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.	)	

PLAINTIFF ACCELERATION BAY LLC'S
MOTION FOR REARGUMENT AND RECONSIDERATION

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Pursuant to Local Rule 7.1.5, Plaintiff Acceleration Bay LLC ("Acceleration Bay") respectfully moves for reconsideration of the portion of the Court's October 17, 2018 Order (Dkt. No. 600, the "Order") excluding Acceleration Bay from using a publisher agreement between Defendant Activision Blizzard, Inc. ("Activision") and non-party Microsoft Licensing G.P. (Ex. 1, the "Microsoft Publisher Agreement") for damages where the Court allowed Activision to use another publisher agreement in moving to limit Acceleration Bay's damages.

Here, the Court permitted Activision to rely on a redacted publisher agreement to preclude liability and damages as to PlayStation versions of the accused products (Ex. 2, the "Sony Publisher Agreements") on a motion to dismiss, but then precluded Acceleration Bay from using the parallel unredacted Microsoft Publisher Agreement in which Activision provided a royalty rate, which is relevant to damages. Because the Microsoft Publisher Agreement is relevant evidence of the value to Activision of access to the technology accused of infringement in this case, it is admissible under Fed. R. Evid. 401-402. The Court's finding otherwise constitutes clear error of law and fact, and will result in manifest injustice to Acceleration Bay.

I. ARGUMENT

Reconsideration and reversal of the Court's rulings that Microsoft Publisher Agreement is not relevant and therefore inadmissible is necessary because it (i) is based on clear error of law regarding the admissibility of relevant evidence; (ii) misapprehends or overlooks facts that, if properly considered, would have led the Court to reach a contrary result regarding relevance; and (iii) results in manifest injustice to Acceleration Bay by rewarding Activision for its improper discovery tactics. *Max's Seafood Cafe v. Quinteros*, 176 F.3d 669, 677 (3d Cir. 1999) (reconsideration is warranted "to correct a clear error of law or fact to prevent manifest injustice"); *Dentsply Int'l, Inc. v. Kerr Mfg. Co.*, 42 F. Supp. 2d 385, 419 (D. Del. 1999) (courts

have discretion to reconsider their prior rulings); *Karr v. Castle*, 768 F. Supp. 1087, 1093 (D. Del. 1991) ("the court should reconsider a prior decision when it appears the court has overlooked facts . . . which, had they been considered, might reasonably have altered the result.")

First, the Microsoft Publisher Agreement satisfies the test for admissibility under the Federal Rules of Evidence. In particular, Fed. R. Evid. 401 provides that relevant evidence "means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence," which is a relatively low hurdle to clear. *Thomas v. Dragovich*, 142 F. App'x 33, 37 (3d Cir. 2005) (threshold for finding evidence relevant is low). In turn, Fed. R. Evid. 402 provides that relevant evidence is admissible.

Specifically, the Microsoft Publisher Agreement is a relevant indicator of the value to Activision to obtain access to the licenses that allow the accused products to access the infringing technology platform. Acceleration Bay's damages expert, Dr. Christine Meyer, highlighted this relevance in her report wherein she opines that, while the Microsoft Publisher Agreement is not a "directly comparable" patent license, it provides valuable insight into the royalty rate Activision was willing to pay for access to the infringing platform. Dkt. No. 480, Ex. 69, Meyer Rpt. at ¶ 72.

Activision confirmed the relevance of its publisher agreements to damages because it relied upon the Sony Publisher Agreements to claim Sony licensed the Asserted Patents to Activision. Dkt. No. 268 n.3 (citing Dkt. No. 235, 7/10/17 Hearing Tr. at 37:2-12). Indeed, despite admitting that it "does not have a written license agreement with Sony expressly identifying the Asserted Patents by number," Activision nonetheless used its Sony Publisher Agreements which redacted the royalty rates to claim that Acceleration Bay did not have

standing to pursue the Sony PlayStation versions of the accused products. Ex. 3, Excerpted Portions of Activision Response to Common Request for Admission No. 1; Dkt. No. 18. At the hearing, Activision represented that its publisher agreement with Sony granted it a license to the Asserted Patents. Dkt. No. 268 at 3 n. 3 ("As a side note, Defendant[s] assert they have actual licenses (Tr. 37:2-12) . . .").[1] The Microsoft and Sony Publisher Agreements contain parallel patent license provisions regarding, for example, royalty rate information. *Compare* Ex. 1, Microsoft Publisher Agreement at 28-29 (royalties paid for use of platform) *with* Ex. 2, Sony Publisher Agreements at 27 (redacted royalty rates applicable to licensed products). The Court committed clear error in permitting Activision to use its publisher agreement as a sword and thus relevant for purposes of its defenses, but then shield Activision when it is relevant for purposes of Acceleration Bay's damages claims.

Second, the Court's relevancy determination is premised on a clear error of fact insomuch as the Court overlooked and/or misapprehended facts confirming the relevance of the Microsoft Publisher Agreement and the discovery efforts surrounding Activision's publisher agreements. As explained above, despite using its parallel Sony Publisher Agreements as a sword to limit damages, Activision concealed with redactions the royalty rates associated and unit pricing with that agreement that allegedly licensed Acceleration Bay's Asserted Patents to Activision, as well

[1] Dkt. No. 235, 7/10/17 Hearing Tr. at 37:2-12: "Activision Counsel: **All of the defendants are licensed**. But that is an affirmative defense, and we would rather not have to go through expert reports on half the products in this case to get to an affirmative defense. So, if the Court would indulge a Summary Judgment on license defense, we can do that. **All of these products are licensed products. And they are licensed not only because of directly through the Sony license, which does not require us to be licensed, by the way, because all these products are manufactured by Sony.** All we do is provide code to the products to Sony, who makes the games and distributes them." (emphasis added).

as its other confidential publisher agreements. Ex. 4, Excerpted Portions of 8/16/18 Pl. Ltr. Br. re: Discovery Motions at 1-3, 5.

When Acceleration Bay moved to unredact the financial terms of these publisher agreements, Activision argued that, notwithstanding its reliance on certain provisions of these agreements as a defense to infringement, "these agreements are extremely confidential and sensitive, such that the redacted financial terms should not be disclosed even under the Protective Order." Dkt. No. 276 at 3. Activision also contended that the agreements are not relevant to the hypothetical negotiation. *Id.* The Special Master declined to grant Acceleration Bay's motion to compel, based on the sensitivity of the publisher agreements and stating that they were "not likely to be relevant." Dkt. No. 276 at 2-3. Thus, Activision blocked Acceleration Bay from obtaining the financial terms of the Sony Publisher Agreements and other publisher agreements.

The Special Master's reasoning does not apply, however, to Activision's Microsoft Publisher Agreement — which was not at issue in Acceleration Bay's motion to compel — because Activision did not redact the royalty rate or other information from the Microsoft Publisher Agreement. Activision deemed the Microsoft Publisher Agreement relevant and therefore produced it without redactions to Acceleration Bay during discovery. The financial terms of the Microsoft Publisher Agreement are relevant because they evidence what Activision is willing to pay for its arrangement with Microsoft and something that Activision, as well as the patentee, would be aware of at the time of the hypothetical negotiation.

Thus, the Microsoft Publisher Agreement which includes similar rights as in the Sony Publisher Agreements provides insight into what the parties knew and understood at the time of

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