IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

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

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

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April 26, 2018

BY CM/ECF & HAND DELIVERY

The Honorable Richard G. Andrews
U.S. District Court for the District of Delaware
U.S. Courthouse
844 North King Street
Wilmington, DE 19801

PUBLIC VERSION
May 7, 2018

Re: *Acceleration Bay LLC v. Activision Blizzard, Inc.*,
D. Del., C.A. No. 16-453-RGA

Dear Judge Andrews:

Acceleration Bay submits this letter pursuant to Your Honor's directive during the pretrial conference on April 20, 2018 to (i) identify the docket numbers of complete copies of the opening, reply and supplemental reports of Acceleration Bay's damages expert, Dr. Christine Meyer, and (ii) provide citations to the portions of Dr. Meyer's report addressing the date of the hypothetical negotiation. In addition, Acceleration Bay responds to Activision's unauthorized April 24, 2018 letter that requests for a second time, the Court reconsider its order to allow Dr. Meyer's to submit a supplemental report.

As a preliminary matter, Acceleration Bay filed complete copies of Dr. Meyer's opening and reply reports with its summary judgment opposition briefing. D.I. 480 (Andre Decl., Volume 1) at Ex. 69 (Meyer Opening Rpt.) and Ex. 70 (Meyer Reply Rpt.). Activision filed Dr. Meyer's supplemental report under seal as D.I. 534, Attachment 1.

Dr. Meyer's analysis of the hypothetical negotiation is entirely consistent with this Court's Order that "the date of first infringement is the relevant date for a hypothetical negotiation." D.I. 521. Dr. Meyer performed a comprehensive analysis of the hypothetical negotiation utilizing several alternative dates, including those Activision proposed.

In particular, regarding the date of first infringement, Dr. Meyer identified in her report the products accused of infringement (Meyer Opening Rpt. ¶ 20 n.34), the release date of each accused product (*id.* at ¶¶ 21-23 *id.* at Ex. 3) and the issue date of each of the asserted patents (*id.* at ¶¶ 14-19). *See also* Meyer Reply Rpt. ¶¶ 11, 14; Meyer Supp. Rpt. ¶¶ 7-8; *id.* at S15-S18. This is evidence that relates to the date of first infringement, which requires both that the patent issued and the accused product is sold. *Boston Scientific Corp. v. Cordis Corp.*, 777 F. Supp. 2d 783, 791 (D. Del. 2011) ("Infringement begins when both the patent has issued and the accused

products are sold."); *Fujifilm Corp. v. Motorola Mobility LLC*, No. 12-cv-03587-WHO, 2015 WL 1265009, at *3 (N.D. Cal. Mar. 19, 2015) (the hypothetical negotiation date must be tied to the start of infringement ***by the products actually accused of infringement***, "not just before the start of infringement by any [] product that incorporates allegedly infringing features") (emphasis added); *Applied Med. Res. Corp. v. U.S. Surgical Corp.*, 435 F.3d 1356, 1361–62 (Fed. Cir. 2006) (hypothetical negotiation must be for accused products, not earlier products).

In addition, Dr. Meyer considered the hypothetical negotiation from each of the dates Activision's damages expert proposed, namely March 2, 2004 (i.e., earliest issuance date of one of the asserted patents), August 2007 (i.e., development period of Call of Duty: Modern Warfare, a Call of Duty game ***not*** accused of infringement, but in the same franchise of games as the two Call of Duty games that Acceleration Bay is accusing of infringement) and "as late as 2014" (i.e., development period of Destiny). Meyer Opening Rpt. ¶ 45, ¶ 46 n.133, ¶ 149, n.345; Meyer Reply. Rpt. ¶¶ 11-17; Meyer Supp. Rpt. ¶¶ 7-12. Dr. Meyer ultimately concluded that for each alternative hypothetical negotiation date, her opinion of the reasonable royalty did not change. *Id.*[1] Notably, Activision's damages expert, Ms. Lawton, did a similar analysis, determining that her opinion did not change if the hypothetical negotiation date was March 2, 2004, August/September 2007 or late 2014. D.I. 486-487, Ex. C-6 to Barry Decl. in Support of Opp. (Lawton Rpt.) at ¶¶ 24(b), 878-895.[2]

As explained in Acceleration Bay's April 17, 2018 letter, Dr. Meyer's supplemental report is consistent with her opening and reply reports, as well as with Orders by this Court and the Special Master. To argue otherwise, Activision conflates separate and independent rulings from the Special Master that, when correctly reviewed, establish that Activision has no grounds to exclude Dr. Meyer's opinion based upon these orders.

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[1] In reaching this conclusion, Dr. Meyer evaluated numerous inputs, including, for example: (i) Activision's profits during the damages period, of which the parties to the hypothetical negotiation would be aware (Meyer Opening Rpt. ¶¶ 49-50; *id*., at Ex. 4A-E); (ii) purported non-infringing alternatives proposed by Activision (Meyer Opening Rpt. at ¶¶ 51-57; *id*. at Ex. 5); (iii) prior licenses to the asserted patents, including the [redacted] License (Meyer Opening Rpt. ¶¶ 60-67); (iv) Activision's licenses, which date back to 2003 (Meyer Opening Rpt. at ¶¶ 68-97); (v) the relationship between the negotiating parties (Meyer Opening Rpt. ¶ 108; Meyer Reply Rpt. ¶ 13); and (vi) Activision's use of the invention (Meyer Opening Rpt. at ¶ 132-135; Meyer Reply Rpt. ¶ 14).

[2] As she explained in her reports, Dr. Meyer invoked the "book of wisdom" doctrine when evaluating the hypothetical negotiation in 2004 and/or 2007 to make the parties aware of the state of the video game market and the scope of infringement around the time of the accused infringement in the 2015 timeframe. Meyer Opening Rpt. ¶¶ 62-63, 149 n.345; Meyer Reply Rpt. ¶¶ 8, 16-17, 21; Meyer Supp. Rpt. ¶ 7, 10. Dr. Meyer explained that she did not invoke the "book of wisdom" for the analysis pursuant to a hypothetical negotiation date in 2014, since the nature of multiplayer would be similar in 2015. Meyer Supp. Rpt. ¶ 7 n.8.

Contrary to Activision's claim, the Special Master already ruled that Dr. Meyer's report containing opinions based on alternative dates for the hypothetical negotiation, including the dates proposed by Activision, ***does not violate*** any of the Special Master's prior orders. After Dr. Meyer served her expert report, Activision filed a baseless motion to exclude Dr. Meyer's opinion that her reasonable royalty would remain the same under alternate hypothetical negotiation dates. Activision raised the exact same arguments it asserts in its letter campaign regarding Dr. Meyer's supplemental report, namely that Dr. Meyer's opinion violates the Special Master's prior order that Acceleration Bay is bound to the hypothetical negotiation date identified in its interrogatory responses. D.I. 347 (Special Master Order No. 12) at 7 ("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."). ***The Special Master denied Activision's motion***. *Id*. at 8-9.

Critically, ***Activision did not appeal the Special Master's Order*** and, therefore, it is now the law of the case. D.I. 62 (Rule 16 Scheduling Order) ("All Orders issued by the Special Master are deemed issued in these Actions."). Ignoring the Special Master's Order denying Activision's motion to strike Dr. Meyer's expert report, Activision instead focuses on an earlier discovery ruling by the Special Master. In the Special Master's Order No. 3, the Special Master ***denied Activision's motion*** seeking to preclude Acceleration Bay from arguing a different hypothetical date than Acceleration Bay identified in its interrogatory responses based on discovery disclosures. D.I. 227 (Special Master Order No. 6) at 8. Activision's contention that this order precludes Dr. Meyer's opinion in her supplemental report regarding the hypothetical negotiation is nothing more than an attempt to ignore the fact that ***the Special Master denied Activision's subsequent motion to strike,*** in which Activision asserted that Acceleration Bay's expert could not present an analysis regarding any other hypothetical negotiation dates. D.I. 347 (Special Master Order No. 12) at 7.

Moreover, and as explained in Acceleration Bay's briefing to the Special Master, Dr. Meyer's opinion is consistent with Acceleration Bay's interrogatory response that explicitly stated Dr. Meyer would address the information included in Activision's interrogatory responses, including the hypothetical negotiation dates that Activision proposes. Ex. A attached hereto, Relevant Portions of 10/30/2017 Pl. Opp. at 10-11. Thus, Activision's cherry-picking language from the Special Master's orders to conflate discovery issues with its present *Daubert* challenge is improper.

Furthermore, neither Dr. Meyer nor Dr. Medvidović opined on infringement of earlier versions of the accused products. Indeed, Activision does not point to any actual "opinion" where an analysis was done that explicitly stated earlier versions were infringing. Dr. Meyer's reasonable royalty opinion was limited to the accused products and did not include earlier versions. Dr. Meyer is not an infringement expert and repeatedly testified that she did not offer an infringement opinion. Ex. B attached hereto (Meyer Tr.) at 239:24-240:9. Dr. Meyer did ***not*** identify the 2004 version of the World of Warcraft franchise as an infringing product. Exhibit 3 to her report, which Activision cites, simply lists a history of the franchises and which platforms are implicated. Meyer Opening Rpt. ¶ 23; *id*. at Ex. 3. That earlier games are in the same

franchises as the accused products is not a contention or "admission" that they infringe the asserted claims.

The specious nature of Activision's argument regarding Dr. Medvidović's opinion is apparent because Activision cherry-picks a single line from his expert report, but ***nowhere*** points to an affirmative opinion by Dr. Medvidović that earlier versions of Call of Duty infringe. Activision does not dispute that it did not make its source code available for earlier versions of Word of Warcraft or Destiny, and its argument that the games themselves are publicly available is a red-herring. Activision is using Dr. Meyer's report, which contains no opinion regarding the infringement of earlier versions of the accused products, to confirm the baseless hypothetical negotiation date of Activision's expert. Activision was forced to rely on its incorrect characterization of Dr. Meyer's report because it did not produce any of its own evidence or opinion that the first date of infringement coincided with earlier versions of the accused products. Indeed, as explained in Acceleration Bay's *Daubert* motion to preclude Ms. Lawton's opinion, there is no evidence—and Ms. Lawton relied on none—establishing that earlier versions of the accused products infringe. D.I. 448 at 43-45.

Finally, Activision's suggestion that Dr. Meyer dismissed the [redacted] License solely because of the date of the hypothetical negotiation is wrong. Dr. Meyer provided an extensive discussion of why the [redacted] license is not comparable, including the significant differences in the field of use of the [redacted] License compared to the hypothetical license, the availability of platforms and associated revenues at the time of the hypothetical negotiation going back to 2005, and that all but one of the infringing products were launched after the effective date of the of the [redacted] License. Meyer Opening Rpt. ¶¶ 63-65; Meyer Reply. Rpt. ¶¶ 14-15, 16-17. Thus, Activision's claim regarding Dr. Meyer's analysis of the [redacted] License has no support.

For these reasons and as set forth in Acceleration Bay's April 17, 2018 letter, the Court should deny Activision's request that it reverse its Order authorizing Dr. Meyer's supplemental report.

Respectfully,

/s/ Philip A. Rovner

Philip A. Rovner (#3215)

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

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