

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.,	)	<b>REDACTED</b>
	)	<b>PUBLIC VERSION</b>
Defendant.	)	

**DEFENDANT’S REPLY IN SUPPORT  
OF ITS MOTION TO PRECLUDE INADMISSIBLE  
AND UNDISCLOSED DAMAGES THEORIES AND EVIDENCE**

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With its sole expert reasonable royalty opinion having been excluded, Acceleration seeks at the eleventh hour to advance three royalty claims through a “fact-based” damages theory. Each of the royalty claims is based exclusively on a 15.5% rate that is unsupported by admissible evidence. Acceleration’s CEO selected the rate from a third-party Internet website that has nothing to do with the patents, the accused products or the patented technology. Acceleration’s other proposed fact witness, its Vice President of Licensing, admits [REDACTED]

[REDACTED] Neither witness can discuss a hypothetical negotiation between Boeing and Activision because they were not at either company ever. In short, Acceleration has no evidence of a “fact-based” hypothetical negotiation to support any rate, let alone the 15.5% rate it seeks. And it certainly has no witness who can apply any royalty to a properly apportioned royalty base. Nor does it have any facts or opinions that would allow a jury to determine cost savings or apportion them to patented technology. The only damages claims Acceleration now advances depend exclusively on the 15.5% royalty rate, and those three claims are inadmissible.

**I. Acceleration’s “fact-based damages claim” is not admissible.**

A reasonable royalty “derives from a hypothetical negotiation between the patentee and the infringer when the infringement began.” *ResQNet.com, Inc. v. Lansa, Inc.*, 594 F.3d 860, 869 (Fed. Cir. 2010). It “require[s]” an “analysis” showing “the contribution of the patented technology to the accused products.” *Bio-Rad Labs, Inc., et al. v. 10x Genomics, Inc.*, 2018 WL 4691047, at \*8 n.3 (D. Del. Sept. 28, 2018). A reasonable royalty “requires the patentee to reconstruct the market, by definition a hypothetical enterprise, to project economic results that did not occur.” *Riles v. Shell Exploration & Prod. Co.*, 298 F.3d 1302. This “requires sound economic proof of the nature of the market and likely outcomes with infringement factored out of the economic picture.” *Id.* A party

“cannot make arguments based on non-expert testimony that it could not make based on expert testimony.” *AVM Techs., LLC v. Intel Corp.*, 2017 WL 1753999, at \*2 (D. Del. May 1, 2017).

Acceleration’s present damages claims all rely on the 15.5% rate, but Acceleration has identified no admissible evidence to support that rate (or any other royalty rate). Acceleration does not dispute that the 15.5% rate was plucked from an unauthenticated document prepared by some unknown person and was found on a third-party website. The document is inadmissible hearsay and violates the “rule of thumb” prohibition because it is not tied to the facts of this case. Op. Br. at 10. For instance, Acceleration has no expert or fact witness who can explain: (1) what that unidentified and un-consulted author of the document means when he or she says that 15.5% is the “Industry Standard Royalty Rate[.]” for “Entertainment” (with a picture of a drama mask); (2) what real-world patent licenses, if any, went into that rate; or (3) why “Entertainment” applies to Activision, Boeing, and these patents instead of other listed rates, like “Aerospace” at 4.00%, “Internet” at 8.20%, or “Media and Entertainment” (with a picture of a “TV”) at 6.50%. Op. Br., Ex. 8. In short, after multiple opportunities, Acceleration has failed to point to a shred of evidence for where this 15.5% royalty came from, or whether and how it is in any way tied to the facts of this case.

Nor can Mr. Garland or Mr. Ward provide any personal knowledge on the basis for a 15.5% royalty rate or on its applicability to the hypothetical negotiation. First, as this Court has acknowledged, the “hypothetical negotiation” would have been “with, presumably, Boeing, not Acceleration Bay, as one party to the negotiation.” (D.I. 521). This is because the hypothetical negotiation would have occurred nearly ten years before Acceleration acquired the patents. (*Id.*) Neither Mr. Ward nor Mr. Garland has any relevant factual information to offer because they never worked at Activision or Boeing, let alone in a licensing position.

Second, Messrs. Ward and Garland confirmed at their depositions that [REDACTED] unprivileged knowledge on the 15.5% rate. Acceleration's initial disclosures state Mr. Garland has "[k]nowledge regarding Acceleration Bay's licensing activities." Ex. 3, Acceleration's Supplemental Initial Disclosures at 3. He testified b [REDACTED]

[REDACTED] Ex. 1, Garland Dep. Tr. 52:25-53:8. Mr. Garland confirmed [REDACTED]

[REDACTED] Ex. 1, Garland Dep Tr. 37:19-39:21, 53:15-55:4, 30:12-31:1. Acceleration suggests that Mr. Ward may have additional, undisclosed information about the royalty rate, and faults Activision for deciding "not to inquire into Mr. Ward's bases for the rate." Op. Br. at 9. But, Mr. Ward testified [REDACTED]

[REDACTED] Ex. 2, Ward Dep. 223:9-22, 233:9-21, 286:6-287:7, 323:16-25; 330:1-333:3. When asked about patent valuation and prospective licensees, he refused to answer the questions on the basis of attorney-client privilege except to say "[REDACTED]

[REDACTED] Ex. 2, Ward Dep. 226:25-227:7, 286:9. Mr. Ward repeatedly disavowed any knowledge of any economic facts which could possibly value the patents to Activision.<sup>1</sup>

Acceleration similarly suggests that it may offer an opinion from Mr. Garland, "based on his decades of experience licensing intellectual property," but neither Mr. Garland nor Mr. Ward was

<sup>1</sup> Ex. 2 (Ward Dep.) at 255:6-255:7 [REDACTED]

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