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January 4, 2018

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 v. Activision Blizzard Inc.*
C.A. No. 16-453 (RGA)

Dear Judge Andrews:

We write on behalf of Defendant Activision concerning Plaintiff Acceleration Bay's service of a "supplemental reply expert report" after the close of business on Tuesday. By serving such a report, Acceleration is flouting two of Your Honor's Orders concerning the case schedule and expert discovery. Acceleration Bay has also advised us that it will serve another supplemental expert report tomorrow. Activision respectfully requests that the untimely and unauthorized expert reports submitted by Acceleration Bay be stricken and that it be directed not to submit any additional expert reports. Alternatively, the summary judgment and trial schedule should be adjusted to allow Activision to respond to rebuttal reports in a reasonable manner. We have discussed this matter with Acceleration Bay's counsel but have not reached any resolution.

On February 27, 2017, the Court issued its Scheduling Order in this case (D.I. 62). Paragraph 10(a) provided for three rounds of expert reports in September, November and December of last year, and expressly stated that "No other expert reports will be permitted without either the consent of all parties or leave of the Court." The dates were thereafter adjusted slightly (D.I. 334), but the "no other expert reports" provision never changed.

On July 5, 2017, the Court ordered four additional sets of claim construction briefs, to be followed by hearings. (D.I. 206). Thereafter, on August 7, 2017, Activision requested that the Court modify the schedule so that expert reports (and other events) would follow the claim construction process. (D.I. 253) Activision argued that having expert reports after claim construction was "particularly appropriate" in these cases, given the number of patents, claims, and accused products. On August 14, 2017, Acceleration Bay opposed that request, arguing that there was no need to delay expert reports:

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[T]here is very little difference between the parties' constructions for the remaining terms, such that even if the Court does not issue supplemental claim construction orders prior to expert discovery or summary judgment motions, the parties can address their positions with the alternative constructions before the Court.

On September 8, 2017, the Court denied Activision's request. (D.I. 294)

The parties then went forward with expert reports from September through December, and expert depositions are now proceeding. Acceleration Bay's reports included lengthy opening and reply reports from Dr. Michael Mitzenmacher dated September 25 and December 14, 2017. Dr. Mitzenmacher's deposition was then scheduled for tomorrow, January 5, 2018.

On December 20, 2017, the Court issued two claim construction opinions (D.I. 386 and 387). Notwithstanding the Court's Orders that "[n]o other expert reports will be permitted without either the consent of all parties or leave of the Court" and that expert reports would be completed before the Court's claim constructions, on January 2, 2018, at 9:38 p.m., Acceleration Bay served a 34-page supplemental infringement report of Dr. Mitzenmacher to take into account the Court's December 20 claim construction opinions. It did so without seeking leave of Court or Activision's consent.

The supplemental Mitzenmacher report includes new opinions and analysis to account for the Court's December 20 claim construction rulings. For example, Dr. Mitzenmacher provides new analysis for the "portal computer" and "edge connection request" limitations of the '069 patent to address the Court's claim construction. In addition, he presents an entirely new DOE theory for the flooding limitations of the '344 patent, where he now opines that broadcast messages need only be received by "some but not all participants," as opposed to "all" participants. These issues could have been addressed in the previous expert reports, as the Court adopted constructions of these terms largely similar to those proposed by Defendants. Instead, Acceleration Bay waited until after the Court's claim construction rulings to provide new opinions and analysis after the date for providing expert reports and only two days before Dr. Mitzenmacher's deposition, without Activision's consent or seeking leave of Court.

Even though Dr. Mitzenmacher's deposition was two days away, Acceleration Bay did not give Activision any advance notice that it would serve the supplemental report. It did not discuss with Activision how that report might affect preparation for his deposition, how and when Activision's experts might respond, what effect additional expert reports would have on expert depositions, summary judgment and *Daubert* motions, and trial. Acceleration Bay simply decided to flout the Court's orders and to reverse field on its earlier position that expert reports need not await claim construction. And Acceleration Bay advised us today that it will serve a supplement report for another expert, Dr. Medvidovic, tomorrow, again without consent or leave of Court. Activision requests that the supplemental Mitzenmacher report be stricken and that Acceleration Bay be directed not to submit any additional expert reports without leave of Court or Activision's consent.

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If Acceleration Bay's new expert reports are not stricken, then Activision would like to discuss the timing of responsive reports, as well as summary judgment and *Daubert* motions, and trial. Acceleration Bay has advised us that it does not oppose Activision's submission of responsive expert reports, but Activision's infringement expert's deposition is scheduled for next Monday, January 8, and it is not feasible to respond to Acceleration Bay's reports without extending the schedule. Having created this problem, Acceleration Bay has advised us that it will not agree to any extension of the April 30 trial date. It is manifestly unreasonable for Acceleration Bay, having opposed an extension to the schedule to allow for expert reports to follow Markman, to now, just before its experts' depositions, serve new expert reports ostensibly accounting for the Court's Markman Orders, and to oppose any adjustments to the schedule.

Respectfully,

/s/ Jack B. Blumenfeld

Jack B. Blumenfeld (#1014)

JBB/dlw

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