

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.,)	REDACTED
)	PUBLIC VERSION
Defendant.)	

**DEFENDANT’S MOTION TO PRECLUDE INADMISSIBLE
AND UNDISCLOSED DAMAGES THEORIES AND EVIDENCE**

OF COUNSEL:

Michael A. Tomasulo
Gino Cheng
David K. Lin
Joe S. Netikosol
WINSTON & STRAWN LLP
333 South Grand Avenue, 38th Floor
Los Angeles, CA 90071
(213) 615-1700

David P. Enzminger
Louis L. Campbell
WINSTON & STRAWN LLP
275 Middlefield Road, Suite 205
Menlo Park, CA 94025
(650) 858-6500

Dan K. Webb
Kathleen B. Barry
Sean H. Suber
WINSTON & STRAWN LLP
35 West Wacker Drive
Chicago, IL 60601
(312) 558-5600

MORRIS, NICHOLS, ARSHT & TUNNELL LLP
Jack B. Blumenfeld (#1014)
Stephen J. Kraftschik (#5623)
1201 North Market Street
P.O. Box 1347
Wilmington, DE 19899
(302) 658-9200
jblumenfeld@mnat.com
skraftschik@mnat.com

Attorneys for Defendants

Krista M. Enns
WINSTON & STRAWN LLP
101 California Street, 35th Floor
San Francisco, CA 94111
(415) 591-1000

Michael M. Murray
Anup K. Misra
WINSTON & STRAWN LLP
200 Park Avenue,
New York, NY 10166
(212) 294-6700

Andrew R. Sommer
Thomas M. Dunham
Joseph C. Masullo
Paul N. Harold
WINSTON & STRAWN LLP
1700 K Street, N.W.
Washington, DC 20006
(202) 282-5000

B. Trent Webb
Aaron E. Hankel
Jordan T. Bergsten
Maxwell C. McGraw
SHOOK HARDY & BACON LLP
2555 Grand Boulevard
Kansas City, MO 64108
(816) 474-6550

Original Filing Date: September 28, 2018
Redacted Filing Date: October 9, 2018

I. INTRODUCTION.

On August 29, 2018, the Court excluded the only expert opinion Plaintiff Acceleration Bay (“Acceleration”) has ever disclosed providing a reasonable royalty calculation. [D.I. 578]. Following the Court’s ruling, Defendant Activision Blizzard, Inc. (“Activision”) sought clarification from Acceleration as to what, if any, damages evidence Acceleration believed survived the Court’s ruling and what damages case Acceleration intended to present at trial. In response, just five weeks before trial, Acceleration disclosed that it intends to offer at trial a royalty rate of 15.5% that could be applied to three different damages bases. This royalty rate was taken by Acceleration from an unauthenticated, third-party website listing dozens of rates purporting to be typical in various industries and having nothing to do with the patents in suit. Neither the royalty rate nor the damages models to which Acceleration seeks to apply the royalty rate was disclosed or discussed in any of Acceleration’s expert reports. Activision now moves to preclude Acceleration from presenting the new rate and the new damages theories because they are all based on inadmissible evidence and none were properly disclosed in any expert report. Activision also asks that the Court preclude Acceleration from offering any other damages theory not fulsomely described in a timely expert report.

II. BACKGROUND.

In September 2017, Acceleration served the expert report of Dr. Christine Meyer. All of Dr. Meyer’s damages computations were based on the now excluded *Uniloc v. Electronic Arts* jury verdict. [D.I. 480 (Andre Decl., Volume 1) at Ex. 69, Meyer Report (hereinafter (“Meyer Report”))] Meyer Report ¶¶ 142-149 (“In this case, the royalty rate would be modelled on the rate determined by the jury in the *Uniloc* verdict...”; “I have estimated a reasonable royalty for the infringing products based on my analysis of the *Uniloc* verdict...”). Neither Dr. Meyer nor any

other Acceleration expert provided any other calculation or alternate method of calculating a royalty. *Id.*

On August 29, 2018, the Court ruled that it “will exclude Dr. Meyer’s royalty opinion insofar as it relies on the *Uniloc* jury verdict.” [D.I. 578.] The *Uniloc* jury verdict was the sole basis for the only expert opinion offered by Acceleration for a reasonable royalty. Thus, on August 31, Activision asked Acceleration to confirm that it would not offer at trial any reasonable royalty calculation and, if it intended otherwise, to identify the amount, methodology, and evidentiary basis for any damages claim that it believes survived the Court’s *Daubert* Order. Ex. 1, 8/31/18 Email.

Three weeks later, on September 21, 2018, Acceleration responded by stating that it intends to introduce three damages theories at trial, none of which had been disclosed in any expert report. Each theory relies on a 15.5% royalty rate. Ex. 2, 9/21/18 Letter at 1-2. Acceleration intends to apply the 15.5% royalty rate to three royalty bases: (1) total revenues “related to” the accused products; (2) revenue from sales of the accused games (determined by multiplying average sales price by the number of users/units sold)¹; and (3) the alleged “cost savings” from using re-designed games that Acceleration contends would cost \$7 billion. Ex. 2, 9/21/18 Letter at 2-3.

Acceleration had cursorily identified the rate and theories in its response to Activision’s interrogatory and promised that the royalty would be explained in its expert reports. Ex. 3, 8/18/17 Resp. Interrogatory No. 1 at 6, 8. Yet, none of its experts provided an opinion supporting this royalty rate, and none use any of these three bases. Dr. Meyer was the only expert to

¹ Although initially described as a base of number users/units sold, Acceleration specifies that this users/units sold base is multiplied by the 15.5% royalty rate “applies to the price of the game.” Ex. 2, 9/21/18 Letter at 3.

I. INTRODUCTION.

On August 29, 2018, the Court excluded the only expert opinion Plaintiff Acceleration Bay (“Acceleration”) has ever disclosed providing a reasonable royalty calculation. [D.I. 578]. Following the Court’s ruling, Defendant Activision Blizzard, Inc. (“Activision”) sought clarification from Acceleration as to what, if any, damages evidence Acceleration believed survived the Court’s ruling and what damages case Acceleration intended to present at trial. In response, just five weeks before trial, Acceleration disclosed that it intends to offer at trial a royalty rate of 15.5% that could be applied to three different damages bases. This royalty rate was taken by Acceleration from an unauthenticated, third-party website listing dozens of rates purporting to be typical in various industries and having nothing to do with the patents in suit. Neither the royalty rate nor the damages models to which Acceleration seeks to apply the royalty rate was disclosed or discussed in any of Acceleration’s expert reports. Activision now moves to preclude Acceleration from presenting the new rate and the new damages theories because they are all based on inadmissible evidence and none were properly disclosed in any expert report. Activision also asks that the Court preclude Acceleration from offering any other damages theory not fulsomely described in a timely expert report.

II. BACKGROUND.

In September 2017, Acceleration served the expert report of Dr. Christine Meyer. All of Dr. Meyer’s damages computations were based on the now excluded *Uniloc v. Electronic Arts* jury verdict. [D.I. 480 (Andre Decl., Volume 1) at Ex. 69, Meyer Report (hereinafter (“Meyer Report”))] Meyer Report ¶¶ 142-149 (“In this case, the royalty rate would be modelled on the rate determined by the jury in the *Uniloc* verdict...”; “I have estimated a reasonable royalty for the infringing products based on my analysis of the *Uniloc* verdict...”). Neither Dr. Meyer nor any

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.