

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

ACCELERATION BAY LLC, )  
)  
Plaintiff, ) C.A. No. 16-453 (RGA)  
v. )  
) **PUBLIC VERSION**  
ACTIVISION BLIZZARD, INC. )  
)  
Defendant. )

**ACCELERATION BAY'S OPPOSITION TO ACTIVISION'S  
MOTION FOR LEAVE TO FILE FURTHER SUMMARY JUDGMENT MOTIONS**

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## **INTRODUCTION**

Activision's motion for leave to file yet further summary judgment motions (D.I. 654, "Motion") should be denied because Activision already moved on almost 40 issues and does not identify any new facts that warrant further briefing. Indeed, Activision admits that it already unsuccessfully moved for summary judgment on the very same issues for which it now seeks leave to file additional motions. Motion at 2. To date, Activision has submitted 150 pages of summary judgment and *Daubert* briefing and had a half-day hearing to address these issues. Activision premises its Motion on supposed "new facts," but does not identify any new facts relating to infringement. Instead, it points to the damages opinions in Mr. Parr's supplemental report, which do not raise any new infringement issues and are based on the 2017 infringement opinions of Acceleration Bay's technical experts. Therefore, the Court should deny Activision's request for yet another bite at the apple on non-infringement issues.

## **NATURE AND STAGE OF THE PROCEEDINGS**

The parties have engaged in extensive summary judgment motion practice before the Court. The Court authorized each side to submit 125 pages of briefing on summary judgment and *Daubert* motions. D.I. 425 (Oral Order re: Page Limits). Activision submitted almost its full allotment of pages of briefing raising approximately forty different issues. *See, e.g.*, D.I. 466 (Opening MSJ Brief); D.I. 508 (Reply MSJ Brief). Activision then filed an additional 25 pages of supplemental summary judgment briefing. D.I. 565 (Opening Supp. Brief), D.I. 575 (Reply Supp. Brief). On May 17, 2018, the Court held several hours of oral argument on the parties' motions for summary judgment. Activision did not move for reconsideration when the Court denied its motions for summary judgment in relevant part.

Activision included in its prior summary judgment motions the same three issues for which it now seeks additional summary judgment briefing: (1) non-infringement of the method

claims, (2) no worldwide infringement, and (3) no infringement of the m-regular limitation. *See, e.g.*, D.I. 466 at 7-9, 31-32, 10-19, 38-39.

As authorized by the Court, Acceleration Bay served a supplemental damages report from its expert, Mr. Russell Parr, on December 7, 2018. D.I. 619. Mr. Parr's report does not raise any new infringement theories.

### ARGUMENT

#### **I. There is No Good Cause For Activision to Have Further Summary Judgment Briefing**

Activision should not be given the opportunity to submit further briefing relating to non-infringement. Indeed, Activision admits that it already submitted voluminous briefing and lost on the same issues for which it now seeks leave to file further motions, namely the m-regular limitation, method claims, and foreign infringement. Motion at 1-2. Activision attempts to tie its Motion to the service of Mr. Parr's supplemental *damages* report in December 2018. But Mr. Parr's report is based on the same infringement theories Acceleration Bay has asserted throughout the case, and Activision's Motion does not identify any new infringement theory or relevant facts that could possibly justify further summary judgment briefing. *Liger6, LLC v. Sarto Antonio*, No. 13-4694 (JLL)(JAD), 2017 WL 3574845, at \*2-3 (D.N.J. Aug. 17, 2017) (denying motion for leave to file summary judgment where there were no new issues); *Bernstein v. Virgin Am., Inc.*, No. 15-cv-02277-JST, 2017 WL 7156361, at \*2 (N.D. Cal. Dec. 29, 2017) (denying motion for leave to file a second summary judgment motion where the "[defendant] makes plain that its proposed second summary judgment motion will address the same arguments that [it] made in its first motion.>").

Activision's failure to identify anything new in Mr. Parr's supplemental damages report related to infringement also means that Activision cannot show the good cause required to

modify this Court's scheduling order. Fed. R. Civ. P. 16(b)(4) ("A schedule may be modified only for good cause and with the judge's consent"); *Dow Chem. Canada Inc. v. HRD Corp.*, 287 F.R.D. 268, 270 (D. Del. 2012) (denying request to modify case schedule due to failure to show good cause).<sup>1</sup> Activision's Motion, therefore, should be denied.

Activision also argues that it should be permitted to file further motions to "renew the[se] issues" because it only "cursorily briefed" these issues the first time around. Motion at 2, 3. However, Activision's decision to prioritize some issues over others has nothing to do with the submission of Mr. Parr's supplemental report, which is the supposed *raison d'être* for its Motion. More importantly, Activision's failure to prioritize the issues in its summary judgment briefing is a problem of its own making. Rather than limit its summary judgment briefing to its strongest arguments, Activision took an everything-and-the-kitchen-sink approach to summary judgment, which burdened both the Court and Acceleration Bay. Activision should not be rewarded with further summary judgment briefing and further delay in the progression of this case to trial. *Dow Chem. Canada Inc.*, 287 F.R.D. at 270 (denying modification of scheduling order, recognizing that "[p]rejudice may include the delay of a trial date.") (citing *Redhead v. U.S.*, 686 F.2d 178, 184 (3d Cir. 1982)). Therefore, the Court should hold Activision accountable for its own strategic decisions and deny the Motion.

## **II. There is No Reason to Reconsider Infringement of the Method Claims**

As explained in the prior summary judgment briefing, Acceleration Bay's experts, Drs. Mitzenmacher and Medvidovic, demonstrated that Activision directly infringes the method

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<sup>1</sup> Activision makes the irrelevant and incorrect claim that Mr. Parr's supplemental report presents new damages theories not disclosed during discovery. This claim is irrelevant to Activision's Motion, which seeks leave to file renewed motions for summary judgment on infringement issues, not damages. Acceleration Bay will demonstrate that it timely disclosed Mr. Parr's damages opinions in its Opposition to Activision's Motion to Strike Mr. Parr's report which, pursuant to stipulated Order, will be submitted to the Court on April 5, 2019.

claims because its servers perform various of the claimed method steps and its customers' actions are attributable to Activision. D.I. 475 (2/23/18 Acceleration Bay's Opp. to Defs. MSJ) at 6–7. There is nothing new in Mr. Parr's damages report that requires reconsideration of this infringement issue by the Court. Acceleration Bay asserts the same method claims that it has been asserting throughout the case, and that were part of Dr. Meyer's earlier damages reports. Activision's Motion does not identify anything to the contrary. Motion at 4-5, D.I. 466 at 7-9.

### **III. There is No Reason to Reconsider Infringement Through Worldwide Sales and Activity**

The Court already considered and denied Activision's request for summary judgment on the issue of infringement through world-wide sales and infringement. *See* D.I. 466 at 31–32 (Activision arguing against worldwide damages); D.I. 505 (Activision's Reply Motion for Summary Judgment Brief) at 15–16. Acceleration Bay's infringement experts previously explained why worldwide sales and use of the accused products infringes the asserted patents, including because, even in sessions where the players are located outside of the United States, the claimed steps are performed by Activision's servers in the United States or are attributed to Activision due to its control over the players. D.I. 475 (Acceleration Bay's Opp. to Activision's Motion for Summary Judgment) at 23–25 (citing to various portions of Drs. Medvidovic's and Mitzenmacher's infringement reports).

These infringement claims have not changed, and Mr. Parr relies on these same infringement facts and analyses to support his damages opinions. For example, Mr. Parr explicitly stated in his report that he is relying on the 2017 infringement reports from Acceleration Bay's technical experts:

Dr. Medvidovic has indicated that people outside the United States are able to connect to people inside the United States, such that the games access servers in the U.S. during operation. I rely on Dr. Medvidovic's analysis that, because of

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