

**MORRIS, NICHOLS, ARSHT & TUNNELL LLP**

1201 NORTH MARKET STREET  
P.O. BOX 1347  
WILMINGTON, DELAWARE 19899-1347

(302) 658-9200  
(302) 658-3989 FAX

**JACK B. BLUMENFELD**  
(302) 351-9291  
jblumenfeld@mmat.com

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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:

Activision writes regarding the Court's Oral Order of last Friday, April 13, concerning Plaintiff's damages expert report. The parties have extensively litigated this issue before the Special Master, and the Special Master specifically found that Plaintiff is "bound by" its March 11, 2015 hypothetical negotiation date. D.I. 227, p. 8. Plaintiff has always known March 2015 is not the date of the first alleged infringement. Plaintiff's own expert reports call the 2004 version of World of Warcraft an "infringing product" and state that all Call of Duty versions since 2007 include the accused technology.<sup>1</sup> Despite knowing that the March 2015 date was legally untenable, Plaintiff nevertheless refused to provide any other date even in response to an Order compelling it to provide this discovery. Plaintiff did so knowingly and for tactical reasons, including avoiding the [REDACTED], avoiding saying exactly what functionality is accused of infringement, or admitting that the highly successful earlier versions are noninfringing alternatives. As a result, Activision was denied discovery into possible alternative dates and relied on the Special Master's Order binding Plaintiff to that date throughout expert reports and expert discovery. Activision believes that it would be inappropriate and unfairly prejudicial to give Plaintiff an opportunity to revise its expert report to assert a different date at this time. A change of position by Plaintiff would flout the Special Master's Orders and would severely prejudice Activision.

<sup>1</sup> Both Dr. Meyer and Dr. Medvidovic expressly identify the 2004 version as an "infringing" product. Meyer Rpt. ¶23 & Ex. 3 (D.I.444, Ex. C-3); Medvidovic Rpt.(D.I. 443, Ex. A-1) ¶2 (identifying "base version" as infringing), ¶¶70,73 (stating that WoW released in 2004 and "that the multiplayer functionality is the same, in relevant part, for WoW and its expansions during the relevant time frame."). Similarly, Dr. Medvidovic states that the accused "Connectivity Graph" has been in use since 2007. Medvidovic ¶¶ 161, 190 ("All of CoD games from Call of Duty Modern Warfare 4 going forward use the Connectivity Graph Network's relaying of communications through peer applications programs.").

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Activision's Interrogatory No. 2 asked Plaintiff to identify the hypothetical negotiation date. **Exhibit A** (Pl. Response to Inter. No. 2), pp.7-9. Plaintiff's initial response confirmed that it understood the law, stating only "The hypothetical license negotiation date is the date on which Defendant's infringement began." *Id.* at 8. But Plaintiff did not actually identify any date in its response. On April 28, 2017, Activision moved to compel a substantive response and provide an actual date for the hypothetical negotiation. In opposing the Motion, Plaintiff confirmed that it understood it was required to undertake a bona fide analysis of when the alleged infringement began:

Acceleration Bay disclosed its contention that the date of the hypothetical negotiation is the date infringement began....which encompasses development and testing activities. ... Once Defendants provide that discovery to Acceleration Bay, it can update its response to Interrogatory No. 2.

**Exhibit B.** (May 8, 2017 Opp. Brief, pp. 3-4)

On May 19, 2017, the Special Master ordered Plaintiff to identify the date of the hypothetical negotiation in response to Interrogatory No. 2. D.I. 155. That Order was adopted by the Court over Plaintiff's objections. D.I. 193. Instead of answering the interrogatory in the manner it said it would, however, Plaintiff changed tack altogether and took the position that, for each Defendant in the three related cases, the date of the hypothetical negotiation was the date the respective initial Complaint was filed (for Activision: March 2015):

The hypothetical license negotiation date is the date on which Defendant's infringement began. Defendant's infringement began in March of 2015.

**Exhibit C.** (June 2, 2017 Interrogatory Response).

This response was both unreasonable and contradicted Plaintiff's promise to supplement based on a bona fide inquiry into the date of first alleged infringement. Plaintiff was well aware that the accused products were on sale before March 2015. Plaintiff's responses to this interrogatory amounted to a refusal to comply with the Special Master's Order. The Defendants went back to the Special Master, asking him to preclude the Plaintiff from offering any other date than March of 2015 for the hypothetical negotiation. Defendants explained the consequences of Plaintiff's choice of date in no uncertain terms:

Given that there is less than a month to complete fact discovery and Acceleration is refusing to provide a proper response to Party Specific Interrogatory No. 2, Acceleration should have to live with its response and should be precluded from arguing that the date of the hypothetical negotiation is any date other than the date Acceleration *served* the respective Complaints on each Defendant, regardless of any future impact that may have on Acceleration's ability to present its damages case.

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. . . Defendants intend to argue that any damages theory based on a hypothetical negotiation of the date of service is not supportable and should be stricken. Plaintiff is represented by savvy patent counsel and long ago retained a damages expert. It certainly has had every opportunity to provide the date of the hypothetical negotiation and has not taken this discovery obligation seriously. . . .

**Exhibit D** (Defendants' July 5, 2015 Brief ISO Motion to Preclude Arguments re Hypothetical Date) (original emphasis), p. 1, 3.

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Instead of taking this opportunity to comply with its discovery obligations, Plaintiff doubled down and agreed it **would be bound to that date**, saying that “Defendants do not explain why an order is necessary to limit Acceleration Bay to the position it has already taken.” (**Exhibit E**, July 12, 2017 Opp. Br. pp. 11-12). The Special Master ruled that Plaintiff was “bound by” its March 11, 2015 hypothetical negotiation date and, on that basis, found that no further relief was necessary. D.I. 227, p. 8.<sup>2</sup> Even though Plaintiff and its experts all knew that date was incorrect,<sup>3</sup> it did not appeal the Special Master’s Order. Plaintiff then insisted that its damages expert, Dr. Meyer, use the March 2015 hypothetical negotiation date.

Against that backdrop, there is no basis now to give Plaintiff another chance to do what it agreed it would not do, in order to block discovery. At all times, Acceleration Bay knew: (1) the governing law; (2) that it had deliberately chosen a date that was **not** the date of first infringement; and (3) that Activision would seek to exclude any expert testimony that relied on that date.

Plaintiff’s decision was designed to prejudice Activision and has had that effect. Many issues hinge from the date of the hypothetical negotiation, which Plaintiff has the burden to prove. By choosing the March 2015 date, Plaintiff hoped to avoid [REDACTED]. By refusing to state when infringement began, Plaintiff avoided having to state exactly what conduct is accused of infringement, and just as importantly, what conduct is not accused. Plaintiff’s current position is that there are no non-infringing alternatives to the asserted patents. Yet, based on the March 2015 date for first infringement, the versions of the accused games that existed before that date are all non-infringing alternatives to the patents.

Plaintiff’s protracted refusal to answer Activision’s interrogatory and its agreement to be bound by its position that the hypothetical negotiation date was the date of filing of the Complaint have prevented Activision from taking targeted discovery on damages. If Plaintiff had properly answered Activision’s interrogatory during discovery, it would have had to identify when Activision allegedly incorporated the purported infringing technology. Disclosure of this information would have allowed Activision to engage in targeted discovery relevant to both infringement and damages. That would have included expanded discovery from Boeing, the party to the hypothetical negotiation.

A key example of the targeted discovery focuses on the *Georgia-Pacific* factor concerning “utility and advantages of patent property over old modes and devices.” The date of the hypothetical negotiation, i.e., the date of first infringement defines what are the “old modes and devices.” Activision had been selling video games for many years before Plaintiff’s alleged date of first infringement of March 2015. Call of Duty was first released in 2003, and has had similar multiplayer capabilities since 2007. World of Warcraft was released in 2004 and has had substantially the same technology since then. If Plaintiff had identified a legitimate hypothetical negotiation date, Activision’s experts and its fact witnesses could have provided more specifics on

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<sup>2</sup> Specifically, the Order states “On June 2, 2017, in discovery responses, Plaintiff stated that the date of hypothetical negotiation was the date of service of the complaints in the 2015 filed cases. Plaintiff is bound by that statement and further relief to Defendants does not seem appropriate at this time.”

<sup>3</sup> See fn. 1.

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the technology in the available video games just before the hypothetical negotiation and how that non-infringing technology could have been continued or modified to remain non-infringing. Instead, Plaintiff has criticized Activision's experts and witnesses for allegedly not having provided sufficient detail about the allegedly non-infringing alternatives. Allowing Plaintiff to go back on its word and change the hypothetical negotiation date only days before trial will severely prejudice Activision and prevent it from responding to these other issues on the specifics of the technology in the available games just before the hypothetical negotiation date. *Eagle Harbor Holdings, LLC v. Ford Motor Co.*, No. C11-5503 BHS D.I. 608 (W.D. Wash. Mar. 16, 2015) (striking Plaintiff's expert's reliance on alternative hypothetical negotiation dates for failure to disclose and noting that the defendant was "highly prejudiced" by this failure).

Now, having agreed to be bound by its tactical choice in order to avoid complying with an order of the Special Master, which was affirmed by this Court, Plaintiff should not be permitted to reverse course and to set forth a new position on the date of first infringement just days before trial. Plaintiff was ordered to provide this discovery and made the strategic decision to refuse to do so. Giving Plaintiff another chance would unfairly prejudice Activision by forcing it to defend against a theory on which it obtained no discovery. Activision requests that Acceleration not be released from the consequences of its intentional refusal to answer critical discovery. If the Court determines not to exclude Plaintiff's damages expert opinion altogether, Activision requests that Plaintiff be forced to live with the consequences of its strategic refusal to answer these discovery requests: the Court should enter an Order finding that all versions of the Accused Products on sale before March 2015 are non-infringing alternatives.

Respectfully,

*/s/ Jack B. Blumenfeld*

Jack B. Blumenfeld (#1014)

JBB/dlw

Enclosures

cc: All Counsel of Record (Via Electronic Mail; w/ encl.)

# EXHIBIT A

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