

**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.)	

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



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April 17, 2018

BY CM/ECF & HAND DELIVERY

PUBLIC VERSION

April 24, 2018

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 brief response to Activision's April 16, 2018 letter to the Court regarding a supplemental damages report. D.I. 523.

Pursuant to the Court's Oral Order (D.I. 521), Acceleration Bay intends to serve a short supplemental damages expert report by close of business tomorrow, April 18. The Court should deny Activision's request that it reconsider its Oral Order because Activision's letter is premised on a series of incorrect claims that are contrary to the record.

First, the Special Master already rejected Activision's argument that Acceleration Bay is bound to the March 11, 2015 hypothetical negotiation date. Instead, the Special Master specifically found that Dr. Meyer may provide opinions based on alternative dates for the hypothetical negotiation, including those proposed by Activision, which she has already done and will confirm in her supplemental report. D.I. 347 (Special Master Order No. 12) at 7 (denying Activision's motion to strike Dr. Meyer's damages report: "Dr. Meyer allegedly states that damages would be the same regardless of the hypothetical negotiation date. According to Activision this violates the Special Master Order binding the Plaintiff to the date of service of the complaint as the hypothetical negotiation date."). Activision's lengthy summary of earlier discovery responses and orders critically omits this subsequent order from the Special Master which fully resolved this issue in favor of Acceleration Bay. Activision did not object to this Order, and it is now the law of the case. Moreover, Activision was not "denied discovery" into

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any issues based on the Special Master's Orders. To the contrary, it extensively deposed Dr. Meyer regarding the possible dates for the hypothetical negotiation and their potential impact on her damages analysis. *See, e.g.*, Ex. 1 (Meyer Tr.) at 128:9-140:16 ("I have also addressed in ... this report in various places and in my reply report, that I understand that there's a disagreement as to that [hypothetical negotiation] date and the implications for my analysis"), 233:14-239:1. Thus, the primary basis for Activision's request is wrong.

Second, Activision repeats its unsupported claim that Plaintiff's expert reports endorse Activision's dates of first infringement. They do not. Indeed, Acceleration Bay's experts did not have access to the earlier games in the franchises in which the current games are accused of infringement, and Activision never provided such discovery. For World of Warcraft, Activision points to a background statement from Dr. Meyer that the World of Warcraft franchise started in 2004. Dr. Meyer, a damages expert, never opined or suggested in any manner that the 2004 World of Warcraft game, [REDACTED] infringes the asserted claims. D.I. 503 (3/9/18 Pltf. MSJ Reply) at 22-23; Ex. 1 (Meyer Tr.) at 239:24-240:9.

Third, there is no merit to Activision's claim that Acceleration Bay is trying to avoid the [REDACTED] Dr. Meyer's expert report includes an extensive discussion of that license and explains why it is not a comparable license. She also stated that her opinion remains the same regardless of the date of the hypothetical negotiation. D.I. 480, Ex. 69 to Andre Decl. Opp. MSJ (9/25/17 Report) at ¶¶ 60-67.

Fourth, there will be no prejudice to Activision from the service of a supplemental report by Dr. Meyer, which will conform her prior opinions with the Court's Order. Dr. Meyer already explicitly opined that different dates for the hypothetical negotiation, including those dates proposed by Activision and/or [REDACTED], would not change her ultimate opinions about damages, and Activision deposed her at length on these exact opinions. D.I. 475 (2/23/18 Pltf. MSJ Opp.) at 35-36; D.I. 480, Ex. 69 to Andre Decl. Opp. MSJ (9/25/17 Report) at ¶ 46, n. 133; D.I. 503 (3/9/18 Pltf. MSJ Reply) at 19-23; Ex. 1 (Meyer Tr.) at *e.g.*, 128:9-140:16, 233:14-239:1.

Finally, there is no basis for the Court to find that Activision's pre-March 2015 games are somehow non-infringing alternatives. The Special Master already rejected Activision's claim that Acceleration Bay failed to disclose its infringement theories during discovery. D.I. 347 at 7; D.I. 276 at 7-8. And Acceleration Bay never agreed that the earlier games are non-infringing, nor did Activision provide any evidence to support this claim. To the contrary, Acceleration Bay provided detailed interrogatory responses and un rebutted expert opinions explaining that Activision did not present any evidence that these earlier products, not at issue in the case, are non-infringing or economically acceptable substitutes for the accused products. *See, e.g.*, Ex. 2 (7/24/17 Resp. to Rog. No. 6) at 4-5; D.I. 454-455, Ex. 40 to Andre Decl. MSJ (9/25/17 Medvidović Report) at ¶ 642; D.I. 454, Ex. 35 to Andre Decl. MSJ (12/14/17 Mitzenmacher Report) at ¶ 456. These two elements are necessary for Activision to even suggest they are non-infringing alternatives.

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Accordingly, the Court should deny Activision's request to reconsider its order, and allow Acceleration Bay's damages expert to serve a short supplemental expert report consistent with her prior reports and the Court's Order.

Respectfully,

/s/ Philip A. Rovner

Philip A. Rovner (#3215)

Attachments

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