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December 7, 2018

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:

We write in response to Acceleration Bay's letter brief of yesterday seeking user login data for the World of Warcraft franchise. (D.I. 631.)

Activision Has Supplemented Its Financial Data

At the October 19 pretrial conference, Activision agreed to supplement its financial data for the accused games in this case. (*See* D.I. 631, Ex. 1 at 123:9 to 124:3.) As promised, Activision supplemented its financial data the next business day, including revenue, sales, costs, profits and unit data through Q3 of 2018. (D.I. 631, Ex. 3 at 6.) Since then, Activision has supplied additional financial data where reasonably requested by Acceleration Bay, including details relating to specific platforms and users where possible. (D.I. 631, Ex. 3 at p. 6.) Activision has delivered what was promised.

Activision Did Not Agree To Provide Updated Account Activity For World of Warcraft

The data now being requested by Acceleration Bay is not financial data. Rather, Acceleration Bay is seeking information relating to user logins to World of Warcraft. During fact discovery, the Special Master denied Acceleration's motion to compel that included a request for "usage data." (D.I. 227 at 4-5.)¹ Activision nevertheless provided a limited set of

¹ Although Acceleration Bay objected to other aspects of that order (*see* D.I. 254), Acceleration Bay did not object to the denial of its motion to compel the "usage data" at issue here.

The Honorable Richard G. Andrews

December 7, 2018

Page 2

user login data for World of Warcraft for a limited period of time. Acceleration Bay accepted this production and did not seek further relief on this issue during fact discovery.

Activision never agreed to supplement this data. At the time of the pretrial conference, the parties were actively preparing for the October 29 trial. Acceleration Bay wanted supplemental sales data so that its damages expert could update her damages computation for trial. Dr. Meyer did not provide a damages computation based on the login data for World of Warcraft and never sought supplementation of that data before the pretrial conference. The Court has stricken Dr. Meyer's opinions underlying her damages computations and given Acceleration Bay one final opportunity to advance an admissible damages case. (D.I. 619.)

With this opportunity in hand, Acceleration Bay now seeks to recast Activision's representation at the pretrial conference into some open-ended promise to provide whatever discovery Acceleration Bay demands in connection with its forthcoming damages report. The Court did not re-open fact discovery. Acceleration Bay's request should be denied.

The Requested Information Is Not Relevant and Its Production is Burdensome

Acceleration Bay's request also should be denied because it seeks irrelevant information. Acceleration Bay seeks production of aggregated user account activity for every World of Warcraft version, title and expansion pack, whether accused or not accused, as well as titles that were excluded from the case by the Special Master. (D.I. 185 at 2-5 (precluding discovery into "updated versions of the accused product that have been released since the date the suit was filed in 2015.")). The Court later overruled Acceleration Bay's objections to that order. (D.I. 284 ("It is too late to be adding more products to the case.")). Because relevance depends on the allegations of infringement, Acceleration Bay's request is facially improper and should be denied. *American Standard Inc. v. Pfizer Inc.*, 828 F.2d 734, 742 (Fed. Cir. 1987) (the party "seeking discovery ... must show some relationship between the claimed invention and the information sought"); *see also Icon-IP Pty Ltd. v. Specialized Bicycle Components, Inc.*, Case No. 12-cv-3844, 2014 WL 4593338, *3-*4 (N.D. Cal. 2014) (denying motion where, as here, the patentee "has not articulated a damages theory that would entitle it to broad discovery ... as to unaccused [products].").²

² Unlike Call of Duty and Destiny, user account activity for World of Warcraft cannot be segregated by version or expansion pack. (*See* D.I. 631, Ex. 3 at p. 4.) Even if creating such a data were possible, there is no legal basis for Acceleration Bay to require Activision to create customized account records that it does not otherwise maintain in the ordinary course. *See, e.g., Fadem v. Am. States Preferred Ins. Co.*, Case No. 13-cv-01213, 2014 WL 202176, at *1-*2 (D. Nev. 2014) (denying motion because, as here, "parties are not required to create a document where none exists"); *Rockwell Int'l Corp. v. H. Wolfe Iron and Metal Co.*, 576 F. Supp. 511, 511 (W.D. Pa. 1983) (discussing the unremarkable proposition that party is not required "to prepare, or cause to be prepared" new documents).

The Honorable Richard G. Andrews

December 7, 2018

Page 3

Acceleration Bay Has Not Adequately Conferred

In its letter, Acceleration Bay claims that it repeatedly requested updated World of Warcraft account data. (D.I. 631 at 1.) Not so. Acceleration Bay's first request for this information came last Friday, November 30—a full month after Activision's supplementation of its financial data. (D.I. 631, Ex. 3 at p. 6.) In response, Activision diligently investigated Acceleration Bay's request and explained that the requested supplementation was not practicable given the way account activity is maintained for World of Warcraft. (*Id.* at p. 3.) Activision counsel also requested an explanation from Acceleration Bay why the requested account activity was appropriate or even necessary. (*Id.* at p. 2, 3.) Acceleration Bay responded with the threat of seeking emergency relief—a threat it delivered on yesterday morning.

The parties have not sufficiently conferred about how they might resolve the dispute. The Court should deny Acceleration Bay's motion for its refusal to confer with counsel for Activision. *See In re TQ Delta and Jason H. Vick*, No. 17-328, 2018 WL 5033756, at *4 (D. Del. Oct. 17, 2018) (denying motion where plaintiff failed to “to meet and confer with Defendants before filing the motion”); *see also UCB, Inc. v. Watson Labs., Inc.*, No. 14-1083, 2017 WL 2646110, at *1 (D. Del. May 19, 2017) (the movant's “failure to meet and confer is an independent and sufficient basis on which to deny the relief they seek.”).

Respectfully,

/s/ Jack B. Blumenfeld

Jack B. Blumenfeld (#1014)

JBB/bac

cc: Clerk of Court (via hand delivery)
All Counsel of Record (via electronic mail)