IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

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

ACCELERATION BAY'S OPPOSITION TO
TAKE-TWO DEFENDANTS' MOTION FOR ATTORNEYS' FEES AND COSTS

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SUMMARY OF ARGUMENT

Take Two's motion for attorneys' fees and costs (D.I. 521 "Motion") should be denied because Acceleration Bay's prosecution of this case was not exceptional. The case was hard-fought and involved complex technology that resulted in numerous disputed legal, factual, and expert issues, many of which were decided in Acceleration Bay's favor. Take Two fails to demonstrate that this is "the rare case in which a parties unreasonable conduct . . . is . . . so 'exceptional' as to justify an award of fees," and instead relies on baseless *ad hominem* attacks that grossly distort the record and on findings in other cases that are irrelevant here. *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545, 555 (2014).

Take Two's primary argument completely distorts what was actually disclosed in Acceleration Bay's expert reports. Take Two points to a single screenshot that Acceleration Bay's technical experts stated in their reports had been "modified" to "illustrate" their infringement opinions. Both experts explained that the annotated image was only being used for demonstrative purposes—to graphically illustrate the concept of the underlying connections between participants, which are not displayed in the game—and was not to be relied upon as evidence. Indeed, Take-Two's counsel acknowledged during a deposition that the image was "to ***illustrate*** your testimony ***as opposed to evidence*** that it actually happened." Declaration of Aaron Frankel ("Frankel Decl.") filed herewith, Ex. 1 (Mitzenmacher Tr.) at 66:5-7 (emphasis added). Thus, Take Two recognized long ago that this image was illustrative and not evidence, but nonetheless argues now that this demonstrative is "evidence." Take Two's reliance on an easily disproven claim as its lead argument confirms the meritless nature of its Motion.

Take Two's remaining arguments rely on garden-variety litigation events, such as the invalidation of a handful of claims from the much larger set of claims that Acceleration Bay

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