

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

ACCELERATION BAY LLC,)	
)	C.A. No. 15-228 (RGA)
Plaintiff,)	
)	PUBLIC VERSION
v.)	December 12, 2017
)	
ACTIVISION BLIZZARD, INC.)	
)	
Defendant.)	

**LETTER TO THE HONORABLE RICHARD G. ANDREWS
FROM PHILIP A. ROVNER, ESQ.**



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January 5, 2018

PUBLIC VERSION

BY CM/ECF & HAND DELIVERY

The Honorable Richard G. Andrews
U.S. District Court for the District of Delaware
U.S. Courthouse
844 North King Street
Wilmington, DE 19801

Re: *Acceleration Bay LLC v. Activision Blizzard, Inc.*
D. Del., C.A. No. 16-453-RGA

Dear Judge Andrews:

Acceleration Bay writes in response to Defendant Activision's letter, dated January 4, 2017. Activision's request to strike Acceleration Bay's supplemental expert reports or delay the trial should be denied. "[E]vidence should be excluded sparingly and only in circumstances involving litigation conduct that is clearly unprofessional or inappropriate, and in circumstances creating prejudice to the party against whom the evidence is offered." *EON Corp. IP Holdings LLC v. FLO TV Incorporated*, 2013 WL 6504689, at *5 (D. Del. Dec. 12, 2013) (quoting *Bridgestone Sports Co, Ltd. v. Acushnet Co.*, 2007 WL 521894 (D. Del. Feb. 15, 2007)). Moreover, "the exclusion of 'critical evidence' such as conclusions on infringement or invalidity, should be considered 'an extreme sanction not normally to be imposed absent a showing of willful deception or flagrant disregard of a court order by the proponent of the evidence.'" *Id.* (quoting *In re. Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 791-92 (3d Cir.1994)).

Here, Acceleration Bay's infringement experts promptly provided brief supplemental reports that address the impact of the Court's recent Supplemental Claim Construction Orders, which construed fifteen groups of terms. D.I. 386, 387.¹ This supplementation is warranted

¹ Citations to "D.I. ___" refer to C.A. No. 16-453-RGA.

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because, for various terms, the Court formulated its own constructions that were not originally proposed by either party and, therefore, were not included in the original infringement reports.

In its letter, Activision completely ignores the *Pennypack* factors, likely because it knows it cannot meet them.² There is no prejudice to Activision from the service of these supplemental reports. Acceleration Bay's experts worked over the holidays to provide these supplements in advance of their depositions. Indeed, in its letter to the Court, Activision reveals that it has already thoroughly analyzed Dr. Mitzenmacher's report and provides no reason why it would be unprepared to depose him today. The supplemental reports are brief. Dr. Mitzenmacher's report is 34 pages, and Dr. Medvidović's report, which will be served today (one week in advance of his deposition), will be about 50 pages. The bulk of the supplemental reports consists of repeating the text of the various claim elements and the Court's new constructions, and there are only a handful of pages of substantive content in each report. *See* Ex. 1 (Mitzenmacher Supplemental Report). Moreover, for the majority of the terms, the experts simply confirm that the Court's Supplemental Claim Construction Orders do not change their opinions because the constructions were generally consistent with the parties' proposed constructions that were addressed in the previous reports. *Id.*

Nor can Activision claim any surprise regarding the supplemental reports. Acceleration Bay's experts disclosed to Activision long ago that they would provide such supplementation. Specifically, Drs. Mitzenmacher and Medvidović stated in their opening reports that "if the Court adopts a different construction for a term from that proposed by the parties, I reserve the right to revisit my opinion and supplement this report to address those modifications." Not surprisingly, Activision's experts similarly announced their intention to do the same. For example, Activision's non-infringement expert, Dr. Kelly, stated in his report that "I reserve the right to modify or supplement my opinions if the Court adopts a new construction, modifies any of the present constructions, or further construes the meanings of terms that occur in the asserted claims." Activision's other experts offered similar statements. Defendants previously argued to the Court that the subsequent rounds of claim construction orders (necessitated by Defendants' insistence on construing over fifty terms) would likely require supplemental reports. D.I. 253 at p. 2. As such, Activision's new contention that the experts should not be permitted to submit short supplemental reports rings hollow. Indeed, to cure any prejudice Activision might suffer, Acceleration Bay already informed Activision that it consents to their experts providing responsive supplemental reports, even if they are served after those experts' upcoming depositions.

Activision completely fails to show any incurable prejudice or bad faith on behalf of Acceleration Bay. The Court, therefore, should not strike the supplemental expert reports, which

² The *Pennypack* factors are "(1) prejudice to or surprise in fact of Defendant; (2) the ability of [Defendant] to cure the prejudice; (3) the extent to which allowing such witnesses or evidence would disrupt the orderly and efficient trial of the case or of other cases in the court; (4) any bad faith or willfulness in failing to comply with the court's order; and (5) the importance of the excluded evidence." *Insight Equity v. Transitions Optical, Inc.*, 2016 WL 7031281, at *1 (D. Del. Nov. 30, 2016) (internal quotations omitted).

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go to the key issue of infringement. Nor should the Court modify the trial date or case schedule. Trial is nearly four months away and Acceleration Bay is serving these brief reports several days in advance of the experts' depositions. In *Insight Equity*, this Court declined to strike Plaintiff's new alternative damages theory when trial was seven months away. *Insight Equity*, 2016 WL 7031281, at *1 ("This is not a case where Plaintiff seeks a second bite at the apple on the eve of trial. Instead trial is not scheduled for seven months. That is ample time to allow Plaintiff to prepare an alternative damages theory and for Defendant to test it.") (internal citation omitted). Here, Acceleration Bay is not presenting new infringement theories. Instead, its experts are merely conforming their opinions to the Court's claim construction order.

Respectfully,

/s/ Philip A. Rovner

Philip A. Rovner (#3215)

cc: All Counsel of Record (Via ECF Filing, Electronic Mail)
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