

**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. 14

On December 18, 2017, Defendants sought from the Special Master “clarification of Special Master Order No. 13”. This request seeks to compel Plaintiff, Acceleration Bay, to

produce the pre-filing analysis conducted by its infringement expert, Dr. Medvidovic. Defendants point out that Dr. Medvidovic's declaration stated that he had been retained by Acceleration Bay to conduct a pre-filing expert analysis of its infringement claims. Defendants believe that Dr. Medvidovic's analysis was shared with Reed Smith. If so, according to Defendants, Dr. Medvidovic's analysis should be produced in accordance with Special Master Order No. 13.

Even if Dr. Medvidovic's analysis was not shared with Reed Smith, Defendants argue that it should be produced because "Dr. Medvidovic is now a testifying expert in this case". According to Defendants such a 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", and work product protection under this Rule does not extend to materials prepared by or for a testifying expert.

Defendants' request on December 18, 2017 also argues that a recent decision, subsequent to Special Master Order No. 13, supports Defendants' argument that Dr. Medvidovic's analysis

should be produced. Defendants cite to *Ansell Healthcare Products LLC v. Reckitt Benckiser LLC*, C.A. No. 15-cv 915-RGA (Dec. 11/2017).

Acceleration Bay's response to Defendants request of December 18, 2017 argues that Dr. Medvidovic's analysis is work product and need not be produced under the above cited Rule 26. Plaintiff distinguished the *Ansell* case from the situation involving Dr. Medvidovic's analysis in this litigation.

Plaintiff submits that Special Master Order No. 13 doesn't require clarification because it only required producing to Defendants what Plaintiff provided in writing to Hamilton Capital or its counsel at the time of Hamilton Capital's due diligence. Plaintiff emphatically states that it did not provide any written materials prepared by Dr. Medvidovic to Hamilton Capital or its counsel.

Plaintiff explains that Dr. Medvidovic's pre-filing analysis is work product, in that it was prepared for Plaintiff and its counsel in connection with its decision to file this lawsuit. Thus, according to Plaintiff, Dr. Medvidovic's pre-filing analysis is covered by the Protective Order in this case which precludes from discovery any conversation or communication between counsel

and any testifying expert or consultant, except to the extent that such conversation or communication is relied upon by the expert.

As to the *Ansell* case, upon which Defendants have relied in part in seeking reconsideration or clarification of Special Master Order No. 13, Plaintiff contends that *Ansell* did not change controlling law and that the facts in that case are distinguishable from the situation involving Dr. Medvidovic. According to Plaintiff, *Ansell* involved a plaintiff who provided materials to an expert who was both a consultant and an expert, with the result that those materials did not constitute work product. By contrast, Defendants here do not seek production of anything that Plaintiff provided to Dr. Medvidovic. Rather they seek production of Dr. Medvidovic's pre-filing analysis for Plaintiff and its attorneys which is protected work product.

The *Ansell* case concerns a situation where a "dual hat" expert is initially hired as a consulting expert and then is subsequently retained as a testifying expert in the same case. The Court's opinion in the *Ansell* case finds that documents exchanged with the expert that concern the subject matter of the opinions in the expert report should be produced. There has been no evidence of documents provided to Dr. Medvidovic that have not already been produced to

Defendants. Dr. Medvidovic's expert report disclosed the documents he is relying upon. Thus, there is no reason to treat Dr. Medvidovic's pre-filing analysis as anything other than work product shared between Plaintiff and its counsel.

In their reply, Defendants take issue with much that is argued by Plaintiff. However, Defendants have not persuaded me that Dr. Medvidovic's pre-filing analysis was provided to Hamilton Capital or its counsel. Furthermore, I am not persuaded that Dr. Medvidovic's pre-filing analysis should be produced under the ruling in the *Ansell* case. It may be, however, that Dr. Medvidovic's deposition, currently scheduled for January 12, 2018, will elicit facts contrary to Plaintiff's representations, as to Dr. Medvidovic. In that hypothetical situation, Defendants can pursue appropriate discovery recourses.

IT IS ORDERED that Defendants' request for reconsideration or clarification of Special Master Order No. 13 is DENIED.

Dated: December 27, 2017

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