

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE NORTHERN DISTRICT OF CALIFORNIA

3
4 GEOFFREY PECOVER; and ANDREW
5 OWENS, on behalf of themselves
6 and all others similarly
7 situated,

8 Plaintiffs,

9 v.

10 ELECTRONIC ARTS, INC., a Delaware
11 Corporation,

12 Defendant.

No. C 08-2820 CW

AMENDED ORDER
CONCERNING DUTIES
AND INSTRUCTIONS
FOR COURT-
APPOINTED
TECHNICAL ADVISOR
AND MODIFYING THE
CASE SCHEDULE

13 _____/

14 The Court hereby notifies the parties of its intent to
15 appoint Dr. Tim Bresnahan as the Court's Technical Advisor
16 regarding economic issues in this antitrust case, if Dr. Bresnahan
17 accepts the appointment. The Court further instructs Dr.
18 Bresnahan regarding his duties and role as Technical Advisor.

19 BACKGROUND

20 At the hearing on January 19, 2012, this Court directed the
21 parties to meet and confer regarding the advisability of having a
22 Court-appointed expert who would advise the Court on the economic
23 issues in this case but would not testify to the jury. The Court
24 instructed the parties to consider candidates for such an
25 appointment, the subject matter on which the expert would assist
26 and what role the expert might perform. The Court noted that it
27 might require expert advice to assist it in resolving the parties'
28 competing expert testimony to rule on Defendant Electronic Arts,
Inc.'s anticipated motion to de-certify the class prior to its
summary judgment motion.

1 On March 12, 2012, the parties filed a joint letter with the
2 Court. In the letter, the parties identified five candidates,
3 three of whom were selected by Defendant and two of whom were
4 selected by Plaintiffs. Plaintiffs stated that they would accept
5 one of Defendant's selections, Dr. Steven Salop. Defendant in
6 turn recognized that any of the five candidates, including the two
7 proposed by Plaintiffs, were "highly qualified" and "would be a
8 valuable resource for the Court." Joint Letter at 5. While
9 Defendant believes that appointment of a neutral economist is
10 "appropriate and reasonable," id. at 3, Plaintiffs argue that the
11 Court will be able to address adequately the issues presented in
12 this case without expert assistance.

13 LEGAL STANDARD

14 "When outside technical expertise can be helpful to a
15 district court, the court may appoint a technical advisor." FTC
16 v. Enforma Natural Prods., 362 F.3d 1204, 1213 (9th Cir. 2004)
17 (citing Ass'n of Mexican-American Educators v. California, 231
18 F.3d 572, 590 (9th Cir. 2000) (en banc)). "A technical advisor is
19 a tutor who aids the court in understanding the 'jargon and
20 theory' relevant to the technical aspects of the evidence." Id.
21 (quoting Reilly v. United States, 863 F.2d 149, 158 (1st Cir.
22 1988)). "The role of a technical advisor is to organize, advise
23 on, and help the court understand relevant scientific evidence."
24 Id. (citing Ass'n of Mexican-American Educators, 231 F.3d at 590).

25 As an advisor to the Court, the role played by a technical
26 advisor is distinct from that of an expert witness. "A technical
27 advisor may not assume the role of an expert witness by supplying
28 new evidence; nor may an advisor usurp the role of the judge by

1 making findings of fact or conclusions of law." Id. (citing A&M
2 Records, Inc. v. Napster, Inc., 284 F.3d 1091, 1097 (9th Cir.
3 2002); Reilly, 863 F.2d at 155). Because of this distinction,
4 "[t]echnical advisors, acting as such, are not subject to the
5 provisions of Rule 706, which govern court-appointed expert
6 witnesses." Id.

7 While the Ninth Circuit does "not require strict adherence to
8 any specific procedures regarding technical advisors," it has
9 endorsed certain "procedural steps . . . to assure the parties
10 that the court is proceeding openly and fairly appointing such
11 individuals." FTC, 362 F.3d at 1214-1215. These steps are to

12 (1) utilize a fair and open procedure for appointing a
neutral technical advisor;

13 (2) address any allegations of bias, partiality, or lack
of qualification;

14 (3) clearly define and limit the technical advisor's
15 duties;

16 (4) make clear to the technical advisor that any advice
he or she gives to the court cannot be based on any
17 extra-record information; and

18 (5) make explicit, either through an expert's report or
a record of ex parte communications, the nature and
19 content of the technical advisor's advice.

20 Id. (citing Ass'n of Mexican-American Educators, 231 F.3d at
611-14 (Tashima, J., dissenting)).

21 DISCUSSION

22 Based on the complexity of the economic issues and theories
23 presented, especially related to injury and damages, the Court
24 finds that outside technical advice would be helpful in proceeding
25 in this case.
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1 I. Identity of the Technical Advisor

2 If he chooses to accept the position, the Court selects Dr.
3 Tim Bresnahan of Stanford University as its Technical Advisor.

4 Plaintiffs proposed Dr. Bresnahan, and Defendant indicated
5 that Dr. Bresnahan was highly qualified to serve in this capacity.
6 The parties have already had the opportunity to consider and raise
7 disputes regarding potential biases or conflicts and have not
8 identified any such disputes.

9 In order to accept this appointment, Dr. Bresnahan must give
10 his consent to serve as the Court-appointed expert in this case,
11 and must acknowledge his responsibility to discharge his duties in
12 accordance with the instructions set forth in this order, by
13 signing in the designated space below and returning the signed
14 original to the Court in the enclosed envelope.

15 II. Payment of the Technical Advisor

16 Plaintiffs state that it would be "almost cost-prohibitive"
17 if they were required to split the costs of paying for a neutral
18 expert with Defendant. Joint Letter at 9. Defendant "leaves it
19 to the Court's discretion whether the neutral's fees . . . should
20 be paid equally by the parties or entirely by EA." Id. at 5 n.9.
21 While the parties do not provide the Court with an estimate of Dr.
22 Bresnahan's rates, Plaintiffs state that the hourly rates charged
23 by the various economists proposed by the parties range from \$650
24 to \$1,250 per hour. Id. at 9. Plaintiffs also state that the
25 rates charged by their proposed economists, including Dr.
26 Bresnahan, "fall at the lower end of this spectrum." Id. at 9
27 n.20.
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1 The Court orders that Defendant shall pay for ninety percent
2 of Dr. Bresnahan's fees and expenses, and Plaintiffs will share
3 equally the other ten percent. The parties will deposit a
4 retainer totaling \$30,000 in one of its counsel's trust account;
5 the retainer shall be apportioned in the same manner as the fees
6 and expenses.

7 III. Duties of the Technical Advisor

8 As the Court's Technical Advisor, Dr. Bresnahan shall serve
9 as a neutral, independent advisor to the Court on the economics at
10 issue in this litigation. His duties shall be to organize, advise
11 on, and help the Court understand relevant economic evidence and
12 theories presented by the parties and their experts at various
13 stages of this litigation, including class certification, summary
14 judgment and trial.

15 IV. Materials to be Provided to the Technical Advisor

16 Within five days of the date of the order appointing him as
17 the Technical Advisor, the parties shall provide Dr. Bresnahan
18 with copies of the following materials, both in electronic format
19 and in organized binders that are labeled and tabbed:

- 20 1. The operative complaint;
- 21 2. The operative answer;
- 22 3. The Court's Order of December 21, 2010 granting in part
23 and denying in part Plaintiffs' motion for class certification;
- 24 4. The expert reports and declarations of the parties'
25 economists; and
- 26 5. Complete transcripts for the depositions of the parties'
27 economists. If the transcripts are not yet available, the parties
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1 shall provide them to Dr. Bresnahan within five days of the date
2 on which the parties receive them.

3 The parties will provide additional materials to Dr.
4 Bresnahan during the course of the litigation. Those materials
5 will include the following:

6 1. The parties' briefs and supporting materials filed in
7 relation to Defendant's motion to de-certify the class,
8 Defendant's motion for summary judgment and the parties' Daubert
9 motions, on the date they are filed with the Court; and

10 2. The parties' pretrial documents, on the date they are
11 filed with the Court.

12 The parties shall not send Dr. Bresnahan any additional
13 material that is not already in the record, unless by stipulation
14 or Court order.

15 V. Instructions to the Technical Advisor

16 1. Any advice provided to the Court by Dr. Bresnahan will
17 not be based on any extra-record information.

18 2. To the extent that the Court may ask Dr. Bresnahan to
19 prepare formal written reports providing technical advice
20 concerning the case, copies of the formal written reports prepared
21 by Dr. Bresnahan shall be provided to the parties and filed in the
22 docket of this case. However, the Court reserves the right to
23 have informal verbal communications with Dr. Bresnahan which are
24 not included in any formal written report.

25 3. Dr. Bresnahan shall provide formal written reports on
26 any challenges under Daubert v. Merrell Dow Pharmaceuticals, 509
27 U.S. 579 (1993), filed by either party, any motion to de-certify
28 the class, motions for summary judgment, and any other matters on

1 which the Court may request a written report. After reviewing the
2 materials provided to him, Dr. Bresnahan will prepare an expert
3 report, containing a statement of his evaluations and the reasons
4 for his evaluations. The Court is looking for a basic statement
5 of Dr. Bresnahan's evaluations of the expert reports and
6 supporting evidence submitted by the parties. Although he may
7 look to other such reports for guidance as to formatting and
8 standard content, no specific format is required.

9 4. Dr. Bresnahan shall attend the motion hearings in the
10 case. He shall attend relevant portions of the ten-day trial that
11 is scheduled to commence on October 29, 2012, if the Court
12 requests that he do so.

13 5. Dr. Bresnahan may review any pleadings, motions or
14 documents submitted to the Court.

15 6. As a technical advisor, Dr. Bresnahan will make no
16 written findings of fact and will not supply any evidence to the
17 Court. Thus, Dr. Bresnahan will be outside the purview of "expert
18 witnesses" under Federal Rule of Evidence 706. As such, the
19 provisions in Rule 706 for depositions and questioning of expert
20 witnesses will be inapplicable to Dr. Bresnahan. See Ass'n of
21 Mexican-American Educators, 231 F.3d at 591 ("Rule 706 applies to
22 court-appointed expert witnesses, but not to technical advisors
23 . . . ").

24 7. Dr. Bresnahan will have no contact with any of the
25 parties or their counsel except for billing purposes.

26 8. Dr. Bresnahan shall bill at his usual hourly rate. He
27 shall issue statements to the parties and draw from the trust
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1 account every fifteen (15) days for his performance of the
2 appointment.

3 9. Dr. Bresnahan shall report to the Court on a periodic
4 basis, every sixty (60) days, regarding the state of his fees and
5 expenses and make a recommendation to the Court as to whether the
6 trust account needs additional deposits from the parties as the
7 case progresses. All matters pertaining to the fees of Mr.
8 Bresnahan are referred to Magistrate Judge Cousins.

9 VI. Case Schedule

10 If Defendant files a motion to de-certify the class, it shall
11 do so at the same time that it files its motion for summary
12 judgment; both motions shall be contained in a single brief. Any
13 Daubert motions shall also be contained within the parties' briefs
14 on their dispositive motions.

15 To allow the Technical Advisor to review the documents filed
16 by the parties and file a written report advising the Court on
17 both motions and to maintain adequate time between the dispositive
18 motion hearing and the trial date, the Court finds good cause to
19 modify the case schedule as follows:

20	Deadline for Plaintiffs to file their motion for summary judgment, if any, and their <u>Daubert</u> motion, to be contained in a single brief of twenty-five pages or less.	05/31/2012
21		
22		
23	Deadline for Defendant to file its cross-motion for summary judgment, its motion to decertify the class, its <u>Daubert</u> motion, and its opposition to Plaintiffs' motion for summary judgment, to be contained in a single brief of thirty-five pages or less.	06/14/2012
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26	Deadline for Plaintiffs to file their reply in support of their motion for summary judgment, if any, and <u>Daubert</u> motion, and their opposition to Defendant's motions for summary judgment and to decertify the class, to be	06/21/2012
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1	contained in a single brief of twenty-five pages or less.	
2	Deadline for Defendant to file its reply in support of its motion for summary judgment, its motion to de-certify the class and its <u>Daubert</u> motion, to be contained in a single brief of fifteen pages or less.	06/28/2012
3		
4		
5	Due date for formal written report of Technical Advisor addressing the parties' <u>Daubert</u> challenges, the parties' cross-motions for summary judgment, and Defendant's motion to de-certify the class	7/12/2012
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7		
8	Hearing on all motions and further case management conference	7/26/2012 at 2:00 p.m.
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10	Final Pretrial Conference	10/17/2012 at 2:00 p.m.
11	All pretrial deadlines are advanced one week before the deadlines contained in the Court's Order for Pretrial Preparation. All pretrial documents, including motions in limine, shall be filed one week earlier than the dates provided in the Court's Order for Pretrial Preparation, to allow the Technical Advisor to review them and advise the Court thereon.	
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15	Ten-day Jury Trial	10/29/2012 at 8:30 a.m.
16		

IT IS SO ORDERED.

Dated: March 26, 2012



 CLAUDIA WILKEN
 United States District Judge

CONSENT

I consent to serve as the Court's Technical Advisor in Pecover v. Electronic Arts, Case No. 08-2820, and will discharge my duties in accordance with the instructions provided to me by the Court.

Dated: _____

 DR. TIM BRESNAHAN