IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ACCELERATION BAY LLC, Plaintiff, v. ACTIVISION BLIZZARD, INC. Defendant.	)	C.A. No. 15-228 (RGA)
ACCELERATION BAY LLC, Plaintiff, v. ELECTRONIC ARTS INC., Defendant.	)	C.A. No. 15-282 (RGA)
ACCELERATION BAY LLC, Plaintiff, v. TAKE-TWO INTERACTIVE SOFTWARE, INC., ROCKSTAR GAMES, INC. and 2K SPORTS, INC., Defendants.	)	C.A. No. 15-311 (RGA)

PLAINTIFF'S MOTION FOR RECONSIDERATION
OF THE COURT'S DECEMBER 1, 2015 ORDER

I. INTRODUCTION

Pursuant to Local Rule 7.1.5, Plaintiff Acceleration Bay LLC ("Plaintiff") moves for reconsideration or clarification of the Court's December 1, 2015 Order (D.I. 47[1]) concerning the disputes set forth in the November 23, 2015 Joint Letter from Defendants Take-Two Interactive Software, Inc., Rockstar Games, Inc., and 2K Sports, Inc.'s (collectively, "Defendants") and Plaintiff regarding the proposed protective order (the "Protective Order") (D.I. 44). Specifically, Plaintiff requests that the Court reconsider its adoption of Defendants' proposed Prosecution Bar in paragraph 10.7 of the Protective Order and/or clarify Defendants' definition of "Restricted Confidential – Source Code Material" in paragraph 1.10 of the Protective Order. As written, these provisions impose undue prejudice on Plaintiff by preventing it from employing its counsel of choice, maintaining a cohesive litigation strategy, avoiding duplicated efforts and increased costs, and preparing its case for trial. For example, given Defendants' definition of Source Code Material in paragraph 1.10, litigation counsel are effectively precluded from participating in any manner in the *inter partes* review ("IPR") proceedings. The breadth of the preclusive effect of the Protective Order as currently worded would necessarily result in a manifest injustice, especially when considering this Court's previously rulings, the Patent Office's procedures designed specifically to permit litigation counsel's participation in IPR proceedings, and that far less restrictive measures available to the Court to protect Defendants' highly confidential materials.

II. LEGAL STANDARD

Delaware District Court Local Rule 7.1.5 allows a party to move for reconsideration of an opinion or decision within fourteen days of its entry. The Court may amend its order or decision

[1] All docket references at to the docket in *Acceleration Bay LLC v. Activision Blizzard Inc.*, C.A. No. 15-228-RGA.

where the movant demonstrates a need to prevent manifest injustice or correct a clear error of law or fact. *In re DaimlerChrysler A.G. Securities Litig.*, 200 F. Supp. 2d 439, 442 (D. Del. 2002) (citing *Max's Seafood Café v. Quinteros*, 176 F.3d 669, 677 (3d Cir. 1999)).

III. ARGUMENT

A. The Prosecution Bar is Overly Restrictive and Contrary to this Court's Precedent

Plaintiff will suffer manifest injustice if the Court enters the Protective Order's Prosecution Bar (¶ 10.7) in its current scope. As written, the Prosecution Bar prevents Plaintiff from hiring its counsel of choice to defend against post-grant proceedings before the Patent Office, including the six IPR petitions Defendants recently filed on the patents-in-suit. This outcome is unjust to Plaintiff and will impede its "strong interest" in maintaining a coherent litigation strategy and avoiding duplicative efforts and increased costs. *Xerox Corp. v. Google Inc.*, 270 F.R.D. 182, 185 (D. Del. 2010) (recognizing the importance of reexamination proceedings and the "significant" harm in denying plaintiff its choice of counsel, and thereby a coherent litigation strategy, while refusing to "force plaintiff to split its resources between two fronts of the same war" by ordering a post-grant prosecution bar). *See also Two-Way Media Ltd. v. Comcast Cable Commc'ns LLC*, C.A. No. 14-1006-RGA, 2015 WL 7257915, at *2 (D. Del. Nov. 17, 2015) (denying a post-grant prosecution bar and holding: "The attenuated risk of inadvertent disclosure or competitive use must be balanced with the potential harm in denying Plaintiff its choice of counsel in post-grant proceedings."); *Grobler v. Apple Inc.*, No. 12-cv-01534 JST (PSG), 2013 WL 3359274, at *1 (N.D. Cal. May 7, 2013) (holding "any prosecution bar should serve only to mitigate the risk of inadvertent use of proprietary information by a patentee, not to unduly burden a patentee with additional expense"); *EPL Holdings, LLC v.*

Apple Inc., 12-cv-04306 JST (JSC), 2013 WL 2181584, at *3 (N.D. Cal. May 20, 2013) (noting that a total ban on trial counsel from post-grant proceedings "would burden a patentee").

The Patent Office recognized that many patents subject to IPR proceedings are also involved in District Court litigation, and that parties often want litigation counsel to represent them in IPR proceedings for consistency and efficiency reasons. As such, an expanded PTAB panel issued an order authorizing a motion for *pro hac vice* admission pursuant to 37 CFR § 42.10 and set forth guidelines for timing and content of motion for *pro hac vice* admission. *See* Exhibit 1 attached hereto, *Motorola Mobility, LLC v. Michael Arnouse*, IPR2013-00010, Paper No. 6 (PTAB Oct. 15, 2012). However, if District Courts were to enter overly preclusive Prosecution Bars, as the one Defendants propose here, then there would be no possible way for litigation counsel to participate in both the IPR proceedings and District Court litigation. Accordingly, the Court should at the very least proscribe limits that would permit litigation counsel to aid in the pending IPR petitions.

Defendants' Prosecution Bar is also inconsistent with this Court's prior decisions. *See, e.g., Two-Way Media,* 2015 WL 7257915, at *2 (further discussed below); *Eon Corp. IP Holdings v. Flo TV Inc.*, C.A. No.10-812-RGA, D.I. 580, slip op. at 1 (D. Del. Aug. 29, 2013) (*aff'g* Special Master's Rulings and Recommendations (D.I. 542)) (denying a post-grant prosecution bar and holding that a defendant's confidential information is "basically irrelevant" to a reexamination proceeding); *Xerox*, 270 F.R.D. at 185 ("The court concludes that the risk of inadvertent or competitive use of defendants' confidential information by plaintiff's trial counsel in evaluating potential claim amendments on reexamination is outweighed in this case by the potential harm in denying plaintiff the full benefit of its trial counsel in that venue."); *ALZA*

Corporation, et al., v. Par Pharmaceutical Inc., C.A. No. 13-1104-RGA, transcript ruling (attached hereto as Exhibit 2) ("*ALZA* ruling") at 17-19 (D. Del. Dec. 13, 2013).

In the recent *Two-Way Media* case, which contained similar facts to the instant dispute, this Court rejected a prosecution bar that would have prevented the plaintiff's trial counsel from participating in post-grant proceedings involving the patents in suit. In doing so, this Court noted that "only narrowing claim amendments may be made during post-grant proceedings" and that, after prosecution of the patents in suit closes, there is "little risk that confidential information learned in litigation will be competitively used to draft claims that read on Defendants' products." *Two-Way Media*, 2015 WL 7257915, at *2.

Just as in *Two Way Media*, prosecution in the instant matter has closed. Plaintiff is unable to expand the scope of its asserted claims in post-grant proceedings, or convert Defendants' source code to competitive use, regardless of whether or not its trial counsel has access to that code. Any perceived risk to Defendants is far outweighed by the "significant" harm in denying Plaintiff the full benefit of its trial counsel in post-litigation proceedings, thereby damaging its ability to maintain a coherent legal strategy and minimize duplicative costs and efforts. *Xerox*, 270 F.R.D. at 185. Furthermore, Defendants did not present any special or unique circumstances in this case that would compel such a draconian result. *See* D.I. 44 at 3. Accordingly, the Court should reconsider its December 1, 2015 Order and issue a "post-grant proceedings exception" to the Prosecution Bar, which will allow Plaintiff's attorneys who have access to Defendants' source code to participate in post-grant proceedings involving the patents in suit.

DOCKET ALARM

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