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8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **COUNTY OF LOS ANGELES**
10 **CENTRAL CIVIL WEST COURTHOUSE**

11 JASON WEST, an individual, and
VINCENT ZAMPELLA, an individual,

12 *Plaintiffs,*

13 v.

14 ACTIVISION PUBLISHING, INC., a
15 Delaware corporation; *et al,*

16 *Defendants.*

Case No. SC 107041

[Consolidated with Case No. SC 107757
Alderman, et al. v. Activision Publishing]

Hon. Elihu M. Berle | Department 323

Opposition to Activision Motion #9 of 15

**WEST'S AND ZAMPELLA'S
OPPOSITION TO ACTIVISION'S
MOTION *IN LIMINE* NO. 9 TO
PRECLUDE EVIDENCE OR ARGUMENT
REGARDING THOMAS FENADY;
DECLARATION OF STEVEN M. DUNST**

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20 AND RELATED CROSS-COMPLAINTS
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Hearing Date: March 5, 2012

Hearing Time: 9:00 a.m.

Trial Date: May 29, 2012

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25 **[LODGED CONDITIONALLY UNDER SEAL PURSUANT TO PROTECTIVE ORDER]**
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1 **I. INTRODUCTION**

2 Thomas Fenady testified that George Rose directed him in June or July 2009 to “dig up
3 dirt on Jason and Vince” because “we’re sick of dealing with these guys, their ego ... we just
4 want to get rid of them.” Activision was looking for “excuses to dump [Jason and Vince].”
5 When Fenady hesitated, Rose assured him that “this comes from Bobby [Kotick] directly.”

6 Activision now seeks to exclude everything about Fenady. But the Fenady evidence is
7 integral to plaintiffs’ case. It shows that Activision planned on firing them more than eight
8 months before it did, more than seven months before the so-called Manatt “independent”
9 investigation, and more than two months before plaintiffs had any contact with Electronic Arts.
10 In sum, it shows that the Manatt investigation was mere pretext, and that Activision did not fire
11 Jason and Vince because of their contact with EA or for any other supposed misconduct.

12 Activision’s principal basis for excluding the Fenady evidence is privilege. But Bobby
13 Kotick’s directive to dig up dirt on West Zampella is not privileged, even if the CEO’s request is
14 funneled through and the effort is led by a lawyer. Activision’s attempt to cloak Fenady in
15 privilege is also literally “baseless,” as Activision failed to provide evidentiary support through a
16 declaration from either Kotick or Rose. The deposition testimony Activision did provide actually
17 proves that the effort to dig up dirt served no privileged purpose. Activision’s argument is also
18 irrelevant, because it ignores the fact that Activision repeatedly waived any privilege over what
19 Rose asked Fenady to do and over what Fenady actually did to dig up dirt: at Rose’s deposition,
20 at Fenady’s deposition, and in its interrogatory responses. Activision’s motion should be denied.

21 **II. PROFFER OF TESTIMONY**

22 In June or July 2009, Activision’s Chief Legal Officer George Rose told IT professional
23 Thomas Fenady to “dig up dirt on Jason and Vince” because “we’re sick of dealing with these
24 guys, their ego ... we just want to get rid of them.” Dunst Decl. Ex. 1 at 275:3-276:12; Dunst
25 Decl. Ex. 3. In short, Rose was looking for “excuses to dump them.” Dunst Decl. Ex. 1 at
26 268:18-270:4, 275:3-276:12. Rose’s instruction to “dig up dirt” came straight from the top—
27 from Activision CEO Bobby Kotick. Dunst Decl. Ex. 1 at 271:13-274:21. Rose’s primary
28 directive was simple: “Don’t get caught doing it.” Dunst Decl. Ex. 1 at 285:3-287:1. Rose told

1 Fenady to hack into Jason and Vince’s email, voicemail, and personal computers to “see what
2 files and documents were on there.” Dunst Decl. Ex. 1 at 164:6-167:18, 277:23-279:11. When
3 Fenady expressed concerns over what he was being asked to, and was instructed by his direct
4 supervisor not to participate, Rose pressed: “Bobby [Kotick] will take care of you. This comes
5 from Bobby directly ... Don’t worry about repercussions.” Dunst Decl. Ex. 1 at 271:13- 274:21.
6 The scope of the investigation was “very wide”: anything related to Jason and Vince that could
7 give Activision justification for firing them. Dunst Decl. Ex. 1 at 288:17-291:22.

8 Fenady contacted third-party vendors to try to covertly break Infinity Ward’s passwords
9 and access plaintiffs’ information. But Microsoft refused to assist Activision without a court
10 order, and when Fenady approached a vendor that specializes in testing computer network
11 security systems (InGuardians), the vendor responded that it “didn’t feel comfortable doing it”
12 because of “legal hurdles.” Dunst Decl. Ex. 1 at 311:18-313:4, 323:7-328:10, 359:20-366:8.
13 Fenady then asked Activision’s Facilities Department for help gaining covert physical access to
14 Infinity Ward. With Rose’s blessing, they discussed staging a fake “fumigation” and a “mock
15 fire drill” at Infinity Ward to get Jason and Vince away from their computers long enough to
16 image their contents. Dunst Decl. Ex. 1 at 297:12-299:11.

17 **III. NO PRIVILEGE BARS THE INTRODUCTION OF FENADY’S TESTIMONY**

18 **A. The Fenady Evidence Is Not Privileged**

19 In asserting privilege, Activision emphasizes that Fenady acted “exclusively” at Rose’s
20 direction. As a factual matter, however, Rose was at best an intermediary. Fenady testified that
21 Rose asked him to dig up dirt at the behest of Kotick, Activision’s CEO and a non-lawyer. Dunst
22 Decl. Ex. 1 at 271:13- 274:21. But even if a lawyer directed the investigation, that is not enough
23 to claim privilege. It is not enough that a lawyer is involved; the communications and the work
24 must have a legal purpose. If the dominant purpose of a communication is anything other than to
25 secure or render legal service or advice, that communication is not privileged regardless of how
26 many lawyers are involved. *See Casualty & Surety Co. v. Superior Court*, 153 Cal. App. 3d 467,
27 475 (1984). Activision acknowledged as much in a hearing on another privilege issue: “In
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1 concept, if they are pure business discussions, yes, they would not be privileged just because you
2 stuck a lawyer in there. No one is claiming that on our side.” Dunst Decl. Ex. 4 at 36:8-10.

3 On this key element, Activision presents no evidence. Activision submits no declaration
4 from Rose or Kotick that Fenady dug up dirt for a legal purpose. The deposition testimony
5 Activision ignores proves the opposite. Rose testified that he enlisted Fenady’s help “in gathering
6 information” on Jason and Vince as part of “forming Project Icebreaker.” Dunst Decl. Ex. 2 at
7 228:16-229:25. Rose testified that Icebreaker was formed to conduct “contingency planning”
8 about Jason and Vince and the future of the Infinity Ward studio. Dunst Decl. Ex. 2 at 179:14-
9 181:22. Those are business objectives. Similarly, in Activision’s briefing and executive
10 declarations about Icebreaker, Activision and its business executives have repeatedly described
11 the project’s purpose as an “effort to *retain* West and Zampella as heads of Infinity Ward,
12 improve relations with the Infinity Ward studio, and undertake contingency planning to protect
13 the operations of Infinity Ward in the event those efforts were unsuccessful...” *See, e.g.*, Dunst
14 Decl. Ex. 5. (emphasis in original.) Again, those are business objectives, not legal objectives.¹

15 In addition, Activision cannot use privilege to hide what Fenady actually did to dig up
16 dirt. The attorney-client privilege allows the client “to refuse to disclose, and to prevent another
17 from disclosing, a confidential *communication* between client and lawyer.” *Costco Wholesale*
18 *Corp. v. Superior Court*, 47 Cal. 4th 725, 732 (Cal. 2009). It does not, however, shield conduct.
19 *See State Farm Fire & Casualty Co. v. Superior Court*, 54 Cal. App. 4th 625, 641 (1997)
20 (holding that while communications a former State Farm employee had with in-house counsel
21 were presumptively privileged, declarations about “inspections Ms. Zungia made of the automatic
22 insertion machine system (the AIM system)” were not)). Activision cannot block Fenady’s
23 testimony about what he did in response to Rose’s directive that he “dig up dirt” on Jason and

24 ¹ The evidence is not work product, either. Activision’s only case in support of its work-product
25 argument deals with work-product protection over actual *documents*, not conduct or verbal
26 communications like at issue here. *See BP Alaska Exploration, Inc. v. Superior Court*, 199 Cal.
27 App. 3d 1252-61 (1998). Qualified work product protects only “derivative” materials: materials
28 created by or derived from an attorney’s work on behalf of a client that reflect the attorney’s
evaluation or interpretation of the law or the facts. *See Mack v. Sup. Ct. (State of Calif.)*, 259 Cal.
App. 2d 7, 10 (1968). Fenady’s efforts to collect data and access Infinity Ward’s e-mail systems
are not “derivative” of any attorney’s thoughts or impressions, particularly since Rose didn’t even
give Fenady any specific misconduct issues to investigate.

1 Vince; that includes discussions with third-parties, steps he took to access Jason’s and Vince’s
2 emails and servers, and anything he considered doing in response to dig up dirt.

3 Even if there is a valid privilege, Activision still cannot hide the fact that Fenady had
4 communications with Rose about investigating Jason and Vince in the Summer of 2009. Indeed,
5 just to assert privilege, the asserting party *must* provide these foundational facts. The case law is
6 clear: the attorney-client privilege does not “protect independent facts related to a
7 communication; that a communication took place, and the time, date and participants in the
8 communication.” *State Farm Fire & Casualty Co. v. Superior Court*, 54 Cal. App. 4th 625, 639-
9 640 (1997). The subject matter of communications is also an unprotected foundational fact. *See*
10 *State Farm*, 54 Cal. App. 4th at 641 (“To the extent necessary, we will identify the subject matter
11 covered in each of the challenged paragraphs, but without disclosing the privileged
12 communication.”). Fenady must be allowed to testify that he communicated with Rose in
13 Summer 2009; that Bobby Kotick and Activision’s Facilities executives were also involved; and
14 that the subject of the communications was digging up dirt on Jason and Vince.

15 **B. Activision Waived Any Privilege Over The Fenady Evidence**

16 **1. Activision Waived Privilege By Affirmatively Eliciting Testimony**

17 With the client there, and despite being warned that West and Zampella would argue
18 waiver, Activision’s lawyer affirmatively elicited testimony concerning what Rose asked Fenady
19 to do and what Fenady actually did to dig up dirt. It did so not once, but twice: from both Fenady
20 and Rose. A subject-matter privilege waiver occurs whenever “any holder of the privilege,
21 without coercion, has disclosed a significant part of the communication or has consented to
22 disclosure made by anyone.” Cal. Evid. Code § 912(a).² The disclosure only needs to reveal
23 “some detail”—enough substantive information so that the specific content of the communication
24 has been disclosed. *See Julrik Productions, Inc. v. Chester*, 38 Ca. 3d 807, 811 (1974) (client
25 waived the attorney-client privilege in connection with a letter written by client to attorney when
26 client “testified under cross-examination not only that there was a letter but went into some detail

27 _____
28 ² The same doctrine governing attorney-client privilege waivers governs waivers of work product.
See McKesson HBOC, Inc. v. Superior Court, 115 Cal. App. 4th 1229, 1238-1239 (2004).

1 as to its contents”). The waiver doctrine’s purpose is “to protect against the unfairness that would
2 result from ... selectively disclosing privileged communications to an adversary, revealing those
3 that support the cause while claiming the shelter of the privilege to avoid disclosing those that are
4 less favorable.” *Tennenbaum v. Deloitte & Touche*, 77 F.3d 337, 340-341 (9th Cir. 1996).

5 Activision elicited testimony from Rose about what he asked Fenady to do:

6 Q: Mr. Rose, I just have a couple of questions for you. First, you testified earlier
7 today about discussions you had with Mr. Fenady. I have a specific question for
8 you. Did you ever ask Mr. Fenady to dig up dirt on Jason and Vince?

8 A: No. Absolutely not.

9 Dunst Decl. Ex. 2 at 285:1-10.

10 West and Zampella were clear at the Rose deposition that Activision risked waiver by
11 affirmatively eliciting testimony. Dunst Decl. Ex. 2 at 298:18-299:16. This testimony from Rose
12 reveals everything he claims he asked Fenady to do to dig up dirt on Jason and Vince. *See U.S. v.*
13 *Pinho*, 2003 WL 25772423, 4 (E.D. Pa. 2003) (“When Defendant testified that none of her
14 conversations with her attorney included a conversation about that specific subject, she was, in
15 fact, testifying to the content of all conversations that she had with her attorney regarding the
16 specific subject.”).

17 Activision did the same thing at Fenady’s deposition. With its client present, **Activision**
18 elicited testimony from Fenady about what Rose said to him:

19 Q: So as I understand it, the investigation in your mind included seeing whether you
20 could get access to Mr. Jason and Mr. Vince's work computers; correct?

20 A: Yes.

21 Q: It included determining whether you could get access to their work email; correct?

21 A: Correct.

22 Q: It included determining whether you could get access to their work voicemail?

22 A: Correct.

23 Q: It did not include getting access to any personal computer or personal telephone;
24 correct?

24 A: Correct.

25 Q: What I wanted to know is, Did I get it all?

26 A: The only thing I would include is, it involved engaging third parties in order to do
27 so. That was all part of -- the objective was the same.

27 Q: Which was to gain access --

28 A: To their work systems, yes.

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Q: When you used the shorthand, "digging dirt" in your message to Robert Dye, were you referring to what you have also called an "investigation"?

A: Yes.

Dunst Decl. Ex. 1 at 438:19-441:23.

Activision also elicited testimony from Fenady about what he actually did:

Q: To your knowledge did Activision conduct any kind of fire testing to gain access to computers in Infinity Ward?

A: To my knowledge, no.

Q: Did they, to your knowledge, do anything to gain access to the computers at Infinity Ward?

A: I only know it was discussed. I don't think it was acted upon.

Q: So far as you know, Activision never gained access in any kind of secret or surreptitious fashion to the computers at Infinity Ward?

A: My understanding is we were unable to.

Q: Sitting here today, are you able to say one way or the other if InGuardians was willing to go forward and do the engagement after the email that's your final recollection of the dealings with InGuardians?

A: I don't recall them doing any work after that, no.

Dunst Decl. Ex. 1 at 428:24-434:4.

West and Zampella cautioned Activision at Fenady's deposition that eliciting testimony would constitute a subject-matter waiver, much like they warned Activision at Rose's deposition:

"I just want to be clear, as we stated at the Rose deposition, we are not agreeing, as Jason and Vince, that your asking questions doesn't constitute a waiver. So you don't have to agree. I'm just stating for the record that [as to] your questions, I'm not agreeing is not a waiver." Dunst

Decl. Ex. 1 at 414:2-415:19. Activision dived right in anyway. The above testimony, that *Activision* elicited from Fenady, waives privilege over the subjects of what Rose asked Fenady to do and what Fenady did to try to dig up dirt on plaintiffs. That testimony specifically delineates the major tasks Rose asked Fenady to accomplish, including digging up dirt on Jason and Vince; accessing Jason's and Vince's work computers, email, voicemail; and engaging third-parties for help with password-breaking. Activision at one point even asked Fenady "Did I get it all?" to make sure that it elicited *everything* Rose asked Fenady to do as part of digging up dirt on Jason and Vince. The testimony also describes what Mr. Fenady actually did to dig up dirt, including:

1 whether penetration testing was performed; whether InGuardians went forward with password-
2 breaking; and whether Fenady was able to gain secret access to Jason's and Vince's computers.

3 Activision tries to claim that a stipulation at the November 17, 2011 hearing prevents any
4 waiver. Not so. To resolve the motion to compel Fenady's *second* deposition day, the parties
5 agreed that any further testimony by Fenady about "what he was instructed to do" by Rose and
6 "what he actually did" would take place without Activision waiving privilege. Dunst Decl. Ex. 6
7 at 86:24-87:20. That stipulation, however, was limited. First, Activision had already elicited the
8 above-quoted testimony from Rose *before* the November 17, 2011 hearing. Activision cannot
9 undo a waiver that already occurred. Second, the stipulation does not apply to the testimony
10 *Activision* elicited. The stipulation was to protect Activision from questions *plaintiffs* asked. It
11 did not mean that Activision itself could ask Fenady about anything on redirect—without waiving
12 privilege—and then move to exclude *the very testimony it elicited*.

13 2. Activision Also Waived Any Privilege By Letting Fenady Testify 14 Without Objection

15 Activision waived privilege when it did not object to testimony from Fenady during the
16 first day of his deposition. "[F]ailure to claim the privilege in any proceeding in which the holder
17 has the legal standing and opportunity to claim the privilege" waives privilege. Cal. Evid. Code §
18 912(a); *see People v. Hayes*, 21 Ca. 4th 1211, 1265 (1999).

19 Plaintiffs learned about Fenady from a Facebook conversation Fenady had with Robert
20 Dye, an Activision employee. Fenady told Dye that "atvi [Activision] asked me to dig up dirt on
21 [Jason and Vince] about 6 months prior to COD release. looking for excuses to dump them..."
22 Dunst Decl. Ex. 3. Plaintiffs produced this document on September 3, **2010** and Activision never
23 asserted any privilege over it. At the first day of Fenady's deposition, Activision's counsel, with
24 the client present, allowed Fenady to testify about the truth of what he told Dye:

25 Q: And when you made these statements, did they accurately -- well, first of all,
26 does this document accurately set forth what you said to Robert Dye and what
he said to you?

27 A: Yes. I would say yes, it did.

28 Q: And when you made your statements to Robert Dye, did they accurately express
your views on what you wrote?

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A: Yes.

Q: So you weren't like lying to him or being -- trying to mislead him or --

A: No.

Q: So you think all these statements --I mean, your testimony is these were true statements from your perspective?

A: Yes.

Dunst Decl. Ex. 1 at 166:24-167:13, 167:15-18.

This testimony, with no objection from Activision, results in a subject matter waiver. It shows that Rose asked Fenady to “dig up dirt” and told Fenady that he did so because Activision wanted an excuse to fire Jason and Vince. The Court’s November 17, 2011 stipulation discussed above does not apply here either; the waiver took place before any stipulation. The stipulation, directed to the second day of Fenady’s deposition, cannot undo an intentional waiver that already occurred during the first day of Fenady’s deposition.

3. Activision Further Waived Any Privilege By Allowing Rose To Testify Without Objection

Activision’s counsel, with its client there, also did not object when Rose testified, before the November 17 hearing, about what he asked Fenady to do:

Q: So am I correct to understand that as part of Project Icebreaker, you asked the Activision IT department to enable you to monitor the email traffic of Infinity Ward, including Mr. West and Mr. Zampella?

A: Correct.

Q: ... And you told me that one of the things you asked Mr. Fenady to do was to enable you to monitor the emails of Mr. West and Mr. Zampella and other people at Infinity Ward as part of Project Icebreaker. Were those efforts successful?

A: No.

Q: Did you ask Mr. Fenady or other people at information technology at Activision to do anything else as part of Project Icebreaker?

A: As part of the Project Icebreaker, once it proved to be impossible to do what I just said, no.

Dunst Decl. Ex. 2 at 240:5-10, 250:2-18.

Activision also, without objecting on privilege grounds, allowed Rose to testify about what Fenady actually did to dig up dirt:

1 Q: Was there any technical impediment to Mr. Fenady giving you access to the
2 Infinity Ward email system, given your statement that he told you he could go
3 behind it, their firewall, at will?
4 A: Yes.
5 Q: What was the impediment?
6 A: The impediment was that when he did go behind the firewall, he discovered that
7 Infinity Ward mail server was set up in such a way that it did not allow anyone
8 other than a highly qualified technical expert to be able to make sense, reconstruct,
9 discern whatever the traffic may be.
10 Q: And did he tell you he was not so qualified and that if -- well, start there. Did he
11 tell you he lacked those qualifications?
12 A: I don't remember him saying he lacks those qualifications. He -- I remember him
13 saying that he cannot really make sense of it.
14 Q: ...What was the information or work that Mr. Fenady was asking Microsoft to
15 assist with?
16 MR. MARENBERG: Well, objection. Foundation. You can answer. Go ahead.
17 A: As I mentioned, when Mr. Fenady had found his way behind the firewall, he
18 discovered the server set up in certain manner and the server -- in addition to the
19 email traffic that was going on from the server to various computers, the server
20 itself was password protected by one of the Infinity Ward employees. And in
21 order to ease the task of reading the emails, one of the possibilities was to be able
22 to read it directly from the server. But since the server was password protected,
23 there was no way to get to the server without having a password. And therefore,
24 Mr. Fenady at his own initiative contacted Microsoft to find out if there was a way
25 for him to get by the password.

16 Dunst Decl. Ex. 2 at 419:13-420:5, 421:1-422:19.

17 By allowing all this testimony without objecting, Activision waived any privilege. The
18 testimony from Rose that he asked Fenady to monitor Jason's and Vince's emails—*and nothing*
19 *else*—reveals *everything* he claims he asked Fenady to do to investigate Jason and Vince “as part
20 of Project Icebreaker.” Activision allowed Rose to testify about everything he asked Fenady to
21 do—all before the November 17 hearing—but now seeks to block Fenady from testifying about
22 *anything* Rose asked him to do on the subject. Such a selective waiver is unfair and not
23 permitted. See *McKesson HBOC, Inc. v. Sup. Ct.*, 115 Cal. App. 4th 1229, 1241 (2004). That's
24 not all: as shown above, Activision allowed Rose to testify about what Fenady did at Kotick's
25 direction, including Fenady's in-house efforts to get around IW's firewall and his discussions
26 with Microsoft on password-breaking. Dunst Decl. Ex. 2 at 419:13-420:5, 421:1-422:19.

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1 Activision never discusses this waiver in its motion, but at the hearing may point to a
2 stipulation the parties reached during the Rose deposition.³ The stipulation, however, does not
3 give Activision a basis for its motion. First, the stipulation does not undo testimony Activision
4 allowed Rose to give. The stipulation is clear that Activision was waiving any privilege that
5 may exist for the specific questions plaintiffs asked Rose—the parties simply agreed that those
6 answers would not result in a broader waiver beyond those questions. Activision cannot now
7 change its mind and prevent West and Zampella from asking Rose the same questions at trial
8 that they asked, and that Activision let Rose answer, at his deposition.

9 Second, Activision cannot prevent a broader subject-matter waiver either. The parties did
10 not agree to a blanket non-waiver rule. Rather, the parties agreed that any non-waiver stipulation
11 had to be specifically invoked for each question. Activision’s lawyer came up with the magic
12 words “same agreement as to waiver” that had to be said in order to take advantage of any non-
13 subject matter waiver stipulation:

14 MR. SCHWARTZ: ... it would be clearer for the record, because we always forget if we -
15 - when we have these running stipulations, until someone says otherwise. So, if you can
16 just find some shorthand way to say "I'll allow him to answer if it's not a broader waiver,"
17 however you want to express it.

18 MR. MARENBERG: All right. Well, we can --why don't we just say same -- "same
19 agreement as to waiver"?

20 MR. SCHWARTZ: That's fine.

21 Dust Decl. Ex. 2 at 213:15-215:10.

22 Activision referenced the stipulation numerous times throughout Rose’s deposition before
23 allowing him to answer questions. Dust Decl. Ex. 2 at 205:15-207:16, 208:15-209:22, 210:6-
24 213:14, 231:16-232:6, 232:8-22, 233:10-234:18; 357:18-360:5. As to the testimony quoted
25 above, however, Activision did not assert privilege or invoke the stipulation. It allowed all of
26 the Rose testimony quoted above—including whether Rose asked Fenady to monitor email
27 traffic, whether those efforts were successful, and whether Rose asked Fenady to do anything
28 else to “dig up dirt”—without *any* objection or reference to any stipulation as to subject-matter
waiver. Thus, Activision waived any privilege as to that testimony.

³ The parties stipulated that if Activision let Rose testify about Fenady issues, “one, it’s not a
waiver of any question or anything relating to Icebreaker other than that question and, two, I’m
not obligated to continue to go down -- down this road...” Dust Decl. Ex. 2 at 188:3-192:18.

1 **4. Activision Also Waived Any Privilege By Its Interrogatory Responses**

2 Once Fenady testified that Activision tried to dig up dirt on Jason and Vince, Activision
3 supplemented its response to plaintiffs’ interrogatories that asked about the existence of any
4 investigation into plaintiffs before Activision fired them. Its original answer identified the early
5 2010 Manatt investigation as the only investigation Activision conducted. But once documents
6 about Project Icebreaker came out, and once Rose and Fenady testified about the secret 2009
7 investigation into plaintiffs’ conduct, Activision amended its interrogatory response and admitted
8 that “George Rose managed efforts focusing on how to proceed with Activision’s future
9 relationship with West and Zampella and reviewing their conduct.” Dunst Decl. Ex. 8.
10 Activision cannot disclose that subject matter and then seek to block testimony concerning it.
11 Further, Activision also waived any privilege by presenting a skewed characterization of what
12 Rose did to investigate plaintiffs.

13 **C. Activision Is Estopped From Claiming Privilege**

14 In addition to waiver, Activision is also estopped from claiming privilege. As noted
15 above, in its initial interrogatory responses, Activision stated under oath that “The only
16 investigation conducted into Jason’s and Vince’s conduct was the fact-finding investigation
17 performed by Manatt, Phelps & Phillips LLP (“Manatt”) in early 2010.” Dunst Decl. Ex. 7. In a
18 Response to Request for Admission, Activision admitted that “Activision did not conduct any
19 investigation of West or Zampella prior to July 1, 2009.” Dunst Decl. Ex. 9. Activision cannot
20 now claim privilege over an investigation that it swore never existed. A Fourth Circuit case
21 makes this same point. There, an ex-wife denied in a deposition that her attorney told her to
22 remove an illegal wiretap from her husband’s phone. The court took the denial as a waiver of
23 privilege: “By answering the question as she did, Stables both waived her privilege and provided
24 probative evidence that she had no conversation with her attorney on the subject of a phone tap.
25 Without a communication, there is nothing to which the privilege can attach.” *Hawkins v.*
26 *Stables*, 148 F.3d 379, 381 (4th Cir. 1998).

1 **III. ACTIVISION’S OTHER ARGUMENTS DO NOT BAR THE EVIDENCE**

2 The probative value of Fenady’s testimony is not substantially outweighed by a
3 substantial danger of undue prejudice or confusion. Undue prejudice only occurs when “the jury
4 is emotionally inflamed against a party *without regard to the issues in the case.*” *Smalley v. Baty*,
5 128 Cal. App. 4th 977, 985 (2005) (emphasis added). Activision fails to mention the obvious:
6 evidence that the CEO and Chief Legal Officer of Activision initiated an effort to “dig up dirt”
7 on Jason and Vince months before their termination is probative of a vital issue in this case—that
8 Activision terminated Jason and Vince pre-textually, in bad faith. Whether Fenady knew about
9 Activision’s stated reasons for firing Jason and Vince does not lessen the impact of his testimony.
10 Also, Activision has the right to call George Rose or Bobby Kotick to counter anything it disputes
11 in Fenady’s testimony, substantially lessening any risk of undue prejudice. *See Pannu v. Land*
12 *Rover North America*, 191 Cal. App. 4th 1298, 1230 (2001).

13 Also, section 913(a) does not apply here. West and Zampella do not intend to comment
14 on or ask the jury to draw an adverse inference from Activision’s decision to exercise a privilege.

15 **IV. CONCLUSION**

16 For these reasons, Activision’s Motion *in Limine* No. 9 should be denied.

17 Dated: April 23, 2012.

Respectfully submitted,

18 ROBERT M. SCHWARTZ
19 VICTOR JIH
O’MELVENY & MYERS LLP

21 By: Robert M. Schwartz /s/
22 Robert M. Schwartz
23 Attorneys for Plaintiffs and Cross-Defendants
24 Jason West and Vincent Zampella