

MORRIS, NICHOLS, ARSHT & TUNNELL LLP

1201 NORTH MARKET STREET
P.O. BOX 1347
WILMINGTON, DELAWARE 19899-1347

(302) 658-9200
(302) 658-3989 FAX

STEPHEN J. KRAFTSCHIK
(302) 351 9378
(302) 498 6233 fax
skraftschik@mmat.com

September 27, 2016

The Honorable Richard G. Andrews
United States District Court
For the District of Delaware
844 North King Street
Wilmington, DE 19801

VIA ELECTRONIC FILING

Re: *Acceleration Bay LLC*
C.A. Nos. 15-228 (RGA); 15-282 (RGA); and 15-311 (RGA)

Dear Judge Andrews:

We write on behalf of Defendants in response to Plaintiff's September 16, 2016 Notice of Supplemental Authority. The subject of Plaintiff's Notice, the Northern District of California's order transferring the declaratory judgment actions to the District of Delaware (the "Order"), is not germane to Defendants' motion for attorneys' fees in the above-captioned actions (e.g., D.I. 161 in C.A. No. 15-228).

Acceleration Bay argues that "Based on Judge Seeborg's holding that the issues and parties are the same in the 2015 and 2016 Acceleration Bay actions, there is no requisite 'material alteration of the legal relationship of the parties necessary to permit an award of attorney's fees.'" As explained in Defendants' motion and reply briefs, however, Defendants are prevailing parties under both *CRST Van Expedited, Inc. v. E.E.O.C.*, 136 S. Ct. 1642 (2016), and *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 603-04 (2001). Judge Seeborg's Order does not address either of those cases, or the prevailing party issue, or otherwise implicate the positions Defendants advanced on that issue

To the contrary, Judge Seeborg expressly cabined his holding to the "first to file" issue that was before him. He noted that "the relation back doctrine, strictly construed, may not technically apply" but nevertheless concluded that "AB will not be precluded from 'relating back' to the original complaints *for purposes of the first-to-file rule on this particular record.*" Order at 7 n.3 & 8 (emphasis added).

Respectfully,

/s/ Stephen J. Kraftschik

Stephen J. Kraftschik (#5623)

SJK/dlw

cc: Clerk of Court (Via Hand Delivery)
All Counsel of Record (Via Electronic Mail)