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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

<p>GAMETEK LLC,</p> <p align="right">Plaintiff,</p> <p align="center">vs.</p> <p>FACEBOOK, INC.; et al.,</p> <p align="right">Defendants.</p>		
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CASE NO. 12-CV-501 BEN (RBB)

**ORDER:**

**(1) DENYING BIG VIKING GAMES' MOTION TO STRIKE UNDISCLOSED CONSTRUCTION AND EXTRINSIC EVIDENCE**  
[Docket No. 181]

**(2) DENYING BIG VIKING GAMES' MOTION TO STRIKE PORTION OF GAMETEK LLC'S RESPONSIVE CLAIM CONSTRUCTION BRIEF**  
[Docket No. 187]

Presently before the Court is Defendant Big Viking Games, Inc.'s (1) Motion to Strike Undisclosed Construction and Extrinsic Evidence (Docket No. 181) and (2) Motion to Strike Portion of Plaintiff GameTek LLC's Responsive Claim Construction Brief (Docket No. 187). For the reasons stated below, both Motions are **DENIED**.

**I. MOTION TO STRIKE UNDISCLOSED CONSTRUCTION AND EXTRINSIC EVIDENCE**

Big Viking Games moves to strike GameTek's construction of "commitment of consideration" and the dictionary definitions GameTek seeks to rely on for the claim

1 phrases “set of demographics” and “commitment of consideration.”

2 The July 13, 2013 Scheduling Order sets forth the deadlines for disclosing  
3 proposed claim constructions and extrinsic evidence. (Docket No. 129.) On  
4 September 6, 2012, the Court modified the deadline for disclosure of proposed claim  
5 constructions and extrinsic evidence. (Docket Nos. 141, 151.) On October 15, 2012,  
6 the parties exchanged preliminary proposed constructions and extrinsic evidence.  
7 (Bekier Decl. [Docket No. 181-2] ¶ 2.) On November 5, 2012, the parties exchanged  
8 responsive proposed constructions and extrinsic evidence. (*Id.* ¶ 3.) On November 19,  
9 2012, after meeting and conferring, the parties filed their joint claim construction chart,  
10 worksheet, and hearing statement. (Docket Nos. 164, 165, 166.)

11 On January 13, 2013, the day before the opening claim construction briefs were  
12 due, GameTek proposed a different construction, along with three new extrinsic  
13 evidence dictionary definitions, for the phrase “commitment of consideration.” (Bekier  
14 Decl., Exh. A [Docket No. 181-3].) In addition, GameTek disclosed three new  
15 extrinsic evidence dictionary definitions for the phrase “set of demographics.” (*Id.*,  
16 Exh. B [Docket No. 181-4].) Big Viking Games moves to strike GameTek’s new  
17 proposed construction and extrinsic evidence, arguing that it was unfairly prejudiced  
18 in its ability to prepare its opening claim construction brief.

19 Under Patent Local Rule 4.1, parties are required to exchange “preliminary  
20 proposed construction[s] of each claim term, phrase, or clause which the parties have  
21 identified for claim construction purposes,” and “provide a preliminary identification  
22 of extrinsic evidence, including without limitation, dictionary definitions . . . .”  
23 PATENT L.R. 4.1.a & b. The parties then are required to provide responsive claim  
24 constructions “setting forth the responding party’s alternate construction” and  
25 corresponding extrinsic evidence. PATENT L.R. 4.1.c & d.

26 Under Federal Rule of Civil Procedure 37, however, when a party moves for an  
27 order compelling disclosure or discovery, “[t]he motion must include a certification  
28 that the movant has in good faith conferred or attempted to confer with the person or

1 party failing to make disclosure or discovery in an effort to obtain it without court  
2 action.” FED. R. CIV. P. 37(a)(1). Because this is a discovery and disclosure dispute,  
3 Rule 37 applies here. *See Pulse Eng’g, Inc. v. Mascon, Inc.*, No. 08-CV-0595, 2009  
4 WL 250058, at \*3 (S.D. Cal. Feb. 3, 2009).

5 GameTek argues that Big Viking Games never requested a meet and confer to  
6 discuss the alleged disclosure deficiencies, as required by Federal Rule of Civil  
7 Procedure 37. Big Viking Games does not assert that it requested the required meet  
8 and confer, nor does it otherwise address this argument by GameTek. Because Big  
9 Viking Games was obligated to make a good faith effort to meet and confer to resolve  
10 this dispute before bringing the present motion, Big Viking Games’ Motion to Strike  
11 Undisclosed Construction and Extrinsic Evidence is **DENIED**.

12 **II. MOTION TO STRIKE PORTION OF RESPONSIVE CLAIM CONSTRUCTION**  
13 **BRIEF**

14 Big Viking Games moves to strike GameTek’s arguments regarding the  
15 construction of the term “ordering” in GameTek’s Responsive Claim Construction  
16 Brief.

17 In its Opening Claim Construction Brief, GameTek briefly mentioned the term  
18 “ordering,” and indicated that this term was not in dispute:

19  
20 The remaining disputed phrases—“ordering the at least one selected  
21 game object without *interrupting* the *gaming action* of the at least one  
22 user” . . . —need no further construction beyond *gaming action* and  
23 *interrupting*. With each of these phrases, Plaintiff and Defendant are  
24 merely repeating their positions with respect to *gaming action*,  
*interrupting*, and *purchasing*. None of the other words such as  
“ordering” . . . appear to be in dispute, nor has either side requested  
construction of those words since they have an easily understandable  
ordinary meaning.

25 (Docket No. 178, at 22-23.) Big Viking Games provided a construction for “ordering”  
26 in its Opening Claim Construction Brief. (Docket No. 177, at 17-19.)

27 The parties filed responsive claim construction briefs on January 28, 2013.  
28 (Docket Nos. 180, 183.) GameTek’s Responsive Claim Construction Brief raised

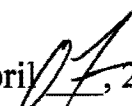
1 arguments against Big Viking Games' proposed construction for "ordering." (Docket  
2 No. 183, at 20-22.) Big Viking Games moves to strike GameTek's arguments  
3 regarding the construction of "ordering" in its Responsive Claim Construction Brief,  
4 arguing that it has been prejudiced by GameTek's failure to put forth its affirmative  
5 position in its Opening Claim Construction Brief.


6 Under the Patent Local Rules, parties are required to "simultaneously file and  
7 serve opening briefs and any evidence supporting their claim construction." PATENT  
8 L.R. 4.4(a). Subsequently, parties are to "simultaneously file and serve briefs  
9 responsive to the opposing party's opening brief and any evidence directly rebutting  
10 the supporting evidence contained in the opposing party's opening brief." PATENT L.R.  
11 4.4(b).

12 Here, although GameTek did not advance an affirmative proposed construction  
13 for "ordering" in its Opening Claim Construction Brief, GameTek simply responds to  
14 Big Viking Games' proposed construction in its Responsive Claim Construction Brief.  
15 To the extent that GameTek advanced new arguments that Big Viking Games has not  
16 had an opportunity to respond to, Big Viking Games will have an opportunity to  
17 address these arguments at the Claim Construction Hearing.

18 Accordingly, Big Viking Games' Motion to Strike Portion of Gametek LLC's  
19 Responsive Claim Construction Brief is **DENIED**.

20 **IT IS SO ORDERED.**

21  
22 DATED: April , 2013

  
HON. ROGER T. BENITEZ  
United States District Judge

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