disconcerting to them, the idea that for a case
 10 that they can't understand where the plaintiff is coming
 11 from, that they should have to turn over their entire source
 12 code.
 13 Let me suggest that we at least try another meet
 14 and confer where he can have his experts explain to us
 15 exactly what's missing, and then if we have to come back,
 16 then we have to come back, and I will understand that that
 17 may very well be our final straw.
 18 But --
 19 THE COURT: No. No. This is the final straw.
 20 MR. TOMASULO: Well, I understand, but we never
 21 got a substantive response to our request that they identify
 22 something. They just said, we want it all or we're going to
 23 court. That is not fair to us.
 24 THE COURT: Mr. Frankel, the topics that are
 25 listed in Mr. Walters' declaration here, 5A, B, C, D and E,

1 he said is that's where he'd like to start.
 2 THE COURT: Yes. Well, that's the problem. So
 3 do you agree that the game's source code ought to be
 4 something that could be collected from a repository in a
 5 matter of hours?
 6 MR. TOMASULO: No, I don't. It took -- these
 7 games are enormous, and so to put them on a bit lock secured
 8 hard drive takes several days just to put one game on a hard
 9 drive.
 10 THE COURT: But when you say it takes several
 11 days, is this like the way -- is this like something where
 12 you say, here's a device. Push a button. And then it
 13 starts doing whatever it does, and the person who pushed the
 14 button then goes off and does something else?
 15 MR. TOMASULO: No. It would take a team of
 16 people. I mean, for instance, for -- because I know what
 17 happened with EA. It was multiple engineers, the paralegal
 18 that's in-house at EA. They have to go and extract the
 19 source code.
 20 And these people -- I guess it's another part of
 21 kind of the overarching theme of these things, the engineers
 22 are almost impossible to get them to break away from their
 23 day job.
 24 THE COURT: Right.
 25 MR. TOMASULO: They are --

1 if you had the code that did all of that, would that
 2 actually -- would that actually be what you were looking
 3 for?
 4 MR. FRANKEL: The short answer is no.
 5 THE COURT: All right. Tell me why.
 6 MR. FRANKEL: And --
 7 THE COURT: With a short answer.
 8 MR. FRANKEL: Yes. And I just received this
 9 15 minutes ago. But we have already in our complaint
 10 identified a number of items, a functionality, they're
 11 important to infringement, and I've identified them in a
 12 meet and confer and in written correspondence, which is
 13 attached as an exhibit. And without that, the claims are
 14 not just the network.
 15 The claims talk about a game, a broadcast
 16 channel for information, the type of data that's being
 17 exchanged, and we need this context to understand how it
 18 operates. And having access to the full source code will
 19 speed up the review, because then we can follow the
 20 functionality that we can see in the games we've play tested
 21 in the source code and we'll save everyone time.
 22 MR. TOMASULO: Briefly, your Honor, what they've
 23 identified in the complaint are just, in other words, if you
 24 are going to play NBA 2K, there's a game that let's you play
 25 at something like Rutgers Park, you know, one of the famous

1 outdoor parks in New York, and then there's another one that
2 let's you play somewhere else. Those don't matter for
3 multiplayer. The thing works the same way. It's the way
4 you jiggle the controller that sends the information back
5 and forth. It doesn't matter what the art assets are, the
6 way that that particular world is created, or anything like
7 that.

8 THE COURT: All right. I have to confess, I
9 can't possibly make a fair decision on this issue, and so
10 what I'm going to do is, I'm going to refer your disputes,
11 other than the ones that I do resolve today, and any future
12 disputes, to a Special Master. And that person could spend
13 as much time as they need to figure this out, but I can't
14 figure this out.

15 MR. TOMASULO: Thank you, your Honor.

16 THE COURT: And it's clear that it costs a
17 lot of money to do this. It costs a lot of money to do
18 that.

19 Maybe -- you know, I'm kind of inclined to
20 believe that, to some extent, it's a lot better to produce
21 everything. Maybe plaintiff ought to pay for half of it. I
22 don't know. But I just -- you know, I don't know what the
23 accused functionality is. I just can't, can't and don't
24 have the -- I can't come to a reasonable decision, so I need
25 to give it to someone who has more time to work through this

1 that designed this functionality.

2 THE COURT: All right. What's your response to
3 that?

4 MR. TOMASULO: That is not correct.

5 THE COURT: Okay. Because?

6 MR. TOMASULO: Okay. So Call of Duty is the
7 game that he's talking about.

8 THE COURT: Is that right? Is that the game
9 you're talking about?

10 MR. FRANKEL: There are three games. There's
11 two different Call of Duty titles that were actually created
12 by different studios, so they're not entirely similar, and
13 then there's another game, Destiny.

14 THE COURT: Okay.

15 MR. FRANKEL: Yes.

16 THE COURT: All right.

17 MR. TOMASULO: Destiny is made by another
18 company altogether, so there's a developer for a game and a
19 publisher. Sometimes the developer and the publisher are
20 the same company. Sometimes they're not.

21 With respect to Destiny, it's developed by a
22 company called Bungee. It's a third-party company. They
23 make the game. We don't have the source code. We're not
24 allowed to have the source code, and they've issued a
25 subpoena to Bungee.

1 than I do. So that's what I'm going to do with that.

2 What else do we have?

3 MR. FRANKEL: The next issue, your Honor, and I
4 hope to keep this one particularly brief. For some of the
5 Activision games, there's a company called Demonware.

6 THE COURT: Well, my impression is Activision is
7 not saying that they won't produce stuff for Demonware;
8 right?

9 MR. TOMASULO: No. We have produced stuff from
10 Demonware. Over 2500 directories.

11 MR. FRANKEL: Well, and to be clear, because I
12 think their papers weren't exactly clear. Let me clarify
13 what they have produced and what they haven't and why we are
14 here.

15 Demonware provides this middleware functionality
16 that creates peer-to-peer connections, and there's no
17 dispute that's a very important part of the technology here.
18 To the extent that source code has been incorporated into
19 the source code for the accused games, we've been able to
20 review it as part of our review of the source code and we
21 appreciate that. What we did not get is the core technical
22 documents that we cannot believe the defendants don't have
23 that describe how these networks operate. And now we
24 understand that the reason that Activision doesn't have
25 those documents is that it's their subsidiary that has them

1 THE COURT: Okay.

2 MR. TOMASULO: And I mean this is the first I've
3 heard him mention --

4 THE COURT: Well --

5 MR. TOMASULO: -- Demonware in the context of
6 Destiny.

7 THE COURT: All right.

8 MR. TOMASULO: In other words --

9 THE COURT: So let's talk about Demonware and
10 Call of Duty.

11 MR. TOMASULO: All right. So Demonware and Call
12 of Duty.

13 So Demonware provides file libraries, and to the
14 extent those libraries are incorporated into the compiled
15 game, they were on the source code review computer, and
16 that's what you saw.

17 THE COURT: Right. And so it sounds to me like
18 he wasn't complaining about that. He thinks there should be
19 some other technical documents.

20 MR. TOMASULO: And he has not explained what --
21 beyond the relevance of what, what he wants.

22 THE COURT: All right. Give me an example of
23 another technical document that you think Demonware should
24 have had.

25 MR. FRANKEL: Well, we believe it's extremely

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1 likely that they have the design documents that describe the
2 types of networks that their code creates, and that's what
3 we wanted to get from defendants.

4 THE COURT: Okay. Design documents. Does
5 Demonware have design documents?

6 MR. TOMASULO: The way these -- I don't know.
7 The answer is, the way these games are -- these two games
8 were built by two different, they're called studios.

9 THE COURT: Okay.

10 MR. TOMASULO: And so those studios -- for Call
11 of Duty, there have been different studios over the years.
12 And so those -- that studio is an entity unto itself even
13 though those two studios, say like Sledgehammer are owned by
14 Activision.

15 Those studios, we went to their people and we
16 got -- that's how we got the source code in the first place
17 and that's the source code they reviewed.

18 When they say that there haven't been technical
19 documents produced, that's just simply incorrect.

20 THE COURT: And so --

21 MR. TOMASULO: They're --

22 THE COURT: So he's saying there should be
23 design documents for Call of Duty. You are saying, I take
24 it, we've produced what we have and we looked at Demonware
25 for these things, too. Is that right?

40

1 it.

2 THE COURT: Okay.

3 MR. FRANKEL: If they do have it, we would like
4 it.

5 THE COURT: Okay. So that issue is resolved;
6 right?

7 MR. TOMASULO: As long as it's what I said and
8 not what he said, because what he said is not correct.

9 THE COURT: Well, what I thought he said is,
10 what I thought we agreed on, there are two principles here,
11 one of which is Demonware is a wholly-owned subsidiary, so
12 you do have control and access over whatever it is they have
13 even though they're a separate company.

14 And the second thing is that to, if they have
15 design documents for these things, you're going to find that
16 out and produce them. And that sounded to me like what you
17 agreed to what I said. It didn't sound to me any different
18 than what he said.

19 MR. TOMASULO: I thought -- yes. We'll do what
20 I said, which is to look for the design documents that are
21 relevant to Call of Duty, and we are not withholding
22 anything like that. All of those things, if they were
23 relevant, they would have been at the studio in the first
24 place.

25 THE COURT: Okay.

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1 MR. TOMASULO: Well, this is the first I've
2 heard of a specific request that we go look for Demonware's
3 supposedly design documents.

4 Whatever documents the studio --

5 THE COURT: So let's take care of that.

6 MR. TOMASULO: Okay.

7 THE COURT: Because you're willing to do it. So
8 can you contact Demonware in the next ten days and find out
9 whether they have any design documents, advise Mr. Frankel
10 if they do, and then promptly get them if they do. And if
11 they don't, advise them of that.

12 MR. TOMASULO: So there's a specific type of
13 document called a technical design document. He's a
14 software engineer, so he probably knows what that is. All
15 we can ask Demonware, if they have any CDDs that were
16 relevant, or CDs or something similar that were relevant to
17 how Call of Duty operates.

18 THE COURT: Okay.

19 MR. FRANKEL: Your Honor, this is exactly what
20 we clearly asked for in correspondence and in the meet and
21 confer. Demonware, as a wholly-owned subsidiary, be a part
22 of the discovery process, including core technical
23 discovery, and if it comes down to it, depositions. If
24 all -- and I think counsel has agreed that we will get that
25 discovery from them. If they don't have it, they don't have

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1 MR. TOMASULO: But we'll also ask Demonware and
2 we'll do what -- we'll ask Demonware if they have these
3 kinds of documents that are relevant to Call of Duty.

4 THE COURT: Okay. All right.

5 MR. TOMASULO: And we'll produce them if we can
6 find them.

7 THE COURT: Okay.

8 MR. FRANKEL: Your Honor, I think we are close,
9 but I just want to confirm that the fact that Demonware is a
10 subsidiary is not going to be a basis for them to be less
11 involved in the discovery here, because it's -- you know,
12 it's not just for Call of Duty. They designed a kit.

13 THE COURT: Well, you know, we're not talking
14 about discovery generally. We're talking about core
15 technical documents, and for core technical documents,
16 they're a wholly-owned subsidiary.

17 Activision, if they're the one who have the
18 relevant technical documents, Activision needs to get them
19 from Demonware, and I think twice now, Mr. Tomasulo has said
20 he would.

21 MR. TOMASULO: What I want -- there is a
22 distinction here, and what -- Demonware is not an accused
23 product. They have more -- so they have some files that are
24 incorporated into the client side server, into the client
25 side code for Call of Duty. That was produced, and we'll go

1 and see if they have technical design documents.
 2 I think he wants something much different. He
 3 wants us to go and get a bunch of things from Demonware that
 4 have nothing to do with how Call of Duty operates.
 5 THE COURT: Well, all we're talking about right
 6 now is design documents.
 7 MR. TOMASULO: Regarding Call of Duty.
 8 THE COURT: Regarding Call of Duty.
 9 MR. TOMASULO: Exactly.
 10 THE COURT: So, you know, I'm not -- I have
 11 enough trouble when we've got a concrete dispute without
 12 having abstract disputes, so let's consider that resolved.
 13 All right. Foreign sales of accused products.
 14 So the accused products here are software?
 15 MR. FRANKEL: Yes, your Honor. And there are a
 16 number of theories under which my client can obtain damages
 17 for the foreign activity, and I'm happy to go through them.
 18 I think that the key point is this is not a summary judgment
 19 motion on liability, but rather what is relevant for
 20 discovery.
 21 Some of the claims at issue are computer storage
 22 medium claims, and that's a claim that refers to a disk that
 23 has software on it. And the defendants make these products
 24 in the U.S., and then if they ship them and sell them
 25 overseas, the fact that it was made --

1 Let me just say one thing. They could assert
 2 those claims or they could not. They are going to have to
 3 make an election.
 4 THE COURT: Well, if they said it's an accused
 5 product, that seems to me to be an assertion of a
 6 computer-readable medium claim; right?
 7 MR. TOMASULO: Not really, because they
 8 identified the accused products. Not all of these things
 9 are even distributed that way.
 10 So you can buy these games online. If a foreign
 11 customer buy the game -- if a foreign customer buys, for
 12 instance, World of Warcraft online in Germany, it downloads
 13 it from a German server.
 14 THE COURT: Well, so --
 15 MR. TOMASULO: So it's just too broad a brush.
 16 THE COURT: Am I correct in thinking,
 17 Mr. Frankel, that what you are looking for, if a
 18 computer-readable medium is sold, is made in the United
 19 States, and it is sold somewhere outside the United States,
 20 you'd like to know what the revenue for that is?
 21 MR. FRANKEL: That is correct, your Honor, and I
 22 think that that is black letter law. They have not
 23 challenged that. But there are other damages theories as
 24 well.
 25 THE COURT: Well, before you get to other

1 THE COURT: I got that.
 2 So what do you say, because I have to say,
 3 inquiring minds have read your letter that say, yes, they're
 4 mostly methods and systems, and so you can't recover from
 5 that. The thing that's left out was the mostly. Well, what
 6 about the things that are not the mostly?
 7 MR. TOMASULO: Well, so they have 129 asserted
 8 claims. We don't know which ones. They have 129 claims to
 9 assert. There's maybe a handful that are device claims. So
 10 then what I would say is this is just not a ripe dispute
 11 because we don't know what the claims are.
 12 So let me just give you --
 13 THE COURT: Well, let's assume he's representing
 14 they're going to accuse some computer mediums, if that's the
 15 right term.
 16 MR. TOMASULO: But they have not done that. In
 17 other words, let me say, let me give another example.
 18 So --
 19 THE COURT: Wait. Didn't we start off by before
 20 you did your core discovery, didn't they accuse certain
 21 products?
 22 MR. FRANKEL: Yes.
 23 MR. TOMASULO: Their software products. So they
 24 could elect to assert, they have some Beauregard claims,
 25 which is basically computer readable medium claims.

1 damages theories --
 2 MR. FRANKEL: Yes.
 3 THE COURT: -- I'd like to know just what it is
 4 that you are looking for in terms of foreign sales of
 5 accused products. Besides for the foreign sales of these
 6 computer mediums, is there something else you're talking
 7 about here?
 8 MR. FRANKEL: Yes, your Honor. So part of the
 9 way some of these games work is, first you purchase the
 10 disk, so that is a revenue event.
 11 THE COURT: Yes.
 12 MR. FRANKEL: And then there can be other
 13 sources of revenue from using the game in a multiplayer
 14 network, and the foreign participants can play the games
 15 with people in the United States where, so where there are
 16 going to be networks in the United States, and even if the
 17 activity is occurring, even if this post-purchase activity
 18 is occurring overseas, it can go to the profitability of the
 19 game, and it would be relevant to a Georgia-Pacific
 20 analysis.
 21 So for that reason we think it's fair game for
 22 discovery. Down the road, the experts can fight over what
 23 is the appropriate calculation of damages. And there are
 24 other theories as well that I can go into on why foreign
 25 revenue is relevant.

1 THE COURT: So why is this premature?
 2 MR. TOMASULO: Well, we don't know what claims
 3 they're asserting or where all of these things are made. I
 4 mean, this is just a very broad brush, just say, give us
 5 everything, and it's just yet another --
 6 THE COURT: Well, you say where the things are
 7 made. I mean, you are the ones who know where the things
 8 are made. Right?
 9 MR. TOMASULO: Well, some of them are made in
 10 different places. So some games are made -- you know, some
 11 games are stamped overseas. Some games are stamped here.
 12 Some games are sold online.
 13 THE COURT: Well, presumably, without knowing
 14 for sure, if you make these games overseas --
 15 MR. TOMASULO: There's --
 16 THE COURT: The sale of those games is not
 17 covered. Right?
 18 MR. FRANKEL: Well, your Honor, the
 19 interrogatory responses we have to date say that every
 20 accused game is manufactured at least in part in the United
 21 States, not to mention that foreign -- people can purchase
 22 the games and they could be downloaded from a server here.
 23 And even if they are not, they can access the networks here
 24 and that's a source of revenue.
 25 THE COURT: All right. So here's the thing.

1 about that.
 2 MR. BLUMENFELD: Your Honor, I think the only
 3 things left are the Hamilton Capital --
 4 THE COURT: Okay.
 5 MR. BLUMENFELD: -- and the privilege log, which
 6 are related issues.
 7 THE COURT: Well, let's talk about the Hamilton
 8 thing first.
 9 So I have seen the word "Boeing" in here, and I
 10 didn't know what that was relevant to. Boeing sold the
 11 patents to somebody? This is Boeing, like aircraft.
 12 MR. FRANKEL: Boeing was the original assignee
 13 of the patents and they were transferred to Acceleration
 14 Bay.
 15 THE COURT: Okay. Is there a dispute relating
 16 to Boeing and Acceleration Bay's relationship?
 17 MR. BLUMENFELD: There is, your Honor, and maybe
 18 two. Maybe one procedural and one substantive. But we are
 19 about very shortly to move to dismiss all three cases for
 20 lack of standing, and the reason for that relates to the
 21 agreement between Boeing and Acceleration Bay.
 22 THE COURT: Okay.
 23 MR. BLUMENFELD: And that agreement, if that is
 24 the basis for Acceleration Bay's claim that it owns the
 25 patents.

1 Some of this may wash out down the road, but it strikes me
 2 that it's not actually all that hard for you to produce a
 3 spreadsheet with the revenues of the accused products over
 4 whatever the relevant time period is. And so I don't see a
 5 whole lot of burden on you.
 6 MR. TOMASULO: If that's what we're going to do,
 7 then that's what we'll do.
 8 THE COURT: All right. I think you should do
 9 it.
 10 MR. TOMASULO: All right. Thank you, your
 11 Honor.
 12 THE COURT: And why don't you do it within
 13 three weeks.
 14 MR. TOMASULO: All right. We'll try and do
 15 that, your Honor.
 16 THE COURT: All right. Okay. Does that
 17 take care of the things that were raised in Acceleration
 18 Bay's letter, using the phrase "take care" of in a loose
 19 sense?
 20 MR. FRANKEL: Yes, your Honor.
 21 THE COURT: All right. All right. And I think
 22 in terms of what the defendants raised, the first issue is
 23 kind of a mirror image. I think the second is a mirror
 24 image. The third is -- oh, wait. This must be the
 25 response. No wonder it's such a mirror image. Yes. Sorry

1 THE COURT: Right.
 2 MR. BLUMENFELD: And I think Mr. Tomasulo said
 3 we intimately got that from Boeing by subpoena, but I don't
 4 think we've gotten that from the plaintiff. But there are
 5 provisions in that that reserve to Boeing field of use, that
 6 provide --
 7 THE COURT: Well, and so in terms of there being
 8 a dispute, what is left -- you know, I understand the loan
 9 agreement, Hamilton. Is that related to the Boeing or are
 10 they two separate things?
 11 MR. BLUMENFELD: It is related in a sense, and
 12 that is that the, as we understand it at least, Acceleration
 13 Bay entered into agreements with Boeing, the transfer
 14 agreement, and with Hamilton Capital, a loan agreement at
 15 the same time, or they were negotiating them at the same
 16 time.
 17 And the Boeing agreement we think reserves
 18 rights to Boeing, which deprive --
 19 THE COURT: Right. Which you already have.
 20 MR. BLUMENFELD: Which we already have. What we
 21 don't know is what rights may be reserved to Hamilton
 22 Capital, because what we have is a security agreement, and
 23 the reason we have it is because it was filed in the Patent
 24 Office. And the security agreement says that under the
 25 terms of the loan agreement, which we don't have, the

1 grantor has granted to the lender, and the grantor being
2 Acceleration Bay, has granted to the lender a security
3 interest in among other properties, certain intellectual
4 property of grantor. We know that's the patents that are
5 at issue here, or includes the patents that are at issue
6 here.

7 And the security agreement refers to the loan
8 agreement and incorporates it by reference. It is also
9 referred to, although not by name, in the Boeing agreement.

10 What we would like to know is what rights
11 Hamilton has in the patent. As I said, we're going to move
12 to dismiss based on the Boeing agreement, but we'd like to
13 know what other rights --

14 THE COURT: And am I correct in thinking that
15 somebody who owns the patent can, so to speak, mortgage it,
16 and they still own the patent. Right?

17 MR. BLUMENFELD: People can -- I guess they can
18 do what you do with your home. You still own your home.

19 THE COURT: Right.

20 MR. BLUMENFELD: Someone has a security
21 interest. What we don't know is what interest in the
22 patents Hamilton Capital got, for example. There are
23 provisions like this in the Boeing agreement. If certain
24 things happen or don't happen, there could be a claim to,
25 for the reversion of the patents.

1 give your Honor a copy of it.

2 The concern here is that this is fishing to find
3 out the litigation budget.

4 THE COURT: Well, and so, you know, I can't -- I
5 take it, for what you are looking for, if I redact the
6 litigation budget, you don't care, because that's not what
7 you are interested in; right?

8 MR. BLUMENFELD: That's not -- I would be
9 interested, for example, your Honor, if there are provisions
10 which give Hamilton Capital the right to approve or veto
11 licenses or settlements, things like that.

12 THE COURT: That's written out in words.

13 MR. BLUMENFELD: That's not the numbers.

14 THE COURT: Yes. Well, I will tell you what.
15 If you don't mind, I will go have a look. If I could get
16 one -- actually, do you have more than one copy?

17 MR. FRANKEL: I do, your Honor. I will give
18 you the unredacted copies with proposed redactions
19 highlighted.

20 THE COURT: Okay.

21 MR. FRANKEL: Two. But, again --

22 THE COURT: Well, if the proposed redactions are
23 just numbers, did you redact anything besides numbers?

24 MR. FRANKEL: I would have to check, but I mean,
25 it's clearly indicate with the highlighting.

1 THE COURT: All right. So, Mr. Frankel, I
2 understand -- so how big is this loan agreement? How many
3 pages?

4 MR. FRANKEL: It's 30, 40 pages.

5 THE COURT: And that's a lot of pages. In terms
6 of -- and so I understand you wrote it's irrelevant.

7 In terms of the -- and so I assume without
8 knowing for sure that the part of it that is most -- that
9 has the strongest reason why you don't want to give it up is
10 because it shows what kind of funding you have. Right?

11 MR. FRANKEL: That is correct, your Honor.

12 THE COURT: So what I was wondering, and part of
13 the reason why I asked you to redact it with all the numbers
14 gone, if it's redacted so there are no numbers in it, is it
15 otherwise terribly sensitive?

16 MR. FRANKEL: Well, the answer is yes. We do
17 have copies here. I can make it available to the Court for
18 an in-camera inspection.

19 I think the quickest point I just want to make
20 is that a security interest in a patent is routine. There
21 are hundreds of thousands of those before the Patent Office.
22 That does not create a standing issue.

23 I will represent that there is nothing in the
24 loan agreement that speaks to that issue that is
25 inconsistent with the recorded security interest. And I can

1 THE COURT: Okay. All right. You mean like in
2 yellow or something where I can actually see what it is?

3 MR. CHOA: Yes.

4 MR. FRANKEL: Yes.

5 THE COURT: Okay.

6 MR. FRANKEL: And I would also like to point out
7 I do not represent Hamilton. You know, I don't know that
8 they consent to the production --

9 THE COURT: Okay. All right.

10 MR. FRANKEL: -- of this information.

11 Two copies, your Honor?

12 THE COURT: Two copies would be good, because
13 somebody else is going to be looking at it besides me.

14 (Mr. Frankel handed documents to the Court.)

15 THE COURT: Are they stapled together in some
16 way?

17 MR. FRANKEL: Yes.

18 THE COURT: All right. So we now each have one
19 with the things.

20 Okay. So let's go, let us just go have a look
21 at this, and we'll be as quick as we can.

22 (Short recess taken.)

23 - - -

24 (Proceedings resumed after the short recess.)

25 THE COURT: All right. Have a seat.

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1 So we've looked at this, and there's one
2 paragraph that potentially has some relevance, and I don't
3 know. You know, the agreement certainly provides that
4 plaintiff, seems to provide them with close to a hundred
5 percent of, or it does not seem to take away anything on the
6 patents. One thing that concerns me is that there is a
7 provision which seems to say there are some settlements that
8 the lender can reject.

9 MR. TOMASULO: Well, that would be -- that is
10 one of the considerations for standing, whether the patent,
11 the purported patent owner, or the plaintiff, has the right,
12 or the sole right to approve settlements.

13 MR. FRANKEL: Your Honor, I am not aware of any
14 case law that suggests that that creates a standing issue,
15 but if that's the only paragraph at issue, we can produce
16 that one paragraph.

17 THE COURT: Well, so here's the thing, is I did
18 look through it quickly, and I think that the main thing,
19 because the -- because, in fact, it's strange.

20 I was doing a bankruptcy appeal the or day, and
21 apparently, it looks like a basic loan agreement is the same
22 across a lot of difficult fields, because the paragraphs are
23 numbered the same way as this particular bankrupt, who had
24 nothing to do with the patent law, was doing things.

25 So I also think that once you take out the

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1 objection or do something, you don't have to do anything
2 until I resolve their objection.

3 MR. FRANKEL: Okay.

4 THE COURT: But --

5 MR. TOMASULO: We did subpoena them as well.
6 There are subpoena responses.

7 MR. BLUMENFELD: Your Honor, the only thing I
8 would request is that in the event that we move to dismiss
9 for lack of standing based on the Boeing agreement before we
10 get the redacted Hamilton agreement and there's something in
11 there that we want to rely on, that we be able to at least
12 supplement the record on that point.

13 THE COURT: Well, I don't know what your
14 schedule is. Why don't you wait ten days and maybe it will
15 be moot.

16 MR. BLUMENFELD: We can do that. We certainly
17 don't mind waiting ten days. What I don't want to end up is
18 litigating and hoping it will be produced.

19 THE COURT: Well, if it turns out -- I mean, you
20 know, my impression is with the yellow, with the things that
21 are proposed to be redacted, which I think -- and there are
22 some places where there are some words that are redacted
23 around the numbers, and I'm fine with that, because I
24 understand, because they really, sometimes they're words
25 that have the effect of the numbers, and they are irrelevant

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1 numbers, there's almost nothing that is -- I don't see
2 anything that's really sensitive in particular in here. So
3 my inclination, because I have seen standing, I have seen
4 language in a standing case somewhere along the lines that
5 does sort of suggest that it's conceivable that a control
6 over the ability to settle cases could be an issue, and if
7 it's the case that there is a Boeing agreement creates some
8 issue that's good enough for defendants to be representing
9 that they could make this motion. I think actually the
10 better course is to make your redactions, attorneys' eyes
11 only, highest confidentiality designation, and to turn it
12 over.

13 MR. FRANKEL: Your Honor, and, again, I don't
14 represent Hamilton --

15 THE COURT: And I will give you -- presumably, I
16 know you'll communicate important information to them. So
17 I'm not saying you have to do this today or even next week,
18 but let's say that if -- is it reasonable to say that by
19 next Friday, if Hamilton has some independent objection,
20 that they intervene or file something otherwise, and
21 otherwise make the redactions and turn it over?

22 MR. FRANKEL: Well, again, I can't speak for
23 Hamilton, but I would certainly, you know, reach out and
24 communicate that deadline from the Court.

25 THE COURT: Right. And if they file an

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1 to your issue as I think you'll see when you get the
2 redacted copy. All right?

3 Yes, Mr. Frankel?

4 MR. FRANKEL: Just a related question. So there
5 has been that subpoena to Hamilton seeking discovery into
6 the financing terms. To avoid my client having to make a
7 protective order, could we agree that this would be the
8 extent of the discovery, producing this agreement?

9 THE COURT: I don't know what the subpoena is
10 that has been given to Hamilton. That's kind of hard for me
11 to imagine what else could be relevant.

12 MR. TOMASULO: Maybe they have claim charts or
13 things like that. Maybe they have doubts about the case. I
14 don't know.

15 THE COURT: Yes. I would say I don't think
16 that's going to be so, but --

17 MR. TOMASULO: Okay.

18 THE COURT: In any event, so I'm returning
19 both the two copies that we got so I don't have them
20 anymore.

21 And perhaps you all can discuss -- well, I don't
22 think that's going to get us anywhere. But why don't you --
23 you know, I realize that if Hamilton actually wants to raise
24 a big issue, it's possible that next Friday is not enough
25 time. So I don't want to -- I don't want to prejudice

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1 them in some way that is not foreseen, but if they have a
2 bona fide objection they want to have heard, file something
3 indicating that is the case and we could agree on a schedule
4 if need be. Okay?

5 MR. FRANKEL: Thank you, your Honor.

6 MR. TOMASULO: Presumably other than relevance.

7 THE COURT: Well, they -- I think they are
8 limited to -- well, I'm not going to try to predict what
9 they're limited to, but I imagine Mr. Frankel's client will
10 tell them relevance isn't likely to get them far.

11 MR. TOMASULO: Okay.

12 THE COURT: Okay? So I guess I took my papers
13 away with me. I was an optimist. Have I gotten through
14 everything now?

15 MR. BLUMENFELD: The only other issue, it's
16 related a little bit, is, we asked for a privilege log, and
17 I'm not so concerned about the Hamilton side, but on the
18 negotiations between Acceleration Bay and Boeing -- and I
19 mean there's really, I think, two issues.

20 The first is that given what we've now seen in
21 the agreement between them, we would like to know what back
22 and forth there was, because some of the terms are pretty
23 interesting in terms of substantial rights, standing,
24 ownership, things like that. And on that, I'm not asking
25 Mr. Frankel to answer this. I suspect that those are

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1 Mr. Frankel to be saying there aren't any.

2 MR. FRANKEL: Well, I don't agree with counsel's
3 statement, because we have produced documents. We've
4 produced the deal document. We've produced some draft
5 documents.

6 MR. TOMASULO: Boeing produced those.

7 MR. FRANKEL: Well, my firm represents both
8 Boeing and Acceleration Bay, and the documents have been
9 produced. So they've not been -- you know, if the issue is
10 that we need to produce the same document --

11 THE COURT: I doubt that that is the issue.

12 MR. FRANKEL: So the parties have not gotten
13 into e-mail discovery at this point, but the documents that
14 are relevant have been identified and produced. And I do
15 believe that there are circumstances where there is
16 privilege between people negotiating a deal. We've
17 submitted cases.

18 THE COURT: But you have not -- you're not
19 claiming any privilege.

20 MR. FRANKEL: Correct.

21 THE COURT: So whether there is privilege or not
22 is kind of academic.

23 MR. FRANKEL: Correct.

24 MR. BLUMENFELD: It sounds to me a little bit,
25 your Honor, like this is an issue which is going to come

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1 documents between Boeing and his law firm, although I don't
2 know that for sure.

3 And the second point is that at least in the law
4 that I've been through in this area, during the time you're
5 negotiating as opposed to the time when you have an
6 agreement and have a common interest, that you're sitting on
7 opposite sides of the table and those documents aren't
8 privileged anyway, but they, I think, are claiming that if
9 there are any such documents, they are privileged. In order
10 to able to even challenge that privilege, we need to know if
11 there's anything there and what it is.

12 MR. FRANKEL: Your Honor, we've previously
13 represented that there has been no exchange of substantive
14 diligence between my client and Boeing about the asserted
15 patents.

16 I can further represent -- I hope this will moot
17 the issue -- that Acceleration Bay has not withheld
18 negotiation documents with Boeing on a basis of privilege.
19 So if I understand the request, there would be nothing to
20 log.

21 MR. BLUMENFELD: But they also have not produced
22 any documents, which makes me -- of negotiation with Boeing.
23 So either there aren't any or they have not withheld them,
24 but they have not got around to producing them yet.

25 THE COURT: Well, I certainly would understand

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1 up when we get around to e-mail discovery, at least if
2 I'm understanding what Mr. Frankel said, because I don't
3 think -- I don't think he can say that somehow the agreement
4 was reached and there was no back and forth before it was
5 reached. And if what he's saying is, that will come up
6 later during e-mail discovery, then I guess we'll deal with
7 it, but either with Mr. Frankel or with a Special Master at
8 the time that that comes up.

9 MR. FRANKEL: Without waiver of privilege or any
10 immunity, sometimes people are careful not to create a lot
11 of documents, and we've produced the relevant documents. We
12 may very well have hypothetically had privilege, but the
13 documents, we've not withheld documents on that basis.
14 There was nothing to log. It's a hypothetical issue.

15 THE COURT: Okay. Well, I would say the
16 representation that there's nothing to log takes care of it
17 for today. Right?

18 MR. BLUMENFELD: It does, your Honor.
19 Obviously, unless we get dismissed, somewhere along the way
20 in discovery we'll get some fact discovery on this.

21 THE COURT: All right. So do you want me to go
22 ahead and just get a Special Master, or do you want me to
23 wait until the next time you all want some relief?

24 MR. FRANKEL: Well, we're -- your Honor, we
25 would like to start that process immediately with respect to

1 Take-Two given that --

2 THE COURT: Okay.

3 MR. FRANKEL: All we have --

4 THE COURT: All right. I will take care of it
5 on Tuesday.

6 MR. TOMASULO: Thank you, your Honor. I was
7 going to try to catch a plane.

8 THE COURT: All right. That's fine. We're
9 done.

10 MR. TOMASULO: Thank you, your Honor.
11 (Conference concluded at 5:05 p.m.)

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EXHIBIT G

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

-v-

PLATINUM MANAGEMENT (NY) LLC;
PLATINUM CREDIT MANAGEMENT, L.P.;
MARK NORDLICHT;
DAVID LEVY;
DANIEL SMALL;
URI LANDESMAN;
JOSEPH MANN;
JOSEPH SANFILIPPO; and
JEFFREY SHULSE,

Defendants.

----- X

No. 16-cv-6848 (DLI)(VMS)

**DECLARATION OF DANIEL M.
BURSTEIN IN SUPPORT OF THE
RECEIVER'S APPLICATION FOR
AN ORDER AUTHORIZING THE
RETENTION AND PAYMENT OF
REED SMITH LLP**

I, Daniel M. Burstein, pursuant to 28 U.S.C. § 1746, declare as follows:

1. I am a member of the bar of this Court, and am a Senior Managing Director of Guidepost Solutions LLC ("Guidepost"), and as such work with Bart M. Schwartz, the Court-appointed Receiver for Platinum Partners Credit Opportunities Master Fund, LP ("PPCO") and certain related entities (collectively, the "Receivership Entities"). I submit this declaration in support of the Receiver's Application for an Order Authorizing the Retention and Payment of Reed Smith LLP (the "Application").

2. Mr. Schwartz was appointed as Receiver on consent of defendants Platinum Management (NY) LLC, Platinum Credit Management, L.P., and Mark Nordlicht by an order of this Court on December 19, 2016 (the "Appointment Date"), as amended January 30, 2017 [Docket No. 59-2] (the "Receiver Order"), following an Order to Show Cause filed in this matter by the Securities and Exchange Commission (the "SEC"). See Docket Nos. 5 & 6. On March 8, 2017, this Court entered a preliminary injunction, enjoining violation of the federal securities laws, and

ordering that Bart Schwartz continue to act as Receiver pursuant to the Receiver Order [Docket Nos. 105, 106].

3. On June 23, 2017, the Receiver submitted an application to resign from his role as Receiver of the Receivership Entities [Docket No. 170]. Under the Receiver Order, however, the Receiver continues to act as Receiver until a successor is appointed by this Court (Receiver Order ¶ 43). As discussed below, the Application seeks the retention of a law firm to conduct a due diligence review of the Receivership's position in a litigation funding arrangement. Because this review must be conducted to make that position saleable, and because the Receivership currently pays approximately \$700,000 each month to maintain this position, the Receiver seeks approval of the Application now, so that the position may be sold (in whole or in part) as quickly as possible, possibly before the Receiver needs to make the next monthly payment.

4. The SEC staff consents to the Receiver's filing of this Application, but has indicated that it does not intend to take a position on the merits of this application until at or after the July 7, 2017 hearing on the SEC's Application for an Order to Show Cause for the Appointment of a New Receiver. [Docket No. 173].

5. This declaration is based on my personal knowledge, books and records of the Receivership Entities, and information I learned from, among others, the Receiver, Guidepost personnel who are working with me on this matter, and Platinum employees knowledgeable about the Receivership Entities' litigation funding investments.

The Receiver's Authority

6. Under the Receiver Order, the Receiver is empowered to "take custody, control and possession of all Receivership Property," (Receiver Order ¶ 6.B), "manage, control, operate and maintain the Receivership Entities," (Receiver Order ¶ 6.C), "transfer, compromise, or otherwise

dispose of any Receivership Property, other than real estate, in the ordinary course of business” in the manner the Receiver deems “most beneficial” to the Receivership Entities (Receiver Order ¶ 28), and manage and maintain the business operations of the Receivership Entities (Receiver Order ¶ 31).

7. The Receiver Order empowers the Receiver to “engage and employ persons . . . to assist the Receiver in carrying out the Receiver’s duties and responsibilities” (Receiver Order ¶ 6.F, ¶ 49). The Receiver Order requires that such persons be compensated upon the prior approval of the Court, and directs them to comply with the SEC’s Billing Instructions (Receiver Order ¶ 50).

The Receivership’s Investment in Acceleration Bay and the Need for Due Diligence Counsel

8. The Receivership Entities have interests in a variety of assets. PPCO, through its subsidiary named Hamilton Capital LLC (“Hamilton”),¹ provides litigation financing to borrowers in multiple investments. In February 2015, Hamilton entered into a loan and security agreement with Acceleration Bay LLC (“Acceleration Bay”), a California based technology incubator that purchases and licenses patents for various technologies (the “Agreement”).

9. Under the Agreement, Hamilton made a \$15,000,000 loan facility available to Acceleration Bay. Acceleration Bay uses the funds received from Hamilton to pursue actions against potential infringers of a group of patents it purchased from an intellectual property licensing company (the “Patents”). Pursuant to the Agreement, Hamilton will receive a participation in any recovery stemming from judgments or settlement proceeds obtained against potential infringers of the Patents.

¹ Hamilton itself has multiple subsidiaries. As used in this application Hamilton includes both Hamilton Capital LLC and its subsidiaries.

10. To date, Hamilton has provided Acceleration Bay with nearly \$6,800,000 through the loan facility created by the Agreement. However, Hamilton is approximately \$1,500,000 behind its funding obligations. In consultation with the SEC staff, the Receiver has been making payments of \$700,000 each month to avoid a potential default and to maintain the Receivership's participation rights under the Agreement.

11. Acceleration Bay has retained Kramer Levin Naftalis & Frankel LLP ("Kramer Levin") to monetize the Patents. Kramer Levin filed suit against Activision Blizzard Inc., Electronic Arts Inc., Take-Two Interactive Software, Inc., Rockstar Games, Inc., and 2K Sports, Inc. in the United States District Court for the District of Delaware (Case Nos. 1:15-cv-00228, 1:15-cv-00229, and 1:15-cv-00311), alleging that the defendants infringed on the Patents (the "Litigation"). The Litigation is presently active and requires additional funding. The cases are scheduled for trial beginning April 2018.

12. Due to the ongoing costs required to maintain the Receivership's interest created by the Agreement, the Receiver has explored selling all or part of the Receivership's interest.

13. There is an active market for litigation funding arrangements such as the Agreement. However, it is common practice in the litigation funding arena to provide potential buyers with an independent review of the litigation in question prior to the sale of a position. Before entering into the Agreement, Hamilton retained Reed Smith to conduct a review of the Patents and to advise on the potential merits of a case against alleged infringers. The Receiver now wishes to retain Reed Smith to conduct a review of the Litigation, so that its review can be provided to potential purchasers of the Receivership's interest under the Agreement. Based on a review of competing bids, Reed Smith is best positioned to conduct this review for the lowest price due to its existing familiarity with the Patents.

Terms of Proposed Retention

14. The Receiver requests authorization to retain Reed Smith according to the terms of the engagement letter attached hereto as Exhibit A. Reed Smith is a global law firm with more than 1,700 attorneys worldwide and its attorneys are familiar with patent litigation and are familiar with the Patents at issue. The hourly rates of the attorneys who will work on the proposed engagement range from \$350 to \$850 per hour.

15. If its retention is approved, Reed Smith will review and analyze the strengths and weaknesses of the Litigation, including a review of all pleadings, written discovery, fact depositions, expert reports, expert depositions, claim construction related findings and court orders. As mentioned above, Reed Smith is familiar with the Patents and was retained by Hamilton to conduct a similar review prior to the formation of the Agreement.

16. Reed Smith expects that its work will cost between \$40,000 and \$50,000 in total and has agreed that its fees for completing this work will not exceed \$50,000.

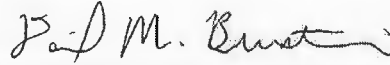
17. Before commencing this engagement, Reed Smith will submit to the Receiver and the SEC staff a certification confirming that it has performed a conflict check and that it does not have any potential or actual conflicts which prevent it from accepting the proposed engagement. Reed Smith will also confirm that none of the attorneys who will work on the engagement are currently subject to disciplinary actions in any court. Reed Smith will certify that it agrees to abide by the SEC Receivership Billing Instructions.

18. This engagement is expected to last less than four weeks. Given the circumscribed nature of the work to be performed, the Receiver requests authorization to make payment to Reed Smith up to \$50,000 without the submission of a formal fee application or further order of this

Court. The Receiver will submit Reed Smith's invoices to the SEC Staff for their review prior to payment.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: New York, New York
June 30, 2017



Daniel M. Burstein

EXHIBIT H

REED SMITH LLP PRIVILEGE LOG

DATE	DESCRIPTION	PRIVILEGE
11/6/2014	Email from Kramer Levin to Reed Smith attaching a zip file of documents relating to the "Asserted Patents"	Common Interest
11/10/2014	Emails between Kramer Levin and Reed Smith relating to the "Asserted Patents"	Common Interest
11/11/2014	Emails between Kramer Levin and Reed Smith relating to the "Asserted Patents"	Common Interest
12/03/2014	Emails between Kramer Levin and Reed Smith concerning a proposed 12/18 meeting in Menlo Park relating to the "Asserted Patents"	Common Interest
1/06/2015	Emails between McDermott Will & Emery and Reed Smith relating to their common client and the "Asserted Patents"	Attorney Client
1/07/2015	Email from Kramer Levin to Reed Smith relating to the "Asserted Patents" and attaching a document	Common Interest
1/16/2015	Emails from Kramer Levin to Reed Smith attaching a zip file of documents relating to the "Asserted Patents"	Common Interest
1/23/2015	Email from Kramer Levin to Reed Smith, copy Jack Simony, relating to the "Asserted Patents"	Common Interest
1/26/2015	Email from Reed Smith to Kramer Levin, copy Jack Simony, relating to the "Asserted Patents"	Common Interest

EXHIBIT I

From: [Frankel, Aaron](#)
To: [Barry, Kathleen B.](#); [Lin, David K.](#); [Tomasulo, Mike](#); [Enzminger, David P.](#); [Cheng, Gino](#); [Netikosol, Joe](#); [Enns, Krista M.](#); [Sommer, Andrew R.](#); [Blumenfeld, Jack](#); [Kraftschik, Stephen](#); [Webb, Dan K.](#); [Murray, Michael M.](#)
Cc: [Andre, Paul](#); [Kobialka, Lisa](#); [Hannah, James](#); [Lee, Hannah](#); provner@potteranderson.com; jchoa@potteranderson.com
Subject: RE: Acceleration Bay Actions
Date: Monday, September 18, 2017 6:14:48 PM

Kathleen:

There are no such documents.

Regards,
Aaron

Aaron M. Frankel
Special Counsel

**KRAMER LEVIN
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From: Barry, Kathleen B. [<mailto:KBarry@winston.com>]
Sent: Friday, September 15, 2017 2:47 PM
To: Frankel, Aaron; Lin, David K.; Tomasulo, Mike; Enzminger, David P.; Cheng, Gino; Netikosol, Joe; Enns, Krista M.; Sommer, Andrew R.; JBlumenfeld@MNAT.com; skraftschik@MNAT.com; dwebb@winston.com; Murray, Michael M.
Cc: Andre, Paul; Kobialka, Lisa; Hannah, James; Lee, Hannah; provner@potteranderson.com; Choa, Jonathan A. (jchoa@potteranderson.com); Winston Video Game DE Team
Subject: [EXTERNAL] RE: Acceleration Bay Actions

Aaron,

Plaintiff's production is missing many of the documents that were supposed to be produced. Among other things, we have not received any of the diligence documents between Acceleration Bay including its representatives and Hamilton Capital including its representatives. When are you available to further meet and confer?

Regards,
Kathleen

Kathleen Barry

Winston & Strawn LLP

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From: Frankel, Aaron [<mailto:AFrankel@KRAMERLEVIN.com>]

Sent: Tuesday, September 12, 2017 5:05 PM

To: Barry, Kathleen B. <KBarry@winston.com>; Lin, David K. <DLin@winston.com>; Tomasulo, Mike <MTomasulo@winston.com>; Enzminger, David P. <DEnzminger@winston.com>; Cheng, Gino <GCheng@winston.com>; Netikosol, Joe <JNetikosol@winston.com>; Enns, Krista M. <KEnns@winston.com>; Sommer, Andrew R. <ASommer@winston.com>; JBlumenfeld@MNAT.com; skraftschik@MNAT.com; Webb, Dan K. <DWebb@winston.com>; Murray, Michael M. <MMurray@winston.com>

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Subject: RE: Acceleration Bay Actions

Kathleen:

Acceleration Bay anticipates serving the documents responsive to the Court's order shortly (likely, tomorrow). When will Activision provide the Call of Duty source code, as required by Special Master Order No. 10?

Defendants withdrew their request to seek emails in response to RFP 139. *See* Def. Brief F at 4 ("Defendants are not moving to compel on emails").

We have previously indicated that there are no further documents responsive to RFP No. 174.

Regards,
Aaron

Aaron M. Frankel
Special Counsel

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From: Barry, Kathleen B. [<mailto:KBarry@winston.com>]
Sent: Sunday, September 10, 2017 2:00 PM
To: Frankel, Aaron; Lin, David K.; Tomasulo, Mike; Enzminger, David P.; Cheng, Gino; Netikosol, Joe; Enns, Krista M.; Sommer, Andrew R.; JBlumenfeld@MNAT.com; skraftschik@MNAT.com; dwebb@winston.com; Murray, Michael M.
Cc: Andre, Paul; Kobialka, Lisa; Hannah, James; Lee, Hannah; provner@potteranderson.com; Choa, Jonathan A. (jchoa@potteranderson.com); Winston Video Game DE Team
Subject: [EXTERNAL] RE: Acceleration Bay Actions

Aaron,

We write to follow-up to Acceleration Bay's email below and the required production. As a result of Plaintiff's decision not to accept the Court's anticipatory ruling, Plaintiff must produce all documents responsive to Defendants' RFP Nos. 139 (except accounting documents), 150, and 165. Further, the Court's September 5, 2017 order requires Plaintiff to produce documents responsive to RFP No. 167.

- RFP 139 states: "All Documents including emails referring or relating to communications with third parties including but not limited to the Named Inventors, Robert Abarbanel, Scott Smith, Hamilton Capital, Sony Computer Entertainment America Inc., McKinsey & Company, Acorn Technologies, Inc., Global IP Law Group, RPX Corporation, Open Inventions Network, Intellectual Ventures, Google, and Microsoft about the Asserted Patents, any Related Applications, the technology of the Asserted Patents, infringement of the Asserted Patents, or the validity of the Asserted Patents."
 - Please confirm that the production in response to this RFP will include all communications between Plaintiff (and its representatives) and all third parties, including the foregoing entities. Such communications include but are not limited to:
 - Communications between Acceleration Bay (including through its counsel and representatives) with Hamilton Capital (and its representatives including Reed Smith, McDermott Will & Emery), any company related to Hamilton (e.g. Platinum Partners Credit Opportunities Master Fund LP or any related company)
 - Communications between Acceleration Bay (including through its counsel

and representatives) with anyone associated with the Platinum Partners receivership, including Daniel Burstein, Bart Schwartz, Melanie L. Cyganowski.

- Communications between Acceleration Bay (including through its counsel and representatives) with anyone regarding raising additional funding or purchasing claims or the loan agreement.
- We also understand that certain documents prepared by an expert were shown to Hamilton and/or its representatives before the loan agreement was completed. Please confirm that you will produce that as well.
- Ms. Radovsky testified that Acceleration's counsel had prepared an analysis of damages and communicated that to her over the phone. That analysis was communicated to third parties and should be produced as well.
- If Acceleration Bay has acquired any additional funding, loans or revenue, documents regarding that are responsive to RFP 165.

I also do not believe we have received any documents in response to RFP No. 174. Please produce the agreements between Acceleration Bay and its employees or former employees, including Mr. Ward and Mr. Agiato.

Please confirm that Plaintiff will be producing these documents by Tuesday September 12.

Regards,
Kathleen

Kathleen Barry

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From: Frankel, Aaron [<mailto:AFrankel@KRAMERLEVIN.com>]

Sent: Thursday, September 07, 2017 4:25 PM

To: Lin, David K. <DLin@winston.com>; Tomasulo, Mike <MTomasulo@winston.com>; Enzminger, David P. <DEnzminger@winston.com>; Cheng, Gino <GCheng@winston.com>; Netikosol, Joe <JNetikosol@winston.com>; Enns, Krista M. <KENns@winston.com>; Sommer, Andrew R. <ASommer@winston.com>; Barry, Kathleen B. <KBarry@winston.com>; JBlumenfeld@MNAT.com; skraftschik@MNAT.com; Webb, Dan K. <DWebb@winston.com>; Murray, Michael M. <MMurray@winston.com>

Cc: Andre, Paul <PAndre@KRAMERLEVIN.com>; Kobialka, Lisa <LKobialka@KRAMERLEVIN.com>; Hannah, James <JHannah@KRAMERLEVIN.com>; Lee, Hannah <HLee@KRAMERLEVIN.com>; provner@potteranderson.com; Choa, Jonathan A. (jchoa@potteranderson.com) <jchoa@potteranderson.com>

Subject: Acceleration Bay Actions

Counsel:

Pursuant to the Court's September 5, 2017 Order on Acceleration Bay's Objections to Special Master Order #6, Acceleration Bay hereby informs Defendants that it will comply with the Special Master's Order No. 6 as to the three RFPs discussed in the Court's Order.

Regards,
Aaron

Aaron M. Frankel
Special Counsel

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EXHIBIT J

CONFIDENTIAL – OUTSIDE COUNSEL ONLY

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.	)	CONFIDENTIAL –
	)	OUTSIDE COUNSEL ONLY
Defendant.)	

ACCELERATION BAY LLC,)	
)	
Plaintiff,)	
)	
v.	)	C.A. No. 16-454 (RGA)
)	
ELECTRONIC ARTS INC.,	)	CONFIDENTIAL –
	)	OUTSIDE COUNSEL ONLY
Defendant.)	

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

**DEFENDANTS’ BRIEF IN SUPPORT OF THEIR FURTHER
MOTION TO COMPEL RELATED TO HAMILTON CAPITAL**

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November 9, 2017

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 ■ [REDACTED]

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I. INTRODUCTION

Defendants have repeatedly requested that Acceleration Bay produce documents concerning the Asserted Patents that Acceleration Bay exchanged with Hamilton Capital during their negotiation of a litigation finance agreement in 2014 and 2015. In response to these requests—and to Defendants’ motion to compel—Acceleration Bay told the Court and Defendants in February 2016 that there were no responsive documents to produce or log and that there were “no exchanges of diligence information regarding the Asserted Patents between Acceleration Bay and Hamilton Capital.” Ex. 1 at 3; *see also* Ex. 2 at 60–61. In September 2017, Hamilton Capital’s counsel revealed to Defendants’ counsel for the first time that Acceleration Bay had, in fact, exchanged at least eight emails and at least two dozen documents related to the Asserted Patents with Hamilton Capital through its counsel Reed Smith before Hamilton Capital agreed to finance Acceleration Bay in February 2015. Ex. 3 (Reed Smith Privilege Log); Ex. 4 (Reed Smith Supplemental Privilege Log).

Acceleration Bay produced none of these documents despite an Order from the Special Master, which was upheld by the District Court. The Court and the Defendants deserve an explanation. These documents were clearly relevant and material—at least two of them are prior art. Indeed, the withheld documents appear to be the likely inspiration for Plaintiff’s infringement theories. This, obviously, is deeply troubling given the age-old holding that “[t]hat which infringes, if later, would anticipate, if earlier.” *Peters v. Active Mfg. Co.*, 129 U.S. 530, 537 (1889). The withheld references show the very features that are accused of causing infringement. *Compare* Ex. 21 (prior art article showing games using dynamic load balancing and “need to know” updating) with Exs. 28, 29, 30 (infringement allegations where the accused products are alleged to be m-regular through use of load balancing and proximity rules (aka

“need to know” updating)). Regardless of Acceleration Bay’s excuse for failing to produce these documents earlier, it must do so now.

Acceleration Bay has withheld responsive documents and failed to comply with Orders of the Special Master and the Court. It should be ordered to comply with those Orders, to produce all responsive documents immediately, to explain its failure to produce these documents and its representations to the Court that they did not exist, and to pay Defendants’ reasonable fees and expenses. Additionally, Defendants should be given leave to amend their positions in light of the documents Acceleration Bay withheld.

II. BACKGROUND

A. Before filing suit, Acceleration Bay exchanged emails related to the Asserted Patents with Hamilton Capital.

According to a privilege log recently produced to Defendants by counsel to Hamilton Capital at Reed Smith, between November 2014 and January 2015—before these cases were first filed and before Hamilton Capital agreed to finance this litigation—counsel for Acceleration Bay exchanged at least eight emails and may have had at least one meeting with counsel for Hamilton Capital. Ex. 3. Each of these emails was described as “relating to the ‘Asserted Patents,’” and multiple emails had documents attached. *Id.* These documents included (i) the Asserted Patents and their file histories, (ii) [REDACTED] (iii) at least two prior art references, and (iv) at least 14 documents related to the technology of the Asserted Patents, many of which reference the Accused Products by name. Ex. 4.

B. During discovery, Acceleration Bay represented to the Court that there were no exchanges of diligence information between it and Hamilton Capital.

On September 30, 2015, Defendants requested documents related to Acceleration Bay’s

relationship with Hamilton Capital, including (emphasis added):¹

REQUEST FOR PRODUCTION NO. 90: All documents and things relating to Hamilton Capital XII LLC.

REQUEST FOR PRODUCTION NO. 91: All documents and things relating to any agreement between Acceleration Bay and Hamilton Capital XII LLC.

REQUEST FOR PRODUCTION NO. 92: *All documents and things relating to any communication between Acceleration Bay and Hamilton Capital XII LLC about any Asserted Patents.*

REQUEST FOR PRODUCTION NO. 93: All documents and things relating to any communication between Acceleration Bay and Hamilton Capital XII LLC about this Case.

Ex. 5. Acceleration Bay objected and requested a meet and confer on these requests. Ex. 6. On February 2, 2016, following a meet and confer, counsel for Defendants requested a privilege log for all documents being withheld related to Acceleration Bay's interactions with Hamilton Capital and Boeing. Acceleration Bay refused to provide one.

Defendants then moved to compel a privilege log, and argued that such documents could be relevant to, among other things, "patent valuation, damages, royalty rates, and pre-suit investigative diligence." Ex. 7 at 3, C.A. No. 15-228, D.I. 84. In its response to that motion, on February 11, 2016, Acceleration Bay argued that the Protective Order did not require it to provide a privilege log because those communications occurred after litigation counsel had been retained. Acceleration Bay also stated that there were no relevant documents to log and

¹ The Hamilton Capital documents were responsive to numerous other discovery requests, including Defendants' request for all documents related to the Asserted Patents (RFP 1), communications between Acceleration Bay and any other person related to the patents (RFP 2), documents related to this case (RFP 4), "[a]ll documents and things relating to or constituting prior art or potential prior art (including but not limited to inventions, developments, products, services, domestic or foreign patents, domestic or foreign patent applications, publications, public uses, sales or offers for sale) with respect to any Asserted Patents" (RFP 39), and "[a]ll documents ... relating to communication concerning this Case between Acceleration Bay and any person or entity, including ... any prospective or actual investors" (RFP 6). Ex. 5.

reiterated “*that there have been no exchanges of diligence information regarding the Asserted Patents between Acceleration Bay and Hamilton Capital.*” Ex. 1 at 3, C.A. No. 15-228, D.I. 86 (emphasis added). The Court held a hearing on February 12, 2016. In response to the Court’s questions, Acceleration Bay disclaimed any privilege:

[MR. FRANKEL:] So the parties have not gotten into e-mail discovery at this point, but the documents that are relevant have been identified and produced. And I do believe that there are circumstances where there is privilege between people negotiating a deal. We've submitted cases.

THE COURT: But you have not – you’re not claiming any privilege.

MR. FRANKEL: Correct.

THE COURT: So whether there is privilege or not is kind of academic.

MR. FRANKEL: Correct.

Ex. 2 (Feb. 12, 2016 Hr’g Tr.) at 60. Acceleration’s counsel added, “[S]ometimes people are careful not to create a lot of documents, and we’ve produced the relevant documents. We may very well have hypothetically had privilege, but the documents, *we’ve not withheld documents on that basis. There was nothing to log.* It’s a hypothetical issue.” *Id.* at 61 (emphasis added). The Court responded, “I would say the representation that there’s nothing to log takes care of it for today.” *Id.*

C. The Special Master ordered Acceleration Bay to produce all communications with Hamilton Capital about the Asserted Patents.

Acceleration Bay’s original suits were dismissed for lack of subject matter jurisdiction and these cases were refiled in June 2016. On March 3, 2017, Defendants again requested documents relating to Acceleration Bay’s communications with Hamilton Capital:

REQUEST FOR PRODUCTION NO. 139: All Documents including emails referring or relating to communications with third parties including but not limited to ... Hamilton Capital ... about the Asserted Patents, any Related Applications, the technology of the Asserted Patents, infringement of the Asserted Patents, or the validity of the Asserted Patents.

Ex. 8 at 8. Acceleration Bay refused to produce any documents in response. Ex. 9 at 12–13.

Defendants again moved to compel, this time focused on Acceleration Bay’s communications with third parties, including Hamilton Capital. Ex. 10 (D.I. 210); Ex. 11 (Ltr Br). Based on Acceleration Bay’s previous representations that there had been no exchanges of diligence information with Hamilton Capital, Defendants clarified that they were not seeking full email discovery (i.e., requiring Acceleration Bay to run search terms over emails) with respect to RFP 139.² In opposing Defendants’ motion, Acceleration Bay represented that it did “not have any documents responsive to” RFP 139 with respect to Hamilton Capital except for documents “evidencing its receipt of funding from Hamilton Capital.” Ex. 12 at 16, 15.

The Special Master ordered Acceleration Bay to respond to RFP 139 fully. Ex. 13 (SM Order No. 6) at 8–9.

D. The Court overruled Acceleration Bay’s objections, rejected its claim of privilege, and ordered it to comply with the Special Master’s ruling.

Acceleration Bay objected to the Special Master’s Order, asserting that it “requires Acceleration Bay to produce its exchanges with Hamilton Capital, which are not relevant, contain work product and are subject to common interest immunity.” Ex. 14 at 2, C.A. No. 16-453, D.I. 254. Specifically, Acceleration Bay objected to production of monthly reports regarding financing and the status of the litigation. *Id.* at 5. It did not, however, make any specific objections with respect to *pre-litigation diligence documents* exchanged before Acceleration Bay and Hamilton Capital entered into their funding agreement. *Id.* Rather,

² Defendants’ statement that they were not seeking “emails” was simply a shorthand reference reiterating the agreement between the parties that Defendants were not requesting that Acceleration Bay run electronic search terms to locate potentially responsive ESI. Defendants did not intend to waive their right to email communications *already known* to Acceleration Bay. If Acceleration Bay had not represented that there were no relevant documents to log and that there were no diligence materials exchanged in February 2016, Defendants would not have agreed to exempt Acceleration Bay from searching for emails in response to RFP 139.

Acceleration Bay stated that it understood Defendants' request "to seek only non-email documents," and reiterated its position that it had no documents responsive to the request beyond those "evidencing its receipt of funding from Hamilton Capital." *Id.* at 7 n.5 & n.6.

The Court agreed with the Special Master that Acceleration Bay had to comply with the Special Master's Order Number 6 with respect to RFP 139 if it continued to assert that it was an "operating company." (Ex. 15 at 2–3, C.A. No. 16-453, D.I. 285). The Court also expressly rejected Acceleration Bay's claim of privilege. *Id.* Plaintiff has since stated that it will advance its position that it is an "operating company," and thus the Special Master's Order stands with regard to RFP 139.

E. After serving subpoenas on Hamilton Capital and its counsel, Defendants discovered that Acceleration Bay and Hamilton Capital had in fact exchanged emails and documents related to the Asserted Patents.

In late 2016, the Securities and Exchange Commission brought criminal charges against the owners of Hamilton Capital. Subsequent public court filings in this case revealed some details of Hamilton Capital's financing of Acceleration Bay, including the loan amount, the amount that had been distributed at that time. . Importantly, they also revealed that Hamilton Capital had hired Reed Smith to perform diligence on the potential loan: "[b]efore entering into the [Loan] Agreement, Hamilton retained Reed Smith to conduct a review of the Patents and to advise on the potential merits of a case against alleged infringers." Ex. 16.

On July 31, 2017, after Special Master Order No. 6, but before Acceleration Bay's objections, the Defendants served subpoenas on Hamilton Capital and the law firm that it used to perform diligence before it entered into the agreement to fund these lawsuits, Reed Smith. The subpoenas sought, among other things, any exchange of diligence information between Acceleration Bay and Hamilton Capital (and its counsel Reed Smith). Reed Smith responded to the subpoena on August 11, 2017, stating that it would not produce the documents because,

among other reasons, they were communications involving Acceleration Bay and could be sought directly from Acceleration Bay. Reed Smith, however, later agreed to provide a privilege log for the documents sought by the subpoena, and did so on September 25, 2017. Ex. 3. Reed Smith provided a supplement to the privilege log on October 19, 2017. Ex. 4. Reed Smith also stated that it had reviewed expert materials provided to it by Acceleration Bay.

Despite Acceleration Bay's previous representations that there had been no diligence documents exchanged between it and Hamilton Capital, Reed Smith's privilege log appears to show at least eight email chains and a meeting between Acceleration Bay's Counsel and Hamilton Capital's counsel "relating to the Asserted Patents." Ex. 3. A number of the emails on the privilege log also included attachments sent from Accelerations Bay's counsel at Kramer Levin to Reed Smith. For example, a November 6, 2014 email attached the six patents (and their file histories) that Acceleration Bay ultimately asserted in this case, a January 7, 2015 email attached the General Agreement [REDACTED] and a January 16, 2015 email attached what appear to be two prior art documents and fourteen other documents relating to the technology of the asserted patents. One of the emails concerns a "proposed 12/18 meeting in Menlo Park relating to the 'Asserted Patents.'" All of the logged emails pre-date the February 27, 2015 funding agreement.

After Defendants learned about these communications from the Reed Smith privilege log, they contacted Acceleration Bay's counsel, noted that they had not seen any "diligence documents between Acceleration Bay including its representatives and Hamilton Capital including its representatives," and asked for a meet and confer. Acceleration Bay's counsel responded that "*there are no such documents.*" Ex. 17 (emphasis added).

There clearly are such documents. Defendants hereby move to compel Acceleration Bay to produce the emails and attachments listed on Reed Smith's privilege log, as well as any other communications or documents exchanged between Acceleration Bay and Hamilton Capital (including their respective counsel) pre-dating their February 27, 2015 agreement.

III. ARGUMENT

A. Acceleration Bay must respond fully to Defendants' discovery requests.

Both the Special Master and the Court have directed Acceleration Bay to produce all responsive documents. Acceleration Bay possesses responsive documents. It should have produced them long ago, and it should be ordered to produce them now.

1. Acceleration should be required to produce all responsive documents and to explain why they were not produced earlier in response to Defendants' discovery requests and the Orders of the Special Master and Court.

The discovery obtained from Reed Smith reveals that Acceleration Bay possesses, at minimum, several categories of responsive documents. Acceleration Bay has the emails its counsel exchanged with Reed Smith, and the documents attached to those emails. As one of the emails concerned a "proposed meeting," Acceleration Bay likely also has presentation materials, meeting notes, or other documents from that or other meetings. Ex. 3. Reed Smith has further indicated that it reviewed expert materials related to the Asserted Patents, and that material must also be produced.³ Whether those materials relate to technical or damages issues and whether those materials are formal documents or simply notes, which were shared with Hamilton Capital through Reed Smith, they are responsive and relevant. During the meet and confer, Acceleration

³ In addition to these materials, Boeing obtained from Acceleration Bay an analysis of possible patent damages. Ex. 19 at 48. During the meet and confer on this motion, Acceleration Bay's counsel represented that this analysis, which was presumably also shared with Hamilton Capital through Reed Smith, was delivered orally, but to the extent there are any written materials evidencing this analysis (including notes taken about the oral analysis), those must be produced.

Bay agreed to produce all the references and prior art attached to the emails. But that is not the end of the story. It should also be ordered to comply immediately with Defendants' discovery requests and supplement its responses. *See* Fed. R. Civ. P. 26(e).

Acceleration Bay must produce *all responsive documents*, not merely those that Defendants have discovered. To that end, Acceleration Bay should also be required to explain how it searched for and identified responsive documents. Acceleration Bay should also be required to explain how it represented that “that there have been no exchanges of diligence information regarding the Asserted Patents between Acceleration Bay and Hamilton Capital or Boeing” and that there were no relevant documents to place on a privilege log, as well as the basis on which the documents identified in the supplemental privilege log provided by Reed Smith were withheld from production.

During the meet and confer, Acceleration Bay offered three excuses, none of which is plausible. First, Acceleration Bay claimed the documents were not relevant, but Acceleration Bay would not have been exchanging irrelevant documents with its prospective litigation financier to secure money to bring this case. And importantly, some of the documents are clearly *prior art*, which clearly is relevant. *See* Exs. 20, 21. The other references should have been produced in response to a variety of discovery requests. Some of these references themselves cite prior art (Ex. 21 (citing Exhibit Ex. 22)), some specifically discuss the Accused Products and the network structures they employ (Ex. 23), and some undermine Acceleration's infringement and damages theories (Exs. 24, 25, 26, 27). Some of the previously unproduced references demonstrate that, contrary to the Acceleration Bay's infringement allegations, the Accused Products do not contain overlay networks, as the term is commonly understood in the industry. *See* Ex. 24 at 6 (discussing a “hybrid structured [peer-to-peer] overlay system” does not include

any connections that do not exist in the underlying network); Ex. 25 at 1 (proposing “a balanced tree structure overlay on a peer-to-peer network capable of supporting both exact queries and range queries efficiently” that does not include any connections that do not exist in the underlying network). One of the references notes that World of Warcraft has a client-server network architecture, confirming Activision’s representation that World of Warcraft relies on a client-server architecture. Ex. 23 at 1 (“Existing deployments of such games have been built on a server-client architecture, even as some have claimed that such centralized architectures are inherently unscalable. This claim has been shown to be untrue by Blizzard’s World of Warcraft.”) Another cites to a reference that provides a non-infringing alternative for interest management framework in the accused products. Ex. 26 (citing Ex. 27).

Second, Acceleration Bay asserted that the documents were privileged. In 2016, however, Acceleration Bay told both the Court and Defendants that it was not withholding documents based on a claim of privilege. Ex. 2 at 60–61. And the Court expressly rejected the claim of privilege and work-product protection that was belatedly raised by Acceleration Bay in its objections to Special Master Order No. 6. Ex. 15 at 2–3, C.A. No. 16-453, D.I. 285.

Third, Acceleration Bay disputed that these documents were the “diligence information regarding the Asserted Patents” that it had told the Court did not exist. Ex. 1 at 3, C.A. No. 15-228, D.I. 86; *see also* Ex. 17. But that is belied both by the nature of the documents—the documents exchanged included the patents’ file histories, prior art, references related to the technology of the Asserted Patents that mentioned the Accused Products, [REDACTED] [REDACTED] which included licenses to the patents—and also by Acceleration Bay’s statement in March 2017 that Reed Smith “conduct[ed] due diligence” regarding the patents. Ex. 18 at 2. At

no point during the meet and confer did Acceleration Bay assert that it had been unaware of the documents' existence or that its failure to produce them had been unintentional.

2. Acceleration has no basis to continue withholding responsive documents.

Regardless of the merits of its excuses, Acceleration has no basis to withhold any responsive documents (including emails). There is no basis for disputing these materials' relevance. The documents exchanged between Acceleration Bay and Hamilton Capital prior to their signed funding agreement are clearly relevant to a number of issues in the case, including at least patent valuation, damages, royalty rates, and Acceleration Bay's status as an operating company. Indeed, Reed Smith has already represented that the emails and documents "relat[e] to the 'Asserted Patents'" and are responsive. Ex. 3. Moreover, the Special Master and the Court have already ordered Acceleration Bay to produce those documents.

The documents are not protected from disclosure by privilege. That has already been decided: in overruling Acceleration Bay's objections to Special Master Order No. 6, the Court rejected Acceleration Bay's assertion of privilege. Ex. 15 at 2–3, C.A. No. 16-453, D.I. 285 ("Based on the submissions, I do not think Plaintiff has done anything more than boldly assert Mr. Ward's communications with his lender are work product."). In any event, Acceleration Bay cannot assert the privilege now because it told the Court in February 2016 it was "not claiming any privilege." Ex. 2 (Feb. 12, 2016 Hr'g Tr.) at 60.

Acceleration Bay had no good faith basis for withholding the prior art and other references it shared with Hamilton Capital. Prior art is "factual in nature," not work product. *Lakewood Eng'g & Mfg. Co. v. Lasko Prod., Inc.*, 2003 WL 1220254, at *5 (N.D. Ill. Mar. 14, 2003) (ordering a party to disclose "the dates of all prior art searches" and to "identify the persons involved and the prior art that was discovered"). Even if the emails that included the references were privileged (which they are not), "stapling one privileged document to a non-

privileged document does not cloak the non-privileged material with protection from discovery.”

In re Gabapentin Patent Litig., 214 F.R.D. 178, 187 (D.N.J. 2003).

Any privilege or protection for the references, emails or any other documents was waived when they were shared with Hamilton Capital in an effort to entice it to invest in Acceleration Bay. The common interest exception does not apply.⁴ Judge Andrews has explained the requirements to establish the common interest exception to waiver:

To show that there is a proper community of interest, the interests “must be ‘identical, not similar, and be legal, not solely commercial.’” Additionally, to show that the members of the community are “allied in a common legal cause,” the party asserting the privilege bears the burden of showing “that the disclosures would not have been made but for the sake of securing, advancing, or supplying legal representation.”

Delaware Display Grp. LLC v. Lenovo Grp. Ltd., 2016 WL 720977, at *4 (D. Del. Feb. 23, 2016) (citations omitted). Communications between a patentee and a third party related to efforts to secure a loan are not protected by the common interest exception. *See Leader Technologies, Inc. v. Facebook, Inc.*, 719 F.Supp.2d 373, 376 (D. Del. 2010) (finding no common interest for documents shared with a third party in an effort to entice an investment); *Corning Inc. v. SRU Biosystems, LLC*, 223 F.R.D. 189, 190 (D. Del. 2004) (“SRU’s disclosures to BD were made not in an effort to formulate a joint defense but rather to persuade BD to invest in SRU.”). Other courts have similarly found that documents exchanged between a patent owner and a prospective litigation funder are not protected:

GE and plaintiff were negotiating a business transaction whereby GE would loan plaintiff money that would be repaid through patent enforcement actions or licensing of patents. Had the agreement come to pass, then communications to

⁴ As with any assertion of privilege, “there must be ‘(1) a communication (2) made between privileged persons (3) in confidence (4) for the purpose of obtaining or providing legal assistance for the client.’” *Delaware Display Grp. LLC v. Lenovo Grp. Ltd.*, 2016 WL 720977, at *4 (D. Del. Feb. 23, 2016) (quoting *In re Teleglobe Commc’ns Corp.*, 493 F.3d 345, 359 (3d Cir. 2007)). Acceleration Bay bears the burden to establish privilege. *Id.* at *4.

further the enforcement activity may have been protectable but the purpose of the communications during the negotiations were to entice a third-party to loan plaintiff money and not to further a then-shared legal interest. For these reasons, the common interest doctrine does not cover the communications between plaintiff and GE

Net2Phone, Inc. v. Ebay, Inc., 2008 WL 8183817, at *10 (D.N.J. June 26, 2008); *see also High Point SARL v. Sprint Nextel Corp.*, 2012 WL 5306268, at *6 (D. Kan. Oct. 29, 2012) (“Avaya has not shown that it had substantially identical common legal interest in the validity, enforceability, and potential for infringement of the patents-in-suit at the time it disclosed the slide presentations to the two specific companies.”).

Any possible privilege or work-product protection that may have existed was also waived when those documents were shared in an effort to entice Hamilton Capital to invest in Acceleration Bay. At the time of the exchanges (before the February 27, 2015 funding agreement), Acceleration Bay and Hamilton Capital were in fact adverse to each other. At least the eight known emails and attachments are not subject to any privilege or work product protection and should be produced. Similarly, any other documents exchanged between Acceleration Bay and Hamilton Capital prior to February 27, 2015 are also not subject to any privilege or protection and should be produced.

3. Acceleration Bay must produce its pre-filing expert analysis.

While attempting to secure its loan, Acceleration Bay discussed and/or shared with Hamilton Capital an expert analysis. That expert analysis must be produced. Defendants believe that the expert analysis was prepared by Acceleration Bay’s expert Dr. Medvidovic as part of its pre-filing investigation, because that is the only pre-filing expert analysis Acceleration Bay has disclosed. *See* Ex. 18 (March 6, 2017 Andre Decl.) at 2.

In any event, that analysis must be produced. It is not work product. Dr. Medvidovic is now a testifying expert in this case and his pre-filing analysis is not protected work product

under Fed. R. Civ. P. 26(b)(4), as it is not a “draft[] of [a] report[] ultimately submitted in the” litigation. *In re Application of Republic of Ecuador*, 280 F.R.D. 506, 513 (N.D. Cal. 2012). And “the work-product protection of Rule 26(b)(3) does not extend to materials prepared by or for a testifying expert.” *Republic of Ecuador v. Hinchee*, 741 F.3d 1185, 1193 (11th Cir. 2013) (citing *Republic of Ecuador v. For Issuance of a Subpoena Under 28 U.S.C. § 1782(a)*, 735 F.3d 1179, 1183–85 (10th Cir. 2013)).

[REDACTED]

B. Defendants should be given leave to amend their positions in light of the withheld documents.

In light of the Reed Smith disclosures, Defendants are now aware that Acceleration Bay withheld at least 16 references, at least two of which are material prior art.⁵ See Ex. 4.

⁵ The two references that Defendants have so far identified as material prior art are Rabani 1998 (Ex. 20), and Das 1997 (Ex. 21). Ex. 4. Both of these references were published before the

Acceleration Bay withheld these references despite discovery requests for “[a]ll documents and things relating to or constituting prior art or potential prior art (including ... publications...) with respect to any Asserted Patents.” Ex. 5 at 13 (RFP 39).

Defendants should be given leave to amend or supplement their invalidity positions in light of these new references. At minimum, Defendants should be permitted to include them in their reply expert reports. Additionally, to the extent other documents withheld by Acceleration (such as the emails) bear on other expert reports (such as the reports on damages), Defendants should be given leave to amend or supplement those positions as well.

C. Acceleration should pay Defendants’ reasonable fees and expenses.

Acceleration Bay failed to comply with previous Orders of the Special Master and the Court. Thus, it should “pay the reasonable expenses, including attorney’s fees, caused by the failure.” Fed. R. Civ. P. 37(b)(2)(C).⁶ It “must” pay those expenses “unless the failure was substantially justified or other circumstances make an award of expenses unjust.” *Id.* Acceleration has not offered any reasonable justification—let alone a substantial one. Thus, it must pay Defendants’ reasonable expenses, including Defendants’ costs in discovering the withheld documents (such as subpoenaing Reed Smith), their costs in bringing this motion, and their costs in amending or supplementing their contentions and expert reports.

Similarly, because Acceleration Bay failed to respond to Defendants’ discovery requests, it should pay Defendants’ “reasonable expenses incurred in making th[is] motion [to compel], including attorney’s fees.” Fed. R. Civ. P. 37(a)(5)(A).

priority dates of the Asserted Patents. Additionally, some of the withheld references cite to prior art, such as Das 1997, which cites Funkhouser 1995 (Ex. 22).

⁶ Under Rule 37(a)(5)(A) and (b)(2)(C), the Special Master may order “the disobedient party, the attorney advising that party, or both to pay the reasonable expenses.” Defendants currently have no position on whether Acceleration, its attorneys, or both should pay their reasonable expenses.

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November 9, 2017

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I hereby certify that on November 9, 2017, copies of the foregoing were caused to be served upon the following in the manner indicated:

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EXHIBIT K

HIGHLY CONFIDENTIAL - OUTSIDE COUNSEL ONLY

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ACCELERATION BAY, LLC,

Plaintiffs,

vs. No. 16-453 (RGA)

ACTIVISION BLIZZARD, INC.,

Defendant.

/

HIGHLY CONFIDENTIAL - OUTSIDE COUNSEL ONLY

VIDEO RECORDED INDIVIDUAL AND FRCP 30(b)(6) DEPOSITION OF

JOE WARD

JUNE 15, 2017

9:13 A.M.

990 Marsh Road

Menlo Park, California

REPORTED BY:

Mark W. Banta

CSR No. 6034, CRR

Page 2

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12

13

ALSO PRESENT: LOU MEADOWS, Videographer

14 U.S. Legal Support

15

16

17

18

19

20

21

22

23

24

25

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1 INDEX TO EXHIBITS

2 Individual and FRCP 30(b)(6)

3 JOE WARD

4 Acceleration Bay LLC v. Activision Blizzard, Inc., etc.

5 June 15, 2017

6 Mark W. Banta, CSR No. 6034, CRR

7

8 MARKED	DESCRIPTION	PAGE
9 Exhibit 111	Amended Notice of 30(b)(6) Deposition of Acceleration Bay LLC	9
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Exhibit 112	6-2-2017 Memo re meeting with Conservation International, Bates Nos. AB-AB 004484-4485, labeled CONFIDENTIAL - OUTSIDE COUNSEL ONLY, and 2016 Annual Report, Bates Nos.	56
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13	AB-AB 004486-4551	
14 Exhibit 113	2-27-2015 Promissory Note, Bates Nos. AB-AB 002323-2360, labeled CONFIDENTIAL - OUTSIDE COUNSEL ONLY	133
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16 Exhibit 114	Printout from Accelerator Bay website - Incubator - Investor	176
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19 Exhibit 116	Printout from Accelerator Bay website - Partnering - Collaboration Approach page	210
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13 Exhibit 124	E-mail string with last dated 9-8-2015 - Ward to Holt, Bates No. AB-AB 003526, labeled CONFIDENTIAL - OUTSIDE COUNSEL ONLY	318
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1 MENLO PARK, CALIFORNIA
2 THURSDAY, JUNE 15, 2017, 9:13 A.M.
3
4 PROCEEDINGS
5 THE VIDEOGRAPHER: On the record. This is the
6 recorded video deposition of Joe Ward in the matter of
7 Acceleration Bay LLC, versus Activision Blizzard, Inc. in
8 the United States District Court for the District of
9 Delaware, case number 16-453 (RGA).
10 This deposition is taking place at Kramer,
11 Levin, Naftalis & Frankel LLP, 990 Marsh Road, Menlo
12 Park, California.
13 Today's date is June 15th, 2017, and the time is
14 9:13 a.m.
15 My name is Lou Meadows. I'm the videographer
16 with U.S. Legal Support, located at 44 Montgomery Street,
17 Suite 550, in San Francisco, California.
18 Video and audio recording will be taking place
19 unless all counsel have agreed to go off the record.
20 Counsel, would you please introduce yourselves
21 and state whom you represent.
22 MR. ENZMINGER: Good morning. David Enzminger,
23 Winston & Strawn, on behalf of defendants.
24 MR. ANDRE: Paul Andre from Kramer Levin
25 representing Acceleration Bay and the witness.

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1 THE VIDEOGRAPHER: Thank you. Your certified
2 court reporter is Mark Banta. Would you please
3 administer the oath.
4 JOE WARD
5 Having stated that he would testify the truth,
6 the whole truth, and nothing but the truth, testified as
7 follows:
8 EXAMINATION
9 BY MR. ENZMINGER:
10 Q. Good morning, Mr. Ward.
11 A. Hi, David. How are you?
12 Q. Have you been deposed before?
13 A. No.
14 Q. I take it you've had a chance to chat with your
15 counsel about this deposition?
16 A. I have.
17 Q. And you do understand that you've just been
18 placed under oath?
19 A. I do.
20 Q. And you understand that you have a legal
21 obligation to give the best, truthful testimony you can?
22 A. Yes.
23 Q. Is there any reason you can think of why you
24 can't do that?
25 A. No.

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1 Q. So by whom are you employed?
2 A. Acceleration Bay.
3 Q. Anyone else?
4 A. No.
5 Q. How long have you been employed by Acceleration
6 Bay?
7 A. To the best of my recollection, it would roughly
8 start two or three years ago.
9 Q. You were the founder of Acceleration Bay?
10 A. I am the founder.
11 Q. And was Acceleration Bay founded in late 2014?
12 A. That sounds about right.
13 Q. Okay. Can you generally just give me a sense of
14 your educational background?
15 A. Educational background?
16 Q. Yeah.
17 A. So I have nearly 30 years of experience in the
18 IT and telecommunications media sector.
19 I have a background in network engineering in
20 practice and a school that got completed in 2000 – not
21 2000, in – when I was 15 years old, so whatever year
22 that was.
23 Q. Do you hold any degrees?
24 A. No. Do I hold any degrees?
25 Q. Yeah, college degrees, for example?

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1 A. No, I do not hold any college degrees.
2 Q. Do you own – do you hold any professional
3 degrees?
4 A. Can you please clarify what professional degree
5 is.
6 Q. Do you have a master's degree or anything like
7 that?
8 A. I do not.
9 MR. ENZMINGER: Let's mark as Exhibit 111 a
10 deposition – Amended Notice of Deposition to
11 Acceleration Bay LLC.
12 (Exhibit 111 marked.)
13 BY MR. ENZMINGER:
14 Q. Do you recognize Exhibit 111?
15 A. It appears familiar.
16 Q. Do you have an understanding that, in addition
17 to testifying in your personal capacity, you're also
18 testifying on behalf of Acceleration Bay?
19 A. I am to testify on behalf of Acceleration Bay
20 also. Yes, I am.
21 Q. Did you have a chance to go over with counsel
22 the topics on which you'll be testifying on behalf of
23 Acceleration Bay?
24 A. I had a chance to review the topics.
25 Q. All right. We'll go through the topics, but you

<p style="text-align: right;">Page 102</p> <p>1 without my asking you, so you obviously must have some 2 understanding of what it means. So tell us what it 3 means, self healing – or self-organizing. 4 A. From my point of view? So self-healing and 5 self-organizing are – I believe are quite similar. So 6 organization is the function that the mesh network 7 performs when it's having participants come and leave. 8 Q. How does it do that? 9 MR. ANDRE: Objection. Form of the question. 10 THE WITNESS: I'm not an expert on how that 11 functions. 12 BY MR. ENZMINGER: 13 Q. Do you have any understanding of how the network 14 organizes itself? 15 A. I'm not an expert in how it does that. 16 Q. Do you have any understanding at all of how it 17 does it? Whether you're an expert or not, any 18 understanding at all? 19 A. Well, I just – I just shared with you how I 20 believe that self-healing and self-organizing works, so 21 that's – that's my understanding of how the mesh 22 network, the SWAN technology functions when it comes to, 23 you know, self-healing, participants coming in and out, 24 and organizing. So that's my personal understanding, but 25 I'm just not an expert in it.</p>	<p style="text-align: right;">Page 104</p> <p>1 Q. So before or after Acceleration Bay was formed? 2 A. I believe it was before. 3 Q. Before Acceleration Bay was formed, did you have 4 any conversation – did you have any discussions with 5 anyone from Boeing? 6 A. I don't recall that I did, no. 7 Q. Have you ever had any conversations with anyone 8 from Boeing? 9 A. In terms of in-person or telephone calls? 10 Q. Yes. 11 A. I don't recall having direct conversations 12 with – with them apart from if they were on a phone call 13 during negotiations. 14 Q. Did you participate in any conversations in 15 which Boeing was a party to the conversation? 16 A. I believe – I believe I may have sat in on a 17 call, but I – I didn't communicate directly with anyone 18 from Boeing that I recall. 19 Q. Okay. What call do you remember sitting in – 20 is it one call you remember sitting in on? 21 A. I'm not 100 percent sure whether it was one or 22 two. 23 Q. Okay. What do you recall from those calls? 24 A. I can't recall anything that specific from the 25 calls. If I did sit in on them, I just – I recall way</p>
<p style="text-align: right;">Page 103</p> <p>1 Q. Okay. My question was: Do you have any 2 understanding at all, at any level, of how the network 3 does those things? 4 MR. ANDRE: Objection. Form of the question. 5 BY MR. ENZMINGER: 6 Q. Self-healing and self-organizing? 7 A. No. I'm not an expert in how it does it, but I 8 know it does do it. 9 MR. ENZMINGER: Okay. Let's take a break to 10 change the tape. 11 THE VIDEOGRAPHER: This marks the end of DVD 1. 12 Off the record, the time is 11:19 a.m. 13 (Recess taken from 11:19 to 11:27 a.m.) 14 THE VIDEOGRAPHER: On the record. This marks 15 the beginning of DVD 2 in the deposition of Joe Ward on 16 June 15th, 2017. The time is 11:27 a.m. Please 17 continue. 18 BY MR. ENZMINGER: 19 Q. Mr. Ward, how did you become aware of the 20 patents that are at issue in these lawsuits? 21 A. My counsel asked if I'd be interested in having 22 a look at them. 23 Q. When was that? 24 A. Well, it's a while back now, so it could be 25 three years, maybe four.</p>	<p style="text-align: right;">Page 105</p> <p>1 back when there being a lot – there being some 2 negotiations going on or some discussions related to 3 where we are now, but that's – that's all I can recall. 4 Q. When you said "way back when," can you frame it 5 in time? Was it before or after Acceleration Bay was 6 formed? 7 A. I can't remember in that specific order. 8 Q. What do you recall from the discussions, if 9 anything at all? 10 A. I don't recall much from the discussions. 11 Q. It's fair to say you did not negotiate the 12 acquisition of these patents from Boeing? 13 MR. ANDRE: Objection. Form of the question. 14 THE WITNESS: I rely on counsel to do that for 15 me. 16 BY MR. ENZMINGER: 17 Q. Counsel was the one who found the patents in the 18 first place? 19 MR. ANDRE: Objection. Form of the question. 20 THE WITNESS: I rely on counsel to, you know, to 21 do – to do their role, and they introduced me to the 22 patents. That – 23 (Interruption by Reporter.) 24 THE WITNESS: That Boeing held at the time. 25 //</p>

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1 BY MR. ENZMINGER:
2 Q. How – the counsel that introduced you to the
3 patents was Mr. Andre who is sitting here in the room?
4 A. Yes, it is.
5 Q. How do you know Mr. Andre?
6 A. Paul and I met at a little league baseball game
7 in Foster City.
8 Q. When was that?
9 A. Could be three, four years ago or maybe a little
10 bit more.
11 Q. When did you engage Mr. Andre to represent you?
12 A. I can't recall specifically how and when he was
13 engaged.
14 Q. But it was after he brought the patents to you?
15 MR. ANDRE: Objection. Form of the question.
16 THE WITNESS: I'm not sure exactly when the
17 attorney-client privilege commenced.
18 BY MR. ENZMINGER:
19 Q. I'm not asking about attorney-client privilege.
20 I'm asking when – when you hired him.
21 A. It was – I believe it was after we had seen the
22 patents.
23 Q. Okay. When you say "we received the patents,"
24 who are you referring to?
25 A. Well, I refer to Acceleration Bay and me as we.

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1 Q. Okay. Except that Acceleration Bay didn't exist
2 at that time?
3 A. Yeah.
4 Q. Is that fair?
5 A. That's fair.
6 Q. So I am just trying to understand the sequence
7 of events. So you met Mr. Andre at a little league game;
8 right?
9 A. Correct.
10 Q. At some point thereafter, he brought you these
11 patents to evaluate?
12 A. Sometime thereafter, yeah.
13 Q. And then at some time thereafter, Mr. Andre and
14 his firm helped you form Acceleration Bay?
15 MR. ANDRE: Objection. Form of the question.
16 THE WITNESS: I don't remember when Acceleration
17 Bay was formed, but it was formed by the law firm.
18 BY MR. ENZMINGER:
19 Q. It was formed by Kramer Levin?
20 A. Yes, they did the legal work for it.
21 Q. Okay. And they formed the company for you;
22 right?
23 MR. ANDRE: Objection. Form of the question.
24 THE WITNESS: As I recall it, it was – it was
25 the law firm did the legal work.

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1 BY MR. ENZMINGER:
2 Q. Okay. To form – to form Acceleration Bay?
3 MR. ANDRE: Objection.
4 THE WITNESS: As I recall it.
5 BY MR. ENZMINGER:
6 Q. And it was the law firm that before that had
7 found the patents; correct?
8 A. I believe that's – that's the case, yes.
9 Q. And they did – the law firm did the negotiation
10 with Boeing?
11 MR. ANDRE: Objection. Form of the question.
12 THE WITNESS: How much – whether there was a
13 negotiation or not, I wasn't really – I didn't
14 participate a lot in that side of things.
15 BY MR. ENZMINGER:
16 Q. Okay. So you did not participate in the
17 negotiation with Boeing, but the Kramer Levin law firm
18 did; right?
19 MR. ANDRE: Objection. Form of the question.
20 THE WITNESS: Yeah, when it comes to the
21 acquisition or any legal matters, I refer back to counsel
22 to do their things.
23 BY MR. ENZMINGER:
24 Q. I'm talking about business deals, too; right?
25 A. Yeah.

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1 Q. You had no business conversations with Boeing;
2 right?
3 MR. ANDRE: Objection. Form of the question.
4 THE WITNESS: The business side of things is,
5 you know, is different than legal side, but I allow my
6 counsel to do the negotiations.
7 BY MR. ENZMINGER:
8 Q. Okay. Both the business negotiations and the
9 legal negotiations; correct?
10 MR. ANDRE: Objection. Form of the question.
11 THE WITNESS: Yeah, I – I can't tell you
12 whether the issue separate the two.
13 BY MR. ENZMINGER:
14 Q. But it's fair to say that you did not have any
15 business negotiations with Boeing regarding this patent
16 portfolio?
17 MR. ANDRE: Objection. Form of the question.
18 THE WITNESS: I asked my counsel to do the
19 business negotiations.
20 BY MR. ENZMINGER:
21 Q. Okay. And you did not have any involvement in
22 the business negotiations with Boeing?
23 MR. ANDRE: Objection. Form of the question.
24 THE WITNESS: Yeah, I'm not sure what any
25 involvement really means, but when it comes to the – the

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1 acquisition of the patents, that was my law firm.
2 BY MR. ENZMINGER:
3 Q. By Kramer Levin, the plaintiff's counsel?
4 A. If I say "law firm" or "counsel," that means
5 Kramer Levin.
6 Q. Okay. Do you know when Mr. Andre or anyone from
7 Kramer Levin first started talking about these patents
8 with Boeing?
9 A. No, I do not know.
10 Q. Do you know how they – how they came upon these
11 patents from Boeing?
12 A. I do not know how that came about.
13 Q. Okay. Have you – you personally – paid
14 Mr. Andre any amount?
15 MR. ANDRE: Objection. I'll instruct the
16 witness not to disclose any kind of financial
17 arrangements you have with the law firm.
18 THE WITNESS: That's – no, I can't answer that
19 question. That's personal.
20 BY MR. ENZMINGER:
21 Q. I'm not asking for arrangements. I just want to
22 know, have you ever paid a nickel to Kramer Levin for
23 legal services?
24 A. I can't answer the question. You're referring
25 to me personally.

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1 Q. You can't answer the question because you don't
2 know?
3 A. I can't answer the question because you're
4 asking me if I've paid anything personally to Kramer
5 Levin.
6 Q. Right. Have you?
7 A. I – I don't know if I – that's a personal
8 matter.
9 Q. Just a yes or no question. Have you personally
10 paid any – paid any –
11 MR. ANDRE: Objection.
12 BY MR. ENZMINGER:
13 Q. Any amount to Kramer Levin?
14 MR. ANDRE: Objection. It's not relevant.
15 THE WITNESS: I – I don't believe the question
16 is relevant and –
17 BY MR. ENZMINGER:
18 Q. It's not for you to say. Just answer the
19 question.
20 MR. ANDRE: Counsel, quit instructing my
21 witness. You don't instruct him to answer. I do. He's
22 given you his answer.
23 MR. ENZMINGER: He doesn't have the right to
24 make relevance objections.
25 MR. ANDRE: You're asking his personal business.

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1 If you ask about Acceleration Bay, he'll answer
2 Acceleration Bay. You're asking about his personal life
3 and his personal business, that's a different story.
4 MR. ENZMINGER: It's a yes or no question. Are
5 you instructing him not to answer?
6 MR. ANDRE: I'm not instructing him not to
7 answer. I'm just saying stop instructing him at all.
8 MR. ENZMINGER: Okay. You –
9 (Interruption by Reporter.)
10 MR. ANDRE: You don't instruct him not answer.
11 BY MR. ENZMINGER:
12 Q. Just so we're clear, I've asked you a question.
13 A. Yes.
14 Q. Your counsel just said he's not instructing you
15 not to answer. So have you paid any amount personally to
16 Kramer Levin for legal services?
17 A. Well, I was – I'm not – I'm here under my
18 capacity as Acceleration Bay, so –
19 Q. You're also here in your own, in your personal
20 capacity.
21 A. Um-hmm.
22 Q. Is that fair?
23 A. I guess it is, yeah.
24 Q. Okay. So have you paid any amount personally to
25 Kramer Levin for legal – legal services?

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1 MR. ANDRE: Objection. Form of the question.
2 THE WITNESS: I – I'm not – I'm not – I don't
3 believe that's a fair question because you're asking me
4 about personally.
5 BY MR. ENZMINGER:
6 Q. No one is instructing you not to answer, sir.
7 It's not privileged.
8 A. Okay.
9 Q. So you need to answer the question.
10 MR. ANDRE: And counsel, stop – you're
11 instructing him to answer. He did answer the question.
12 BY MR. ENZMINGER:
13 Q. Have you paid –
14 MR. ANDRE: I've not instructed him not to
15 answer. You can't sit there and instruct him to answer.
16 You've asked a question, he's given you the answer.
17 BY MR. ENZMINGER:
18 Q. What is the answer to my question? Have you
19 paid any amount to Kramer Levin for legal services?
20 A. Kramer Levin represents Acceleration Bay now,
21 and so that's – I don't really get into the legal side,
22 so, you know, I take my advice from counsel.
23 Q. Your counsel is expressly now twice not
24 instructing you to refuse to answer my question.
25 Are you on your own refusing to answer my

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1 question?
2 A. I – I'm under the understanding that anything
3 that's personal I'm not here to talk about. I'm here to
4 represent Acceleration Bay LLC.
5 BY MR. ENZMINGER:
6 Q. You are here also in your personal capacity.
7 You understand that; right?
8 A. Right.
9 Q. Okay. Have you paid any amounts to Kramer Levin
10 for legal services? Yes or no?
11 MR. ANDRE: Objection. Form of the question.
12 Asked and answered.
13 THE WITNESS: Yeah, I don't understand the
14 question, so...
15 BY MR. ENZMINGER:
16 Q. Have you paid any amount to Kramer Levin for
17 legal services?
18 MR. ANDRE: Counsel, he's already – he's
19 already given you an answer multiple occasions. Asking
20 it a fifth or sixth time is not going to do the trick.
21 He's already given you the answer.
22 BY MR. ENZMINGER:
23 Q. Yes or no?
24 A. I can't answer that question yes or no. I'm
25 just not sure how it's relevant to me personally.

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1 Q. You do understand that there's a judge will
2 decide whether it's relevant or not. You understand that
3 much?
4 A. I believe it's possible, yeah.
5 Q. Okay. You're refusing to answer a question
6 because you think it's not relevant.
7 MR. ANDRE: Counsel, you're getting into his
8 personal business, and he's already expressed to you he's
9 uncomfortable talking about his personal business. If
10 you want to ask if Acceleration Bay has paid Kramer Levin
11 money, you can ask, but that's not relevant either, but
12 you can ask that question.
13 BY MR. ENZMINGER:
14 Q. Are you refusing to answer my question because
15 you think it's not relevant?
16 A. I'm – I'm refusing to – I'm not refusing
17 anything. I'm just – all I'm saying is that I don't see
18 the connection with me personally and Kramer Levin in
19 terms of what I paid – what I may have paid and what I
20 may have not paid. But my understanding is – of these
21 proceedings is, is that anything that comes into my
22 personal domain is – is not the purpose of the
23 discussion. So if you want to talk about things that me
24 personally, what shoe size I have or, you know, what I
25 pay personally, I'm just not familiar with proceedings

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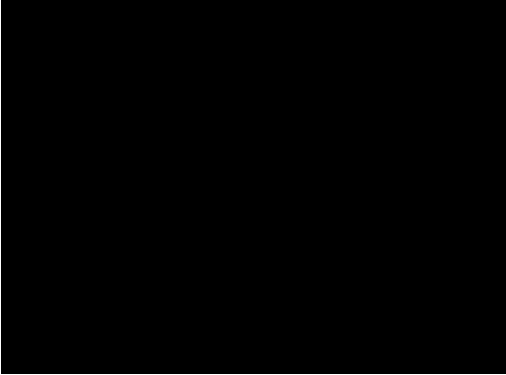
1 enough to feel comfortable answering the question.
2 BY MR. ENZMINGER:
3 Q. How about this: You can answer the question and
4 then Mr. Andre and I can discuss with a judge whether
5 it's used – it can be used. That's typically the way it
6 works in a deposition. Am I wrong, Mr. Andre?
7 MR. ANDRE: Counsel, I think he's answered the
8 question.
9 MR. ENZMINGER: He's definitely not answered the
10 question. It's a very simple question.
11 Q. Have you paid Kramer Levin for legal services or
12 have you not? Yes or no?
13 A. I just – I think it's a personal matter and my
14 understanding of the proceedings is that personal issues
15 aren't to be discussed.
16 I'm here representing Acceleration Bay.
17 Acceleration Bay is the business that I represent, and
18 that's what I'm here to talk about. Whether – I'm here
19 as Joe Ward representing Acceleration Bay, and my
20 understanding is, and if I'm wrong later, then I may be
21 wrong, but I'm – I understand right now what my rights
22 are is I don't talk about my personal life.
23 BY MR. ENZMINGER:
24 Q. So you're not – you're not going to answer my
25 question on whether you've paid Kramer Levin any amount?

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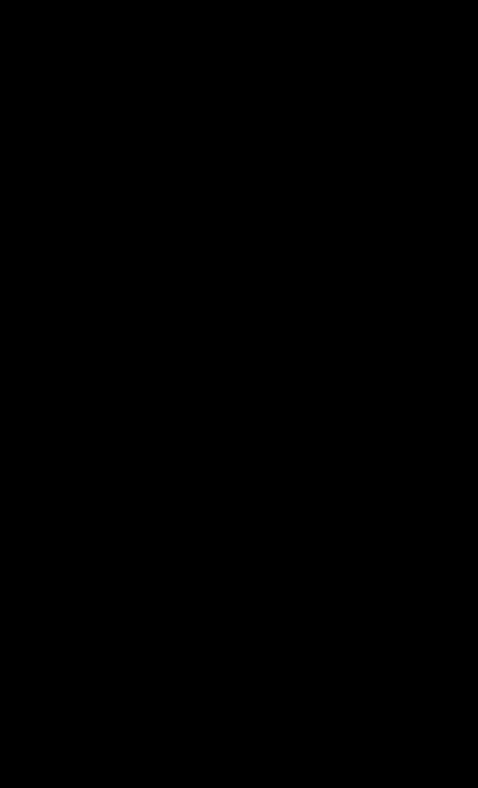
1 A. I'm not comfortable with it.
2 Q. Who paid Kramer Levin to form Acceleration Bay?
3 MR. ANDRE: Objection. Form of the question.
4 THE WITNESS: Yeah, I don't really understand.
5 I mean, we – we pay our own way. Acceleration Bay pays
6 its own way.
7 BY MR. ENZMINGER:
8 Q. Okay. So Acceleration Bay did not exist before
9 it was formed; right?
10 A. I believe that that might be logical, yeah.
11 Q. Okay. So somebody – and Kramer Levin formed
12 Acceleration Bay; right?
13 MR. ANDRE: Objection. Form of the question.
14 THE WITNESS: Our law firm does our legal work,
15 and so we're – when I required Acceleration Bay to be
16 incorporated, they were able to perform that task for me.
17 BY MR. ENZMINGER:
18 Q. So who paid for Acceleration Bay to be formed?
19 A. I haven't looked at the invoices, so I don't –
20 and if I – even if I did, that's attorney-client
21 privilege, what's in those invoices.
22 BY MR. ENZMINGER:
23 Q. It's not attorney-client privilege. I mean,
24 who – where did the money come from to form Acceleration
25 Bay?

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1 A. We have – we have our own financing and that
2 covers our legal costs.
3 Q. The financing deal was in May 2017; true? I'm
4 sorry, February 2017. Correct?
5 A. I can't recall the date.
6 Q. Okay. Do you have any investment in
7 Acceleration Bay besides the financing from the financing
8 company to pay for this litigation?
9 MR. ANDRE: Objection. Form of the question.
10 THE WITNESS: We have – we have our own
11 financing that's under NDA, and that's – that's where we
12 get our financing from.
13 BY MR. ENZMINGER:
14 Q. Is that the Hamilton Capital deal?
15 A. Hamilton Capital is our investor.

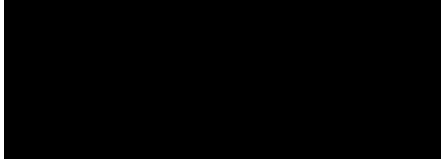


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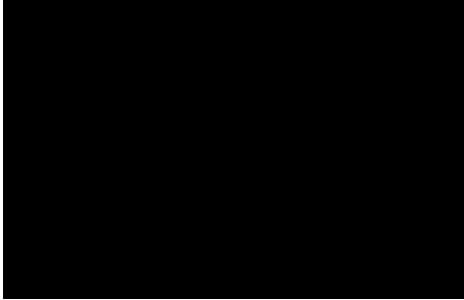


23 MR. ANDRE: I'm –
24 MR. ENZMINGER: And it owns –
25 MR. ANDRE: I'm going to mark this transcript

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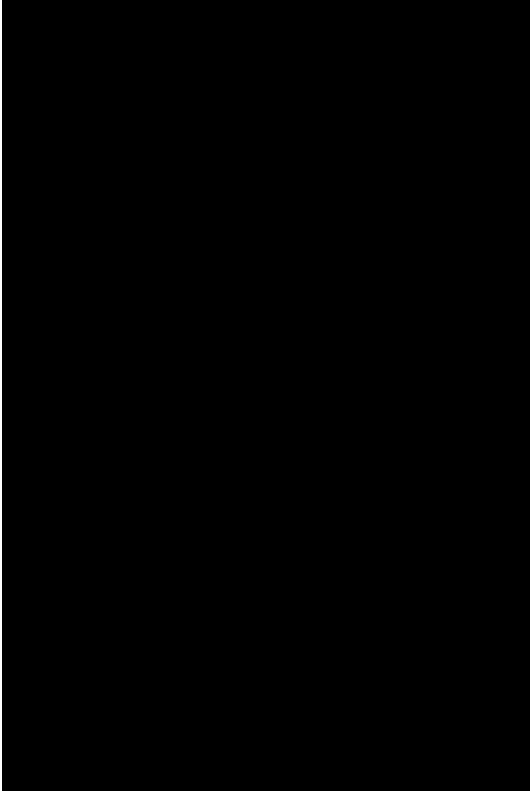


5 MR. ANDRE: Objection. Form of the question.
6 THE WITNESS: I'm not comfortable with the
7 complexity of the question.
8 BY MR. ENZMINGER:
9 Q. How many deals do you have with Hamilton
10 Capital?
11 A. I have a financing agreement with – with
12 Hamilton Capital.
13 Q. What else?
14 A. That's what I have.
15 Q. Is there only one financing agreement with
16 Hamilton Capital?
17 A. I believe that's the only one.

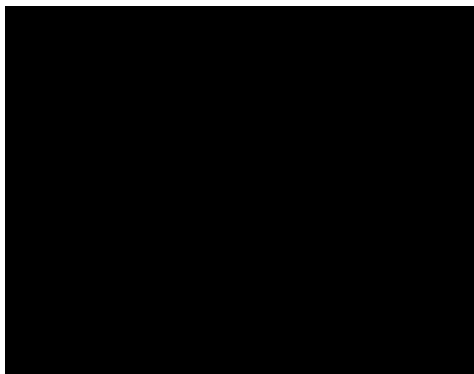


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1 highly confidential, outside attorneys' eyes only, before
2 I forget.
3 BY MR. ENZMINGER:



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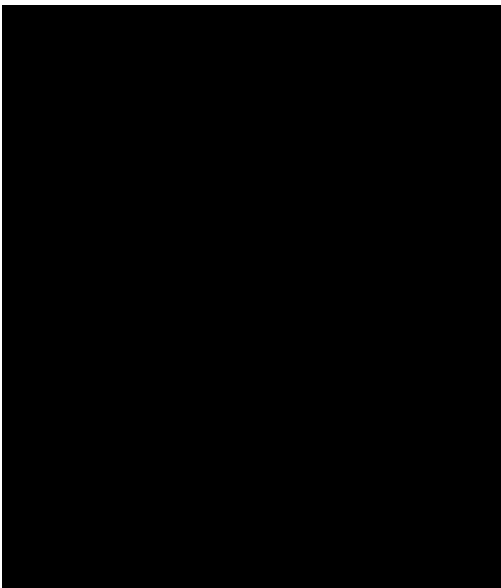
11 Q. And all incubations that Acceleration Bay – and
12 by the way, are there any other incubations?
13 A. So there's Cloud ETV, there's Bot M8. Those are
14 formed entities. There's Phone Torrent and there's
15 Gigatrail, and they're the – they're the primary
16 concepts we're working on at the moment. And then
17 underneath those we have the projects that will fall
18 under each one of those. They're all kind of evolving,
19 but it still all comes back down to, you know, leveraging
20 the SWAN technology as its primary focus, including Cloud
21 ETV, which we haven't really covered a lot of, or Bot M8.
22 Q. So all of those entities are wholly owned by you
23 through your holding company?
24 A. Currently, yes. No, sorry. So Cloud ETV has a
25 note with Eastman Kodak Company, and Eastman Kodak

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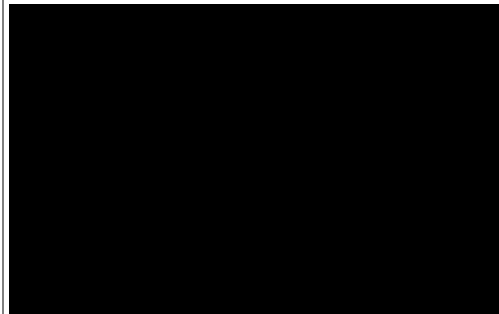


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1 Company, that note will convert into stock into – into
2 Cloud ETV, Inc.
3 So Cloud ETV will leverage the SWAN technology
4 to do realtime push updates on the product. So if you
5 want, you know, stocks, if you want news feeds, if you
6 want realtime Twitter, all those things will be provided
7 by the SWAN technology so that the interface will have
8 that – you know, that CNN or Bloomberg style realtime
9 look and feel.



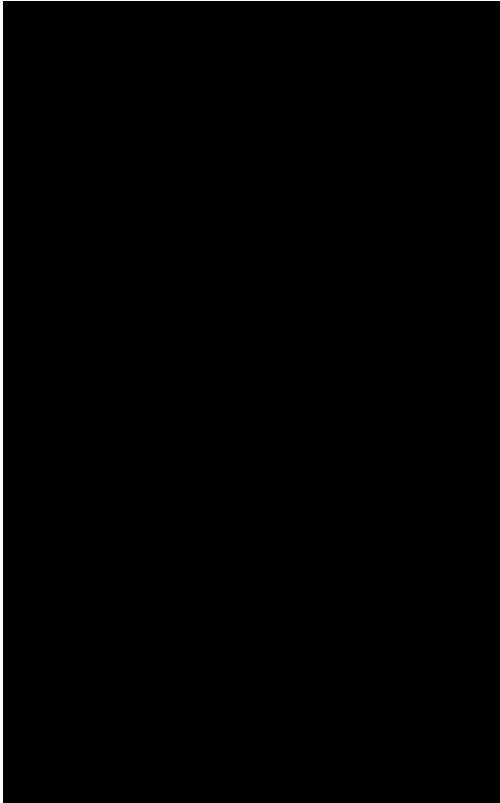
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9 Q. Does Acceleration Bay – so Acceleration Bay
10 LLC, does it have any officers besides you?
11 A. No, it does not.
12 Q. And it has no other directors besides you?
13 A. Well, it's an LLC, I don't think we have a
14 concept –
15 Q. But there are no other members?
16 A. Members. I don't understand.
17 Q. Sorry. I misspoke.
18 (Interruption by Reporter.)
19 THE WITNESS: There are no other members.
20 BY MR. ENZMINGER:
21 Q. There's – is there anyone else besides you
22 through Forward People that has any ownership or
23 beneficial interest in Acceleration Bay?
24 MR. ANDRE: Objection. Form of the question.
25 THE WITNESS: So there are no other members and

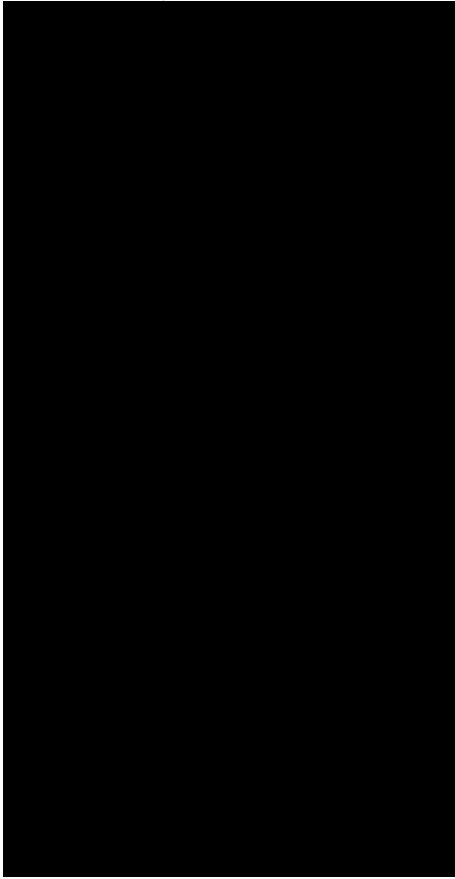
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1 there are no other shareholder equivalents in
2 Acceleration Bay.
3 BY MR. ENZMINGER:

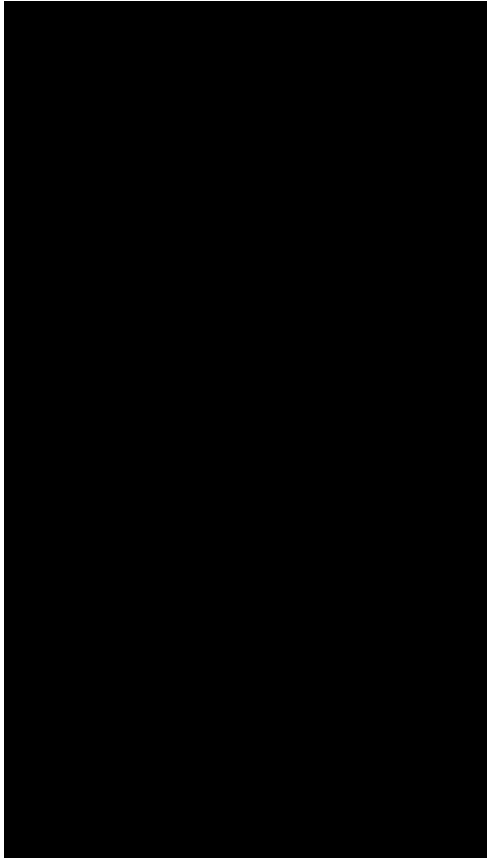


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1 BY MR. ENZMINGER:

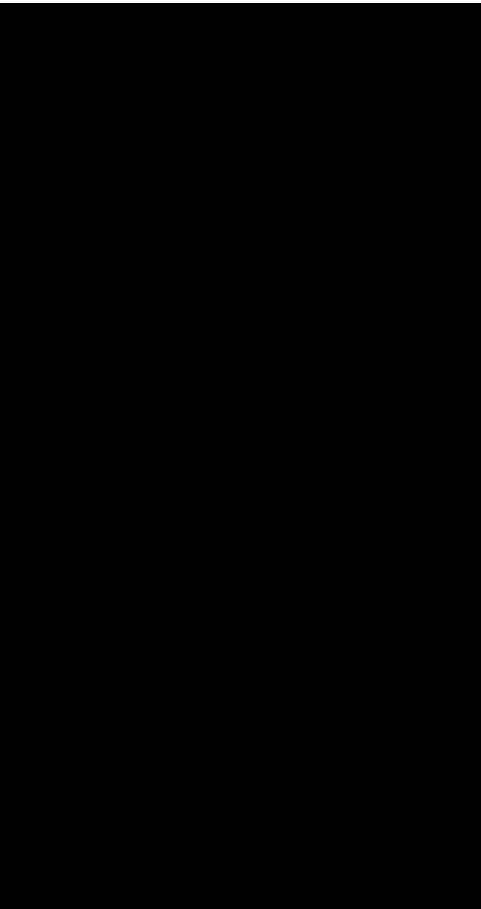


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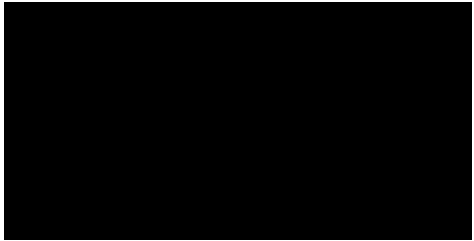


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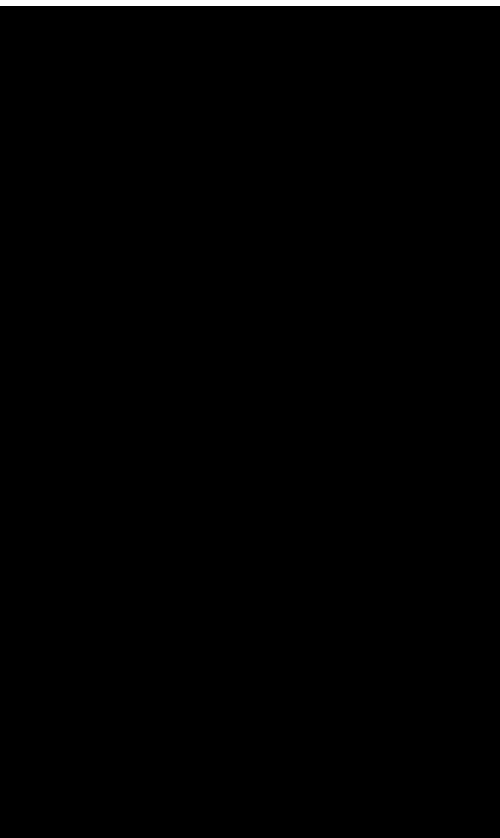


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7 Q. Does Acceleration Bay have books and records?
8 A. It has just a bank account.
9 Q. No other books and records?
10 A. We don't have any recordkeeping requirements as
11 a sole member LLC.
12 Q. I'm not suggesting you do. I'm just asking if
13 they exist. Right.
14 A. Just a bank account.
15 Q. Okay. So Acceleration Bay has a bank account.
16 Does it have any other – it has no other kinds of books
17 and records?
18 A. Well, it has other books and records but not –
19 we don't have financial records.
20 Q. Okay. On the bank account, who is the signatory
21 of the bank account?
22 A. I'm the signatory of the bank account.
23 Q. Any others?
24 A. No, there are no other signatories.
25 Q. Does Acceleration Bay have any contracts with

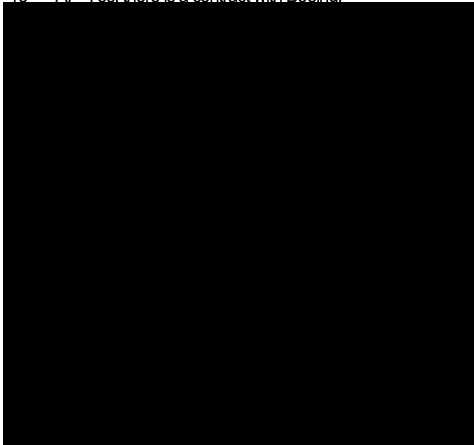
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24 MR. ENZMINGER: Let's mark as Exhibit 113 –
25 sorry, it's already been marked, I think.

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1 anyone?
2 MR. ANDRE: Objection. Form of the question.
3 THE WITNESS: What type of contracts?
4 BY MR. ENZMINGER:
5 Q. Well, okay. Let me be – let me actually ask a
6 narrower question.
7 We know about the Hamilton Capital financing
8 agreement, right?
9 A. (Witness nods head.)
10 Q. And there's a deal with Boeing?
11 A. (Witness nods head.)
12 Q. You've got to actually answer.
13 A. Yes, there is a contract with Boeing.



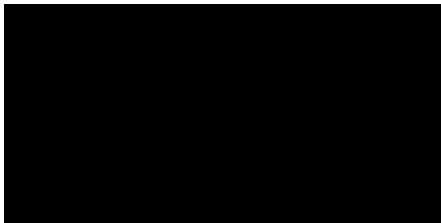
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1 Q. You only have the one deal with Hamilton
2 Capital, right?
3 A. I believe that's correct, yes.
4 MR. ENZMINGER: I've got the wrong binder. No
5 wonder.
6 (Exhibit 113 marked.)
7 BY MR. ENZMINGER:
8 Q. Do you recognize Exhibit 113?
9 A. It looks familiar.
10 Q. Were you involved in any way in the negotiation
11 of the deal with Hamilton Capital?
12 MR. ANDRE: Objection. Form of the question.
13 THE WITNESS: I have relied on counsel to – to
14 negotiate and conclude this agreement.
15 BY MR. ENZMINGER:
16 Q. So the answer to my question is no, you were
17 not – you were not involved in any way in the
18 negotiation of the financing a deal?
19 MR. ANDRE: Objection. Form of the question.
20 THE WITNESS: Yeah, any discussion I had was
21 with my counsel.
22 BY MR. ENZMINGER:
23 Q. Clear to say that you never spoke with anyone
24 from Hamilton Capital?
25 MR. ANDRE: Objection. Form of the question.

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1 THE WITNESS: I'm not – so how do you mean,
2 never?
3 BY MR. ENZMINGER:
4 Q. I mean never. Have you ever spoken with anyone
5 from Hamilton Capital?
6 A. Yes, I have.
7 Q. Okay. And tell me about that conversation.
8 A. I can't tell you about any one of the
9 conversations. It's back to February 2015 when we closed
10 that, and so it's been more than two years since then, so
11 there's been a lot of conversations.
12 Q. There have been a lot of conversations since
13 then?
14 A. Yeah. They're my investor.
15 Q. Had you had any conversations with Hamilton
16 Capital before closing of the transaction which is
17 reflected in Exhibit 113?
18 A. In relation to Exhibit 113, I have relied on
19 counsel to form and close this agreement.
20 Q. Do you have any understanding of the terms of
21 the agreements that are reflected within Exhibit 113?
22 MR. ANDRE: Objection to the extent it calls for
23 a legal conclusion.
24 THE WITNESS: I rely on counsel to – to form
25 the terms in the agreement and understand all of terms in

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7 Q. Okay.
8 A. Anything else is – is – I rely on counsel
9 to – you know, to form and close the agreement.
10 Q. Okay. Do you have an obligation with – or let
11 me ask it this way: After the closing, you said you've
12 had conversations with Hamilton Capital?
13 A. I believe I have, yes.
14 Q. Can you remember any specifically?
15 A. I can't tell you dates and – and specific
16 things. And even if I did, that would be under
17 nondisclosure.
18 Q. There's a protective order in this case.
19 A. Yeah.
20 Q. You understand that, right?
21 A. I – I'm not – I'm not aware of the legal side
22 of things, but I understand I can communicate with you.
23 Q. Okay. So your conversations with your
24 investors, unless Mr. Andre wants to give me an
25 instruction, are not privileged.

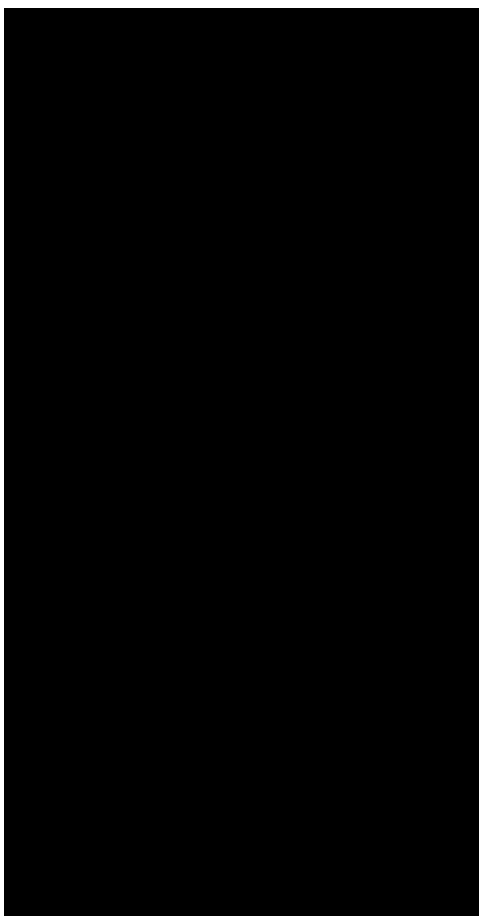
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1 this – this promissory note agreement.
2 BY MR. ENZMINGER:
3 Q. What do you understand your obligations, if any,
4 to be under the agreements with Hamilton Capital?
5 MR. ANDRE: Objection. Calls for legal
6 conclusion.
7 THE WITNESS: Yeah, so I can't talk to the –
8 the legal side. That's – that's what I rely on counsel
9 for.
10 BY MR. ENZMINGER:


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1 A. Um-hmm.
2 Q. So I – when I ask you about the nondisclosure
3 agreement, it's subject to the protective order in this
4 case. That doesn't mean you don't get to answer, it just
5 means we're not going to go blab it.
6 A. Okay.
7 Q. Got it?
8 A. Yeah.
9 Q. Okay. So what kinds of things do you talk about
10 with Hamilton Capital?
11 MR. ANDRE: Objection. Form of the question.
12 I'll just advise the client, if you have a nondisclosure
13 agreement with Hamilton Capital and you cannot disclose
14 information, then you should honor the agreement.
15 THE WITNESS: So I mean we have a nondisclosure
16 agreement in place. You've asked me whether I've had
17 conversations. I can tell you I've had conversations but
18 I can't tell you what was in the conversations.
19 MR. ENZMINGER: Counsel, what's the basis for
20 your objection – your instruction that he can't answer
21 based on a contractual nondisclosure agreement?
22 MR. ANDRE: Counsel, if he has a nondisclosure
23 agreement with a third party and that third party is not
24 a subject to the protective order, he cannot violate that
25 nondisclosure without getting express consent to do so.

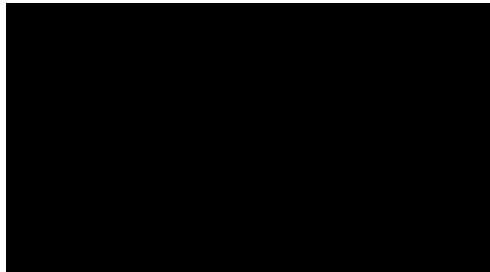
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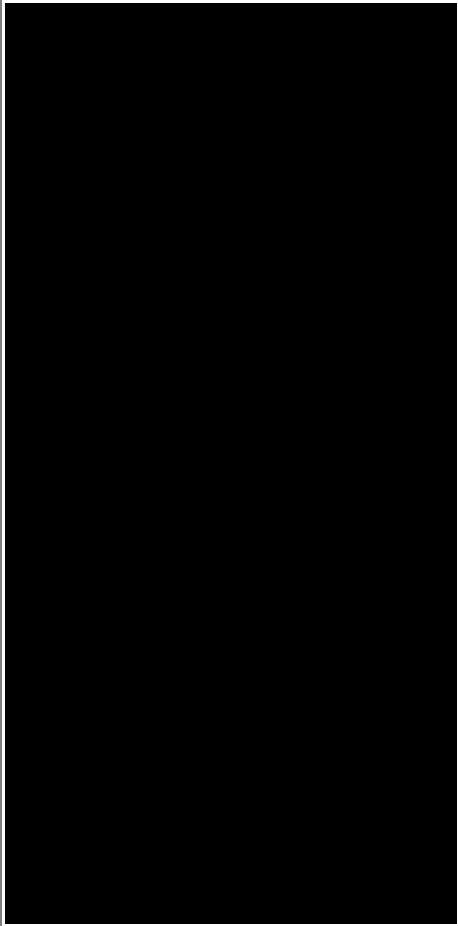
1 bit.
2 Topic 18. It's on page 9.
3 A. Number 18?
4 Q. Yes. Topic 18 relates to Acceleration's
5 financial books and records since its formation. And
6 that's one of the topics that you're being – you're
7 speaking on behalf of the company on.
8 A. Yes. I understand.
9 Q. Okay. You mentioned that there's a bank
10 account?
11 A. There is.
12 Q. And there are no other books and – financial
13 books and records of the company?
14 A. Well, there are other books in terms of
15 incorporation documents and contracts.
16 Q. Okay. With respect to financial records, there
17 are no other documents? There are no general ledgers,
18 for example, or –
19 A. No.
20 Q. No budgets?
21 A. I don't keep a general ledger or a budget.
22 Q. No projections?
23 A. No projections.
24 Q. Does the bank account have money in it?
25 A. Yes, it does.

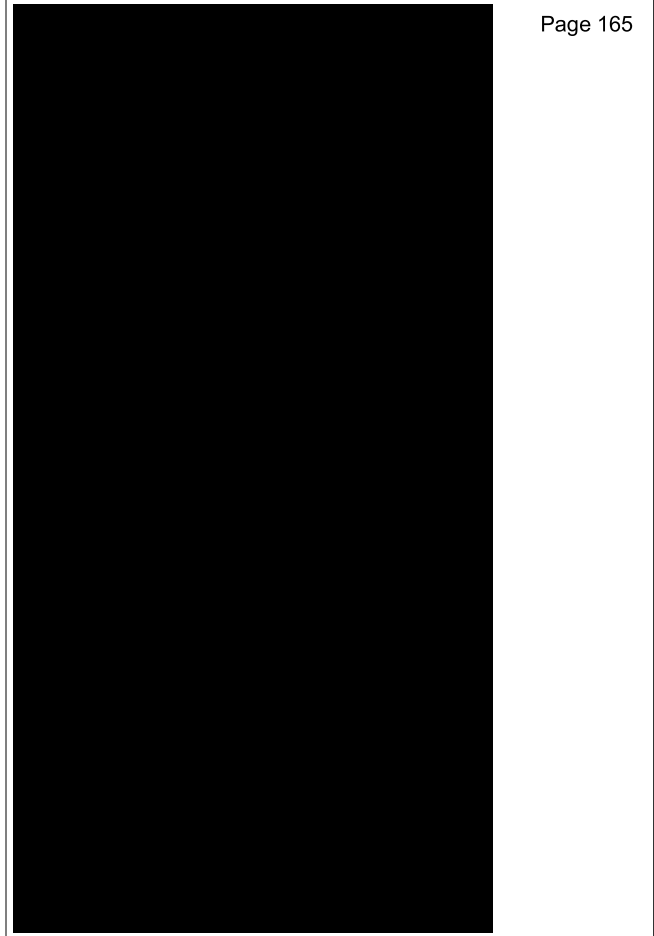
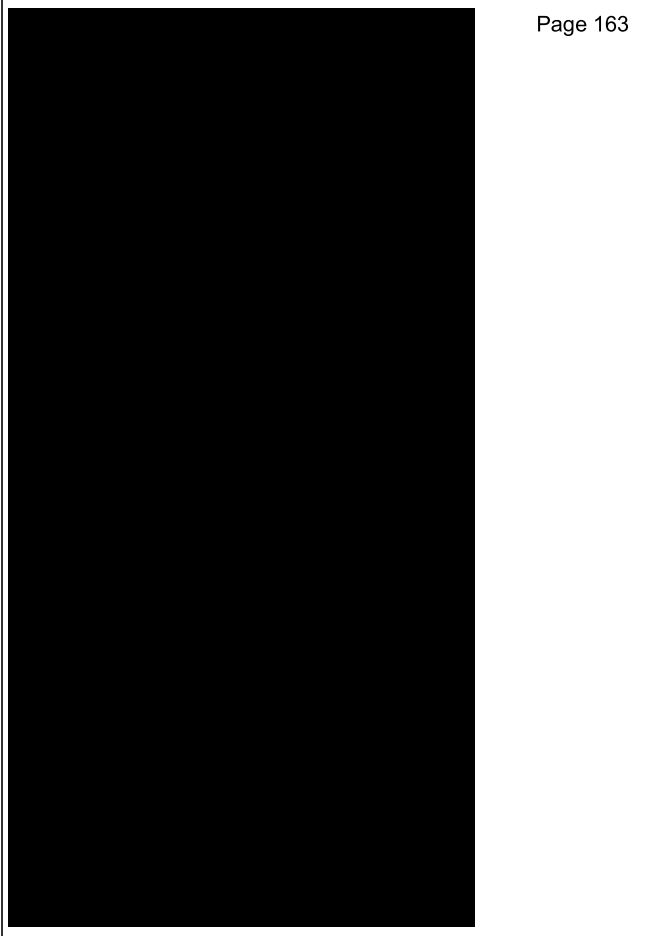
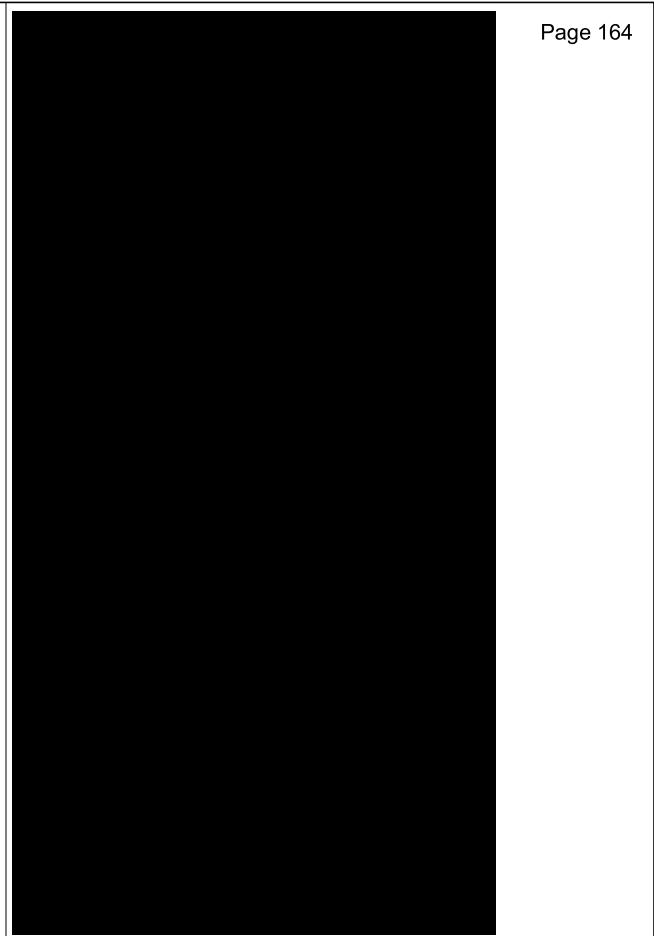
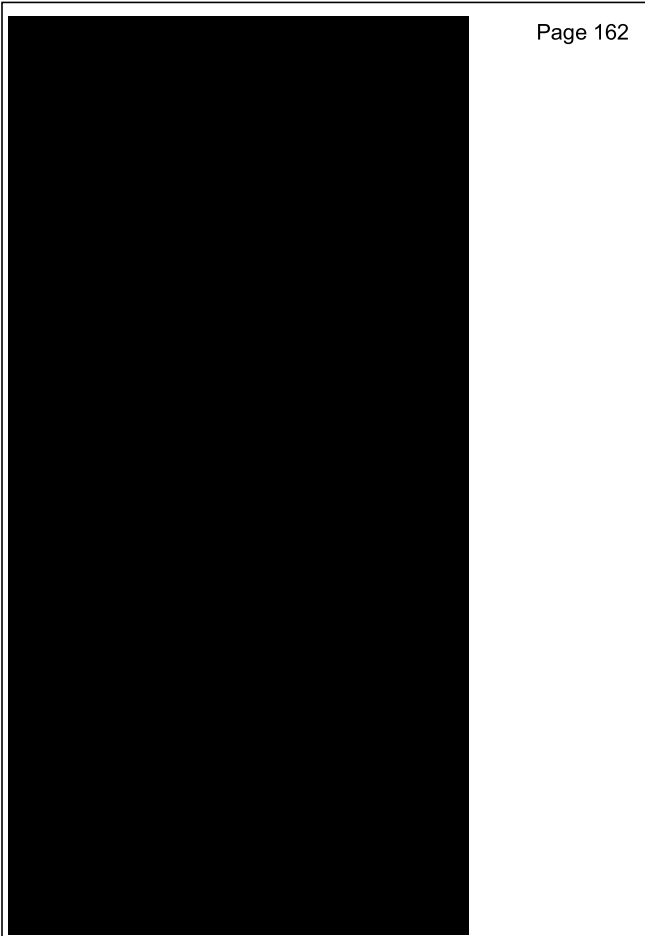
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8 MR. ANDRE: Objection. Form of the question.
9 THE WITNESS: I don't see the connection.
10 BY MR. ENZMINGER:
11 Q. Pardon me?
12 A. I don't see the connection.
13 MR. ENZMINGER: All right. Why don't we break
14 for lunch.
15 THE VIDEOGRAPHER: Off the record. The time is
16 12:31 p.m.
17 (Lunch recess from 12:31 to 1:13 p.m.)
18 THE VIDEOGRAPHER: On the record. The time is
19 1:13 p.m. Please continue.
20 BY MR. ENZMINGER:
21 Q. Thank you. Mr. Ward, do you understand that
22 you're still under oath?
23 A. Thank you. Yes, I do.
24 Q. Turn to Exhibit 118. We're going to talk about
25 some of the topic – I'm sorry, 111. I jumped the gun a

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1 DECLARATION UNDER PENALTY OF PERJURY
2
3 I, JOE WARD, do hereby certify under penalty of
4 perjury that I have read the foregoing transcript of my
5 deposition taken on June 15, 2017; that I have made such
6 corrections as appear noted on the Deposition Errata
7 Page, attached hereto, signed by me; that my testimony as
8 contained herein, as corrected, is true and correct.
9
10 Dated on the _____ day of
11 _____, 2017, at
12 _____, California.
13
14
15 _____
16 JOE WARD
17
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Page 356

1 STATE OF CALIFORNIA)
2 COUNTY OF SAN FRANCISCO)
3
4 I, MARK W. BANTA, a Certified Shorthand
5 Reporter, CSR No. 6034, do hereby certify:
6 That the foregoing proceedings were taken
7 before me at the time and place therein set forth, at
8 which time the witness was put under oath by me;
9 That said proceedings were recorded
10 stenographically by me and were thereafter transcribed;
11 That a review of the transcript by the deponent
12 was not requested;
13 I further certify that I am neither counsel
14 for, nor related to or employed by any attorney of the
15 parties to the action, nor in any way interested in the
16 outcome of this action.
17 In witness whereof, I have hereunto subscribed
18 my name.
19 Dated: June 21, 2017
20
21
22 _____
23 MARK W. BANTA
24 CSR 6034, CRR
25

Page 355

1 DEPOSITION ERRATA SHEET
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25 JOE WARD DATED

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EXHIBIT L

HIGHLY CONFIDENTIAL - OUTSIDE ATTORNEYS' EYES ONLY

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ACCELERATION BAY LLC, a Delaware
Limited Liability Corporation,

Plaintiff,

v. C.A. No. 16-454-RGA

ELECTRONIC ARTS INC., a Delaware
Corporation,

Defendant.

VIDEOTAPED DEPOSITION OF
NATASHA RADOVSKY
VOLUME I

HIGHLY CONFIDENTIAL - OUTSIDE ATTORNEYS' EYES ONLY

May 4, 2017

8:51~~a~~.m.

686 Anton Boulevard
Costa Mesa, California

REPORTED BY:

Leah L. Nelson

CSR No. 12561

Page 2

1 APPEARANCES:

2

3 For Plaintiff Acceleration Bay; Boeing;

4 Natasha Radovsky:

5 KRAMER LEVIN NAFTALIS & FRANKEL LLP

6 PAUL J. ANDRE

7 990 Marsh Road

8 Menlo Park, California 94025-1949

9 (650) 752-1710

10 (650) 752-1800 Fax

11 pandre@kramerlevin.com

12

13 For Defendant Electronic Arts Inc.:

14 WINSTON & STRAWN LLP

15 KATHLEEN B. BARRY

16 35 West Wacker Drive

17 Chicago, Illinois 60601

18 (312) 558-8046

19 (312) 558-5700 Fax

20 kbarry@winston.com

21

22 Also Present:

23 CHRISTOPHER VASI, Videographer

24

25

Page 3

1 INDEX TO EXAMINATION

2

3 WITNESS: NATASHA RADOVSKY, VOLUME I

4 EXAMINATION PAGE

5 By Ms. Barry 8

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1 INDEX TO EXHIBITS

2 NATASHA RADOVSKY, VOLUME I

3 Acceleration Bay LLC vs. Electronic Arts Inc.

4 Thursday, May 4, 2017

5 Leah L. Nelson, CSR No. 12561

6

7 MARKED DESCRIPTION PAGE

8 Exhibit 65 Patent License Agreement 15

9 (Bates Nos. BOEING 000012-23)

10 Exhibit 66 Patent Purchase Agreement 22

11 (Bates Nos. BOEING 003028-47)

12 Exhibit 67 Business Term Sheet 77

13 (Bates Nos. BOEING 005293-5294)

14 Exhibit 68 Business Term Sheet 78

15 (Bates Nos. BOEING 005295-96)

16 Exhibit 69 4/22/10-6/4/10 E-Mail Chain 101

17 Re: Update1; Attachment

18 (Bates Nos. ATI02147-154)

19 Exhibit 70 4/22/10-8/31/10 E-Mail Chain 111

20 Re: Update2

21 (Bates Nos. ATI02860-2863)

22 Exhibit 71 12/20/10-12/21/10 E-Mail Chain 118

23 Re: Patent Portfolio in Structural

24 P2P and MMO Gaming for Sale or

25 License - B9

(Bates Nos. ATI102797-2798)

21 Exhibit 72 10/15/10 E-Mail 121

22 Re: Open Inventions - PPA

23 (Bates No. BOEING 005437)

24 Exhibit 73 Patent Purchase Agreement 121

25 (Bates Nos. BOEING 005438-5448)

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1 INDEX TO EXHIBITS CONTINUED

2

3 MARKED DESCRIPTION PAGE

4 Exhibit 74 9/1/10-9/2/10 E-Mail Chain 131

5 Re: Understanding Between Boeing and

6 Acorn Concerning Global IP Offer for

7 B9--Confidential

8 (Bates Nos. ATI02130-131)

9 Exhibit 75 9/1/10-10/8/10 E-Mail Chain 133

10 Re: Understanding Between Boeing and

11 Acorn Concerning Global IP Offer for

12 B9--Confidential

13 (Bates Nos. ATI02831-833)

14 Exhibit 76 3/13/12-5/4/12 E-Mail Chain 141

15 Re: Fred Holt's Proposal--

16 Re: SWAN--B9; Attachments

17 (Bates Nos. ATI02738-2741)

18 Exhibit 77 Response to Request for Proposal to 172

19 Obtain Intellectual Property Rights

20 (Bates No. HOLT 000870-885)

21 Exhibit 78 7/11/06 E-Mail Re: SWAN Term Sheet 177

22 (Bates No. BOEING 005788)

23 Exhibit 79 Proposed Business Terms 177

24 (Bates Nos. BOEING 005789-5791)

25 Exhibit 80 5/15/09-5/19/09 E-Mail Chain 185

Re: Online Gaming Portfolio

(Bates Nos. BOEING 005479-5480)

21 Exhibit 81 Request for Review/New Deal 186

22 Qualification Form

23 (Bates Nos. BOEING 005481-5483)

24 Exhibit 82 5/25/12 E-Mail Re: Some Info 190

25 (Bates Nos. BOEING 005810-5811)

21 Exhibit 83 5/15/09-7/1/09 E-Mail 192

22 Re: Online Gaming Portfolio

23 (Bates Nos. BOEING 005460-5462)

24

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1	INDEX TO EXHIBITS CONTINUED		
2			
3	MARKED	DESCRIPTION	PAGE
4	Exhibit 84	2/5/14-3/11/14 E-Mail Chain Re: BoeingPatents.docx (Bates Nos. BOEING 005392-5394)	194
5			
6	Exhibit 85	Boeing Patient Questionnaire (Bates No. BOEING 005395)	194
7			
8	Exhibit 86	2/5/14-2/11/14 E-Mail Chain Re: BoeingPatents.docx (Bates Nos. BOEING 005371-5372)	195
9			
10	Exhibit 87	Boeing Patent Questionnaire (Bates No. BOEING 005373)	195
11	Exhibit 88	Computer networking, Storage, Security & Wireless Communication (Bates Nos. BOEING 005374-5377)	195
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13	Exhibit 89	Amended and Restated Patent Purchase Agreement	202
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1 NATASHA RADOVSKY,

2 having been first duly sworn, was examined and testified

3 as follows:

4

5 EXAMINATION

6

7 BY MS. BARRY:

8 Q. Good morning, Miss Radovsky. Would you please

9 state your name for the record.

10 A. Natasha Radovsky.

11 Q. And who's your employer?

12 A. Boeing.

13 Q. And how long have you been employed by Boeing?

14 A. 13 years.

15 Q. So you started in about 2004?

16 A. 2004.

17 Q. And what is your business address?

18 A. I don't remember. We just moved from one

19 office to another. It's in Bolsa. I don't remember the

20 number. Bolsa in Huntington Beach, California.

21

22

23 Q. And what is your title at Boeing?

24 A. I am a director of global patent and technology

25 licensing for the Boeing licensing – intellectual

Page 7

1 COSTA MESA, CALIFORNIA;

2 THURSDAY, MAY 4, 2017, 8:51A.M.

3

4

5 THE VIDEOGRAPHER: Good morning. We are on the

6 record. This is the recorded video deposition of

7 Natasha Radovsky in the matter of Acceleration Bay LLC

8 vs. Electronic Arts Inc.

9 This deposition is taking place at 686 Anton

10 Boulevard, Costa Mesa, California, on May 4th, 2017, at

11 approximately 8:52 a.m.

12 My name is Christopher Vasi. I'm the

13 videographer with U.S. Legal Support located at

14 575 Anton Boulevard, Suite 400, Costa Mesa, California.

15 Would all present please identify themselves,

16 beginning with the witness.

17 THE WITNESS: Natasha Radovsky.

18 MR. ANDRE: Paul Andre representing

19 Acceleration Bay, Boeing, and the witness.

20 MS. BARRY: Kathleen Barry with Winston &

21 Strawn LLP on behalf of Electronic Arts Inc.

22 THE VIDEOGRAPHER: Thank you.

23 The certified court reporter is Leah Nelson.

24 Would you please administer the oath to the

25 witness.

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1 property licensing company, which is a subsidiary –

2 wholly owned subsidiary of Boeing.

3 Q. So are you an employee of The Boeing Company or

4 of the Boeing intellectual property –

5 A. Of The Boeing Company.

6 Q. So you're an employee of the parent

7 corporation?

8 A. The parent corporation wholly owns the

9 subsidiary, so I'm a director of the subsidiary.

10 Q. So are you an employee of the parent entity

11 corporation or not?

12 A. I'm an employee of the subsidiary that is

13 wholly owned by the parent corporation.

14 Q. And who's your supervisor?

15 A. Paul Bernal.

16 Q. And where is he at?

17 A. Seattle.

18 Q. And what is his title?

19 A. He's a VP of global patent and technology

20 licensing for the subsidiary, which is Boeing's

21 intellectual property licensing.

22 Q. And how long has he been your supervisor?

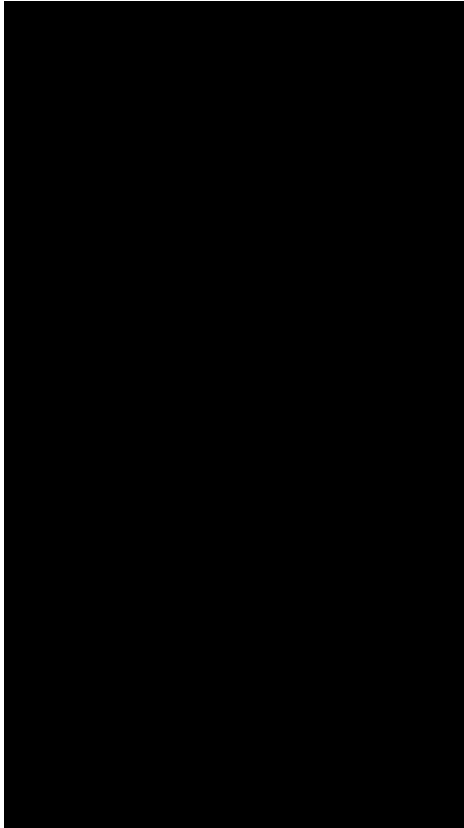
23 A. About six years.

24 Q. And have you always been a director of global

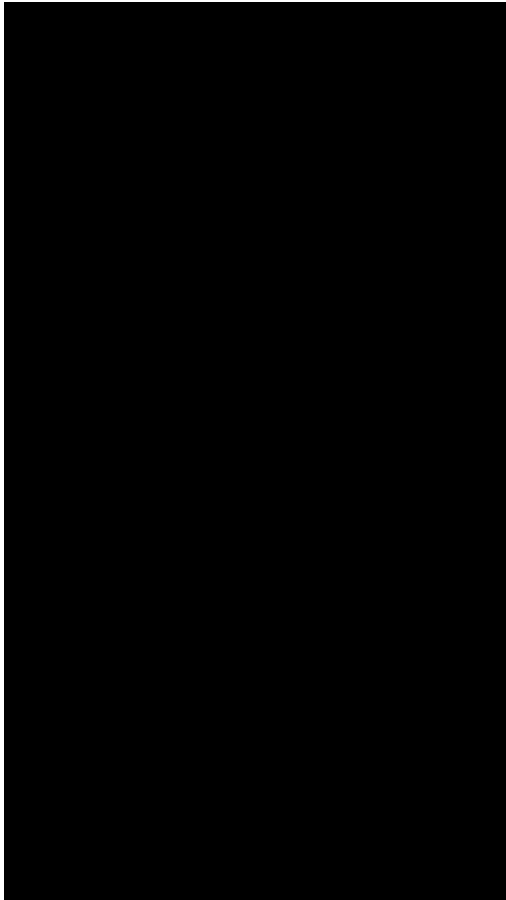
25 patent licensing at Boeing?

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1 using the licensed patents.
2 BY MS. BARRY:



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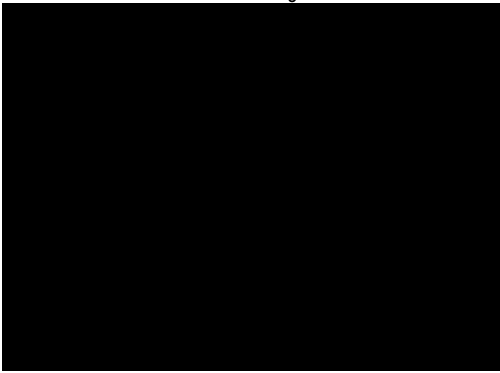
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1 BY MS. BARRY:
2 Q. Have you been told by anyone that the Sony
3 PlayStation is infringing –
4 MR. ANDRE: Objection.
5 BY MS. BARRY:
6 Q. – the SWAN patents?
7 MR. ANDRE: Form of the question. And I
8 counsel – counsel the witness not to disclose any
9 attorney-client communication.
10 BY MS. BARRY:
11 Q. And I've got to take issue with that objection.
12 Any information that you – certainly any – any
13 information that you received before your representation
14 by Kramer Levin is not privileged. And if you're
15 telling me that you're not going to answer my question
16 based on communications that you've had with
17 Kramer Levin, then I need to know more details about
18 that so we can make a determination as to whether or not
19 that's privileged?
20 A. Could you repeat the question, please?
21 MS. BARRY: (Indicating).
22 (Record read)
23 THE WITNESS: No.
24 BY MS. BARRY:
25 Q. So that no one has ever told you that the Sony

Page 38

1 PlayStation is infringing the SWAN patents?
2 A. Correct.
3 Q. Have you been told that the game World of
4 Warcraft is infringing the SWAN patents?
5 MR. ANDRE: Objection. Form of the question.
6 To the extent it calls for attorney-client
7 communication, I'll instruct the witness not to answer.
8 MS. BARRY: And I'll make the same objection
9 that I made before.
10 THE WITNESS: No.
11 BY MS. BARRY:
12 Q. And that's never – you've never been told that
13 the World of Warcraft game is infringing the SWAN
14 patents?
15 A. I don't even know what this game is.



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1 Q. Is there any product that you're aware of that
2 infringes the SWAN patents?
3 MR. ANDRE: Objection. Form of the question.
4 Same instruction.
5 THE WITNESS: No.
6 BY MS. BARRY:
7 Q. And you're not holding back any information
8 based on an assertion of attorney-client privilege; is
9 that right?
10 A. Right.
11 MS. BARRY: Mr. Andre, if we're going to have
12 this privilege objection, can we have a disclosure of
13 when we are holding back information so that we can make
14 the record clear and I can then take my objections and
15 challenges to the proper...
16 MR. ANDRE: I have no idea what you're asking.
17 I'm going to make my objections. I'll give my
18 instructions. To the extent she answers anything held
19 back in privilege, we can bring it up later. But
20 I'm going to make my objections and give the
21 instructions, so let's take it as it goes.
22 MS. BARRY: That's fine.
23 BY MS. BARRY:
24 Q. Have you – in answering my questions so far
25 this morning, have you withheld any information on the

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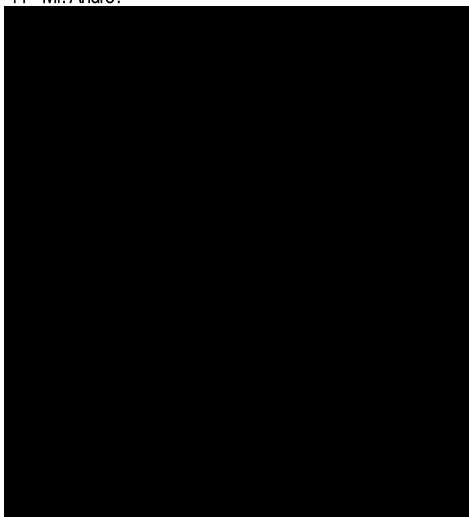
1 basis of an attorney-client privilege?
2 A. No.
3 Q. When did you first meet Joe Ward?
4 A. Who's Joe Ward?
5 Q. You don't know who Joe Ward is?
6 A. No.
7 Q. You've never heard of Joseph Ward?
8 A. I don't recall the name. I probably met him,
9 but I don't recall who that person is.
10 Q. When did you first hear of Acceleration Bay?
11 A. Sometime in 2014 or 2013.
12 Oh, now I recall who that person is.
13 Q. Do you now remember who Joe Ward is?
14 A. Correct.
15 Q. When did you first meet Joe Ward?
16 A. I've never met Joe Ward.
17 Q. Have you ever had any communications with
18 Joe Ward?
19 A. No. I don't think so.
20 Q. How did you – how were you approached about
21 the sale of the patents to Acceleration Bay?
22 A. By Mr. Paul Andre, who represented Acceleration
23 Bay.
24 Q. And how did Mr. Andre reach out to you?
25 A. We met accidentally at a conference event in

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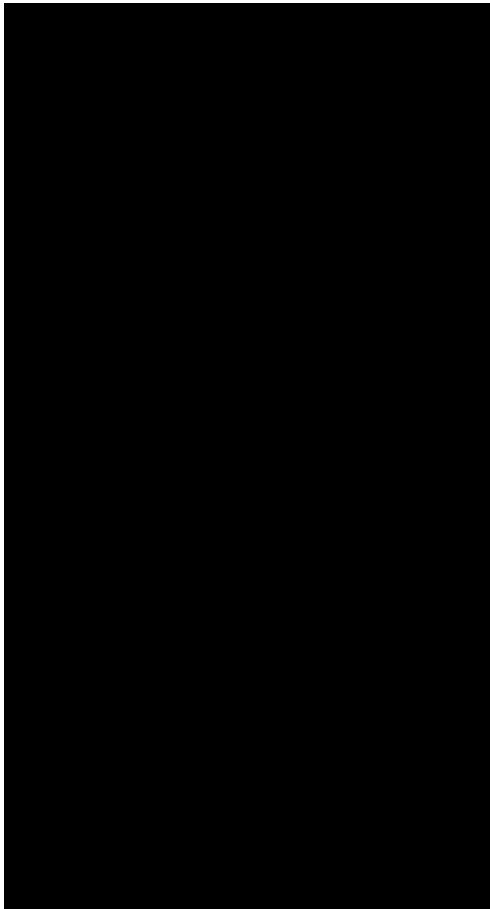
1 San Francisco.
2 Q. What conference was that?
3 A. Something to do with intellectual property
4 something.
5 Q. And it was in San Francisco?
6 A. Yeah.
7 Q. Was it the summer or the winter?
8 A. I don't know. I don't remember.
9 Q. And that was in 2013 or '14?
10 A. I'm counting back from the agreement date.
11 Probably in 2013, most likely.
12 Q. And what did you talk about with Mr. Andre?
13 MR. ANDRE: And I want to instruct the witness
14 when she talks about –
15 When you're talking about Mr. Andre, it's
16 before we were retained as counsel, so during that time
17 period. Don't have any discussions we had more
18 recently.
19 THE WITNESS: Right.
20 MS. BARRY: And I reserve the right to
21 challenge that instruction.
22 BY MS. BARRY:
23 Q. But for now, please tell me what you talked
24 about at the conference.
25 A. Different ways to monetize intellectual

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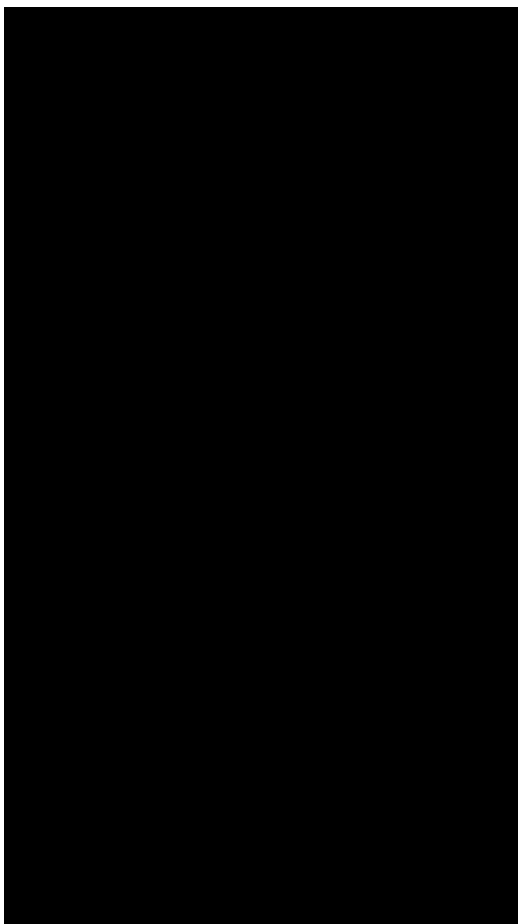
1 properties.
2 Q. And what did Mr. Andre say about that?
3 A. That we would be both looking forward to
4 collaboration.
5 Q. Anything else that you discussed at the
6 conference?
7 A. No.
8 Q. Did you specifically discuss the SWAN patents?
9 A. No.
10 Q. What was your next communication with
11 Mr. Andre?



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19 Q. Were these communications and discussions
20 solely with Mr. Andre?
21 A. Yes.
22 Q. So there was nobody – no other lawyers from
23 Kramer Levin on the phone?
24 MR. ANDRE: Objection. Form of the question.
25 Lacks foundation.

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1 THE WITNESS: I wouldn't know who else was in
2 the room if somebody, but the communications were with
3 Mr. Andre.
4 BY MS. BARRY:
5 Q. And they were primarily over the phone?
6 A. Yes.
7 Q. And – and he didn't indicate to you in those
8 phone conversations that anyone else was on the phone?
9 A. Correct.
10 Q. Okay. So you said there was a term sheet. Who
11 prepared the term sheet?
12 A. I did.
13 Q. And then what happened to the term sheet?
14 A. So term sheet gets negotiated. And after both
15 sides agree with the terms on the term sheet, then
16 Elena Barrio, who's our contracts manager, would draft
17 a – an agreement based on that term sheet.
18 Q. So did you send the term sheet to Mr. Andre?
19 A. Yes, I would. I don't remember, but I would
20 have.
21 Q. And so you would have sent it by e-mail?
22 A. Most likely.
23 Q. And then, did he respond by e-mail?
24 MR. ANDRE: Objection. Form of the question.
25 THE WITNESS: I don't remember.

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1 BY MS. BARRY:
2 Q. What response did you get from Mr. Andre on the
3 term sheet?
4 A. I don't remember which way, but I got the
5 response that the terms and conditions were agreed upon.
6 Q. And then what happened after Mr. Andre
7 indicated that the terms and conditions were agreed to?
8 A. Then Elena Barrio drafted the agreement, the
9 sales agreement, based on that term sheet.
10 Q. Was – before you prepared the term sheet, was
11 there any discussion of the price for the patents?
12 A. Term sheet includes the price of the patent.
13 Q. Who came up with the price for the patents?
14 A. It was discussed over the phone multiple times,
15 and we mutually came up with the agreement on the
16 minimum price and the expected value.
17 Q. And as the negotiator for Boeing, how did you
18 determine what the price should be?
19 A. So it was primarily based on Mr. Andre's
20 analysis of potential revenue, adjusted by the fact that
21 there are risks for litigation and litigation potential
22 expenses.
23 Q. Did Mr. Andre provide you with an analysis of
24 the potential revenue?
25 A. No.

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1 Q. What did he tell you about his analysis of the
2 potential revenue?
3 A. If I recall correctly at the time, it was a low
4 nine-digit figure that was shared with us.
5 Q. So in excess of \$100 million?
6 A. Correct.
7 Q. And did he give you any explanation for how he
8 came up with that figure?
9 A. No.
10 Q. Did Boeing do any due diligence on that figure?
11 A. No.
12 Q. So Boeing just took Mr. Andre's representation
13 that there was a potential revenue of \$100 million from
14 enforcing these patents?
15 A. Correct.
16 Q. And Boeing didn't ask any questions about how
17 that \$100 million of revenue would be obtained?
18 A. No.
19 Q. But Boeing knew that Mr. Andre is a patent
20 litigator, right?
21 MR. ANDRE: Objection. Form of the question.
22 THE WITNESS: No, actually. I don't think so.
23 BY MS. BARRY:
24 Q. You didn't know that Mr. Andre litigates
25 patents, he's a lawyer?

Page 49

1 A. We knew that Mr. Andre is a lawyer. But
2 Mr. Andre represented Acceleration Bay. That was a
3 practicing entity.
4 Q. What makes you say that Acceleration Bay is a
5 practicing entity?
6 A. Because at the time, they planned to develop
7 the technology further and come up with the product that
8 is using that technology. And in addition to that,
9 license this technology to other potential companies.
10 Q. Have you seen any evidence that Acceleration
11 Bay has made efforts to develop the technology?
12 A. No. But it was represented to me at the time
13 that that's what was supposed to happen.
14 Q. And who made that representation to you?
15 A. Acceleration Bay at the time when we
16 negotiated.
17 Q. And when you say Acceleration Bay made that
18 representation to you, who's the person?
19 A. Paul Andre.
20 Q. Other than Paul Andre, have you spoken with
21 anyone else who is representing Acceleration Bay?
22 A. No.
23 Q. You haven't spoken to any employees of
24 Acceleration Bay?
25 A. No.

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1 negotiating the – both the Patent Purchase Agreement
2 and the amended and restated Patent Purchase Agreement
3 that those – the SWAN patents covered by those
4 agreements were valid?
5 MR. ANDRE: Objection. Form of the question.
6 THE WITNESS: Yeah. To the best of our
7 knowledge, yes.
8 BY MS. BARRY:
9 Q. And if there was some question about the
10 validity of the SWAN patents, then the price to purchase
11 or license those patents would be less, right?
12 MR. ANDRE: Objection. Hypothetical. Form of
13 the question.
14 THE WITNESS: No. We actually sell our patents
15 as-is by agreement. So whether they're valid or invalid
16 does not affect the financial considerations for us.
17 BY MS. BARRY:
18 Q. From the buyer's perspective.
19 A. Oh. From the buyer's perspective, I would
20 imagine.
21 Q. The buyer's going to pay less if they think
22 that some or all of the claims of a patent are invalid?
23 MR. ANDRE: Objection. Calls for hypothetical.
24 Speculation.
25 THE WITNESS: I think buyers wouldn't even buy

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1 anything that they think are – is invalid.
2 BY MS. BARRY:
3 Q. So certainly, if they're not inclined to buy a
4 patent that they think is completely invalid, the price
5 for a patent that has some invalid claims is going to be
6 less than the price for a patent with all valid claims?
7 MR. ANDRE: Objection. Form of the question.
8 Calls for speculation.
9 THE WITNESS: Most likely, yes.
10 MS. BARRY: Can we take a quick break? I think
11 I'm almost done here.
12 THE WITNESS: Sure.
13 THE VIDEOGRAPHER: We're going off the record.
14 The time is 3:22 p.m.
15 (Recess)
16 THE VIDEOGRAPHER: We are back on the record.
17 The time is 3:28 p.m.
18 MS. BARRY: We're ending for the day, but we
19 are keeping the deposition open. As you know from the
20 e-mails that we've exchanged, there's a number of
21 documents that you have withheld on the basis of
22 privilege. And from the testimony here today, it's
23 clear those documents are not privileged and those are
24 documents clearly involving Miss Radovsky. And it
25 sounds like there are additional documents which have

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1 not been logged and which do not appear to be privileged
2 which have not been produced.
3 So we will be following up on those, and we
4 will hold the deposition open pending the production
5 of – complete production by Boeing, which has not been
6 forthcoming.
7 MR. ANDRE: We disagree with your
8 characterization. We consider this deposition closed.
9 And Miss Radovsky has been here to answer all of her
10 questions. So with that, off the record.
11 THE VIDEOGRAPHER: This concludes today's
12 recorded video deposition of Natasha Radovsky.
13 We are off the record. The time is 3:28 p.m.,
14 May 4th, 2017.
15 (Deposition adjourned at 3:28 p.m.)
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1 DECLARATION UNDER PENALTY OF PERJURY
2
3 I, NATASHA RADOVSKY, do hereby certify under
4 penalty of perjury that I have read the foregoing
5 transcript of my deposition taken on May 4, 2017; that I
6 have made such corrections as appear noted herein in
7 ink, initialed by me; that my testimony as contained
8 herein, as corrected, is true and correct.
9
10 Dated this ____ day of _____, 20____,
11 at _____, California.
12
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15 _____
16 NATASHA RADOVSKY
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Page 218

1 DEPOSITION ERRATA SHEET
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25 NATASHA RADOVSKY DATED

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1 the transcript (X) was () was not requested. If
2 requested, any changes made by the deponent (and
3 provided to the reporter) during the period allowed are
4 appended hereto.
5
6
7 Dated: May 15, 2017
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12 _____
13 LEAH L. NELSON, CSR 12561
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Page 219

1 STATE OF CALIFORNIA)
2) ss
3 COUNTY OF LOS ANGELES)
4 I, LEAH L. NELSON, hereby certify:
5 I am a duly qualified Certified Shorthand
6 Reporter in the State of California, holder of
7 Certificate No. CSR 12561, issued by the Court Reporters
8 Board of California and which is in full force and
9 effect. (Fed. R. Civ. P. 28(a).)
10 I am authorized to administer oaths or
11 affirmations pursuant to California Code of Civil
12 Procedure, Section 2093(b) and prior to being examined,
13 the witness was first duly sworn by me. (Fed. R. Civ.
14 P. 28(a), 30(f)(1).)
15 I am not a relative or employee or attorney or
16 counsel of any of the parties, nor am I a relative or
17 employee of such attorney or counsel, nor am I
18 financially interested in this action. (Fed. R. Civ. P.
19 28.)
20 I am the deposition officer that
21 stenographically recorded the testimony in the foregoing
22 deposition, and the foregoing transcript is a true
23 record of the testimony given by the witness. (Fed. R.
24 Civ. P. 30(f)(l).)
25 Before completion of the deposition, review of

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EXHIBIT M

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**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF DELAWARE**

ACCELERATION BAY LLC,)
)
 Plaintiff,)
)
 v.)
)
 TAKE-TWO INTERACTIVE SOFTWARE,)
 INC., ROCKSTAR GAMES, INC., 2K)
 SPORTS, INC.,)
)
 Defendant.)

C.A. No. 16-455 (RGA)

HIGHLY CONFIDENTIAL

REBUTTAL EXPERT REPORT OF CATHARINE M. LAWTON

March 20, 2018

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discussed in more detail later.

111. In July 2002, Panthesis acknowledged that “[i]n the absence of low-level solutions like SWAN, users ha[d] been moving toward real-time interaction anyway. Three significant markets in which the applications ha[d] been progressing despite the lack of a peer-to-peer communications infrastructure [were] enterprise collaboration, design collaboration, and **games**. The applications in these areas still rely on client-server networks, although the server may be nominated *ad hoc*, or its presence may be obscured to make the collection of clients look like a community of peers.”³⁷⁵ In addition, Panthesis noted that “Online games have been moving toward massive multiplayer (MMP) games. The new Sony [PlayStation 2] and Microsoft [Xbox] consoles are Internet-enabled and offer multiconsole titles. However, the interactive titles are limited to between eight and sixteen players.”³⁷⁶

B. Video Game Categories

112. There are three distinct categories of video games: console (*e.g.*, Microsoft Xbox, Sony PlayStation), personal computers, mobile/casual (*e.g.*, games that run on mobile devices—tablets and phones).³⁷⁷ Console and PC gaming is known as the “traditional” video game market, and accounts for approximately 80% of industry revenue.³⁷⁸ “Game consoles generally stayed ahead of personal computers by incorporating advanced graphics and processor components. ... By the mid-1990s, computers were able to keep up with game consoles and, with the addition of sound

³⁷⁵ HOLT 002332-359, at 344 (“Panthesis Incorporated Business Plan Small-world Wide Area Networking (SWAN) July 2002”) (emphasis added).

³⁷⁶ HOLT 002332-359, at 344 (“Panthesis Incorporated Business Plan Small-world Wide Area Networking (SWAN) July 2002”).

³⁷⁷ David Greenspan, S. Gregory Boyd, Jas Purewal, Matthew Datum, “Mastering the Game – Business and Legal Issues for Video Game Developers,” *WIPO*, December 2013, p. 18, available at http://www.wipo.int/edocs/pubdocs/en/copyright/959/wipo_pub_959.pdf (hereinafter “Mastering the Game – Business and Legal Issues for Video Game Developers”).

³⁷⁸ “Mastering the Game – Business and Legal Issues for Video Game Developers,” p. 19.

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and graphics enhancements and suitable controllers, could emulate the console game experience.”³⁷⁹

113. The general attributes of each video game category are summarized in **Table 4.1**,³⁸⁰ below:

Categories of Video Games		
Console	Personal computer (PC)	Mobile/Casual
Run on dedicated hardware	Run on Windows, Mac or Linux	Run on tablets and phones
Expensive to develop	Wide variety in terms of cost and genre	Less expensive to develop
Wide variety of genre	No single gatekeeper for platform	Social and casual games
System controlled by IP owners	Majority of sales through digital	Largest number of potential players
Box product and digital but dominated by box sales		

TABLE 4.1

114. The device manufacturers provide software development kits (“SDK”) to the game makers that allow them to implement technology into their games.³⁸¹ The SDK is a set of software development tools that allows the creation of applications for a certain video game console.³⁸²

1. Console

115. Consoles are dedicated hardware that connects to a television or are handheld.³⁸³ “[V]ideo game

³⁷⁹ Joseph Straubhaar, Robert LaRose, Lucinda Davenport, *Media Now: Understanding Media, Culture, and Technology*, 10th Ed., (Boston: Cengage Learning, 2016), p. 316.

³⁸⁰ “Video Games and IP: A Global Perspective.” *See also* “Mastering the Game – Business and Legal Issues for Video Game Developers,” p. 18.

³⁸¹ “Mastering the Game – Business and Legal Issues for Video Game Developers,” p. 31.

³⁸² “Mastering the Game – Business and Legal Issues for Video Game Developers,” p. 231.

³⁸³ *See, e.g.*, “Mastering the Game – Business and Legal Issues for Video Game Developers,” p. 18.

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consoles consist of static technology for the duration of the console’s life cycle.”³⁸⁴ The console market is currently dominated by Nintendo, Microsoft and Sony.³⁸⁵

116. Console manufacturers “control[] the video game ‘value chain.’ Console manufacturers determine[] which games [are] produced for their consoles and thus tightly[] control[] consumer access to those games.”³⁸⁶ It has been said that “[c]onsole makers rule the roost,” and, according to Fred Holt, “the consoles [console manufacturers] were the ones taking most of the money.”³⁸⁷

The traditional video game value chain is shown in **Figure 4.1**,³⁸⁸ below:

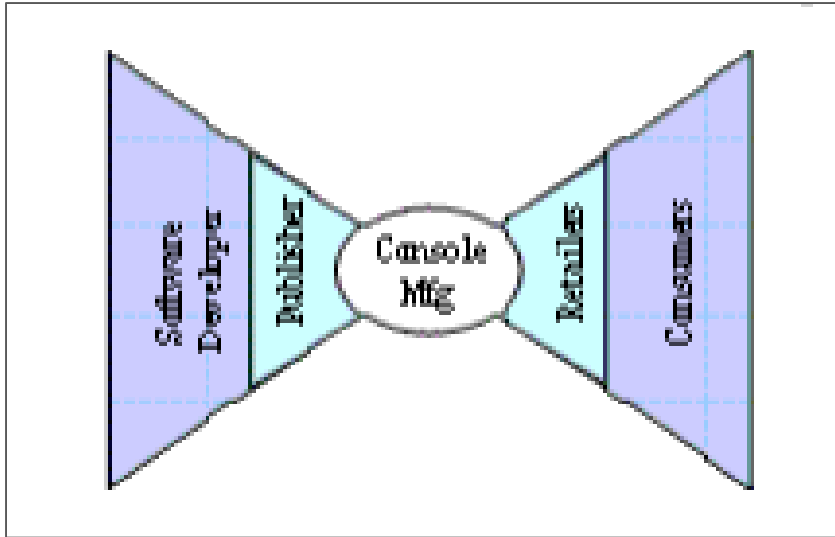
³⁸⁴ James Conley, Ed Andros, Priti Chinai, Elise Lipkowitz, David Perez, “Use of a Game Over: Emulation and the Video Game Industry, A White Paper,” *Northwestern Journal of Technology and Intellectual Property*, Spring 2004, p. 6, available at <http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1022&context=njtip>.

³⁸⁵ See, e.g., “Mastering the Game – Business and Legal Issues for Video Game Developers,” p. 19.

³⁸⁶ James Conley, Ed Andros, Priti Chinai, Elise Lipkowitz, David Perez, “Use of a Game Over: Emulation and the Video Game Industry, A White Paper,” *Northwestern Journal of Technology and Intellectual Property*, Spring 2004, p. 7, available at <http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1022&context=njtip>.

³⁸⁷ May 31, 2017 Deposition of Fred Holt, 215:11-215:16.

³⁸⁸ James Conley, Ed Andros, Priti Chinai, Elise Lipkowitz, David Perez, “Use of a Game Over: Emulation and the Video Game Industry, A White Paper,” *Northwestern Journal of Technology and Intellectual Property*, Spring 2004, p. 8, available at <http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1022&context=njtip>.

CONFIDENTIAL – OUTSIDE COUNSEL ONLY**FIGURE 4.1**

117. The console manufacturer’s business model has been described as follows:

Traditionally, console manufacturers have operated on an “installed base” or “razor/razor blade” model: selling game hardware at a loss in order to profit from subsequent software sales. During the planned life of a game console, console manufacturers reap the bulk of their profits from video game sales.³⁸⁹

118. The console industry has introduced generations of products, which historically have had five to six-year lifecycles.³⁹⁰ “Each console is designed for obsolescence: during the final year of its lifecycle, a next generation console is introduced, and users are migrated from the old console to

³⁸⁹ James Conley, Ed Andros, Priti Chinai, Elise Lipkowitz, David Perez, “Use of a Game Over: Emulation and the Video Game Industry, A White Paper,” *Northwestern Journal of Technology and Intellectual Property*, Spring 2004, p. 8, available at <http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1022&context=njtip>.

³⁹⁰ See, e.g., “Eighth generation of video game consoles,” *Wikipedia*, available at https://en.wikipedia.org/wiki/Eighth_generation_of_video_game_consoles. See also James Conley, Ed Andros, Priti Chinai, Elise Lipkowitz, David Perez, “Use of a Game Over: Emulation and the Video Game Industry, A White Paper,” *Northwestern Journal of Technology and Intellectual Property*, Spring 2004, p. 7, available at <http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1022&context=njtip>.

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the new one.”³⁹¹ The “1st generation” kicked off in 1972 with the Magnavox Odyssey.³⁹² The “7th generation” began with Microsoft’s launch of the Xbox 360 in November 2005.³⁹³ Microsoft and Sony planned that the 7th generation would have a ten-year lifecycle,³⁹⁴ but began to wind down after eight years.³⁹⁵ Sony marketed its 7th generation PlayStation 3 with the “It Only Does Everything” message.³⁹⁶ This message underscored that the console could be used by the whole family—not just for gaming, but also for downloading photos or videos or watching Netflix.³⁹⁷ The goal was to give consumers flexibility to use the console for more than gaming, and

³⁹¹ James Conley, Ed Andros, Priti Chinai, Elise Lipkowitz, David Perez, “Use of a Game Over: Emulation and the Video Game Industry, A White Paper,” *Northwestern Journal of Technology and Intellectual Property*, Spring 2004, p. 7, available at

<http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1022&context=njtip>.

³⁹² Chris Morris, “Video Game System Sales Tank in February,” *Fortune*, March 10, 2016, available at <http://fortune.com/2016/03/10/video-game-system-sales-tank-february/>.

³⁹³ “Mastering the Game – Business and Legal Issues for Video Game Developers,” p. 19.

³⁹⁴ See, e.g., “Eighth generation of video game consoles,” *Wikipedia*, available at https://en.wikipedia.org/wiki/Eighth_generation_of_video_game_consoles (citing Andrew Yoon, “Microsoft: Xbox 360 ‘about halfway’ through generation,” *ShackNews*, June 24, 2011, <http://www.shacknews.com/article/69053/microsoft-xbox-360-about-halfway>. David M. Ewalt, “PlayStation Chief Jack Tretton: How To Sell Vita, Navigate Clouds, And Debut The PS4,” *Forbes*, June 17, 2011, available at

<https://www.forbes.com/sites/davidewalt/2011/06/17/playstation-chief-jack-tretton-how-to-sell-vita-navigate-clouds-and-debut-the-ps4/#3acf69304b35>. See also Aaron Linde, “Sony: PS3 Will Reclaim Lead within Life Cycle,” *ShackNews*, May 7, 2008, available at

<http://www.shacknews.com/article/52568/sony-ps3-will-reclaim-lead>. Aoife Cunningham, Holger Langlotz, Marc Rhode, Clayton Whaley, “Video Games Industry Overview – An Analysis of the Current Market and Future Growth Trends,” *International Business Project*, 2008, pp. 18-19, available at

http://holgerlanglotz.de/downloads/BU4510_VideoGamesIndustry_LanglotzEtAl.pdf.

³⁹⁵ See, e.g., “Useful Notes/Console Wars,” *TV/Tropes*, available at

<http://tvtropes.org/pmwiki/pmwiki.php/UsefulNotes/ConsoleWars?from=Main.ConsoleWars>.

³⁹⁶ David M. Ewalt, “PlayStation Chief Jack Tretton: How To Sell Vita, Navigate Clouds, And Debut The PS4,” *Forbes*, June 17, 2011, available at <https://www.forbes.com/sites/davidewalt/2011/06/17/playstation-chief-jack-tretton-how-to-sell-vita-navigate-clouds-and-debut-the-ps4/#3acf69304b35>.

³⁹⁷ David M. Ewalt, “PlayStation Chief Jack Tretton: How To Sell Vita, Navigate Clouds, And Debut The PS4,” *Forbes*, June 17, 2011, available at <https://www.forbes.com/sites/davidewalt/2011/06/17/playstation-chief-jack-tretton-how-to-sell-vita-navigate-clouds-and-debut-the-ps4/#3acf69304b35>.

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“[w]atching video content on the PS3 is a perfect example of that.”³⁹⁸ The strategy was directed to expanding the market—“[t]he more flexible you are, the wider net you can cast.”³⁹⁹

119. “By early 2006, Sony PS2 dominated the video console market with a 55% market share, followed by Microsoft’s Xbox with 24%, Nintendo Game Cube with 15%, and the newest entry, Microsoft’s Xbox360 with 6%.”⁴⁰⁰ In addition, in 2005, eight of the top 10 selling video games were for the PS2 console.⁴⁰¹
120. By early-2005, industry analysts expected that the 7th generation consoles “would overshadow the role of the PC in many homes.”⁴⁰² In May 2005, EA’s CFO commented: “The stakes for next generation hardware leadership are enormous. It’s about owning the set-top box that may ultimately connect the living room to the Internet.”⁴⁰³
121. In 2005, as the market transitioned from the 6th generation to the 7th generation consoles, Sony’s PS3 console was expected to continue to account for a substantial share of video games software

³⁹⁸ David M. Ewalt, “PlayStation Chief Jack Tretton: How To Sell Vita, Navigate Clouds, And Debut The PS4,” *Forbes*, June 17, 2011, available at <https://www.forbes.com/sites/davidewalt/2011/06/17/playstation-chief-jack-tretton-how-to-sell-vita-navigate-clouds-and-debut-the-ps4/#3acf69304b35>.

³⁹⁹ David M. Ewalt, “PlayStation Chief Jack Tretton: How To Sell Vita, Navigate Clouds, And Debut The PS4,” *Forbes*, June 17, 2011, available at <https://www.forbes.com/sites/davidewalt/2011/06/17/playstation-chief-jack-tretton-how-to-sell-vita-navigate-clouds-and-debut-the-ps4/#3acf69304b35>.

⁴⁰⁰ John Sterman, Kahn Jekari, Cate Reavis, “Sony’s Battle for Video Game Supremacy,” *MIT Sloan*, December 8, 2011, p. 7, available at <https://mitsloan.mit.edu/LearningEdge/CaseDocs/07-046-Sonys-Battle.pdf?v=20120410>.

⁴⁰¹ John Sterman, Kahn Jekari, Cate Reavis, “Sony’s Battle for Video Game Supremacy,” *MIT Sloan*, December 8, 2011, p. 7, available at <https://mitsloan.mit.edu/LearningEdge/CaseDocs/07-046-Sonys-Battle.pdf?v=20120410>.

⁴⁰² John Sterman, Kahn Jekari, Cate Reavis, “Sony’s Battle for Video Game Supremacy,” *MIT Sloan*, December 8, 2011, p. 13, available at <https://mitsloan.mit.edu/LearningEdge/CaseDocs/07-046-Sonys-Battle.pdf?v=20120410>.

⁴⁰³ John Sterman, Kahn Jekari, Cate Reavis, “Sony’s Battle for Video Game Supremacy,” *MIT Sloan*, December 8, 2011, p. 13, available at <https://mitsloan.mit.edu/LearningEdge/CaseDocs/07-046-Sonys-Battle.pdf?v=20120410>.

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sales. Video game software sales by platform show the shift that was projected to occur as the market transitioned from the 6th generation consoles to the 7th generation consoles. **Figure 4.2**,⁴⁰⁴ below, shows historical sales of video game software for consoles by console platform during the period 2001 through 2006, and a forecast of such sales for the period 2007 through 2011. **Figure 4.2** shows that in 2006, the vast majority of video game software for consoles, was sold for the 6th generation Sony PlayStation platform (PlayStation 2). It also shows that the Sony PlayStation (PlayStation 3) was expected to be the dominant platform in the 7th generation.

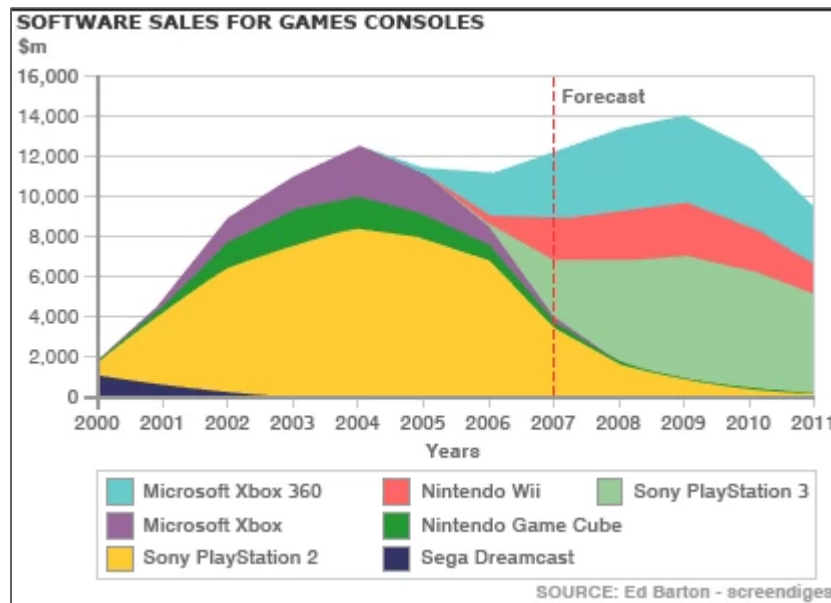


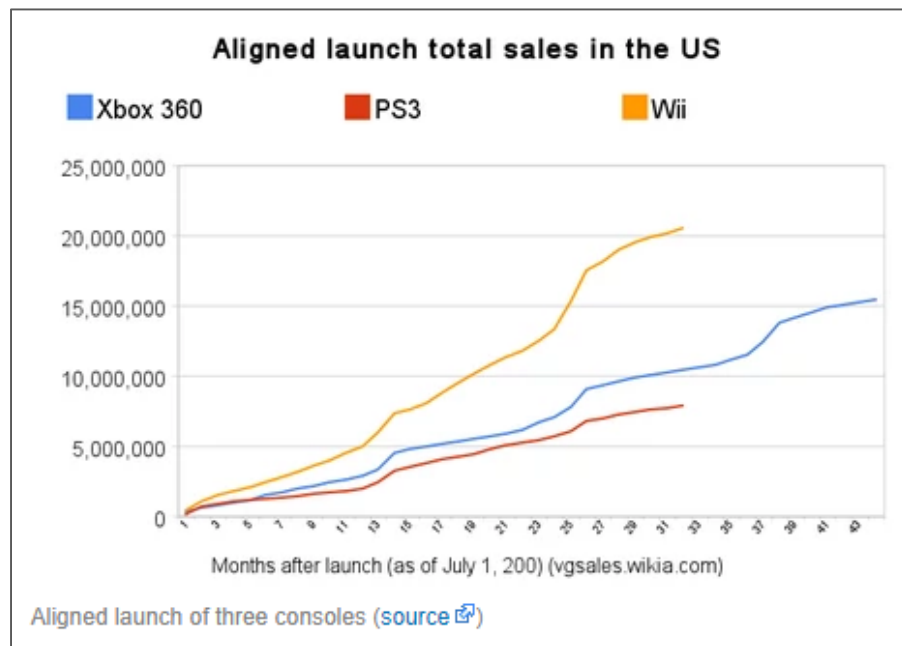
FIGURE 4.2

122. In the U.S., the “7th generation” console market shares through April 2009 (43 months after the launch of the first 7th generation console, the Xbox 360), were Nintendo Wii (46.58%), Xbox

⁴⁰⁴ “Video game console marketshare.gif,” *Fandom*, available at http://vgsales.wikia.com/wiki/File:Video_game_console_marketshare.gif (image with source from https://vignette.wikia.nocookie.net/vgsales/images/c/cc/Video_game_console_marketshare.gif/revision/latest?cb=20081219053117).

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(35.49%), and PlayStation3 (17.93%).⁴⁰⁵ The Xbox360 and Sony PS3 U.S. launch trajectories were similar as shown in **Figure 4.3**,⁴⁰⁶ below. **Figure 4.3** shows launch trajectories, not overall console sales in the U.S., and shows that Nintendo sold more Wii consoles during its initial launch months than either Sony PlayStation 3 or Microsoft Xbox 360 consoles.

**FIGURE 4.3**

123. The “8th generation” of gaming consoles began on November 18, 2012 with Nintendo’s release of the Wii U, which was followed by the Sony PlayStation 4 on November 15, 2013, and the Microsoft Xbox One on November 22, 2013.⁴⁰⁷
124. In the U.S. the leading console manufacturers in 2013, based on sales of units, were Nintendo Wii (39%), Microsoft Xbox (38%), and Sony PlayStation (23%).⁴⁰⁸ In June 2011, Jack Tretton,

⁴⁰⁵ “NPD Seventh generation,” *Fandom*, available at http://vgsales.wikia.com/wiki/NPD_Seventh_generation.

⁴⁰⁶ “NPD Seventh generation,” *Fandom*, available at http://vgsales.wikia.com/wiki/NPD_Seventh_generation.

⁴⁰⁷ See, e.g., “Eighth generation of video game consoles,” *Wikipedia*, available at https://en.wikipedia.org/wiki/Eighth_generation_of_video_game_consoles.

⁴⁰⁸ “Mastering the Game – Business and Legal Issues for Video Game Developers,” p. 20.

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President and CEO of Sony Computer Entertainment of America, a subsidiary of Sony responsible for its PlayStation brand in North America, described the differentiation between the console franchises as follows:

I think more than ever, this generation of consoles has more product differentiation, and companies have staked out their own ground. I've always felt that the classic Nintendo franchise was a more casual, young audience, Microsoft was more the shooter audience, and we were always the masses. But I think we were all interested in the same things. But you mentioned Vita, and that's clearly our message in the portable space. The big message in the console space was our exclusive big blockbuster titles. And then there's the 3D and [PlayStation] Move. It's a very healthy industry, there's room for everybody. We're going after a lot of the same things, but I think consumers get the product differentiation. They kind of gravitate to one brand or another, depending on what their tastes are.⁴⁰⁹

125. Total console sales increased rapidly in 2006 and 2007 following the introduction of “7th generation” consoles.⁴¹⁰ The sales growth levelled off in 2009.⁴¹¹ In 2011, console sales began to decline, and this decline accelerated in 2012.⁴¹² The console unit sales for the period November 2006 through July 2013 are shown in **Figure 4.4**,⁴¹³ below.

⁴⁰⁹ David M. Ewalt, “PlayStation Chief Jack Tretton: How To Sell Vita, Navigate Clouds, And Debut The PS4,” *Forbes*, June 17, 2011, available at <https://www.forbes.com/sites/davidewalt/2011/06/17/playstation-chief-jack-tretton-how-to-sell-vita-navigate-clouds-and-debut-the-ps4/#3acf69304b35>.

⁴¹⁰ “Mastering the Game – Business and Legal Issues for Video Game Developers,” p. 26.

⁴¹¹ “Mastering the Game – Business and Legal Issues for Video Game Developers,” p. 26.

⁴¹² “Mastering the Game – Business and Legal Issues for Video Game Developers,” p. 26.

⁴¹³ “Mastering the Game – Business and Legal Issues for Video Game Developers,” p. 26.

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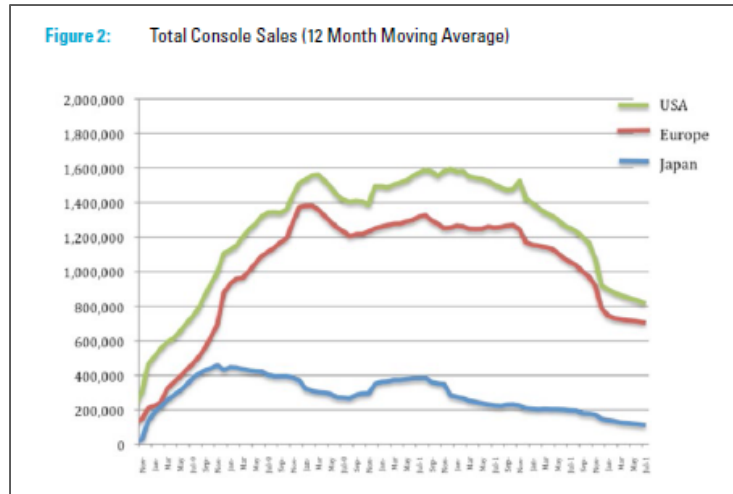


FIGURE 4.4

126. Console games dominate the video game industry and account for the vast majority of games sold as shown in **Table 4.2**,⁴¹⁴ below:

Year	Console Game Sales	PC Game Sales
2006	231.8 Million Units	1.2 Million Units
2007	388.4 Million Units	5.2 Million Units
2008	628.5 Million Units	9.3 Million Units
2009	602.3 Million Units	8.8 Million Units
2010	636 Million Units	17.6 Million Units

TABLE 4.2

127. By March 2016, the “two-year rush to buy new video game systems from Sony and Microsoft” was slowing down.⁴¹⁵ In February 2016, game console sales fell 23% year over year, which

⁴¹⁴ Casey O’Donnell, “The North American Game Industry,” in Peter Zackariasson, Timothy Wilson, Ed., *The Video Game Industry: Formation, Present State, and Future*, (New York: Routledge, 2012), p. 101.

⁴¹⁵ Chris Morris, “Video Game System Sales Tank in February,” *Fortune*, March 10, 2016, available at <http://fortune.com/2016/03/10/video-game-system-sales-tank-february/>.

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marked the third consecutive month of sales declines in the category.⁴¹⁶

128. As of April 2016, the best-selling video game consoles of all time based on units installed are shown in **Figure 4.5**,⁴¹⁷ below:

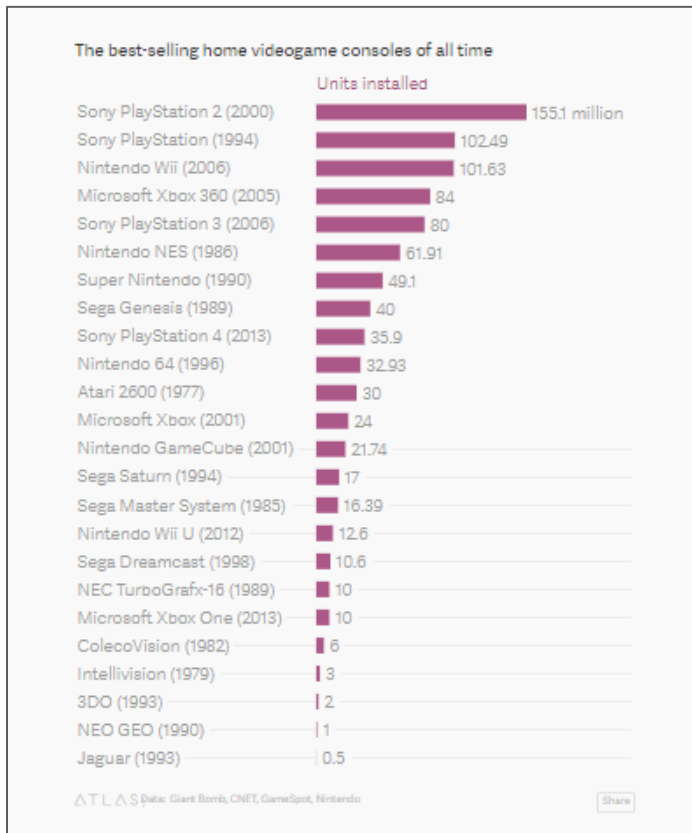


FIGURE 4.5

2. Personal Computer (PC)

129. PC video games run on general-purpose personal computers.⁴¹⁸ The most common PC operating system is Windows, however, Mac and Linux can also run a number of games.⁴¹⁹

⁴¹⁶ Chris Morris, “Video Game System Sales Tank in February,” *Fortune*, March 10, 2016, available at <http://fortune.com/2016/03/10/video-game-system-sales-tank-february/>.

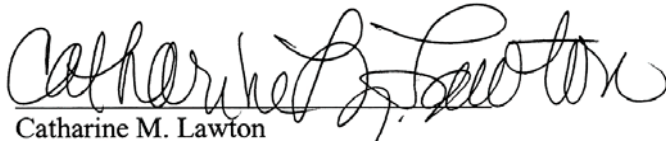
⁴¹⁷ Mike Murphy, “The golden era of video-game console sales is over,” *Quartz*, April 16, 2016, <https://qz.com/666299/the-golden-era-of-video-game-console-sales-is-over/>.

⁴¹⁸ “Mastering the Game – Business and Legal Issues for Video Game Developers,” p. 18.

⁴¹⁹ “Mastering the Game – Business and Legal Issues for Video Game Developers,” p. 18.

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Respectfully submitted,



Catharine M. Lawton

March 20, 2018

EXHIBIT N

CONFIDENTIAL – OUTSIDE COUNSEL ONLY – SOURCE CODE

CONFIDENTIAL – OUTSIDE COUNSEL ONLY – SOURCE CODE

**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., Delaware Corporations,)
)
 Defendants.)
_____)

**EXPERT REPORT OF DR. RICARDO VALERDI
REGARDING COST ESTIMATES**

CONFIDENTIAL – OUTSIDE COUNSEL ONLY – SOURCE CODE

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I, Ricardo Valerdi, have been asked by Plaintiff Acceleration Bay LLC (“Acceleration Bay”) to testify as an expert witness in the above referenced action. I expect to testify at trial in this action regarding the opinions set forth in this report (the “Report”), as well as on any other issues for which I have submitted or will submit an expert report in this action.

1. Summary of Opinions

As part of my work in this action, I have been asked by Acceleration Bay to provide an opinion regarding development costs of games. Specifically, I have been asked to determine the cost of rearchitecting each of the Accused Products in this case in order to develop a new networking platform for each of the accused games. The Accused Products include Grand Theft Auto V, NBA 2K15, NBA 2K16. These Accused Products are sold by Defendants Take-Two Interactive Software, Inc., Rockstar Games, Inc. and 2K Sports, Inc. (together, “Take-Two” or “Defendants”).

2. Experience and Qualifications

a) Curriculum Vitae

The details of my education, work experience, research, and publications (including publications authored in the last 10 years) are summarized in my curriculum vitae (“CV”) attached hereto as Appendix A of this Report.

b) Prior Testimony

A list of cases in which I have testified at deposition or trial or in written reports during at least the past five years is attached as Appendix A of this Report.

c) Compensation

My rate of compensation for my work in this case is \$400 per hour plus any direct expenses incurred. My compensation is based solely on the amount of time that I devote to

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activity related to this case and is in no way affected by any opinions that I render. I receive no other compensation from work on this action. My compensation is not dependent on the outcome of this matter.

3. Materials Considered

My opinions, expressed herein, and preparation of this Report are based on the information I have reviewed to date, including the Asserted Patents and all materials referenced in this Report. My opinions are based on my knowledge and experience in the fields of computer networks and network optimization.

In addition to the materials referenced in this Report, a list of the materials that I have considered in forming my opinions is attached as Appendix B to this Report.

I have play-tested each of the Accused Products to understand its functionality. I also reviewed source code for each of the Accused Products.

I had a conversation with the infringement experts in this case, Dr. Nenad Medvidovic and Dr. Michael Mitzenmacher, during which they explained the source code of each of the Accused Product and how each Defendant operates and infringe the Asserted Patents.

I had a conversation with the damages expert in this case, Christine Meyer, during which I described and explained how I reached my opinions set forth in this Report.

4. Demonstratives

I anticipate that I may create or cause to be created demonstratives that I will use at trial to help explain to the jury my opinions as well as associated background issues.

In order to aid the Court and jury in understanding my opinion, I intend to create demonstrative exhibits for trial. These demonstrative exhibits will include non-graphical illustrations (such as documents, charts, tables, etc.) and graphical illustrations (such as figures,

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drawings, pictures, videos, etc.). While these demonstratives have not yet been created, they will be completed and demonstrated at trial.

5. Methodology

For purposes of my analysis below, I rely upon the opinions of Drs. Medvidovic and Mitzenmacher that the Accused Products are infringing each of the Asserted Claims. I further relied on their opinions that there are no viable non-infringing alternatives to the Asserted Claims, but that, if there were such an alternative, it would require rearchitecting the game to develop a new network architecture and associated functionality. I set forth to estimate the cost to do so.

There are multiple methodologies to estimate the cost of software projects. These include analogy, bottom up, expert opinion, and parametric. The use of a parametric cost model is the most dependable because it is based on historical data and uses a Cost Estimating Relationship to translate characteristics of the software into cost and schedule estimates. Parametric models are standard across industries where software costs are high such as aerospace and defense, ecommerce, and entertainment.

For this case, the most systematic and reliable way to arrive at a cost estimate was to use a commercially available cost model. There are multiple options available, each with their own features. The SEER-SEM model developed by Galorath, Inc. (est. 1979) was chosen for this project because of the multiple knowledge bases available to characterize software projects and their excellent reputation in the industry to provide high quality cost models that are continuously updated.

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Another advantage of parametric cost models is that the results can be replicated by others. That is, the same inputs (project characteristics) would generate the same outputs (cost and schedule) which allows for external validation of the model assumptions.

The methodology used to arrive at a cost estimate for each game involved four steps:

Step 1: Describe each game using knowledge bases available in the SEER-SEM model

Step 2: Estimate the number of physical lines of code for a game

Step 3: Estimate the number of logical lines of code for each game

Step 4: Enter the number of logical lines of code into SEER-SEM to obtain a cost estimate

The following sections describe each of the four steps in more detail.

a) Step 1: SEER-SEM model Knowledge Bases

A Knowledge Base is a set of pre-defined settings for a subset of a cost model's technology parameters based on key project characteristics. SEER-SEM's core model is configured to a circumstance ("out-of-the-box") by a set of knowledge bases, and it is these knowledge bases that are calibrated based on new industry information and trends. These knowledge bases correspond to specific people/process/technology related parameter values. In fact, each knowledge base is defined specifically to the underlying subset of likely parameters, some visible to users, and others hidden. For example a unique knowledge base may be used when developing a Multimedia application such as a videogame and the efficiencies of an experienced software development team. All of these people/process/technology characteristics are captured and reside in one of over two-hundred unique knowledge bases delivered with the application. These knowledge bases are created by:

- Constantly collecting data from many sources, both public and private.
- Data scrubbing, normalization, and processing

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- Tracking development trends across industries
- Quantifying these trends in various knowledge bases that account for differences across programming languages and project size

An example classification for a game evaluated in this expert report is provided in

Figure 1.

The screenshot shows the 'Create/Modify WBS Element' dialog box. The title bar reads 'Create/Modify WBS Element'. On the left, there is a sidebar with the SEER For Software logo and instructions for using the Project Assistant. The main area contains the following fields and options:

- Description:** Grand Theft Auto V
- Analyst:** (empty field)
- Element Type:** Rollup, Program, Component, COTS, Unit, Add Item
- Indenture:** Level 2
- Knowledge Base Selections:**
 - Platform:** Web Based Development
 - Application:** Multimedia
 - Acquisition Method:** Full Design Reuse
 - Development Method:** Agile Full
 - Development Standard:** IEEE
 - Class (Custom):** No Knowledge
 - Sizing Methods:** Lines, Functions; None
 - Start Date:** 1/01/2010
- Buttons:** Create and Insert Next Element, OK, Change
- Footer:** Created 9/21/2017 12:17:45 AM Modified 10/05/2017 3:25:13 PM

Detailed descriptions of each knowledge base selection are provided below.

Platform: Web Based (web.plt)

An environment hosting applications that are generally accessed through a web browser over the internet or an intranet using web method transport mechanisms and protocols. This knowledge base is appropriate for the development of web-based or browser-based applications, as well as cloud-based platforms. The selection of a web-based platform knowledge base is appropriate for each of these games because the focus of my analysis is the development of a new networking architecture. The selection is also highly conservative because other potentially

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relevant platforms in the SEER-SEM knowledge base, such as client-server or business mission-critical would have yielded a higher budget.

Type of Application: Multimedia (multimed.app)

An application that achieves enhanced user interaction by going beyond standard computing interfaces, for example, using graphics and input devices in ways that require custom programming. The selection of multimedia application-type for each of the Accused Products was appropriate because they all use custom graphics and are media-intensive programs.

Acquisition method: Full Design Reuse (desgnreu.end)

This knowledge base can be used for situations where the software is being built from a completely preexisting design, previously successfully implemented, and now abstracted for reuse. These jobs are more akin to renovation than reuse. This knowledge base assumes some low-level design reuse. It also assumes that full recoding and testing are required, although design tasks are likely to be reduced by between 30 and 40 percent.

Standard of quality target: IEEE (ieee.std)

The Institute of Electrical and Electronics Engineers (IEEE) standards for software development. These are high-end, commercial standards that incorporate state-of-the-practice software development and maintenance methods. This knowledge base assumes moderate adherence and is suitable for medium reliability commercial products.

Development Process: Agile Full (agilefull.met)

This knowledge base is used to describe the impacts of deploying an Agile software development life cycle approach. This methodology is independent of the numerous Agile implementation methods (Scrum, XP, ASD, etc) and considers the generic set of Agile characteristics. This methodology assumes the development team is motivated, has strong

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programming skills, has previously performed an Agile project, and the project will have a certified facilitator – such as a "Scrum Master." Software will be delivered using a series of incremental deliveries, where the requirements-design-code-integration process sequence is repeated using short delivery cycles, until full functionality has been reached. The primary criterion for determining the content of each repetition (often referred to as a "delivery," "block," or "release") is customer need (and is typically customer driven). The focus of this strategy is for the software to evolve as the customer requirements are interpreted and implemented over time

Language or Toolset: C++

The Language Type (complexity) parameter estimates the difficulty of learning the programming language that will be used during coding of the task. It can be compared to the number of years of actual work experience or study that are required to master all the features of the language. Language Complexity acts as a learning curve against the Language Experience parameter. The only time when Language Complexity can make noticeable difference in the estimate is when Language Experience is set fairly low.

This parameter is closely related to the Function Implementation Mechanism. If either of these two parameters is changed, the other should be checked to ensure that they are consistent. For example, if the Function Implementation Mechanism is changed from SQL to C, Language Type should also be changed from Low to Nominal, since SQL is a 4th generation language (4GL) and C is a 3rd generation language (3GL).

Rating	Description
Very High	Ada using real time features, Assembly
High	Macro Assemblers

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Nominal C++, C, C#, COBOL, Java, Pascal, FORTRAN, PL/I, Ada Without Tasking

Low Visual Basic, VBA, Python, SQL, Many 4GLs, PHP, Perl, LISP, Ruby

Key staffing Constraint or Objective: Minimum Time

Optimizing for schedule (minimum time) assumes the development will be finished as quickly as possible. Staff will be added as quickly as possible, but larger teams will reduce efficiency and, although the project will be completed sooner, it will also cost more.

Optimizing for effort assumes the software will be developed as cheaply as possible, but will take longer to complete. Staffing will be lower and thus smaller, more efficient teams will realize a cost savings.

b) Step 2: Lines of code for each game

The number of physical lines of code for each game were estimated by multiplying the number of pertinent files by the average lines of code per file. For example:

$$(10 \text{ files}) * (2 \text{ lines of code per file}) = 20 \text{ lines of code used for cost estimate}$$

Since all source code we printed relates to networking functionality, this is a reasonable subset to analyze for purposes of the cost estimate. The fact that only the number of lines of code were counted for files that were printed in full vs. files for which were printed an excerpt biases the sample to smaller files (which are easier to print in full than very large files). Files with a lot of comments were more likely to be printed, skewing the sample set to have more comments and yielding a conservative number of logical lines of code.

c) Step 3: Estimate the number of logical lines of code

A Source Line of Code (SLOC) is one line of source code, used to measure software size. This is an alternative input for software size to functions. Software size should either be entered

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either as lines of code or as functions, not both. The following list describes in detail precisely what is and is not included in a SLOC count. For each logical line of code:

Include: All executable lines.

Include: Non-executable declarations and compiler directives.

Exclude: Comments, banners, blank lines, and non-blank spacers.

Also, look at the means by which a line was produced:

Include: Manually programmed lines.

Include: Lines developed by the developer for use with a Source Code Generator.

Exclude: Lines generated as output from a Source Code Generator.

Include: Lines converted with automated code translators. However, these lines should be entered as pre-existing code. The user will then define how much rework must be done on the translated code through the use of rework percentages.

Include: Copied, reused, or modified lines of code. Again, these lines should be entered as pre-existing lines of code.

Exclude: Deleted lines of code.

Furthermore, look at the origin of each line:

Include: New lines developed from scratch

Include: Pre-existing lines taken from a prior version, build, or release

Include: Invocation statements or lines considered for rework evaluation from COTS or other off the shelf packages. The user should define the level of rework required for those lines which will be modified in any way.

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Include: Invocation statements only for unmodified vendor supplied or special support libraries.

Include: Modified vendor supplied or special support libraries, commercial libraries, reuse libraries, or other software component libraries. The user should define the level of rework required for those lines which will be modified in any way.

Exclude: Lines which are part of an unmodified vendor supplied operating system or utility or other non-developed code.

Lastly, consider the end usage of each line:

Include: Lines which are in or part of the primary product

Include: Lines which are external to or in support of the primary product, only if they are deliverable.

Exclude: Lines which are external to or in support of the primary product, but are not deliverable, or any other non-deliverable lines.

Also, it is often convenient to be able to estimate relationships between SLOC and other size related metrics. The following are approximately equivalent to one source line of code.

Note that these approximations are very rough and should be used only if no other count is available.

5.5 compiled machine instructions, or...

22 bytes of object code (actual compiled executable program or machine readable instructions), or...

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2 source file physical lines or carriage returns (the number of carriage returns is equal to the actual number of lines in a source code file, including blank lines, comments, and other lines generally not counted as SLOC).

Pre-Existing Lines of Code Parameter

Pre-existing lines of code within the program. This figure will be adjusted by the percentages entered for redesign, retest, and reimplementation to arrive at the effective lines of code for this estimate.

Default Labor Rates

The Average Development Monthly Labor Rates are expressed in cost units per effort month. They include direct labor and fringes, G&A, overhead, and fee. The labor rates that are delivered with the SEER-SEM knowledge bases are in U.S. dollars. Current default labor rates (per effort month) are:

- \$22,800 Ground, mobile, or sea-based mission critical systems
- \$18,100 Business systems, enterprise client-server applications
- \$25,900 Unmanned air
- \$30,100 Space systems

For this project the Average Development Monthly Labor Rate used was \$20,300.

Burdens

Labor rates include direct labor and fringes, indirect labor and fringes, G&A overhead and fee (profit).

Direct Labor and Fringes

- Employee Salary, Sick Time, Insurance, Etc.

G&A (typically 9%-12%)

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- Contract handling, Legal handling, Administrative, Etc.

Overhead (typically 105%-165%)

- Utilities, Facilities, Computer licenses, Etc.

Fee (typically 7%-10%)

- Profit

d) Step 4: Obtain a cost estimate

The number of logical lines of code were entered into SEER-SEM to obtain a cost estimate at the 50% confidence level. This means that this will be the most likely outcome for the cost given the inputs provided into the cost model.

I understand that Take-Two only provided a small subset of the source code files for the Accused Products and did not identify the total number of files used in each game.

Based on my conversation with Dr. Medvidovic, to estimate the number of files for each game relating to the networking functionality that would need to be built into the application, I used an industry-based average of 10,000 files (Dr. Medvidovic noted that the EA SDK providing this functionality includes 8,951 files and the corresponding portion for the accused Activision games is at least 12,000 files). This approach is extremely conservative because it does not account for the fact that the size of the accused Take-Two products is considerably larger than the size of the accused EA products (on average 3.2570 times larger), as shown in the table below.

Game	Size
FIFA 15	15.61 GB
FIFA 16	21.93 GB
NHL 15	21.25 GB

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I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed on October 6, 2017 in Barcelona, Spain.

A handwritten signature in cursive script that reads "Ricardo Valerdi".

Ricardo Valerdi, Ph.D.

EXHIBIT O

CONTAINS CONFIDENTIAL, CONFIDENTIAL – OUTSIDE COUNSEL ONLY AND/OR
RESTRICTED CONFIDENTIAL – SOURCE CODE DESIGNATED MATERIAL

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

ACCELERATION BAY LLC,)	
)	
Plaintiff,)	
)	
v.	)	C.A. No. 15-311 (RGA)
)	
TAKE-TWO INTERACTIVE SOFTWARE,)	
INC., ROCKSTAR GAMES, INC. and)	
2K SPORTS, INC.,)	
)	
Defendants.)	

**PLAINTIFF ACCELERATION BAY LLC’S INITIAL CLAIM CHARTS
PURSUANT TO SECTION 1(e) OF THE RULE 16 SCHEDULING ORDER**

Plaintiff Acceleration Bay LLC (“Acceleration Bay” or Plaintiff”), by its undersigned counsel, hereby submits the following Disclosure of Initial Claim Charts and accompanying document production, including the attached claim charts (the “Charts”) (collectively, the “Disclosure”) to Take-Two Interactive Software, Inc., Rockstar Games, Inc., and 2K Sports, Inc. (“Defendants”), pursuant to Section 1(e) of the Court’s Rule 16 Scheduling Order dated October 29, 2015 (D.I. 28) (the “Scheduling Order”) and the Court’s Minute Entry, dated January 13, 2016.

Acceleration Bay makes this Disclosure based upon information presently known and reasonably available to it as of this date. Because discovery and Acceleration Bay’s investigations are ongoing, and because Defendants have not produced any technical documents, has not made available witnesses for deposition, has only made available a small portion of the source code for the Accused Products, and have refused to substantively respond to several interrogatories regarding the networks used in the Accused Products, this Disclosure is

necessarily preliminary. Accordingly, Acceleration Bay reserves the right to amend, modify, supplement, or narrow any portion of this Disclosure, including, but not limited to, the identification of the claims infringed by Defendants, the products and/or services accused of infringement, and the bases and manner of infringement described in this Disclosure.

Acceleration Bay further reserves the right to supplement this Disclosure as necessary and in accordance with the Federal Rules of Civil Procedure and this Court's Scheduling Order, in light of future document production, interrogatory responses, admissions, disclosures, fact witness testimony, expert discovery, any other discovery, future rulings from the Court (including claim construction), any amendments to the pleadings, any additional items of evidence, and/or for any other reason authorized by statute, rule, or applicable case law.

Acceleration Bay further reserves the right to supplement this Disclosure in light of Defendants' contentions, including Defendants' identification of which claim elements it contends are not present in Defendants' products and/or services, and the bases for any such contentions.

Acceleration Bay further reserves the right to rely upon the opinions of one or more experts in support of its infringement contentions in accordance with the Court's Scheduling Order.

To the maximum degree allowed by the Federal Rules of Civil Procedure, the Court's Local Rules, and the Court's Scheduling Order, Acceleration Bay reserves its right to supplement, amend, modify and/or narrow this Disclosure as the extent of infringement becomes more fully known, the Court makes any relevant rulings, and the case develops over the course of discovery.

I. Identification of Infringed Claims

Based on the information presently known to Acceleration Bay, and without the benefit of relevant discovery or the Court's claim constructions, Acceleration Bay provides the following initial contentions pursuant to the Court's Scheduling Order:

Defendants have infringed and continues to infringe at least claims 1, 4, 5, 6, 7, 8, 9, 11, 12, 13, 14, 15, and 18 of U.S. Patent No. 6,701,344 (the "344 Patent"); claims 1, 4, 5, 6, 7, 9, 19, 20, 21, 22, and 24 of U.S. Patent No. 6,829,634 (the "634 Patent"); claims 1, 3, 4, 5, 6, 10, 11, 14, 15, and 16 of U.S. Patent No 6,732,147 (the "147 Patent"); claims 1, 4, 6, 7, 8, 9, 11, 12, and 13 of U.S. Patent No. 6,714,966 (the "966 Patent"); claims 1, 8, 9, and 16 of U.S. Patent No. 6,920,497 (the "497 Patent"); and claims 1, 11, 12, and 13 of U.S. Patent No. 6,910,069 (the "069 Patent") (collectively, the "Asserted Claims") (the patents collectively referred to herein as the "Asserted Patents"). Defendants have directly infringed and continues to directly infringe the Asserted Claims pursuant to 35 U.S.C. § 271(a).

Acceleration Bay prepared this Disclosure without the benefit of Defendants' non-infringement theories. To the extent that Defendants contend that they do not literally infringe a claim, Defendants infringe under the doctrine of equivalents. Once Acceleration Bay receives Defendants' non-infringement positions, if any, Acceleration Bay may demonstrate how the described functionality of the Accused Product is at most insubstantially different from claimed functionality and performs the same function in the same way to achieve the same result.

Due to the early stage of this litigation, the lack of substantial discovery to date (as described above), and the absence of a claim construction order, the above identification is necessarily limited and preliminary in nature. Acceleration Bay reserves the right to amend, modify, supplement or narrow these contentions pursuant to the Federal Rules of Civil

Procedure, the Court's Local Rules, and the Court's Scheduling Order, including identifying additional asserted claims, as it obtains additional information over the course of discovery and in light of the Court's claim construction order.

Acceleration Bay will provide a Preliminary Assertion of Election Claims in accordance with the Scheduling Order in this action.

II. Identification of Accused Products

Based on the information presently known to Acceleration Bay, and without the benefit of relevant discovery or the Court's claim construction, Acceleration Bay provides the following contentions:

Pursuant to Section 1(e)(i) of the Scheduling Order, Acceleration Bay presently accuses of infringement the following of Defendants' products: Grand Theft Auto V; Grand Theft Online; NBA 2K15 and NBA 2K16, including all expansions, expacs, updates, patches, and continuations of these products and all of the backend network architecture for these products (collectively, the "Accused Products").

Acceleration Bay asserts that at least the products identified as Accused Products in the Charts and Exhibits attached hereto, and incorporated herein by reference, infringe one or more of the Asserted Claims as specified in those Charts and Exhibits.

Due to the early stage of this litigation, the lack of substantial discovery to date (as described above), and the absence of a claim construction order, the above identification is necessarily limited and preliminary in nature. Acceleration Bay anticipates that discovery will reveal additional Accused Products and/or products, features, and/or services that infringe the Asserted Patents. Acceleration Bay reserves the right to amend, modify, supplement or narrow these contentions pursuant to the Federal Rules of Civil Procedure, the Court's Local Rules, and

the Court's Scheduling Order, including identifying additional Accused Products, as it obtains additional information over the course of discovery and in light of the Court's claim construction order.

III. Infringement Contentions

Based on the information presently known to Acceleration Bay, and without the benefit of relevant discovery or the Court's claim construction, Acceleration Bay provides the following Charts:

- Chart A: showing how Grand Theft Auto V infringes the Asserted Claims of the Asserted Patents; and
- Chart B: showing how NBA 2K15 and NBA 2K16 infringe the Asserted Claims of the Asserted Patents.

The Charts are incorporated by reference as if fully set forth herein. They are exemplary and not limiting, and address the Asserted Claims without the benefit of full discovery. Any citations included in the Charts are exemplary only, and are not limiting. Acceleration Bay has subdivided the Asserted Claims in the Charts to explain where the Accused Products meet each claim element. These subdivisions are not to be taken as an indication of the boundaries of claim elements with respect to the doctrine of equivalents, or any other issue. In addition, the Accused Products and Defendants' other products/services may infringe the Asserted Claims in multiple ways. Acceleration Bay reserves the right to provide an alternative claim mapping or infringement contentions for such Accused Products or other products and/or services. Acceleration Bay further reserves the right to rely upon the opinions of one or more experts in support of its infringement contentions in accordance with the Court's Scheduling Order.

Due to the early stage of this litigation, the lack of discovery to date (as described above), and the absence of a claim construction order, the above disclosures, including the Charts themselves, are necessarily limited and preliminary in nature. Acceleration Bay reserves the right to amend, modify, supplement or narrow these contentions pursuant to the Federal Rules of Civil Procedure, the Court's Local Rules, and the Court's Scheduling Order, as it obtains additional information over the course of discovery and in light of the Court's claim construction order.

Dated: March 2, 2016

By: /s/ James Hannah

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CERTIFICATE OF SERVICE

I, James Hannah, hereby certify that, on March 2, 2016, the within document was served on the following counsel as indicated:

BY E-MAIL

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CHART A

CONTAINS CONFIDENTIAL, CONFIDENTIAL – OUTSIDE COUNSEL ONLY AND/OR
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6,701,344	Accused Product: Grand Theft Auto Five/Grand Theft Auto Online
<p>The statements and documents cited below are solely provided by way of example and based on information available to Acceleration Bay, LLC ("Acceleration Bay" or "Plaintiff") at the time this chart was created, and are not to be used by way of limitation or for purposes of construing the claim terms.</p> <p>Discovery is ongoing, Acceleration Bay has received only limited discovery from Defendants Take Two Interactive Software, Inc., Rockstar Games, Inc. and 2K Sports, Inc. (together, "Defendant"), and Acceleration Bay is seeking discovery from third parties. In particular, Defendant has not produced a single technical document or made available witnesses for deposition, have only made available a small portion of the source code for the Accused Product, despite Acceleration Bay's requests for access to the complete source code, and have refused to substantively respond to interrogatories regarding the networks used in the Accused Product. Acceleration Bay relies on the limited source code made available to it, its playtesting of the Accused Product, and publicly available information, and reserves its right to supplement its infringement contentions as additional information becomes known to it.</p> <p>"Accused Product" refers to the PC Windows, Xbox One, Xbox 360, PS3 and PS4 versions of Grand Theft Auto Five, including its online mode Grand Theft Auto Online (together, "GTA-V"), as identified in Acceleration Bay's November 2, 2015 Identification of Accused Products.</p> <p>Acceleration Bay contends that the Accused Product infringes each of the claims identified below both literally and under the doctrine of equivalents. Acceleration Bay prepared these Infringement Contentions without the benefit of disclosure of Defendant's non-infringement theories. Once Acceleration Bay receives Defendant's non-infringement positions, if any, Acceleration Bay may further demonstrate how the described functionality of the Accused Product is at most insubstantially different from claimed functionality and performs the same function in the same way to achieve the same result.</p>	
Claim 1	
<p>1-a. A computer network for providing a game environment for a plurality of participants,</p>	<p>The Accused Product meets the recited claim language because it provides a computer network for providing a game environment for a plurality of participants.</p> <p>For example and without limitation, the Accused Product meets the recited claim language because the Multiplayer modes of GTA-V support 16 players on Xbox 360 and PS3 and 30 players (with 2 extra spaces for viewers) on Xbox One, PS4 and PC). http://www.rockstargames.com/V/GTAOnline; http://gta.wikia.com/Grand Theft Auto Online; also see http://gta.wikia.com/Grand Theft Auto V</p> <p>This recited claim language is also met because in GTA-V, players may travel around and interact with other players and the map/environment at will and can take part in many gameplay activities, including assaults on local</p>

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<p>1-e. further wherein the network is m-regular, where m is the exact number of neighbor participants of each participant and</p>	<p>The Accused Product meets the recited claim language because it provides a computer network that is m-regular, where m is the exact number of neighbor participants of each participant.</p> <p>For example and without limitation, the Accused Product creates m-regular game sessions with multiple players during different network gaming states and for different game data. For example, m-regular can indicate that each of the players is optimally connected to other players to ensure that all nodes are connected to the same number of nodes to ensure that no node is overloaded through a communication channel and can utilize different connections, such as sockets and tunnels. For example, the Accused Product creates m-regular topologies of players when setting up logical and physical network topologies for the Accused Product using different networking frameworks, SDKs and APIs. The frameworks, SDKs and APIs utilized by the Accused Product to create these m-regular topologies include internally developed frameworks, SDKs and APIs, such as the Rage framework and those related to voice over IP (“voip”). They also include the ability to set the max number of peers and players. The Accused Product uses these frameworks, SDKs and APIs to:</p> <ul style="list-style-type: none"> • connect players to other players for matchmaking in a game session; • determine which game a player should be matched to; • ensure no players are overloaded for optimal gameplay and bandwidth; • create logical and physical network topologies for the game; • create network connections through tunnels, sockets and ports; • manage the game session during gameplay; • route game data using optimal paths and relays; • distribute voip chat data among the players; and • manage states when players leave, are kicked, or are disconnected from a game session. <p>For example and without limitation, the Accused Product utilizes the Rage framework for matchmaking, player distribution, and connections to the game session within a multiplayer game. The Rage framework attempts to ensure the gameplay and bandwidth are not overloaded so players are evenly distributed on the logical and physical networks. In an evenly-distributed multiplayer game, the network of players are m-regular. The Rage framework includes setting-up peer-to-peer topologies in different configurations using common components, such as a network player manager for managing the players in a session, the connection manager for managing connections for sending data between remote peers, and network interface for utilizing the underlying network functionality.</p> <p>The Accused Product also utilizes the Durango (Xbox One) SDK, Xbox 360 SDK and Microsoft SDK for additional</p>
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	<p>matchmaking and network configuration functionality. The [REDACTED] Xbox 360 SDK and Microsoft SDK are both offered through third-party Microsoft, and Acceleration Bay reserves the right to supplement its contentions related to these SDKs after discovery is provided by Microsoft.</p> <p>In addition, there are multiple logical and physical layers of the network topology that maintain a regular network in order to optimize performance based on the type of data that is being transmitted. These additional layers of the network topology will be identified in upcoming depositions.</p> <p>Testing of the Accused Product is consistent with the above contention.</p>
<p>1-f. further wherein the number of participants is at least two greater than m thus resulting in a non-complete graph.</p>	<p>The Accused Product meets the recited claim language because it provides a computer network in which the number of participants is at least two greater than m thus resulting in a non-complete graph.</p> <p>For example but not limitation, the Accused Product creates a non-complete graph of players during different game sessions, for example where not every player in the game session is directly connected, either logically or physically, to every other player in the game. For example, the Accused Product creates a non-complete graph of players when setting up a logical and physical network topology for the Accused Product using different networking frameworks, SDKs and APIs utilized by the Accused Product. The frameworks, SDKs and APIs utilized by the Accused Product to create these non-complete graphs include internally developed frameworks, SDKs and APIs, such as the [REDACTED] and APIs related to voice over IP (“voip”). The Accused Product utilizes topologies that naturally include a non-complete graph, as well as topologies that include a non-complete graph as the result of inability to connect to peers, failover states, or during host migration of player hosted games. The chance of a non-complete graph grows with the total number of players added to the game, and becomes very likely once more than four players are connected.</p> <p>Testing of the Accused Product is consistent with the above contention.</p>
Claim 4	
<p>The computer network of claim 1 wherein the network is m-</p>	<p>The Accused Product meets the recited claim language because it provides a computer network in which the network is m-connected, where m is the number of neighbor participants of each participant.</p> <p>For example and without limitation, the Accused Product creates m-regular game sessions with multiple players during different network gaming states and for different game data. For example, m-regular can indicate that each</p>

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6,829,634	Accused Product: Grand Theft Auto Five/Grand Theft Auto Online
<p>The statements and documents cited below are solely provided by way of example and based on information available to Acceleration Bay, LLC ("Acceleration Bay" or "Plaintiff") at the time this chart was created, and are not to be used by way of limitation or for purposes of construing the claim terms.</p> <p>Discovery is ongoing, Acceleration Bay has received only limited discovery from Defendants Take Two Interactive Software, Inc., Rockstar Games, Inc. and 2K Sports, Inc. (together, "Defendant"), and Acceleration Bay is seeking discovery from third parties. In particular, Defendant has not produced a single technical document or made available witnesses for deposition, have only made available a small portion of the source code for the Accused Product, despite Acceleration Bay's requests for access to the complete source code, and have refused to substantively respond to interrogatories regarding the networks used in the Accused Product. Acceleration Bay relies on the limited source code made available to it, its playtesting of the Accused Product, and publicly available information, and reserves its right to supplement its infringement contentions as additional information becomes known to it.</p> <p>"Accused Product" refers to the PC Windows, Xbox One, Xbox 360, PS3 and PS4 versions of Grand Theft Auto Five, including its online mode Grand Theft Auto Online (together, "GTA-V"), as identified in Acceleration Bay's November 2, 2015 Identification of Accused Products.</p> <p>Acceleration Bay contends that the Accused Product infringes each of the claims identified below both literally and under the doctrine of equivalents. Acceleration Bay prepared these Infringement Contentions without the benefit of disclosure of Defendant's non-infringement theories. Once Acceleration Bay receives Defendant's non-infringement positions, if any, Acceleration Bay may further demonstrate how the described functionality of the Accused Product is at most insubstantially different from claimed functionality and performs the same function in the same way to achieve the same result.</p>	
Claim 1	
<p>1-a. A non-routing table based computer network having a plurality of participants,</p>	<p>The Accused Product meets the recited claim language because it provides a non-routing table based computer network that supports a plurality of participants.</p> <p>For example and without limitation, the Accused Product meets the recited claim language because the Accused Product utilizes peer-to-peer topologies where participants can forward data from one neighbor participant to other neighbor participants.</p> <p>For example and without limitation, the Accused Product includes functionality for establishing a computer network for different multi-player game sessions.</p>

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<p>1-d. wherein each participant sends data that it receives from a neighbor participant to its other neighbor participants,</p>	<p>The Accused Product meets the recited claim language because each participant sends data that it receives from a neighbor participant to its other neighbor participants.</p> <p>For example and without limitation, the Accused Product meets the recited claim language because the Accused Product utilizes peer-to-peer topologies where participants can forward data from one neighbor participant to another neighbor participants, as set forth above.</p> <p>Testing of the Accused Product is consistent with the above contention.</p>
<p>1-e. wherein data is numbered sequentially so that data received out of order can be queued and rearranged,</p>	<p>The Accused Product meets the recited claim language because data are sequentially numbered in order to queue and rearrange data received out of order.</p> <p>For example and without limitation, gameplay messages are numbered so that they can be arranged if received out of order.</p> <p>For example and without limitation, TCP provides functionality so that messages transmitted over the Internet that are received out of order can be queued and rearranged. https://en.wikipedia.org/wiki/Out-of-order_delivery</p> <p>Testing of the Accused Product is consistent with the above contention.</p>
<p>1-f. further wherein the network is m-regular and m-connected, where m is the number of neighbor participants of each participant,</p>	<p>The Accused Product meets the recited claim language because the network is m-regular and m-connected, where m is the number of neighbor participants of each participant.</p> <p>For example and without limitation, the Accused Product creates m-regular game sessions with multiple players during different network gaming states and for different game data. For example, m-regular can indicate that each of the players is optimally connected to other players to ensure that all nodes are connected to the same number of nodes to ensure that no node is overloaded through a communication channel and can utilize different connections, such as sockets and tunnels. For example, the Accused Product creates m-regular topologies of players when setting up logical and physical network topologies for the Accused Product using different networking frameworks, SDKs and APIs. The frameworks, SDKs and APIs utilized by the Accused Product to create these m-regular topologies include internally developed frameworks, SDKs and APIs, such as the Rage framework and those related to voice</p>

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and	<p>over IP (“voip”). They also include the ability to set the max number of peers and players. The Accused Product uses these frameworks, SDKs and APIs to:</p> <ul style="list-style-type: none">• connect players to other players for matchmaking in a game session;• determine which game a player should be matched to;• ensure no players are overloaded for optimal gameplay and bandwidth;• create logical and physical network topologies for the game;• create network connections through tunnels, sockets and ports;• manage the game session during gameplay;• route game data using optimal paths and relays;• distribute voip chat data among the players; and• manage states when players leave, are kicked, or are disconnected from a game session. <p>For example and without limitation, the Accused Product utilizes the [REDACTED] for matchmaking, player distribution, and connections to the game session within a multiplayer game. The [REDACTED] attempts to ensure the gameplay and bandwidth are not overloaded so players are evenly distributed on the logical and physical networks. In an evenly-distributed multiplayer game, the network of players are m-regular. The [REDACTED] includes setting-up peer-to-peer topologies in different configurations using common components, such as a network player manager for managing the players in a session, the connection manager for managing connections for sending data between remote peers, and network interface for utilizing the underlying network functionality.</p> <p>The Accused Product also utilizes the Durango (Xbox One) SDK, Xbox 360 SDK and Microsoft SDK for additional matchmaking and network configuration functionality. The Durango SDK, Xbox 360 SDK and Microsoft SDK are both offered through third-party Microsoft, and Acceleration Bay reserves the right to supplement its contentions related to these SDKs after discovery is provided by Microsoft.</p> <p>In addition, there are multiple logical and physical layers of the network topology that maintain a regular network in order to optimize performance based on the type of data that is being transmitted. These additional layers of the network topology will be identified in upcoming depositions.</p> <p>For example and without limitation, the Accused Product also creates m-connected game sessions of players during different network gaming states, where connections are communication channels made through passing data through sockets and tunnels, and where each of the players is optimally connected to other players in the game session,</p>
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	<p>without missing connections that would interrupt gameplay or game data. For example, the Accused Product creates an m-connected topology of players when setting up a logical and physical network topology for the Accused Product using different networking frameworks, SDKs and APIs utilized by the Accused Product. The frameworks, SDKs and APIs utilized by the Accused Product to create this m-connected topology include internally developed frameworks, SDKs and APIs, such as █████ Durango (Xbox One) SDK, Xbox 360 SDK and Microsoft SDK and APIs related to voice over IP (“voip”).</p> <p>Testing of the Accused Product is consistent with the above contention.</p>
<p>1-g. further wherein the number of participants is at least two greater than m thus resulting in a non-complete graph.</p>	<p>The Accused Product meets the recited claim language because the number of participants is at least two greater than m thus resulting in a non-complete graph.</p> <p>For example but not limitation, the Accused Product creates a non-complete graph of players during different game sessions, for example where not every player in the game session is directly connected, either logically or physically, to every other player in the game. For example, the Accused Product creates a non-complete graph of players when setting up a logical and physical network topology for the Accused Product using different networking frameworks, SDKs and APIs utilized by the Accused Product. The frameworks, SDKs and APIs utilized by the Accused Product to create these non-complete graphs include internally developed frameworks, SDKs and APIs, such as the █████ framework and APIs related to voice over IP (“voip”). The Accused Product utilizes topologies that naturally include a non-complete graph, as well as topologies that include a non-complete graph as the result of inability to connect to peers, failover states, or during host migration of player hosted games. The chance of a non-complete graph grows with the total number of players added to the game, and becomes very likely once more than four players are connected.</p> <p>Testing of the Accused Product is consistent with the above contention.</p>
<p>Claim 4</p>	
<p>The computer network of claim 1 wherein all the participants</p>	<p>The Accused Product meets the recited claim language because it provides a non-routing table based computer network in which all the participants are peers.</p> <p>For example and without limitation, the Accused Product meets the recited claim language because the users participating in the computer network are peers, as referenced by Defendant in their response to Common Interrogatory No. 5.</p>

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6,732,147	Accused Product: Grand Theft Auto Five/Grand Theft Auto Online
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Claim 1	
<p>1-a. A method of disconnecting a first computer from a second computer, the first computer and the</p>	<p>The Accused Product meets the recited claim language because it practices a method of disconnecting a first computer from a second computer, the first computer and the second computer being connected to a broadcast channel, said broadcast channel forming an m-regular graph where m is at least 3.</p> <p>For example and without limitation, the Accused Product meets the recited claim language because the Accused Product utilizes peer-to-peer topologies where participants can forward data from one neighbor participant to other neighbor participants.</p> <p>For example and without limitation, the Accused Product includes functionality for establishing different broadcast</p>

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<p>second computer being connected to a broadcast channel, said broadcast channel forming an m-regular graph where m is at least 3, the method comprising:</p>	<p>channels for different multi-player game sessions, with a broadcast channel for each game.</p> <p>For example and without limitation, the Accused Product meets the recited claim language because the Multiplayer modes of GTA-V support 16 players on Xbox 360 and PS3 and 30 players (with 2 extra spaces for viewers) on Xbox One, PS4 and PC). http://www.rockstargames.com/V/GTAOnline; http://gta.wikia.com/Grand Theft Auto Online; also see http://gta.wikia.com/Grand Theft Auto V</p> <p>This recited claim language is also met because in GTA-V, players may travel around and interact with other players and the map/environment at will and can take part in many gameplay activities, including assaults on local gangs, robbing armored trucks, and challenging other players to impromptu races. http://gta.wikia.com/Grand Theft Auto Online. Examples of these infringing game modes include without limitation Voice Chat; multiplayer Jobs, use of Social Club and Crews to join and organize multiplayer jobs, Heists, Races (such as lap race, point to point, GTA Race, rally race), Capture (contend, GTA, hold, raid), Last Team Standing, Mission, Versus Mission, Survival, Parachuting, Team Death-match, Come Out to Play, Hasta la Vista and Siege Mentality.</p> <p>For example and without limitation, Rockstar Games Social Club is a digital rights management, multiplayer and communications service provided by Rockstar Games for use with their latest generation of games. http://en.wikipedia.org/wiki/Rockstar Games Social Club. When consumers purchase the Accused Product, they gain full access to Social Club features in-game and on the website. http://socialclub.rockstargames.com/about. Consumers, however, will need to log in to www.rockstargames.com/socialclub with a registered and activated Social Club account together with their Social Club account linked with their PLAYSTATION®Network Sign-In ID, Xbox LIVE® Gamertag, or Games for Windows LIVE® Gamertag. <i>Id.</i></p>
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ROCKSTAR GAMES

Social Club

Welcome to the Rockstar Games Social Club, our members-only community and destination to enhance and extend your game experience.

- STAT TRACKING
- EXCLUSIVE CONTENT
- COMMUNITY
- CREWS
- GAME GUIDES
- EVENTS
- GIVEAWAYS
- ... AND MUCH MORE

[JOIN THE CLUB](#)

COMMUNITY

You're only as good as the company you keep, and it's never been easier to find and connect with like-minded players. With social and gaming account integration, your friends are just a few clicks away, and with personal profile pages and activity feeds, you'll always be tuned in to their latest and greatest accomplishments.

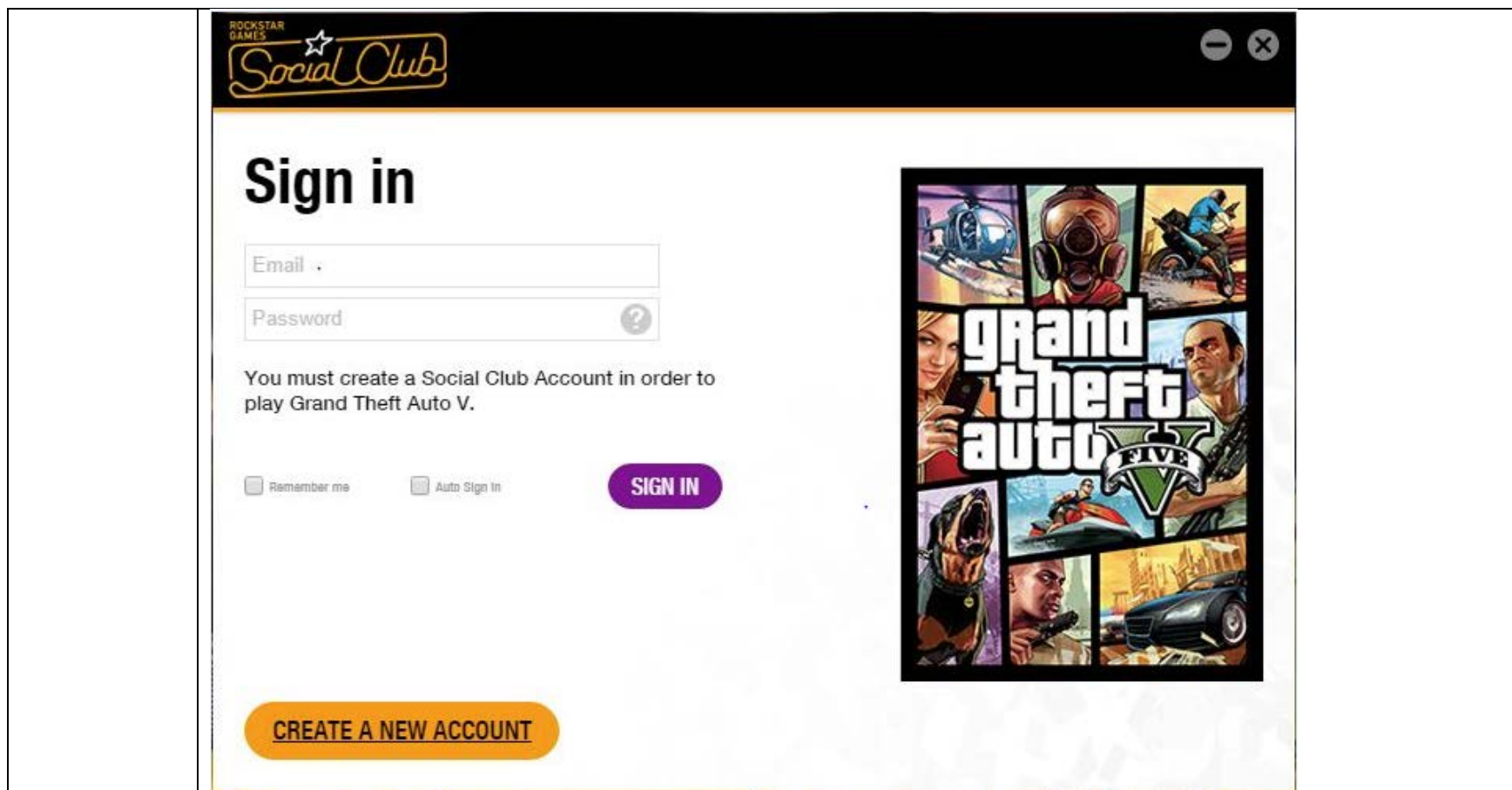
MIDASTOUCH86

JOHN SMITH

@TWINGUNMAMI

<http://socialclub.rockstargames.com/about>

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For example and without limitation, Rockstar utilizes the same servers used for Rockstar Games Social Club to provide GTA-V's multiplayer functionalities. <http://www.idigitaltimes.com/gta-v-online-details-700-multiplayer-missions-confirmed-rockstar-exec-report-362495> (Rockstar's executive Leslie Benzies stating: "We'll use the Rockstar Social Club servers to create our 'cloud,' which control everything. We have servers spread across several of our offices, like New York or San Diego, who are responsible for managing information generated persistent GTA online. How driving is, however, different from other similar games less problematic. But yes, it is a traditional server based on the 'cloud'."). This system involving the Rockstar Social Club servers and the "cloud" is a hybrid peer-to-peer system where participants of the system, either the numerous Rockstar Social Club servers or

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players of the Accused Product, are connected in an infringing manner.

As a further example, the screen capture of the profile page of Kevin Baca, the director of Development of Rockstar Social Club shows that he “implemented P2P and Client server architecture”:

Kevin Baca 3rd
Director of Development, Social Club at Rockstar San Diego
Greater San Diego Area | Computer Games

Previous Rockstar San Diego, Aidia Studios, Sony Online Entertainment
Education University of California, San Diego

[Connect](#) [Send Kevin InMail](#) 144 connections

☆ www.linkedin.com/pub/kevin-baca/13/38a/94

Background

Experience

Director of Development, Social Club
Rockstar San Diego
August 2012 – Present (2 years 8 months)

Responsible for strategic design, planning, and development of high volume data feed, collection, retention, analytics, and real time response systems for online game services.

Heads a multi-site team of developers designing and building web scale online services for game consoles, desktop systems, mobile devices, and browsers.

Senior Networking Programmer
Rockstar San Diego
August 2009 – August 2012 (3 years 1 month)

Developed games for Xbox360, PS3, PC, and mobile platforms, implemented P2P and Client server architectures, designed and developed high volume data feed and retention systems, lead a team of developers to design and build web scale consumer facing online services.

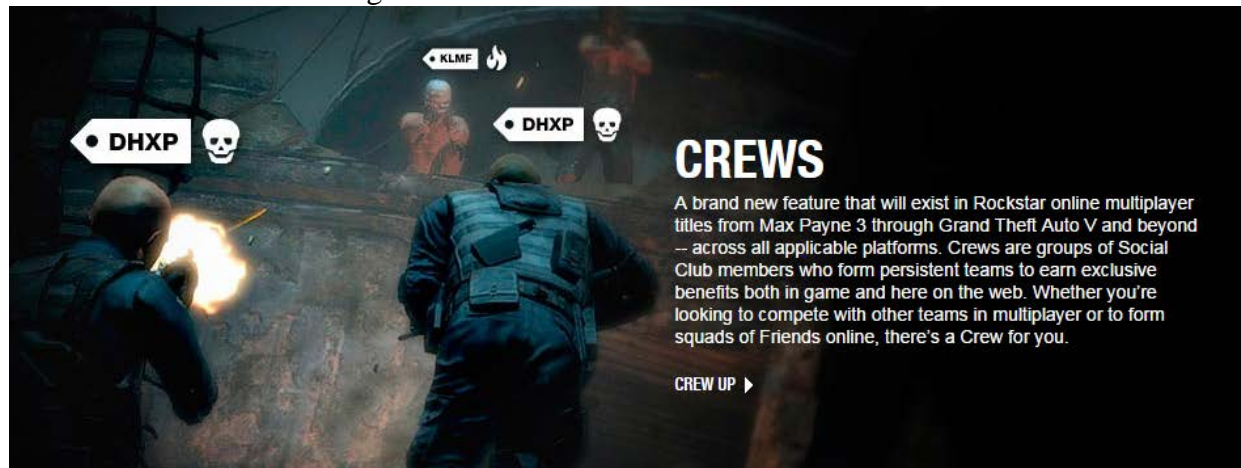
[https://www.linkedin.com/pub/kevin-](https://www.linkedin.com/pub/kevin-baca/13/38a/94)

[baca/13/38a/94](https://www.linkedin.com/pub/kevin-baca/13/38a/94)

As a further example and without limitation, the Accused Product implements the Rockstar Social Club's crew

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system with two types of crews. [http://gta.wikia.com/Grand Theft Auto Online](http://gta.wikia.com/Grand_Theft_Auto_Online). Private crews are mainly aimed at a group of friends or associates to play online together and can hold as many as 1,000 people. *Id.* Public crews are much larger and can have unlimited members. *Id.* Crews consist of a group of players that can battle against other crews and even form alliances with them. <http://gta.wikia.com/Crews> (*see below*). The Accused Product allows characters to band together in a Crew and assist one another in criminal activities. *Id.*



<http://socialclub.rockstargames.com/about>.

Crew also allows players to engage in Jobs with the assistance of other Crew Members. Crews can also join together to play sports, compete in races and simply hang out. [http://www.ign.com/wikis/gta-5/GTA Online](http://www.ign.com/wikis/gta-5/GTA_Online); [http://www.ign.com/wikis/gta-5/Hanging Out](http://www.ign.com/wikis/gta-5/Hanging_Out)

As a further example and without limitation, Team Death Matches in the Accused Product offers players the opportunity to compete against 16 players in high intensity shootouts. <http://www.ign.com/wikis/gta-5/Deathmatches>.

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Inside FIB Building TDM!

Insane action packed close combat inside the FIB Building! You can Get to every area of the building by climbing on to the boxes. ENJOY!

INVITE	PLAYERS 14 of 2-16	RECENTLY JOINED CHARACTER
All From Current Session	Sporge ▾ SPGU HOST 80	<div style="display: flex; justify-content: space-between;"> <div style="width: 45%;">  </div> <div style="width: 50%;"> <div style="background-color: #0056b3; color: white; padding: 5px; text-align: center; font-weight: bold;">FLAME BURST 90</div> <div style="text-align: center; font-size: 2em; font-weight: bold; color: white;">7</div> <div style="margin-top: 10px;"> <p>Stamina</p> <p>Shooting</p> <p>Stealth</p> <p>Flying</p> <p>Driving</p> <p>Hardware Access</p> </div> <div style="text-align: center; margin-top: 10px;">  </div> </div> </div>
From Current Session	lewis2000 ▾ IGN JOINED 27	
My Friends	izegnAx ▾ TRRS JOINED 41	
My Crew Members	FLAME BURST 90 ▾ SPGU JOINED 7	
Skill Matched Players	BeetyKnave14 JOINED 8	
View Joined Players' Info	G0Dz II Davison ▾ DONS JOINED 18	
Matchmaking Open	RamonSapo789 ▾ ANTX JOINED 23	
	Family Souz4 JOINED 51	
	mateodanilo1223 ▾ VGAM JOINED 13	
	sippisosa5150 JOINED 12	
	GOLDINGZOMBIES ▾ MP3 JOINED 45	
	xCRAZY RABBITxx ▾ WLYG JOINED 581	
	thunderbolt809 ▾ PRO1 JOINED 53	
	EarnestDog89 JOINED 4	
	ExcusableCarp6 ▾ FADE JOINING 37	
	MoJoLJ LEFT	

Launching session

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https://www.youtube.com/watch?v=_wXW5V3tjdl

As a further example and without limitation, the Accused Product's Come Out to Play mode allows multiple online players to play against each other by choosing either a team of Hunters or Runners.

<http://www.rockstargames.com/newswire/article/52397/adversary-modes-daily-objectives-and-more-new-updates-also>

As a further example and without limitation, the Accused Product's Siege Mentality mode allows four players to fight to survive against six other players. <http://www.rockstargames.com/newswire/article/52397/adversary-modes-daily-objectives-and-more-new-updates-also>.

As a further example and without limitation, the Accused Product's Hasta La Vista mode allows multiple players to play against each other by choosing either a team of Truckers or a team of Cyclists.

<http://www.rockstargames.com/newswire/article/52397/adversary-modes-daily-objectives-and-more-new-updates-also>.

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For example and without limitation, the Accused Product creates m-regular game sessions with multiple players during different network gaming states and for different game data. For example, m-regular can indicate that each of the players is optimally connected to other players to ensure that all nodes are connected to the same number of nodes to ensure that no node is overloaded through a communication channel and can utilize different connections, such as sockets and tunnels. For example, the Accused Product creates m-regular topologies of players when setting up logical and physical network topologies for the Accused Product using different networking frameworks, SDKs and APIs. The frameworks, SDKs and APIs utilized by the Accused Product to create these m-regular topologies include internally developed frameworks, SDKs and APIs, such as the [REDACTED] framework and those related to voice over IP (“voip”). They also include the ability to set the max number of peers and players. The Accused Product uses these frameworks, SDKs and APIs to:

- connect players to other players for matchmaking in a game session;
- determine which game a player should be matched to;
- ensure no players are overloaded for optimal gameplay and bandwidth;
- create logical and physical network topologies for the game;
- create network connections through tunnels, sockets and ports;
- manage the game session during gameplay;
- route game data using optimal paths and relays;
- distribute voip chat data among the players; and
- manage states when players leave, are kicked, or are disconnected from a game session.

For example and without limitation, the Accused Product utilizes the [REDACTED] framework for matchmaking, player distribution, and connections to the game session within a multiplayer game. The [REDACTED] framework attempts to ensure the gameplay and bandwidth are not overloaded so players are evenly distributed on the logical and physical networks. In an evenly-distributed multiplayer game, the network of players are m-regular. The Rage framework includes setting-up peer-to-peer topologies in different configurations using common components, such as a network player manager for managing the players in a session, the connection manager for managing connections for sending data between remote peers, and network interface for utilizing the underlying network functionality.

The Accused Product also utilizes the Durango (Xbox One) SDK, Xbox 360 SDK and Microsoft SDK for additional matchmaking and network configuration functionality. The Durango SDK, Xbox 360 SDK and Microsoft SDK are both offered through third-party Microsoft, and Acceleration Bay reserves the right to supplement its contentions

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	<p>related to these SDKs after discovery is provided by Microsoft.</p> <p>In addition, there are multiple logical and physical layers of the network topology that maintain a regular network in order to optimize performance based on the type of data that is being transmitted. These additional layers of the network topology will be identified in upcoming depositions.</p> <p>For example and without limitation, the Accused Product also creates m-connected game sessions of players during different network gaming states, where connections are communication channels made through passing data through sockets and tunnels, and where each of the players is optimally connected to other players in the game session, without missing connections that would interrupt gameplay or game data. For example, the Accused Product creates an m-connected topology of players when setting up a logical and physical network topology for the Accused Product using different networking frameworks, SDKs and APIs utilized by the Accused Product. The frameworks, SDKs and APIs utilized by the Accused Product to create this m-connected topology include internally developed frameworks, SDKs and APIs, such as █████ Durango (Xbox One) SDK, Xbox 360 SDK and Microsoft SDK and APIs related to voice over IP (“voip”).</p> <p>Testing of the Accused Product is consistent with the above contention.</p>
<p>1-b. when the first computer decides to disconnect from the second computer, the first computer sends a disconnect message to the second computer, said disconnect message</p>	<p>Accused Product meets the recited claim language because it practices a method that when the first computer decides to disconnect from the second computer, the first computer sends a disconnect message to the second computer, said disconnect message including a list of neighbors of the first computer.</p> <p>For example and without limitation, a player can chose to disconnect from a game session, which sends a disconnect message to the game session network.</p> <p>For example and without limitation, the Accused Product includes software that controls players disconnecting from a game session. This software is implemented through a combination of frameworks, SDKs, and APIs, including the █████ framework. The Accused Product utilizes disconnect messages when a player would like to disconnect from a game, which are sent to match servers, host server, and peers to notify these that the player will be disconnecting from the game. The Accused Product includes the players that it was communicating with, communicating through connections, channels, and tunnels when it disconnects from game sessions.</p> <p>Testing of the Accused Product is consistent with the above contention.</p>

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6,714,966	Accused Product: Grand Theft Auto Five/Grand Theft Auto Online
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Claim 1	
<p>1-a. A computer network for providing an information delivery service for a plurality of participants,</p>	<p>The Accused Product meets the recited claim language because it provides a computer network for providing an information delivery service for a plurality of participants.</p> <p>For example and without limitation, the Accused Product includes functionality for establishing a delivery service to distribute gameplay data to a plurality of participants in an online gaming experience.</p> <p>For example and without limitation, the Accused Product meets the recited claim language because the Multiplayer modes of GTA-V support 16 players on Xbox 360 and PS3 and 30 players (with 2 extra spaces for viewers) on Xbox One, PS4 and PC). http://www.rockstargames.com/V/GTAOnline;</p>

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<p>1-d. wherein each participant sends data that it receives from a neighbor participant to its other neighbor participants,</p>	<p>The Accused Product meets the recited claim language because each participant sends data that it receives from a neighbor participant to its other neighbor participants.</p> <p>For example and without limitation, the Accused Product meets the recited claim language because the Accused Product utilizes peer-to-peer topologies where participants can forward data from one neighbor participant to another neighbor participants, as set forth above</p> <p>Testing of the Accused Product is consistent with the above contention.</p>
<p>1-e. further wherein the network is m-regular, where m is the exact number of neighbor participants of each participant and</p>	<p>The Accused Product meets the recited claim language because the computer network is m-regular, where m is the exact number of neighbor participants of each participant.</p> <p>For example and without limitation, the Accused Product creates m-regular game sessions with multiple players during different network gaming states and for different game data. For example, m-regular can indicate that each of the players is optimally connected to other players to ensure that all nodes are connected to the same number of nodes to ensure that no node is overloaded through a communication channel and can utilize different connections, such as sockets and tunnels. For example, the Accused Product creates m-regular topologies of players when setting up logical and physical network topologies for the Accused Product using different networking frameworks, SDKs and APIs. The frameworks, SDKs and APIs utilized by the Accused Product to create these m-regular topologies include internally developed frameworks, SDKs and APIs, such as the [REDACTED] framework and those related to voice over IP (“voip”). They also include the ability to set the max number of peers and players. The Accused Product uses these frameworks, SDKs and APIs to:</p> <ul style="list-style-type: none"> • connect players to other players for matchmaking in a game session; • determine which game a player should be matched to; • ensure no players are overloaded for optimal gameplay and bandwidth; • create logical and physical network topologies for the game; • create network connections through tunnels, sockets and ports; • manage the game session during gameplay; • route game data using optimal paths and relays;

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	<ul style="list-style-type: none"> • distribute voip chat data among the players; and • manage states when players leave, are kicked, or are disconnected from a game session. <p>For example and without limitation, the Accused Product utilizes the [REDACTED] framework for matchmaking, player distribution, and connections to the game session within a multiplayer game. The [REDACTED] framework attempts to ensure the gameplay and bandwidth are not overloaded so players are evenly distributed on the logical and physical networks. In an evenly-distributed multiplayer game, the network of players are m-regular. The [REDACTED] framework includes setting-up peer-to-peer topologies in different configurations using common components, such as a network player manager for managing the players in a session, the connection manager for managing connections for sending data between remote peers, and network interface for utilizing the underlying network functionality.</p> <p>The Accused Product also utilizes the Durango (Xbox One) SDK, Xbox 360 SDK and Microsoft SDK for additional matchmaking and network configuration functionality. The Durango SDK, Xbox 360 SDK, and Microsoft SDK are both offered through third-party Microsoft, and Acceleration Bay reserves the right to supplement its contentions related to these SDKs after discovery is provided by Microsoft.</p> <p>In addition, there are multiple logical and physical layers of the network topology that maintain a regular network in order to optimize performance based on the type of data that is being transmitted. These additional layers of the network topology will be identified in upcoming depositions.</p> <p>Testing of the Accused Product is consistent with the above contention.</p>
<p>1-f. further wherein the number of participants is at least two greater than m thus resulting in a non-complete graph.</p>	<p>The Accused Product meets the recited claim language because the number of participants is at least two greater than m thus resulting in a non-complete graph.</p> <p>For example but not limitation, the Accused Product creates a non-complete graph of players during different game sessions, for example where not every player in the game session is directly connected, either logically or physically, to every other player in the game. For example, the Accused Product creates a non-complete graph of players when setting up a logical and physical network topology for the Accused Product using different networking frameworks, SDKs and APIs utilized by the Accused Product. The frameworks, SDKs and APIs utilized by the Accused Product to create these non-complete graphs include internally developed frameworks, SDKs and APIs, such as the [REDACTED] framework and APIs related to voice over IP (“voip”). The Accused Product utilizes topologies that naturally include a non-complete graph, as well as topologies that include a non-complete graph as the result of</p>

CHART B

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6,701,344	Accused Product: NBA 2K15 & NBA 2K16
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Claim 1	
<p>1-a. A computer network for providing a game environment for a plurality of participants,</p>	<p>The Accused Product meets the recited claim language because it provides a computer network for providing a game environment for a plurality of participants.</p> <p>For example and without limitation, the Accused Product meets the recited claim language because the Multiplayer modes of the Accused Product allow multiple players to play the game online.</p>

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	<p>Xbox One</p> <p>Technical information on P2P Networking Behavior Version 1.0 Last updated: October 6, 2013</p> <p>Many gaming and app scenarios on Xbox® One rely on low-latency peer-to-peer (P2P) networking capabilities. The platform for these capabilities leverages <u>IPv6</u>, <u>Teredo</u>, and <u>IPsec Internet standards</u>.</p> <p>Xbox One: Technical information on P2P Networking Behavior, Version 1.0 at 1.</p> <p>Testing of the Accused Product is consistent with the above contention.</p>
<p>1-d. wherein each participant sends data that it receives from a neighbor participant to its other neighbor participants,</p>	<p>The Accused Product meets the recited claim language because it provides a computer network in which each participant sends data that it receives from a neighbor participant to its other neighbor participants.</p> <p>For example and without limitation, the Accused Product meets the recited claim language because the Accused Product utilizes peer-to-peer topology where participants can forward data from one neighbor participant to another neighbor participants as demonstrated above.</p> <p>Testing of the Accused Product is consistent with the above contention.</p>
<p>1-e. further wherein the network is m-regular, where m is the exact number of neighbor participants of each participant and</p>	<p>The Accused Product meets the recited claim language because it provides a computer network that is m-regular, where m is the exact number of neighbor participants of each participant.</p> <p>For example and without limitation, the Accused Product creates m-regular connectivity meshes of players during different network game sessions and for different game session data. For example, m-regular can indicate that each of the players is optimally connected to other players to ensure that all nodes are connected to the same number of nodes to ensure that no node is overloaded. For example, the Accused Product creates m-regular topologies of players when setting up logical and physical network topologies for the Accused Product using different networking libraries, SDKs and APIs. The libraries, SDKs and APIs utilized by the Accused Product to create these m-regular topologies include internally developed libraries, SDKs and APIs, such as</p>

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██████████ and those related to voice over IP (“voip”). They also include the ability to set the max number of peers and players. The Accused Product uses these libraries, SDKs and APIs to:

- connect players to other players for matchmaking;
- determine which game a player should be matched to;
- ensure no players are overloaded for optimal gameplay in a connectivity mesh;
- create a game session with logical and physical network topologies for the game;
- create network connections through sockets and ports;
- manage the game during gameplay and to relay content through different NAT configurations;
- route game data using optimal paths and relays;
- distribute voip chat data among the players; and
- manage states when different players leave, are kicked, or are disconnected.

For example and without limitation, the Accused Product utilizes the ██████████ library for matchmaking and player distribution within a multiplayer game. The ██████████ library attempts to ensure players are evenly distributed on the logical and physical networks to avoid overloads. In an evenly-distributed multiplayer game, the network of players is m-regular. The ██████████ library includes setting-up peer-to-peer topologies in different configurations, including optimized peer meshes.

The Accused Product also utilizes the Durango (Xbox One) SDK, Xbox 360 SDK and Microsoft SDK for additional matchmaking and network configuration. The Durango SDK, Xbox 360 SDK and Microsoft SDK are both offered through third-party Microsoft, and Acceleration Bay reserves the right to supplement its contentions related to these SDKs after discovery is provided by Microsoft.

In addition, there are multiple logical and physical layers of the network topology that maintain a regular network in order to optimize performance based on the type of data that is being transmitted. These additional layers of the network topology will be identified in upcoming depositions.

Testing of the Accused Product is consistent with the above contention.

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6,829,634	Accused Product: NBA 2K15 & NBA 2K16
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Claim 1	
<p>1-a. A non-routing table based computer network having a plurality of participants,</p>	<p>The Accused Product meets the recited claim language because it provides a non-routing table based computer network that supports a plurality of participants.</p> <p>For example and without limitation, the Accused Product meets the recited claim language because the Multiplayer modes of the Accused Product allow multiple players to play the game online.</p>

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<p>1-e. wherein data is numbered sequentially so that data received out of order can be queued and rearranged,</p>	<p>The Accused Product meets the recited claim language because data are sequentially numbered so that data can be queued and rearranged.</p> <p>For example and without limitation, gameplay messages are numbered so that they can be arranged if received out of order.</p> <p>For example and without limitation, TCP provides functionality so that messages transmitted over the Internet that are received out of order can be queued and rearranged. https://en.wikipedia.org/wiki/Out-of-order_delivery</p> <p>Testing of the Accused Product is consistent with the above contention.</p>
<p>1-f. further wherein the network is m-regular and m-connected, where m is the number of neighbor participants of each participant, and</p>	<p>The Accused Product meets the recited claim language because it provides a non-routing table based computer network in which the network is m-regular and m-connected, where m is the number of neighbor participants of each participant.</p> <p>For example and without limitation, the Accused Product creates m-regular connectivity meshes of players during different network game sessions and for different game session data. For example, m-regular can indicate that each of the players is optimally connected to other players to ensure that all nodes are connected to the same number of nodes to ensure that no node is overloaded. For example, the Accused Product creates m-regular topologies of players when setting up logical and physical network topologies for the Accused Product using different networking libraries, SDKs and APIs. The libraries, SDKs and APIs utilized by the Accused Product to create these m-regular topologies include internally developed libraries, SDKs and APIs, such as [REDACTED] and those related to voice over IP (“voip”). They also include the ability to set the max number of peers and players. The Accused Product uses these libraries, SDKs and APIs to:</p> <ul style="list-style-type: none"> • connect players to other players for matchmaking; • determine which game a player should be matched to; • ensure no players are overloaded for optimal gameplay in a connectivity mesh; • create a game session with logical and physical network topologies for the game; • create network connections through sockets and ports; • manage the game during gameplay and to relay content through different NAT configurations; • route game data using optimal paths and relays;

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	<ul style="list-style-type: none"> • distribute voip chat data among the players; and • manage states when different players leave, are kicked, or are disconnected. <p>For example and without limitation, the Accused Product utilizes the [REDACTED] library for matchmaking and player distribution within a multiplayer game. The [REDACTED] library attempts to ensure players are evenly distributed on the logical and physical networks to avoid overloads. In an evenly-distributed multiplayer game, the network of players is m-regular. The [REDACTED] library includes setting-up peer-to-peer topologies in different configurations, including optimized peer meshes.</p> <p>The Accused Product also utilizes the Durango (Xbox One) SDK, Xbox 360 SDK and Microsoft SDK for additional matchmaking and network configuration. The Durango SDK, Xbox 360 SDK and Microsoft SDK are both offered through third-party Microsoft, and Acceleration Bay reserves the right to supplement its contentions related to these SDKs after discovery is provided by Microsoft.</p> <p>In addition, there are multiple logical and physical layers of the network topology that maintain a regular network in order to optimize performance based on the type of data that is being transmitted. These additional layers of the network topology will be identified in upcoming depositions.</p> <p>For example and without limitation, the Accused Product also creates m-connected game sessions of players during different network gaming states through communication channels, where each of the players is optimally connected to other players in a mesh for the game session, without missing connections that would interrupt gameplay or game data. For example, the Accused Product creates an m-connected topology of players when setting up a logical and physical network topology for the Accused Product using different networking libraries, SDKs and APIs utilized by the Accused Product. The libraries, SDKs and APIs utilized by the Accused Product to create this m-connected topology include internally developed libraries, SDKs and APIs, such as [REDACTED] Durango (Xbox One) SDK, Xbox 360 SDK and Microsoft SDK and APIs related to voice over IP (“voip”).</p> <p>Testing of the Accused Product is consistent with the above contention.</p>
<p>1-g. further wherein the number of participants is at least two greater</p>	<p>The Accused Product meets the recited claim language because it provides a non-routing table based computer network in which the number of participants is at least two greater than m thus resulting in a non-complete graph.</p> <p>For example but not limitation, the Accused Product creates a non-complete mesh of players during different</p>

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6,732,147	Accused Product: NBA 2K15 & NBA 2K16
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Claim 1	
<p>1-a. A method of disconnecting a first computer from a second computer, the first computer and the second computer being connected to a broadcast channel, said</p>	<p>The Accused Product meets the recited claim language because it practices a method of disconnecting a first computer from a second computer, the first computer and the second computer being connected to a broadcast channel, said broadcast channel forming an m-regular graph where m is at least 3.</p> <p>For example and without limitation, the Accused Product includes functionality to disconnect a player from the broadcast channel for a game.</p> <p>For example and without limitation, the Accused Product creates m-regular connectivity meshes of players during different network game sessions and for different game session data. For example, m-regular can indicate that each of the players is optimally connected to other players to ensure that all nodes are connected to the same number of nodes to ensure that no node is overloaded. For example, the Accused Product creates m-</p>

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<p>broadcast channel forming an m-regular graph where m is at least 3, the method comprising:</p>	<p>regular topologies of players when setting up logical and physical network topologies for the Accused Product using different networking libraries, SDKs and APIs. The libraries, SDKs and APIs utilized by the Accused Product to create these m-regular topologies include internally developed libraries, SDKs and APIs, such as [REDACTED] and those related to voice over IP (“voip”). They also include the ability to set the max number of peers and players. The Accused Product uses these libraries, SDKs and APIs to:</p> <ul style="list-style-type: none"> • connect players to other players for matchmaking; • determine which game a player should be matched to; • ensure no players are overloaded for optimal gameplay in a connectivity mesh; • create a game session with logical and physical network topologies for the game; • create network connections through sockets and ports; • manage the game during gameplay and to relay content through different NAT configurations; • route game data using optimal paths and relays; • distribute voip chat data among the players; and • manage states when different players leave, are kicked, or are disconnected. <p>For example and without limitation, the Accused Product utilizes the [REDACTED] library for matchmaking and player distribution within a multiplayer game. The [REDACTED] library attempts to ensure players are evenly distributed on the logical and physical networks to avoid overloads. In an evenly-distributed multiplayer game, the network of players is m-regular. The [REDACTED] library includes setting-up peer-to-peer topologies in different configurations, including optimized peer meshes.</p> <p>The Accused Product also utilizes the Durango (Xbox One) SDK, Xbox 360 SDK and Microsoft SDK for additional matchmaking and network configuration. The Durango SDK, Xbox 360 SDK and Microsoft SDK are both offered through third-party Microsoft, and Acceleration Bay reserves the right to supplement its contentions related to these SDKs after discovery is provided by Microsoft.</p> <p>In addition, there are multiple logical and physical layers of the network topology that maintain a regular network in order to optimize performance based on the type of data that is being transmitted. These additional layers of the network topology will be identified in upcoming depositions.</p> <p>For example but not limitation, the Accused Product creates a non-complete mesh of players during different game sessions, for example where not every player in the game session is directly connected, either logically or</p>
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physically, to every other player in the game. For example, the Accused Product creates a non-complete graph of players when setting up a logical and physical network topology for the Accused Product using different networking libraries, SDKs and APIs utilized by the Accused Product. The libraries, SDKs and APIs utilized by the Accused Product to create these non-complete graphs include internally developed libraries, SDKs and APIs, such as the [REDACTED] library and APIs related to voice over IP (“voip”). The Accused Product utilizes topologies that naturally include a non-complete optimized mesh, as well as topologies that include a non-complete graph as the result of inability to connect to peers, failover states, or during host migration of player hosted games. The chance of a non-complete graph grows with the total number of players added to the game, and becomes very likely once more than four players are connected.

For example and without limitation, the following screen capture shows that the Accused Product provides a peer-to-peer network for 100 participants to directly share game-related data with each other:

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DEMISTIFYING MYPARK CHAT



There may be some confusion over how the MyPark Chat feature works with MyNBA2K15. This post is designed to help make things easier to understand.

MyPark Chat will only work when a player is logged into a PS4 or Xbox One account. The feature doesn't work on PC, Xbox 360, or PS3. You can only detect your PS4 or Xbox One from the app if your mobile device is connected to the same network as those consoles. If you try to connect when on a different network, you will receive a message saying that no console was found.

Here are the scenarios in which MyNBA2K15's MyPark Chat feature will work:

1. You are using a router/modem that has land line ports and also creates a wi-fi network. Your console will be hardwired to the router/modem, while your mobile device is connected to the wi-fi network.
2. Both your console and your mobile device are connected to the same wi-fi network.

This requirement means that people who want to chat in the park will need to be in close proximity to their console.

You won't be able to chat with people outside of your specific instance of MyPark. That means each instance of the Park you're in can have up to 100 people, meaning these are the only folks you'll be able to chat with.

NOTE: Aside from being on the same network, you also need to make sure you've logged into MyPARK on PS4 or Xbox One with the same account. In order for the app to be populated with the names of other users in the MyPark instance, you need to be connected via your console, too.

<http://support.2k.com/hc/en-us/articles/203884453-Demystifying-MyPark-Chat>

For example and without limitation, the following screen captures show the Accused Product connects more than 30 participants via peer-to-peer network in a park:



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<https://www.youtube.com/watch?v=2XNQ20XXI-o>

For example and without limitation, the following excerpt confirms that Xbox devices use peer-to-peer networking connections to connect multiple participants in an online gaming session.

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	<h2>Xbox One</h2> <p>Technical information on P2P Networking Behavior Version 1.0 Last updated: October 6, 2013</p> <p>Many gaming and app scenarios on Xbox® <u>One</u> rely on low-latency peer-to-peer (P2P) networking capabilities. The platform for these capabilities leverages <u>IPv6</u>, <u>Teredo</u>, and <u>IPsec Internet standards</u>.</p> <p>Xbox One: Technical information on P2P Networking Behavior, Version 1.0 at 1.</p> <p>Testing of the Accused Product is consistent with the above contention.</p>
<p>1-b. when the first computer decides to disconnect from the second computer, the first computer sends a disconnect message to the second computer, said disconnect message including a list of neighbors of the first computer;</p>	<p>Accused Product meets the recited claim language because it practices a method that when the first computer decides to disconnect from the second computer, the first computer sends a disconnect message to the second computer, said disconnect message including a list of neighbors of the first computer.</p> <p>For example and without limitation, a player can chose to disconnect from a game session, which sends a disconnect message to other players in the game session network.</p>

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6,714,966	Accused Product: NBA 2K15 & NBA 2K16
<p>The statements and documents cited below are solely provided by way of example and based on information available to Acceleration Bay at the time this chart was created, and are not to be used by way of limitation or for purposes of construing the claim terms.</p> <p>Discovery is ongoing, Acceleration Bay has received only limited discovery from Defendant, and Acceleration Bay is seeking discovery from third parties. In particular, Defendant has not produced a single technical document or made available witnesses for deposition, has only made available a small portion of the source code for the Accused Product, despite Acceleration Bay’s requests for access to the complete source code, and has refused to substantively respond to interrogatories regarding the networks used in the Accused Product. Acceleration Bay relies on the limited source code made available to it, its playtesting of the Accused Product, and publicly available information, and reserves its right to supplement its infringement contentions as additional information becomes known to it.</p> <p>The term “Accused Product” refers to the PC Windows, PlayStation 3, PlayStation 4, Xbox One and Xbox 360 versions of NBA 2K15 & 16 (together, “NBA 2K”), as identified in Acceleration Bay’s November 2, 2015 Identification of Accused Products.</p> <p>Acceleration Bay contends that the Accused Product infringes each of the claims identified below both literally and under the doctrine of equivalents. Acceleration Bay prepared these Infringement Contentions without the benefit of disclosure of Defendant’s non-infringement theories. Once Acceleration Bay receives Defendant’s non-infringement positions, if any, Acceleration Bay may further demonstrate how the described functionality of the Accused Product is at most insubstantially different from claimed functionality and performs the same function in the same way to achieve the same result.</p>	
Claim 1	
<p>1-a. A computer network for providing an information delivery service for a plurality of participants,</p>	<p>The Accused Product meets the recited claim language because it provides a computer network for providing an information delivery service for a plurality of participants.</p> <p>For example and without limitation, the Accused Product meets the recited claim language because the Multiplayer modes operate using an information delivery service allowing for multiple players to play the game online.</p>

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	<p>Xbox One</p> <p>Technical information on P2P Networking Behavior Version 1.0 Last updated: October 6, 2013</p> <p>Many gaming and app scenarios on Xbox® <u>One</u> rely on low-latency peer-to-peer (P2P) networking capabilities. The platform for these capabilities leverages <u>IPv6</u>, <u>Teredo</u>, and <u>IPsec Internet standards</u>.</p> <p>Xbox One: Technical information on P2P Networking Behavior, Version 1.0 at 1.</p> <p>Testing of the Accused Product is consistent with the above contention.</p>
<p>1-d. wherein each participant sends data that it receives from a neighbor participant to its other neighbor participants,</p>	<p>The Accused Product meets the recited claim language because it provides a computer network in which each participant sends data that it receives from a neighbor participant to its other neighbor participants.</p> <p>For example and without limitation, the Accused Product meets the recited claim language because the Accused Product utilizes peer-to-peer topology where participants can forward data from one neighbor participant to another neighbor participants as demonstrated above.</p> <p>Testing of the Accused Product is consistent with the above contention.</p>
<p>1-e. further wherein the network is m-regular, where m is the exact number of neighbor participants of each participant and</p>	<p>The Accused Product meets the recited claim language because it provides a computer network that is m-regular, where m is the exact number of neighbor participants of each participant.</p> <p>For example and without limitation, the Accused Product creates m-regular connectivity meshes of players during different network game sessions and for different game session data. For example, m-regular can indicate that each of the players is optimally connected to other players to ensure that all nodes are connected to the same number of nodes to ensure that no node is overloaded. For example, the Accused Product creates m-regular topologies of players when setting up logical and physical network topologies for the Accused Product using different networking libraries, SDKs and APIs. The libraries, SDKs and APIs utilized by the Accused Product to create these m-regular topologies include internally developed libraries, SDKs and APIs, such as</p>

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██████████ and those related to voice over IP (“voip”). They also include the ability to set the max number of peers and players. The Accused Product uses these libraries, SDKs and APIs to:

- connect players to other players for matchmaking;
- determine which game a player should be matched to;
- ensure no players are overloaded for optimal gameplay in a connectivity mesh;
- create a game session with logical and physical network topologies for the game;
- create network connections through sockets and ports;
- manage the game during gameplay and to relay content through different NAT configurations;
- route game data using optimal paths and relays;
- distribute voip chat data among the players; and
- manage states when different players leave, are kicked, or are disconnected.

For example and without limitation, the Accused Product utilizes the ██████████ library for matchmaking and player distribution within a multiplayer game. The ██████████ library attempts to ensure players are evenly distributed on the logical and physical networks to avoid overloads. In an evenly-distributed multiplayer game, the network of players is m-regular. The ██████████ library includes setting-up peer-to-peer topologies in different configurations, including optimized peer meshes.

The Accused Product also utilizes the Durango (Xbox One) SDK, Xbox 360 SDK and Microsoft SDK for additional matchmaking and network configuration. The Durango SDK, Xbox 360 SDK and Microsoft SDK are both offered through third-party Microsoft, and Acceleration Bay reserves the right to supplement its contentions related to these SDKs after discovery is provided by Microsoft.

In addition, there are multiple logical and physical layers of the network topology that maintain a regular network in order to optimize performance based on the type of data that is being transmitted. These additional layers of the network topology will be identified in upcoming depositions.

Testing of the Accused Product is consistent with the above contention.

EXHIBIT P

CONFIDENTIAL – ATTORNEYS’ EYES ONLY

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ACCELERATION BAY, LLC,

Plaintiff,

CASE NO.

16-455 (RGA)

v.

TAKE-TWO INTERACTIVE SOFTWARE,
INC., ROCKSTAR GAMES, INC.
and 2K SPORTS, INC.

Defendants.

CONFIDENTIAL - ATTORNEYS' EYES ONLY

VIDEO DEPOSITION OF NENAD MEDVIDOVIC, Ph.D

August 14, 2018

9:08 a.m.

333 South Grand Avenue, Suite 3800

Los Angeles, California

Reported By: Brandi Celestino, CSR No. 13640

Page 2

1 APPEARANCES:

2

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20

21 ALSO APPEARING:

22 KEN PARRA, VIDEOGRAPHER

23 LOUIS CAMPBELL, ESQ., TAKE-TWO

24

25

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1 INDEX TO EXAMINATION

2

3 WITNESS: NENAD MEDVIDOVIC, Ph.D.

4

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7 By Mr. Kastens	280

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11

12 WITNESS INSTRUCTED NOT TO ANSWER

13 PAGE	LINE
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15 21	12

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1 INDEX TO EXHIBITS

2 NENAD MEDVIDOVIC, Ph.D.

3 Acceleration Bay, LLC v. Activision Blizzard, Inc.

4 Tuesday, August 14, 2018

5

6 EXHIBITS		MARKED
7 Exhibit 1	Expert Report of Nenad Medvidovic	7
8 Exhibit 2	Supplemental Opening Expert Report of Nenad Medvidovic, Ph.D.	7
9		
10 Exhibit 3	Reply Expert Report of Nenad Medvidovic, Ph.D.	7
11 Exhibit 4	United States Patent 344	44
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18 Exhibit 10	Drawing	192
19 Exhibit 11	NBA2K Printout AB-TT 004505	259
20 Exhibit 12	How to Resolve Errors in GTA Online About Strict NAT Type Printout	261
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1 LOS ANGELES, CALIFORNIA

2 TUESDAY, AUGUST 14, 2018, 9:08 A.M.

3

4 THE VIDEOGRAPHER: Good morning. We are on the

5 record. This is the videotaped deposition of Dr. Nenad

6 Medvidovic in the matter of Acceleration Bay, LLC vs.

7 Take-Two Interactive Software, Incorporated.

8 This deposition is taking place at 333 South

9 Grand Avenue, Suite 3800, Los Angeles, California 90071,

10 on August 14, 2018, and the time is 9:08 a.m.

11 My name is Ken Parra. I'm the video specialist

12 representing U.S. Legal. Video and audio recording will

13 be taking place unless all counsel agree to go off the

14 record.

15 Would all present please identify themselves

16 beginning with the witness.

17 THE WITNESS: Nenad Medvidovic. First name is

18 spelled N-e-n-a-d, last name, M-e-d-v-i-d-o-v-i-c.

19 MR. KASTENS: Kristopher Kastens from Kramer

20 Levin Naftalis & Frankel here for Acceleration Bay,

21 LLC.

22 MR. TOMASULO: Michael Tomasulo from Winston &

23 Strawn representing the defendants and with me is

24 Louis Campbell also Winston & Strawn.

25 THE VIDEOGRAPHER: Our certified court reporter

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1 THE WITNESS: Again, as we sit here, other than
2 saying I reviewed everything -- I believe that all of the
3 code was requested. Whether all of the code was produced
4 or not, unless you can point me to something specific, I
5 am not sure.
6 BY MR. TOMASULO:
7 Q And did the -- would you agree that it's
8 difficult to understand someone else's code without
9 benefit of the explanation of the engineers who wrote the
10 code?
11 MR. KASTENS: Objection. Form.
12 THE WITNESS: That depends. It may be under
13 some circumstances. In other cases, having an engineer
14 explain it may actually muddy up things. It just
15 depends.
16 BY MR. TOMASULO:
17 Q And you do cite the testimony of the Take-Two
18 engineers?
19 A Yes. I believe there are several engineers who
20 were deposed whose deposition testimony I -- or rather
21 transcripts I had a chance to study.
22 Q And I didn't observe any opinions in your report
23 saying that you disagreed with the testimony you cite.
24 Do you recall any instance in your report where
25 you stated that you were disagreeing with the testimony

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1 of the engineers that you were citing?
2 MR. KASTENS: Objection. Form.
3 THE WITNESS: No, I don't believe so.
4 BY MR. TOMASULO:
5 Q So it's reasonable to conclude that you don't
6 intend to offer any opinion that the testimony that you,
7 yourself, cited in the reports was incorrect; is that
8 right?
9 MR. KASTENS: Objection. Form.
10 THE WITNESS: Certainly, if it doesn't state --
11 say so in my reports, I don't believe that I would be
12 within my rights to say that what I cited one way in my
13 report, I'm now going to use for the complete opposite
14 purpose. I don't believe that's how this works.
15 BY MR. TOMASULO:
16 Q Okay.
17 You, yourself, did you ever test any of the
18 games that you've accused of infringement, Grand Theft
19 Auto or NBA2K?
20 A User-tested them.
21 Q And what does that mean?
22 A I used the games.
23 Q Okay. But the -- did you -- what do you mean by
24 the word "test" in that case?
25 A You -- or one, rather, looks at the system

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1 features, the awkwardly visible features that the system
2 provides through its user interface and tries to confirm
3 certain aspects of the system.
4 Q And did you take any notes during your testing,
5 your play testing?
6 A Nothing other than what's in my report or
7 reports, rather.
8 Q When did you play test the games?
9 MR. KASTENS: Objection. Form.
10 THE WITNESS: Within the past year or year and a
11 half. Specifically for GTA-5 and the two versions of
12 NBA2K that are accused in this case.
13 BY MR. TOMASULO:
14 Q So when you were playing the games, did you
15 physically write down or type up any notes?
16 A No. Again, other than what's in my report, I
17 did not.
18 Q I don't know what that means. I mean, in other
19 words, when you were playing the games, did you take
20 notes?
21 MR. KASTENS: Objection. Form.
22 THE WITNESS: I did not.
23 BY MR. TOMASULO:
24 Q And did you do any screen grabs or capture any
25 video when you played the games?

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1 A No.
2 Q And did you use a packet detector or packet --
3 well, do you know what that term means, a "packet
4 detector" or "packet sniffer"?
5 A I do.
6 Q And what does it mean?
7 A It's a low-level or network level tool that
8 tries to observe what happens when you use a distributed
9 system, what happens at the network level.
10 Q And did you use at any time a packet detector
11 for any of the accused games?
12 A I did not.
13 Q And have you used the packet detector in the
14 past?
15 A Extensively in my research, yes.
16 Q And what are some things you've used a packet
17 detector to do?
18 A I do research in architectures for distributed
19 systems including message-based systems, and these are a
20 highly distributed, highly concurrent software systems
21 that run on many different nodes where things come and go
22 at random times.
23 So one common reason you might want to use a
24 packet sniffer is to try to debug a problem with your
25 system, for example. There are other things you might

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1 Q And if we go back to Figure 1, we can see that
2 I -- I'm sorry. We can see that D is connected to both G
3 and E; correct?
4 A Yes.
5 Q And so if A sends a message to G and E -- I'm
6 sorry. Let me say it again.
7 If A sends a message to each of its four
8 neighbors, H, G, F and E; right?
9 Do you see that?
10 A I do.
11 Q It's a requirement of the claim, Claim 12, that
12 both G and E send that message to D; right?
13 MR. KASTENS: Objection. Form.
14 THE WITNESS: Yes.
15 BY MR. TOMASULO:
16 Q And so if only one of G or E were to send that
17 message to D, the claim would not be met; right?
18 MR. KASTENS: Objection. Form.
19 THE WITNESS: For this particular
20 configuration -- give me just a second.
21 Again, wherein each participant sends data that
22 it receives from a neighbor participant to its other
23 neighbor participants, that requires that each
24 participant, in this case G and E, send the data to D.
25 BY MR. TOMASULO:

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1 Q Okay.
2 MR. TOMASULO: Let's take a quick lunch break
3 then, if that's okay with you guys.
4 MR. KASTENS: Okay.
5 THE VIDEOGRAPHER: We're now off the record.
6 The time is 12:20 p.m.
7 (Lunch recess taken.)
8 THE VIDEOGRAPHER: This marks the beginning of
9 Media No. 3. We are now back on the record. The time is
10 1:14 p.m.
11 BY MR. TOMASULO:
12 Q Can we go to paragraph 173 of your expert
13 report, which is Exhibit 1. This is going to be on
14 page 173 and 174.
15 A Okay.
16 Q So we go to -- it's about 1, 2, 3, 4 lines down
17 in paragraph 173. You state, "As illustrated in the
18 modified image copied below, the participants shooting a
19 rifle on the rooftop, Player No. 1 highlighted in green,
20 is directly connected to three other participants," and
21 so on.
22 Do you see that sentence?
23 A I do.
24 Q Now, that's referring to the image that appears
25 on page 74 of your report?

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1 A Yes. Right above paragraph 174.
2 Q Okay.
3 And then -- what are we at Exhibit 6?
4 COURT REPORTER: 7.
5 MR. TOMASULO: 7 is the next one. Let's mark
6 this as Exhibit 7.
7 (Exhibit 7 marked.)
8 BY MR. TOMASULO:
9 Q Now, we tried to faithfully reproduce in
10 Exhibit 7, which is shown at page 7 of your report.
11 Does it seem correct to you?
12 A It's just an enlargement of the same image as
13 far as I can tell.
14 Q That's what it should be.
15 And so what did you mean by the word "modified"
16 in paragraph 173?
17 A So there are three -- four -- rather three blue
18 and one green circles that are numbered, two squares that
19 are also green and numbered, and a set of lines between
20 them, as shown in this diagram, that have been added to a
21 screenshot of GTA.
22 Q And who made the modifications you just
23 discussed?
24 A I did or rather somebody within the law firm at
25 my instruction did.

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1 Q So did -- this image appears also in
2 Dr. Mitzenmacher's report?
3 A I believe so, yes.
4 Q Whose idea was it to create this, yours or his?
5 A It could have been both. It seems like a pretty
6 obvious thing to do. I'd like to claim some super
7 intelligent insight here, but this is not rocket science.
8 It's a simple addition to the figure.
9 Q So the modifications you discussed, those are
10 the only modifications?
11 A As far as I recall, yes.
12 Q And so, in other words, that's kind of an
13 overlay that's been put on it? I don't know what you
14 want to call it. I'm not trying to make up words.
15 A Sure. I mean, if you believe that there is
16 something else that's been changed from a typical GTA
17 screenshot, you can maybe point me to it, but I don't
18 believe there is anything.
19 Q Well, do you -- I mean, this is your exhibit;
20 right? I mean, I didn't create it. I'm just asking you
21 what you meant by the word "modified."
22 A Yes. I thought -- I can repeat again. It's the
23 green circle labeled number 1, blue circles labeled
24 number 2, 3, and 4; green rectangles or rather squares,
25 number 5 or 6, and the red lines included the two

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1 arrowhead or lines that end with arrowheads that connect
2 them in various ways.
3 Q Who gave you the screenshot to make these
4 modifications?
5 MR. KASTENS: Objection. Form.
6 THE WITNESS: This may have been from a document
7 that was produced by Take-Two and/or it is possibly
8 available online.
9 BY MR. TOMASULO:
10 Q So you don't where it came from? Did you find
11 it? Did the lawyers give it to you?
12 MR. KASTENS: Objection. Form.
13 THE WITNESS: As we sit here, I don't remember
14 for sure.
15 BY MR. TOMASULO:
16 Q As far as you're aware, the modifications that
17 you just discussed, the four circles, the two squares,
18 those are the only modifications that you're aware of?
19 A Yes. I believe you already asked that, and the
20 answer is still yes.
21 MR. KASTENS: Objection. Form.
22 BY MR. TOMASULO:
23 Q So other than that, it's your testimony that
24 this is an actual screenshot from Grand Theft Auto that's
25 not modified in any other way?

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1 MR. KASTENS: Objection. Form.
2 THE WITNESS: This is correct. This is a --
3 screenshot of a death match in Grand Theft Auto.
4 BY MR. TOMASULO:
5 Q And it has not been modified in any other way
6 other than what you just testified about?
7 MR. KASTENS: Objection. Form.
8 THE WITNESS: To the best of my understanding, I
9 certainly did not modify this screenshot. If it was
10 produced, for example, after it was modified by someone
11 at Take-Two or something like that, I'm not aware of
12 that. It's not beyond the realm or impossible, but
13 neither I nor Dr. Mitzenmacher nor the attorneys at
14 Kramer Levin, to the best of my knowledge, did anything
15 to this image other than what I just described a couple
16 times with what you call the overlay.
17 BY MR. TOMASULO:
18 Q And this is an illustration of something you
19 personally observed during gameplay?
20 A Sorry? Is what an illustration?
21 Q Figure 7.
22 A Figure 7?
23 Q Exhibit 7. I'm sorry. Exhibit 7, that which is
24 shown in page 74 of your opening report.
25 A Well, a death match with four players per team,

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1 yes, that's something that I have observed myself.
2 Q But this particular configuration where you have
3 these players, 5 and 6 that are located where they are,
4 and players 1, 2, 3, and 4 located where they are, is
5 that something you specifically recall observing during a
6 game play session?
7 A Yes. Multiple times. Again, there's -- so the
8 only thing that this shows is that Player 2 has, within
9 its line of sight, three different players. That's what
10 happens in a death match with four players per team.
11 Q You can't actually see these other players that
12 would supposedly be under the dots 2, 3, and 4; correct?
13 A Well, you can't maybe see them in a screenshot,
14 but you know that they are there.
15 Q How do you know that they are there?
16 A Because they are on your team. You know where
17 your teammates are.
18 Q How do you know that there are Players 2, 3, 4
19 located where they are, and how do you know Players 5, 6
20 are located where they are?
21 MR. KASTENS: Objection. Form.
22 THE WITNESS: In a death match -- players also
23 announce themselves by shooting, just like in the real
24 world. A shooter announces themselves. -- once they fire
25 a weapon, you know where they are. You would generally

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1 know where your teammates are because you would be in
2 communication with them. This is just a schematic as to
3 where, potentially, 5 and 6 could be, which is also why
4 they are shown off of the edge of this screen. But in
5 this case, Player 2 has a line of sight to Player 5.
6 Player 1, who is presumably me, would not have a direct
7 line of site to Player 5.
8 BY MR. TOMASULO:
9 Q But my question was, you've put a dot there
10 that's supposed to represent Player 2; correct?
11 A Correct.
12 Q And you put a dot in the middle where it's
13 supposed to represent Player 3; correct?
14 A Yes.
15 Q And you put a dot where there's supposed to be
16 Player 4; right?
17 A Right.
18 Q Now, is it -- but we can't actually see a play
19 there. If we remove those dots 2, 3, and 4, would we see
20 a player underneath them?
21 A In this particular image, it's possible that you
22 would not. I don't remember for sure. There are going
23 to be the same exact configurations where you would, in
24 fact, see one or more of -- in the same type of
25 configuration of death match with four players per team,

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1 you would see one or more of your teammates, potentially
2 at any given point in time, depending on where they are
3 with respect to you, whether they are exposed, whether
4 they are obscured by some geographic feature or building
5 or whatever.

6 Q Who would positioned Player 2 where Player 2
7 supposedly is?

8 A Whoever controls the application program which
9 presumably runs in a console that is Player 2 in this
10 game.

11 Q That would be a person controlling Player 2?
12 MR. KASTENS: Objection. Form.

13 THE WITNESS: It would be presumably some user
14 of Grand Theft Auto.

15 BY MR. TOMASULO:

16 Q A "user" means a player or person that's
17 controlling the Avatar?

18 A Right.

19 MR. KASTENS: Objection. Form.

20 BY MR. TOMASULO:

21 Q And you believe that you personally observed
22 instances that were similar to this configuration when
23 you played the game?

24 A Just to make sure that I understand what you
25 mean, this configuration being death match of four

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1 players per team? Yes.

2 Q Well, a configuration where there would be 2, 3,
3 and 4 would be visible, and 5 and 6 were not visible. In
4 other words, is this something that you observed? Did
5 you create this from memory?

6 A Nobody said that 2, 3, and 4 are necessarily
7 visible. For one thing, this is a schematic that shows
8 where they are in this setting. All three of those
9 players may be hiding, and therefore not visible in the
10 screen. That doesn't mean that they are not there. This
11 is why this schematic is drawn exactly the way it is.
12 There is the sort of the network state or the state of
13 the system itself, and then there is what's visible on
14 the screen at a given snapshot in time.

15 Q How do you know that this is representing --
16 this image that's in Exhibit 7 and on page 74 of your
17 report, how do you know that this is from a four-on-four
18 death match?

19 A That is the scenario that I'm postulating in
20 paragraph 173, though. In a death match, players are
21 disbursed on the NAT form 3 connection, so I'm basically
22 saying, assume that what you have in figure -- in
23 Exhibit 7 in this figure, assume you have a death match
24 involving four players per team, this is the rest -- how
25 the rest of the scenario falls out.

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1 Q But my question is, how do you know that the
2 screen grab is even from a four-on-four death match?

3 MR. KASTENS: Objection. Form.

4 THE WITNESS: This screen grab illustrates what
5 would happen if it were a four-on-four death match.

6 BY MR. TOMASULO:

7 Q So it may or may not be a four-on-four death
8 match; right?

9 A It could be a five-on-five death match, but in
10 this particular case it's four-on-four.

11 Q You're speculating on that right? You don't
12 know where this screen grab came from, so you don't know
13 whether this is a screen grab from a four-on-four death
14 match; correct?

15 MR. KASTENS: Objection. Form.

16 THE WITNESS: I'm absolutely convinced that
17 there have been many instances of a four-on-four death
18 match where this exact view has been produced for many
19 players of Grand Theft Auto playing death match around
20 the world. Grand Theft Auto has a large number of
21 options, but it's not limitless. There are a finite
22 number of scenes that you would enter into.

23 BY MR. TOMASULO:

24 Q But -- that's fine, but that's not my question.
25 You just don't know if this particular screen

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1 grab came from a four-on-four death match, right, because
2 you didn't take the screen grab?

3 MR. KASTENS: Objection. Form.

4 THE WITNESS: As we sit here, I don't know who
5 produced the screen grab. I can probably retrace it
6 because it -- there are many similar screen grabs online.
7 It's possible this was also produced by Take-Two.
8 There's nothing in this screen grab that is inconsistent
9 with a four-on-four death match.

10 BY MR. TOMASULO:

11 Q You just don't know if it's from a four-on-four
12 death match; right?

13 MR. KASTENS: Objection. Form.

14 THE WITNESS: I believe it's from a four-on-four
15 death match. Unless you can show me or tell me why it
16 would not be, I don't see how I can -- I don't know
17 what -- exactly you want me to say. This is -- what it
18 shows is what would happen at the level of the system,
19 how these things would network with one another in a
20 four-on-four death match.

21 BY MR. TOMASULO:

22 Q Do you think that this shows -- this appears to
23 be cut off, parts of this. If you look here, up at the
24 top right, 153, that appears to be cut off.

25 A That looks like a 2 to me.

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1 THE VIDEOGRAPHER: We are now off the record.
2 The time is 5:46 p.m.
3 (Proceedings adjourned at 5:46 p.m.)
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Page 283

1 DECLARATION UNDER PENALTY OF PERJURY
2
3 I, Nenad Medvidovic, Ph.D., hereby certify under
4 penalty of perjury that I have read the foregoing
5 transcript of my deposition taken on August 14, 2018;
6 that I have made such corrections as appear noted on the
7 Deposition Errata Page, attached herein, as corrected, is
8 true and correct.
9
10 Dated this _____ day of _____, 2018, at
11 _____, California.
12
13
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15 _____
16 Nenad Medvidovic, Ph.D.
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Page 284

1 STATE OF CALIFORNIA)
2)
3 COUNTY OF LOS ANGELES)
4
5 I, Brandi Celestino, a Certified Shorthand Reporter,
6 duly licensed and qualified in and for the State of
7 California, do hereby certify that there came before me
8 on the 14th day of August, 2018 at 333 South Grand
9 Avenue, Suite 3800, Los Angeles, California, the
10 following named person, to-wit: Nenad Medvidovic, Ph.D.,
11 who was duly sworn to testify the truth, the whole truth,
12 and nothing but the truth of knowledge touching and
13 concerning the matters in controversy in this cause; and
14 that he was thereupon examined under oath and his
15 examination reduced to typewriting under my supervision;
16 that the deposition is a true record of the testimony
17 given by the witness.
18 I further certify that pursuant to FCRP Rule
19 30(e)(1) that the signature of the deponent:
20 X was requested by the deponent or a party before
21 the completion of the deposition;
22 _ was not requested by the deponent or a party
23 before the completion of the deposition.
24 I further certify that I am neither attorney or
25 counsel for, nor related to or employed by any of the
parties to the action in which this deposition is taken,

Page 285


1 and further that I am not a relative or employee of any
2 attorney or counsel employed by the parties hereto, or
3 financially interested in the action.
4 CERTIFIED TO BY ME on this 14th day of August, 2018.
5 
6 _____
7 BRANDI CELESTINO
8 CSR No. 13640
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EXHIBIT Q

CONFIDENTIAL - OUTSIDE COUNSEL ONLY

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

- - - - -x

ACCELERATION BAY, LLC,

Plaintiff,

v.

C.A. No. 16-455 (RGA)

TAKE-TWO INTERACTIVE

SOFTWARE, INC., et al.,

Defendants.

- - - - -x

CONFIDENTIAL - OUTSIDE COUNSEL ONLY

Videotaped deposition of Michael Mitzenmacher, Ph.D.

Boston, Massachusetts

July 27, 2018

9:01 a.m.

Job No.: 710962

Pages: 1 - 266

Reported By: Alan H. Brock, RDR, CRR

Page 2	Page 4
<p>1 Videotaped deposition of Michael Mitzenmacher, 2 Ph.D., held at the offices of: 3 4 5 Ropes & Gray 6 800 Boylston Street 7 Boston, Massachusetts 8 9 10 11 12 13 Before Alan H. Brock, RDR, CRR, Notary Public 14 in and for the Commonwealth of Massachusetts. 15 16 17 18 19 20 21 22 23 24 25</p>	<p>1 C O N T E N T S 2 EXAMINATION OF MICHAEL MITZENMACHER, Ph.D. PAGE 3 Mr. Tomasulo 7 4 Mr. Frankel 222 5 Mr. Tomasulo 251 6 Mr. Frankel 263 7 Mr. Tomasulo 264 8 9 10 E X H I B I T S 11 MARKED DESCRIPTION PAGE 12 Exhibit 1 Expert report of Michael 6 13 Mitzenmacher, Ph.D. 14 Exhibit 2 Supplemental opening expert report 6 15 of Michael Mitzenmacher, Ph.D. 16 Exhibit 3 Expert reply report of Michael 6 17 Mitzenmacher, Ph.D. 18 Exhibit 4 Expert report of Patrick Conlin 6 19 Exhibit 5 Handwritten diagram 40 20 Exhibit 6 Illustrative figure 55 21 Exhibit 7 Illustrative figure 70 22 Exhibit 8 Illustrative figure 80 23 Exhibit 9 "2K Support," AB-TT 002722 - 116 24 AB-TT 002726</p>
Page 3	Page 5
<p>1 A P P E A R A N C E S 2 ON BEHALF OF PLAINTIFF: 3 AARON M. FRANKEL, ESQ. 4 KRAMER LEVIN NAFTALIS & FRANKEL LLP 5 1177 Avenue of the Americas 6 New York, New York 10036 7 650.752.1700 8 afrankel@kramerlevin.com 9 10 ON BEHALF OF DEFENDANTS: 11 MICHAEL A. TOMASULO, ESQ. 12 WINSTON & STRAWN LLP 13 333 South Grand Avenue, 38th Floor 14 Los Angeles, California 90071 15 213.615.1700 16 mtomasulo@winston.com 17 18 ANDREW R. SOMMER, ESQ. 19 WINSTON & STRAWN LLP 20 1700 K Street, N.W. 21 Washington, D.C. 20006 22 202.282.5000 23 asommer@winston.com 24 25 ALSO PRESENT: Bill Slater, Videographer</p>	<p>1 Exhibit 10 "2K Support," TTWO0023885 - 116 2 TTWO0023889 3 Exhibit 11 Internet printout 188 4 Exhibit 12 Email and attachment, ATI03620 - 206 5 ATI03621 6 Exhibit 13 Email chain, ATI03613 - ATI03618 207 7 Exhibit 14 Memorandum opinion 250 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24</p>

Page 54

1 discussed, for any of the -- at any time for any of
2 the games that are at issue in your reports in this
3 case?
4 A. No, I don't believe so.
5 Q. So if we could go to Page 63 of your
6 opening report. Do you see that?
7 A. Yes.
8 Q. At the bottom of Page 63 and the top of
9 Page 64 there are some annotations and a screenshot
10 of what appears to be a Grand Theft Auto Online game
11 session. Is that a fair characterization of what's
12 shown here?
13 MR. FRANKEL: Hold on, please, before
14 you answer.
15 The reason I asked to hold on, it
16 doesn't look to me like that figure printed
17 properly. I'm referring to the figure at the bottom
18 of 63. Is that relevant to what you're going to ask
19 the witness?
20 MR. TOMASULO: Well, what I think
21 happened is that it didn't come to us properly. It
22 may have been something that didn't --
23 May I ask a few more questions, and then
24 we'll see if we can get to the bottom of this?
25 MR. FRANKEL: Sure. You're representing

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1 that you endeavored to print this as it came to you,
2 and your understanding is that the copy of the
3 report you were served on had the image like that?
4 Is that correct?
5 MR. TOMASULO: That is correct. I'll
6 see if I can pull up my copy and just confirm.
7 That is correct. The electronic copy --
8 this isn't a printing error. This would be -- if
9 there's an error, which there certainly appears to
10 be, it would not have been associated with us having
11 a printing problem.
12 MR. FRANKEL: It's not you, it's us.
13 MR. TOMASULO: It might not be you. It
14 might be the Internet.
15 MR. SOMMER: We'll blame it on Adobe.
16 MR. FRANKEL: I'm sorry, counsel, just
17 before we go on: Do you have a copy of Dr.
18 Medvidovic's report?
19 MR. TOMASULO: Yes, so I have the
20 printout from that, which is better.
21 Can we mark this as the next exhibit,
22 please.
23 (Exhibit 6 marked for identification.)
24 A. Oh, yeah. Somehow the red looks as if it's
25 supposed to be overlaid there.

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1 Q. Am I correct that Exhibit 6 is what the
2 figure at the bottom of 63 and the top of 64 should
3 look like?
4 A. That's my recollection.
5 Q. That there was some kind of an error that
6 has separated the red overlays from the actual
7 screenshot; is that right?
8 A. Yeah. Maybe a picture got moved and only
9 one of the pictures got moved and not the overlay in
10 the final printing.
11 Q. Assuming that Exhibit -- are we correct in
12 assuming that Exhibit 6 is what this is supposed to
13 look like?
14 A. Let me just do a quick check, but I believe
15 so, or that's my recollection.
16 MR. FRANKEL: Doctor, you can take your
17 time to confirm that.
18 A. That looks correct.
19 Q. So with respect to this figure, this
20 Exhibit 6, what's the intention of what's being
21 depicted here? That's kind of a crummy question.
22 Let me ask you a different question.
23 Did you create this Figure 6 that's
24 shown in Exhibit 6?
25 A. I'd say I can't recall. I know the

Page 57

1 screenshot was not mine. That came from somewhere.
2 To be honest, I don't think I created the overlay,
3 but I -- I'd say I can't recall.
4 Q. So the screenshot was not something coming
5 from something you personally observed?
6 MR. FRANKEL: Objection to form.
7 A. The screenshot was not something that I
8 personally developed.
9 Q. Is it possible that this was generated by
10 Dr. Medvidovic?
11 A. I'd say it's possible, and again, this may
12 have been something that came to me or suggested by
13 counsel as we were working through examples to show
14 or demonstrate.
15 Q. But to be clear, this isn't a depiction of
16 gameplay that you personally observed.
17 A. It's not a depiction that I personally
18 played, right, and I didn't observe it in the course
19 of it being played. This is like a screenshot, and
20 I believe the description at Paragraph 129 of the
21 report describes or discusses the framing of the
22 screenshot and what it represents.
23 Q. So there's some annotations added to the
24 screenshot; correct?
25 A. Yes. That would be the stuff that sort of

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1 fell off onto the side, for instance.
2 Q. Can you explain what's originally in the
3 screenshot, as opposed to what was added in the
4 image?
5 A. What is added to the image is the red lines
6 and arrows and the numbers 1 through 6 and the
7 corresponding boxes.
8 Q. And then the rest of it is, to your
9 knowledge, an accurate screenshot?
10 A. Yes.
11 Q. You say that there are two players, 5 and
12 6, that were not on the screen. Is that what you're
13 showing by the screen squares with the arrows
14 pointing to them?
15 A. Yes, and I believe that's also represented
16 in Paragraph 130.
17 Q. How do you know those players were there?
18 A. Again, so I think maybe you're missing the
19 point of the picture, and I think this is discussed
20 in Paragraph 131. You know, this is meant to be an
21 illustration of the four-by-four Deathmatch and how
22 it works. There are other players, and they exist
23 in the game because it's a four-by-four Deathmatch.
24 You know, their location as shown in Figure 130
25 could be set up to have those locations simply by

Page 59

1 positioning the player. To be clear, as stated in
2 131, the image is for illustration purposes.
3 Q. Did you add or direct the addition of
4 Players 5 and 6 to this screenshot?
5 A. I'm not clear what you're asking.
6 Q. I think what you're saying -- well, there's
7 a 5 and a 6 with those arrows; correct?
8 A. Yes.
9 Q. Were those Players 5 and 6, those green
10 boxes and those red arrows to the boxes of 5 and 6,
11 were those added to this at your direction?
12 A. It's a -- or, yes, that it matches the
13 explanation that I've provided in Paragraph 129,
14 that Player 5 has a line of sight with Player 2 and
15 two other players not shown in the illustration
16 below. That's what that arrow to 5 is meant to
17 represent. Again, that's also depicted in a
18 different form in Paragraph 130.
19 Q. How do you know this is from a four-on-four
20 Deathmatch?
21 A. This picture I think is for illustrative
22 purposes. It's a screenshot we were using to do it.
23 I don't think the intention of this is to say I was
24 playing a four-by-four Deathmatch and this is the
25 setting that arose. It's to say this is a setting

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1 that can arise during a four-by-four Deathmatch game
2 under the following conditions that are expressed in
3 129 to 131.
4 Q. And just to be clear, those conditions
5 aren't something you personally observed which led
6 to this figure; right?
7 MR. FRANKEL: Objection to form.
8 A. I did not personally observe this picture,
9 but I've seen the, you know -- in playing the game I
10 have seen situations like this where you can see or
11 not see other players; and similarly in my general
12 viewing of, you know, online videos of people
13 playing the games, this matches my understanding of
14 how the game is played.
15 Q. Is this something that you tried to
16 recreate from your memory?
17 MR. FRANKEL: Objection to form.
18 A. Recreate from my memory? I mean, again,
19 maybe I'm not clear on the question. Could you
20 explain what you mean?
21 Q. Well, you said you played the games.
22 A. Yes.
23 Q. So is this some scenario that you recall
24 happening in a game and that you instructed whoever
25 prepared this to recreate it because you remembered

Page 61

1 it?
2 A. No, I don't think I set it up that way,
3 although I could set it up that way.
4 Q. Do you recall ever playing in a four-on-
5 four Deathmatch?
6 A. I believe I've played in a four-on-four
7 Deathmatch. I'm not sure, but I believe I have.
8 Q. So how do you know -- what data do you have
9 to show that Players 5 and 6 would be visible to
10 Players 2 and 4 but not 1 and 3?
11 A. That -- again, so part of it would be just
12 the visibility on the screen. But in terms of --
13 particularly with Grand Theft Auto, as I referred to
14 in Paragraph 161, this is illustrating the issue of
15 proximity rules for data exchange, which is
16 described both in my report and also in Mr. Conlin's
17 testing report.
18 MR. FRANKEL: Counsel, just a second: I
19 believe for clarity of the record that the witness
20 gestured to Paragraph 131, not 161.
21 THE WITNESS: Oh, did I say 161? Sorry.
22 MR. FRANKEL: I believe you did.
23 A. 133.
24 MR. TOMASULO: Whatever, that's fine.
25 Q. You did say 161.

Page 62

1 A. I apologize.
2 Q. Well, what is the small box at the lower-
3 left part of the screen?
4 A. This looks like a variety of the maps, so I
5 believe it's showing your visibility box and players
6 outside the visibility box.
7 Q. Do you know if this is an accurate
8 representation of the screen grab or whether this
9 has been modified?
10 A. I can't recall for that red box if that was
11 there or added.
12 Q. What red box are you talking about?
13 A. The box I believe you're referring to in
14 the left corner.
15 MR. FRANKEL: Counsel, do you want to
16 have the witness circle it on the exhibit? Would
17 that be helpful? Use a different-colored pen or
18 something?
19 Q. Yeah, I think it's better if you do it --
20 MR. FRANKEL: Exhibit 6.
21 Q. Exhibit 6 is bigger. I'm a little unclear
22 what we're talking about here.
23 MR. FRANKEL: Whatever it is you want
24 the witness to talk about, why don't we circle that
25 on the exhibit.

Page 63

1 Q. There's a map -- in the lower left hand
2 there's a box; correct?
3 A. Yes.
4 Q. And then in the box there's three blueish
5 figures; correct?
6 A. Yes.
7 Q. And then below each of those blueish
8 figures there's some other kind of box as well;
9 correct?
10 A. It's a bit hard to make out, but there
11 seems to be -- like you're saying there's some
12 little red dot below them?
13 Q. Something like that. And then outside the
14 box, on the top, there's two more of those figures,
15 which have both the blue and whatever the red thing
16 is underneath it; right?
17 A. Yes.
18 Q. Here's a magnifying glass, if that's of
19 help for either counsel or the witness.
20 MR. FRANKEL: Counsel, do you want the
21 witness to just maybe annotate Exhibit --
22 MR. TOMASULO: I have some questions.
23 Let's see if I can do it my way here.
24 Q. So there's five of these combo boxes of the
25 blue and red; correct?

Page 64

1 A. Yes.
2 Q. And do you know what those five boxes are
3 supposed to represent?
4 A. Not offhand.
5 Q. And do you know if all -- so there's two
6 boxes that are outside the -- if you -- I'm going
7 to --
8 You see the two boxes that are at the
9 top of the field map?
10 A. Yes.
11 Q. And there are two that are outside of
12 there; right? Do you see that?
13 A. I believe I know what you're referring to.
14 Q. So I'm going to circle them on mine, and
15 I'd ask you to do the same. So I've circled these
16 two. Do you see?
17 A. Okay.
18 Q. You can circle the same two at the top.
19 And do you know why those two that have
20 been circled are outside of this box?
21 A. I'm not sure. It may be expressing that
22 they're outside the visibility range.
23 Q. So do you know if those were added or
24 whether those are part of the screen grab?
25 A. I am not sure.

Page 65

1 Q. And in playing the game, did you ever come
2 to see a field-of-view map or something like that,
3 expressed down at the bottom left?
4 A. Yes, I recall field-of-view maps in the
5 bottom left, but I can't recall the specific shapes
6 or pictures.
7 Q. So you don't know whether this is an
8 accurate field-of-view map or whether it's been
9 annotated?
10 A. I would say I would have to go back and
11 check. I'm not sure.
12 Q. What would you check?
13 A. Again, I'd start by asking counsel to find
14 the provenance of the screenshot.
15 Q. As you sit here now, you just don't know if
16 this is accurate or not; right?
17 MR. FRANKEL: Objection to form.
18 A. I guess I'm not clear on what you mean by
19 "is accurate or not." Accurate in what sense;
20 right? I mean, like I've explained the image is for
21 illustrative purposes and the context in which one
22 would understand the illustration in Paragraphs 129
23 to 131.
24 Q. What do you mean, "for illustration
25 purposes"?

Page 282

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Page 283

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9
10 Dated this _____ day of _____, 2018, at
11 _____, California.
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16 Nenad Medvidovic, Ph.D.
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Page 284

1 STATE OF CALIFORNIA)
2)
3 COUNTY OF LOS ANGELES)
4
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Page 285

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5 
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7 BRANDI CELESTINO
8 CSR No. 13640
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