

# EXHIBIT 1

1 IN THE UNITED STATES DISTRICT COURT  
 2 FOR THE DISTRICT OF DELAWARE  
 3  
 4 ACCELERATION BAY, LLC )  
 5 Plaintiff, )  
 6 v. ) Civil Action No. 15-453-RGA  
 7 )  
 8 ACTIVISION BLIZZARD, INC., )  
 9 Defendant. )

10 J. Caleb Boggs Courthouse  
 11 844 King Street  
 12 Wilmington, Delaware  
 13 Friday, October 19, 2018  
 14 8:32 a.m.  
 15 Pretrial Hearing

16 BEFORE: THE HONORABLE RICHARD G. ANDREWS  
 17 United States District Court Judge

18 APPEARANCES:

19 PHILIP A. ROVNER, ESQUIRE  
 20 POTTER ANDERSON & CORROON, LLP  
 21 1313 N. Market Street, 6th Floor  
 22 Hercules Building  
 23 Wilmington, Delaware 19899

24 -and-

25 PAUL ANDRE, ESQUIRE  
 LISA KOBIALKA, ESQUIRE  
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 990 Marsh Road  
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 For the Plaintiff

08:32:58 1 THE CLERK: All rise.  
 08:33:07 2 THE COURT: All right. Good morning. Please be  
 08:33:09 3 seated.  
 08:33:16 4 This is Acceleration Bay versus Activision  
 08:33:19 5 Blizzard. Civil Action Number 16-453.  
 08:33:22 6 Good morning, Mr. Rovner.  
 08:33:23 7 MR. ROVNER: Good morning, Your Honor. Phil  
 08:33:25 8 Rovner from Potter Anderson for plaintiff, Acceleration Bay.  
 08:33:27 9 With me from Kramer Levin, Paul Andre.  
 08:33:27 10 MR. ANDRE: Good morning, Your Honor.  
 08:33:30 11 MR. ROVNER: Lisa Kobialka.  
 08:33:30 12 MS. KOBIALKA: Good morning, Your Honor.  
 08:33:32 13 MR. ROVNER: And Aaron Frankel.  
 08:33:33 14 MR. FRANKEL: Good morning, Your Honor.  
 08:33:34 15 THE COURT: All right. Good morning to you all.  
 08:33:36 16 Mr. Blumenfeld.  
 08:33:37 17 MR. BLUMENFELD: Good morning, Your Honor. Jack  
 08:33:43 18 Blumenfeld for Activision Blizzard. And with me are Trent  
 08:33:45 19 Webb from Shook Hardy & Bacon, David Enzminger, and Mike  
 08:33:48 20 Tomasulo from Winston & Strawn.  
 08:33:51 21 Behind them Aaron Hankel from Shook Hardy &  
 08:33:54 22 Bacon, and Kathleen Barry from Winston & Strawn.  
 08:33:58 23 And in the first row, Omer Salik and Julia  
 08:34:01 24 Kazaks, next to him, from Activision.  
 08:34:03 25 THE COURT: All right. Well, good morning to

1 APPEARANCES CONTINUED:  
 2 JACK B. BLUMENFELD, ESQUIRE  
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 19 For the Defendant  
 20 Also Present:  
 21 Mr. Omar Salik  
 22 Ms. Julia Kazaks

08:51:13  
08:51:13

08:34:06 1 you all, too. All right.  
 08:34:11 2 So, though I've read portions of the Pretrial  
 08:34:15 3 Order, including the motions in limine and the body of it,  
 08:34:19 4 but I guess the first thing to address is damages.  
 08:34:24 5 What are we going to do about that, Mr. Andre?  
 08:34:29 6 MR. ANDRE: Your Honor, we're going to be  
 08:34:35 7 putting forward a damages case that has three factual bases  
 08:34:38 8 that the jury can decide a reasonable royalty.  
 08:34:42 9 First being a cost savings methodology that you  
 08:34:45 10 have allowed in the case with Dr. Valerdi and others who  
 08:34:48 11 will be talking about the cost-savings basis. This is  
 08:34:52 12 largely based on a few other Federal Circuit cases that have  
 08:34:57 13 allowed this type of damages model.  
 08:34:59 14 We also have a revenue-based model based on the  
 08:35:04 15 proper apportionment of the revenue and the profits of the  
 08:35:08 16 infringing technology over the relevant time period that the  
 08:35:12 17 jury can base a reasonable royalty on.  
 08:35:15 18 And we also have a per-unit royalty possibility  
 08:35:18 19 that the jury can base a reasonable royalty on as well.  
 08:35:22 20 THE COURT: All right. So for example, the per  
 08:35:24 21 unit, let's say cost, I don't know, \$100 to buy an  
 08:35:30 22 Activision software package.  
 08:35:31 23 How do you get to a per-unit royalty?

08:35:41 1 THE COURT: Right.

08:35:43 2 MR. ANDRE: And there the jury can rely on

08:35:46 3 different ways. They can look at it from the profits that

08:35:50 4 are involved in those per-user base and then determine what

08:35:54 5 would be a reasonable royalty based on that. It wouldn't be

08:35:58 6 a running royalty, per se, but it would be a lump sum

08:36:00 7 royalty on the life of the sales of those patents on those

08:36:03 8 products.

08:36:04 9 THE COURT: And so is Dr. Meyer going to show up

08:36:06 10 and do calculations related to this?

08:36:09 11 MR. ANDRE: Dr. Meyer will show up. I think

08:36:11 12 about 75, 80 percent of her report is still in. The only

08:36:13 13 thing you excluded was the final number based on the Uniloc.

08:36:19 14 THE COURT: Right.

08:36:20 15 MR. ANDRE: So she's going to give a lot of

08:36:22 16 numbers. She has a lot of numbers by calculation. She does

08:36:25 17 the apportionments. She does the Georgia-Pacific Factors.

08:36:28 18 She does most of the things you would expect a damage expert

08:36:31 19 to do and give the jury the factual predicate to come up

08:36:34 20 with a reasonable royalty.

08:36:35 21 THE COURT: Okay. All right. I might have

08:36:43 22 something more for you on this topic. Let me just hear from

08:36:46 23 the defendants on this.

08:36:47 24 Mr. Enzminger.

08:36:56 25 MR. ENZMINGER: Your Honor, none of those three

08:38:39 1 infringing technology versus not using the infringing

08:38:44 2 technology.

08:38:45 3 She had to go out, and they would have to design

08:38:47 4 a specific aspect of their network that they didn't have to

08:38:52 5 do because they were using the prepackaged software that was

08:38:58 6 infringing. But in that case, the damages expert expressly

08:39:03 7 said that the parties to the hypothetical negotiation would

08:39:07 8 have factored that in.

08:39:10 9 In our case, there is no cost-savings analysis.

08:39:13 10 What they're referring to is Dr. Dr. Valerdi's analysis

08:39:17 11 where he says, If I had to re-engineer the entire game

08:39:20 12 without regard to the patented technology at all, there is

08:39:24 13 not one thing in Dr. Dr. Valerdi's report that relates to

08:39:28 14 the patented technology.

08:39:29 15 He assumes every line of code in the product

08:39:33 16 would have to be rewritten. Every single line, whether it's

08:39:37 17 patented technology or not. And he says, If you had to

08:39:42 18 re-engineer the end game, it would cost this. That's not a

08:39:47 19 cost-savings analogy.

08:39:48 20 And their expert doesn't even say it. What she

08:39:50 21 said was, Dr. Valerdi provides an additional input into my

08:39:55 22 Georgia-Pacific Factor for my Uniloc verdict, and what it

08:39:59 23 means is that there are not non-infringing alternatives and

08:40:04 24 that cost to redesign the entire game would be so

08:40:07 25 prohibited, we have to look at other indicators of value

08:36:59 1 suggestions is admissible. There is no Georgia-Pacific

08:37:03 2 analysis that ties to anything other than the rate that was

08:37:08 3 stricken. Exmark by the Federal Circuit decided earlier

08:37:13 4 this year and is crystal clear on that you cannot do a

08:37:16 5 generic Georgia-Pacific factor that isn't tied to a specific

08:37:20 6 rate that the expert is advancing. Otherwise, it's

08:37:22 7 untethered to the facts of the case.

08:37:24 8 So the fact that Dr. Meyer did Georgia-Pacific

08:37:29 9 Factors with respect to the now-excluded Uniloc jury verdict

08:37:35 10 rate is not admissible. The per-user possibility is

08:37:40 11 inadmissible because there is not a single witness who can

08:37:44 12 tie a per-user royalty rate to the number of users.

08:37:51 13 Dr. Meyer did that, but it was excluded. She

08:37:54 14 has no other opinion on that.

08:37:56 15 THE COURT: All right.

08:38:00 16 MR. ENZMINGER: She doesn't have a royalty rate

08:38:02 17 that she can apply nor does any other witness, and that

08:38:06 18 leaves us back with the cost-savings analysis. There is no

08:38:09 19 cost-savings analysis in this case.

08:38:17 20 Mr. Andre talked about the Federal Circuit has

08:38:19 21 blessed a cost-savings analysis, and I think he's talking

08:38:22 22 about the Prism case which was a case that he argued in the

08:38:26 23 Federal Circuit. In that case, the damages expert actually

08:40:11 1 because it would not have been part of a hypothetical

08:40:14 2 negotiation. We have to look at other indicators of value.

08:40:17 3 So standing alone, that analysis has absolutely

08:40:21 4 nothing to do with the patented technology. It has nothing

08:40:24 5 to do with per-user support. It has nothing to do with

08:40:29 6 applying any number to the royalty base. It's not a

08:40:35 7 cost-savings analysis.

08:40:36 8 There are other problems with it, too. It's not

08:40:41 9 tied to the hypothetical negotiation date. Dr. Valerdi does

08:40:46 10 an analysis where he talks about using current labor rates.

08:40:49 11 This hypothetical negotiation would have occurred ten years

08:40:52 12 ago. It's not apportioned in any way.

08:40:58 13 Dr. -- I'm sorry.

08:40:59 14 THE COURT: So but things like that, you had the

08:41:03 15 chance to raise them already, right, but --

08:41:06 16 MR. ENZMINGER: No.

08:41:06 17 THE COURT: Why not?

08:41:07 18 MR. ENZMINGER: Because Dr. Valerdi was never

08:41:10 19 offered as an independent damages analysis. The only

08:41:13 20 mention of Dr. Dr. Valerdi's analysis in Dr. Meyer's report

08:41:17 21 at all was one paragraph where she says, Dr. Valerdi's

08:41:23 22 analysis of designing the entire game would be too

08:41:26 23 expensive; and therefore, I'm not going to consider

08:41:39 **1** theory at all. And so when you recall the damages, the  
08:41:47 **2** summary judgment in Daubert, we had 50 pages for 16 claims,  
08:41:53 **3** five products, three companies.  
08:41:54 **4** THE COURT: Why are you telling me?  
08:41:57 **5** MR. ENZMINGER: We had to make some judgments.  
08:41:59 **6** THE COURT: Well, so either you did raise it, or  
08:42:01 **7** you didn't raise it, but you can't say, We raised it, and we  
08:42:04 **8** had to make some judgments.  
08:42:06 **9** MR. ENZMINGER: No. No. I'm saying it was  
08:42:11 **10** never mentioned until this morning as a possible stand-alone  
08:42:17 **11** damages case. It's not admissible as a stand-alone damages  
08:42:21 **12** case because it's not tied to patented technology. It's not  
08:42:25 **13** apportioned. No one testified it was a factor in the  
08:42:27 **14** reasonable royalty in the reasonable royalty calculation.  
08:42:31 **15** And there's no way you can take his \$7 billion  
08:42:36 **16** design-around estimate and put a number on that. It's just  
08:42:39 **17** prejudicial. It's just putting a big number out in front of  
08:42:43 **18** the jury and saying, Somewhere between zero and \$7 billion  
08:42:48 **19** is a number.  
08:42:48 **20** But there's not a single other witness, and  
08:42:50 **21** certainly not Dr. Valerdi, who can tie that number to a  
08:42:54 **22** reasonable royalty that the jury can conclude. They have  
08:43:07 **23** nobody who can quantify any of these royalty bases that  
08:43:16 **24** Mr. Andre suggests.  
08:43:17 **25** THE COURT: So do you understand the three

08:45:01 **1** little more. Mr. Andre, can you just explain a little more  
08:45:05 **2** what the revenue-based model is?  
08:45:07 **3** And let me say, I don't expect to resolve this  
08:45:10 **4** this morning, but what I expect to do is set a schedule for  
08:45:17 **5** you all to submit stuff. But part of that, setting the  
08:45:21 **6** schedule I think requires that the defendants say, they may  
08:45:28 **7** not agree with your theory, but at least they understand  
08:45:30 **8** what it is.  
08:45:31 **9** MR. ANDRE: Yeah. I think, Your Honor, we've  
08:45:33 **10** given them notice of these three theories since day one of  
08:45:35 **11** the case.  
08:45:36 **12** THE COURT: Well, so because I don't know what  
08:45:38 **13** it is, but you, of course, don't have to give me notice.  
08:45:41 **14** MR. ANDRE: Well, Your Honor, as far as the  
08:45:43 **15** revenue based, what we have is Dr. Meyer. When they're  
08:45:48 **16** talking about the revenues of the games, she does an  
08:45:50 **17** entire --  
08:45:51 **18** THE COURT: So let's assume the games, we're  
08:45:56 **19** talking World of Warcraft and the Red User are a million  
08:46:00 **20** dollars; right?  
08:46:01 **21** MR. ANDRE: Okay.  
08:46:01 **22** THE COURT: Right.  
08:46:02 **23** MR. ANDRE: Yeah.  
08:46:02 **24** THE COURT: When you say revenues, that's what  
08:46:04 **25** you mean is over a period of time, we sold a billion

08:43:22 **1** Mr. Andre suggests? So I forget what Mr. Andre called them,  
08:43:28 **2** the three different theories here.  
08:43:30 **3** Do you understand what he means by each of the  
08:43:34 **4** theories that he's described briefly this morning?  
08:43:36 **5** MR. ENZMINGER: So the cost-savings methodology,  
08:43:42 **6** I do not know what his methodology is because what has been  
08:43:47 **7** submitted to us is in no way a cost-savings analysis. It is  
08:43:51 **8** not an analysis of what the defendant saved if, by using an  
08:43:56 **9** alleged infringing broad M-regular broadcast channel.  
08:44:05 **10** I mean, if you think about these video games and  
08:44:07 **11** how complex they are, for example, graphics. Graphics,  
08:44:11 **12** rendering graphics, and the artwork, and all of that that  
08:44:14 **13** goes in the games has no possible relationship to an  
08:44:18 **14** M-regular broadcast channel. That would obviously not have  
08:44:21 **15** to be rewritten, yet Dr. Dr. Valerdi's analysis is that the  
08:44:25 **16** entire game, every line of code would have to be rewritten.  
08:44:29 **17** His other assumption is that rewriting the code  
08:44:31 **18** to avoid the patents would use exactly the same number of  
08:44:35 **19** lines that the current product has. There's absolutely no  
08:44:44 **20** cost savings analysis in this case.  
08:44:46 **21** With respect to the revenue-based model, I have  
08:44:49 **22** no idea what he's talking about there because while the  
08:44:53 **23** company, obviously, has revenue, there is no witness who can

08:46:06 **1** dollars. People paid Activision a billion dollars for these  
08:46:10 **2** games; right?  
08:46:11 **3** MR. ANDRE: Right. So you have a billion  
08:46:13 **4** dollars for the games. You have the profits attributed to  
08:46:15 **5** those games as well as what the profit margins are for that.  
08:46:18 **6** You also have the apportionment of what is related to the  
08:46:22 **7** footprint of the invention.  
08:46:23 **8** So we have apportionment. We have the revenues.  
08:46:25 **9** We have the profits, and we have a lot of other -- the cost  
08:46:28 **10** of maintenance. We have the issues regarding the cost of  
08:46:31 **11** development.  
08:46:31 **12** THE COURT: So let's assume, because it was  
08:46:38 **13** obviously stated to this effect, but let's assume the data  
08:46:40 **14** says profits are 20 percent. So instead of a billion, you  
08:46:44 **15** have 200 million. That's the profits.  
08:46:48 **16** I can't remember at this point, did somebody  
08:46:55 **17** apportion what percentage of the games relates to the  
08:47:06 **18** technology that's the infringing technology and what portion  
08:47:11 **19** of it is something else?  
08:47:12 **20** MR. ANDRE: Yeah. Dr. Meyer does that as well.  
08:47:15 **21** And you also required her to do that, and she did it, and  
08:47:17 **22** that's still in the case. So she does --  
08:47:19 **23** THE COURT: That was part of what I did like

08:47:25 1 THE COURT: Okay.

08:47:26 2 MR. ANDRE: And so it's something that

08:47:28 3 everything is in there except her final number that she

08:47:31 4 gave. That's what you excluded based on Uniloc. So we have

08:47:34 5 all the information there for a jury to make the

08:47:38 6 determination what a royalty would be.

08:47:40 7 THE COURT: Well, so to just put a concrete

08:47:44 8 thing on it, I assume that apportionment ends up with her

08:47:48 9 saying "X" percent of revenue or maybe of the profit is

08:47:57 10 attributable to the invention. What's "X"?

08:48:03 11 MR. ANDRE: I think it's 42 percent. I don't --

08:48:09 12 there's a number that she had. I can't recall off the top

08:48:11 13 of my head, but she does an apportionment.

08:48:14 14 THE COURT: All right. So basically she's going

08:48:16 15 to say a billion dollars of sales, 200 million in profits,

08:48:22 16 42 percent of this is apportioned to the invention.

08:48:29 17 And is she going to say something more after

08:48:31 18 that?

08:48:31 19 MR. ANDRE: Well, yeah. She's going to give

08:48:34 20 some more calculations as to how she got to all those

08:48:37 21 numbers.

08:48:37 22 THE COURT: Yeah. Yeah. I mean, assuming we

08:48:41 23 get to all that, then she says 42 percent of this is

08:48:43 24 apportioned to the infringing technology. Then does she say

08:48:47 25 something else like, I don't know, so with the hypothetical

08:48:51 1 negotiation, they would have split this and take 21 percent

08:48:57 2 times 200 million and that would have been the lump sum?

08:49:00 3 MR. ANDRE: She doesn't say that because that

08:49:01 4 was not in her report. I mean, that final number is the

08:49:04 5 only thing that's missing at this point, what that number

08:49:07 6 would be.

08:49:08 7 But as Your Honor's very well aware of, a jury

08:49:11 8 can make that final determination. You don't have to give a

08:49:14 9 percentage, per se. It's not a requirement to give a

08:49:16 10 percentage rate. It's traditional.

08:49:19 11 We try to do it with the Uniloc, and they don't

08:49:21 12 like that number. So the jury is going to have to make a

08:49:25 13 determination based on all the facts that are in. And the

08:49:28 14 fact will be substantial as to the numbers, the revenue

08:49:35 15 numbers, like I said, the cost of development.

08:49:37 16 THE COURT: But, you know, the numbers are

08:49:42 17 obviously made up, but essentially that I have an

08:49:46 18 understanding what you plan to do in relation to this is,

08:49:52 19 Here's a big number. Here's a progress number. Here's the

08:49:56 20 percentage contribution of the games. Jury, do what you

08:50:03 21 think is fair.

08:50:04 22 MR. ANDRE: Yeah. So the Georgia-Pacific

08:50:07 23 Factors which she's going to go through, they're not a

08:50:14 1 royalty rate. It's a reasonable royalty.

08:50:15 2 So she's going to go through each one as factors

08:50:18 3 and say, This is where the parties would be. This is what

08:50:21 4 would be considered, and this would tend to lead to, you

08:50:24 5 know, how the parties would be negotiating at that time.

08:50:27 6 So she's going to go through and do that. So

08:50:29 7 she's going to give them information that they can make a

08:50:33 8 reasonable royalty calculation based on the numbers that's

08:50:35 9 provided. And they'll also be provided through other people

08:50:38 10 as well.

08:50:39 11 So that's the revenue-based model. It's

08:50:41 12 everything, but you know, a percentage.

08:50:47 13 THE COURT: Okay. I understand what you're

08:50:48 14 saying there.

08:50:51 15 And so, Mr. Enzminger, I'm not asking you

08:50:59 16 whether you like it or not, but do you understand what he

08:51:02 17 just said?

08:51:02 18 MR. ENZMINGER: I understand what he just said,

08:51:03 19 and I understand that it's not admissible.

08:51:05 20 THE COURT: So let's skip that for right now.

08:51:08 21 The per-unit analysis, do you understand the plaintiff's --

08:51:17 22 the per user, sorry, do you understand their theory there?

08:51:22 23 MR. ENZMINGER: No. The only per-user royalty

08:51:24 24 that has ever been disclosed to us was excluded and none of

08:51:30 25 these --

08:51:30 1 THE COURT: Based on Uniloc?

08:51:32 2 MR. ENZMINGER: Yes.

08:51:33 3 THE COURT: All right. So Mr. Andre, what about

08:51:35 4 the per user? Can you just explain that a little more?

08:51:37 5 MR. ANDRE: Yeah. We did a -- this is how we

08:51:45 6 describe to them a reasonable royalty based on the number of

08:51:49 7 unique users of the accused products, and then we gave lot

08:51:54 8 numbers or Bates numbers in Dr. Meyer's report. And the

08:51:56 9 idea here is that you would look at the number of unique

08:51:59 10 users that are using this.

08:52:01 11 THE COURT: Right. There's a million users out

08:52:02 12 there, whatever.

08:52:04 13 MR. ANDRE: Right. They pay subscription

08:52:06 14 services. They pay -- you know, there's the revenue

08:52:08 15 generated from that, and you can look at it as a per user in

08:52:13 16 the revenues.

08:52:14 17 The numbers all come in. She does the whole

08:52:16 18 analysis, what the per-user numbers look like and how the --

08:52:19 19 THE COURT: Well, when you say the "per-user

08:52:21 20 numbers" look like, there's a million users. I understand

08:52:23 21 that's not a number or whatever it is, it's out there. What

08:52:28 22 other numbers, categories of numbers are we talking about

08:52:31 23 here?

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