

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

ACCELERATION BAY LLC,)	
)	
Plaintiff,)	
)	
v.)	C.A. No. 16-453 (RGA)
)	
ACTIVISION BLIZZARD, INC.,)	
)	
Defendant.)	
)	
ACCELERATION BAY LLC,)	
)	
Plaintiff,)	
)	
v.)	C.A. No. 16-454 (RGA)
)	
ELECTRONIC ARTS INC.,)	
)	
Defendant.)	
)	
ACCELERATION BAY LLC,)	
)	
Plaintiff.)	
)	
v.)	
)	
TAKE-TWO INTERACTIVE)	C.A. No. 16-455 (RGA)
SOFTWARE, INC., ROCKSTAR GAMES,)	
INC. and 2K SPORTS, INC.,)	
)	
Defendants.)	

**SPECIAL MASTER ORDER NO. 10 AS TO PLAINTIFF’S
AUGUST 16, 2017 DISCOVERY MOTIONS**

On August 16, 2017, plaintiff filed Discovery Motions, with a brief, affidavit and exhibits (“Plaintiff’s Motions”). Following briefing on the Plaintiff’s Motions, argument was held on August 31, 2017. Below are the Plaintiff’s Motions and my rulings as to each:

Plaintiff's first motion seeks to preclude Defendants from relying upon any agreements with Sony, Microsoft and Bungie, or, at the very least, compelling them to produce unredacted copies of these agreements. The parties agreed to defer hearing this motion until September 6, 2017, after Sony was granted leave to intervene with respect to this motion.

* * * * *

Plaintiff's second motion seeks to compel Activision to produce withheld source code printouts for Call of Duty. The central issue for this motion is whether or not there was a misunderstanding with regard to the printing of source code for Call of Duty. The Protective Order provides that Plaintiff is permitted to print 250 pages of source code for each accused game. There are two accused Call of Duty games. Defendant Activision produced a combined 500 pages, covering both Call of Duty games. Plaintiff found that it printed too many pages for one of the games and not enough for the other game. Activision claims that the Plaintiff can only have 250 pages per game and is refusing to produce 71 pages of source code for the game as to which Plaintiff has less than 250 pages. Plaintiff submitted an affidavit that explained the circumstances under which it printed the 500 pages from Activision. The affidavit indicates that Plaintiff relied upon communications with Activision. But for those communications, Plaintiff states that it would have evenly split the 500 page limit between the two games.

Activision argues that the Protective Order is clear and there is no basis for a misunderstanding with regard to the printing. Even if there had been communications between the parties, Activision states that its representative was not authorized to modify the Protective Order with regard to the number of pages to be printed.

I find that there is a colorable basis for Plaintiff's right to the pages in questions, that there was likely some misunderstanding between the parties, and that there is little or no prejudice to Activision in producing the 71 withheld pages.

It is Ordered that Activision produce the 71 withheld pages of source code for the particular Call of Duty game.

* * * * *

Plaintiff's third motion is to compel Defendants to supplement their responses to Plaintiff's Interrogatories Nos. 2, 4 and 7 through 10, or to preclude Defendants from presenting additional argument or evidence at trial on these issues. This motion is best considered by separately addressing the interrogatories.

Plaintiff's Interrogatory No. 2 seeks Defendants' position and evidence with regard to non-infringing alternatives. Defendants' response to Interrogatory No. 2 has set forth certain alleged non-infringing alternatives. Plaintiff contends that their responses are insufficient or incomplete. Defendants respond that additional supplements are not justified, due to the vagueness of Plaintiff's infringement contentions and because Plaintiff has the burden of proving the lack of non-infringing alternatives. I find Defendants' position reasonable.

Plaintiff's motion to compel supplemental response to its Interrogatory No. 2 is denied.

Plaintiff's motion seeks to compel a supplemental response to Interrogatory No. 4, regarding Defendants' damages theories and the facts upon which they will rely. Here again, Plaintiff argues that Defendants' responses are incomplete and not specific enough.

Defendants state that they have provided responses to Interrogatory No. 4 and that a further response is not reasonable since Plaintiff's damage claim is conclusory. Plaintiff claims a

royalty of 15.5% with no explanation for that rate and calculates a \$200 million damage claim for each Defendant without specificity.

In light of Plaintiff's conclusory damages claim, there is little justification for requiring Defendants to supplement their responses to Interrogatory No. 4.

Plaintiff's motion to compel supplemental responses to Interrogatory No. 4 is denied.

Plaintiff's next motion is to compel supplemental responses to its Interrogatory Nos. 7, 8 and 10, all of which relate to infringement. Interrogatory No. 7 concerns non-infringement theories; Interrogatory No. 8 inquires as to source code supporting non-infringement; and Interrogatory No. 10 covers source code modules not used in the accused products.

Defendants' support of their existing responses regarding this motion is that Plaintiff's own deficient responses to infringement contentions make it difficult for Defendants to provide more than it already has in response to these interrogatories. Defendants' position is persuasive.

Plaintiff's motion to compel supplemental responses to Interrogatories Nos. 7, 8 and 10 is denied.

Plaintiff's motion to compel supplemental responses to Interrogatory No. 9 concerns foreign downloads and foreign users connected to U.S.-based servers. This interrogatory relates to Plaintiff's damages claim. Defendants respond that this type of foreign information is neither relevant nor reasonable as a matter of law. Furthermore, Defendants have produced a significant amount of information on foreign sales. Defendants' brief explains the legal limitations for damages from foreign activities.

Plaintiff's motion to compel supplemental responses to Interrogatory No. 9 is denied.

* * * * *

Plaintiff's fourth motion is described as precluding Defendants from relying on belatedly disclosed invalidity materials and witnesses, and quashing Defendants' untimely subpoena to Microsoft. As the title of the motion suggests, this motion has a number of parts or categories. What they do have in common is that Plaintiff seeks to preclude evidence, as to which it has the burden of proof. There has been no finding that any of the categories for which Plaintiff seeks preclusion have been the subject of prior rulings in favor of Plaintiff. Although Plaintiff characterizes this motion as addressing Defendants' late, or on the eve of the fact discovery cut-off date, Defendants strongly argue that the materials and witnesses in question either have been known to Plaintiff for some time or arose due to Plaintiff's alleged mid-July modified infringement contention regarding the m-regular network configuration.

The subpoena to Microsoft was served three days after Plaintiff disclosed its alleged new infringement theory and prior to the fact discovery cut-off. The documents that Plaintiff seeks to exclude were identified by Defendants after Plaintiff's new alleged infringement theory. Case law supports Defendants' argument that allows Defendants to rely on materials sought before the end of fact discovery.

Similarly, as to Plaintiff's motion to preclude testimony from Messrs. Terrano and Kegel, there is evidence that they were identified long before the fact discovery cut-off. Furthermore, their testimony may be needed to respond to Plaintiff's alleged new infringement theory.

It is Ordered that Plaintiff's motion to preclude Defendants from relying on belatedly disclosed invalidity materials and witnesses and quashing Defendants' subpoena to Microsoft is denied.

Dated: September 7, 2017

/s/ Allen M. Terrell, Jr., Special Master
Allen M. Terrell, Jr., Special Master