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.,	)	
	)	
Defendant.	)	

DEFENDANT'S REPLY BRIEF IN SUPPORT OF ITS MOTION TO PRECLUDE THE NEW DAMAGES THEORIES PLAINTIFF RAISED AT THE PRETRIAL CONFERENCE

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Acceleration's plan to ask the jury to determine a lump-sum royalty based on a series of ten-figure numbers not tied to any royalty analysis or calculation is inadmissible. No witness has testified that a royalty award would be derived from Dr. Valerdi's figures or Activision's revenues and profits, how such an award would be calculated, or what it would be. A plaintiff may not ask a jury to provide a damages award based on raw data, speculation or guesswork, and a plaintiff cannot offer damages evidence that is not carefully tied to an admissible royalty analysis. Damages must be based on sound economic principles and there is no authority for Acceleration's plan.

Moreover, the royalty bases Acceleration advances are themselves inadmissible. They are completely untethered to the alleged use of the patented inventions and Acceleration admittedly has no witness to tie these bases to a hypothetical negotiation between Activision and Boeing.

Dr. Valerdi's whole "analysis" turns on a fallacy—that he can reliably quantify the costs of something that Acceleration's experts claim does not exist. Even in the current opposition, Acceleration claims a non-infringing alternative may not exist. Because he was asked to quantify something that does not exist, Dr. Valerdi used a proxy. He speculates that an alternative game would have the same number of lines of relevant code as the existing game. He then used his computer model to predict the cost of writing that volume of code. But, according to Dr. Valerdi, that volume of code is the same in both the speculative alternative and the accused games. Thus, his estimates for the alternative and the existing code would always be identical, because his computer model produces the same output for any given input. The assumption he used to "quantify" some undisclosed alternative "that may not even exist" ensures that there can never be cost savings because he assumed they are the same. And what probative value can there be in asking the jury to assume that a non-existent alternative would cost billions, if it existed? That is pure speculation.

Acceleration proposes to compare Dr. Valerdi's numbers quantifying a speculative alternative to numbers reported by Dr. Meyer regarding the actual cost of development. But none of Acceleration's witnesses made this comparison previously and they should not be allowed to present a new analysis on the eve of trial. Further, since Valerdi's estimate assumes that the alternative has the same volume of relevant code as the allegedly infringing original, comparing his estimate to the development costs contained in Dr. Meyer's report does not represent a 'cost savings' – it represents only the difference between the computer-generated estimated cost of developing the existing products and Meyer's calculation of the actual development. That difference is not probative of true "cost savings," but rather is a measure of how bloated Dr. Valerdi's estimate is compared to the actual development costs. Similarly, Dr. Meyer's purported "apportionment" is based exclusively on her equating the use of the term "multiplayer" in an Activision customer survey with the patented technology.[1]

I. Acceleration ignores that a reasonable royalty must be tethered to the patented technology and based on sound economic principles.

Acceleration identifies three cases that supposedly support its position "that a royalty rate is [not] necessary to sustain a damages award." Opp. 1. But in each case, the expert offered both a specific, reliable calculation supported by reliable evidence and methodology.

In *Powell,* the expert conducted a Georgia Pacific analysis and arrived at a range of per-unit royalty rates. The Federal Circuit found the range and the jury's ultimate determination were both supported by substantial evidence. *Powell v. Home Depot USA Inc.*, 663 F.3d 1221, 1239-41 (Fed. Cir. 2011). The court did not authorize a finding of damages derived from a royalty base with no rate. In *EMC,* Plaintiff's expert "presented a range of appropriate damages," the defendant did "not

[1] Acceleration admits there is no apportionment to WoW. Opp. 15 & n.2. Now, it says it will apply the CoD apportionment to WoW. But no testimony supports that. Dr. Meyer provided no apportionment.

take issue with the methodology," and the Court found "no reason" to consider them unreliable. *EMC Corp. v. Pure Storage, Inc.*, 154 F. Supp. 3d 81, 119 (D. Del. 2016). In *Summit*, the plaintiff's expert calculated a specific rate of $0.28 per phone, which the Federal Circuit found "was based on reliable principles and was sufficiently tied to the facts of the case." *Summit 6, LLC v. Samsung Elecs. Co.*, 802 F.3d 1283, 1296–1300 (Fed. Cir. 2015).

Acceleration's attempts to distinguish *Exmark* fail. A royalty may be a lump sum or a rate multiplied by a base. Regardless, the royalty must be "carefully tied" to the alleged infringement. Having found that expert testimony must be ***tied to a specific proposed royalty rate***, 879 F.3d at 1349–51, *Exmark* prohibits an expert offering *Georgia Pacific* analysis that is not tied to any royalty. Acceleration's plan to offer a base but no rate does not "sufficiently tie" the alleged infringement to a royalty. *ResQNet.com, Inc. v. Lansa, Inc.*, 594 F.3d 860, 869 (Fed. Cir. 2010).

Similarly, Acceleration still has not taken a position or presented any evidence as to the hypothetical negotiation date. "[T]he correct determination of the hypothetical negotiation date is ***essential*** for properly assessing damages." *LaserDynamics*, 694 F.3d at 75, 76 (emphasis added). But Dr. Meyer has no opinion, and Acceleration's technical experts never considered the issue. Without evidence to support the hypothetical negotiation date, Acceleration cannot meet its burden to prove damages. Acceleration's position is essentially that it can make its damages presentation fit whatever hypothetical negotiation Activision or the Court chooses.

Plaintiff has identified no case where a jury was presented merely with a royalty base but no rate or damages calculation. And this is not surprising. The patentee bears the burden of proving damages with reasonable (though not mathematical) certainty. *Lucent Techs., Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1324 (Fed. Cir. 2009). Plaintiff's plan to present merely a royalty base and invite the

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