

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ACCELERATION BAY LLC,

Plaintiff,

v.

ACTIVISION BLIZZARD INC.,

Defendant.

Civil Action No. 1:16-cv-00453-RGA

CASE MANAGEMENT ORDER

On August 29, 2018, two months before the scheduled trial, I issued an Order striking the portion of Plaintiff's primary damages expert's reasonable royalty opinion which relied on a jury verdict in *Uniloc USA, Inc. v. EA*, No. 6:13-cv-00259-RWA (E.D. Tex. Dec. 15, 2014). (D.I. 578 at 27-28). The Parties failed to highlight in their briefing on the issue, and I did not appreciate when I issued the Order, the significance of the *Uniloc* verdict to Plaintiff's ability to put on an acceptable damages case. (See D.I. 442, 475, 505). Because I did not recognize a problem, I did not suggest that the Parties provide me with a status update or ask Plaintiff to specifically address the issue. Defendant revealed the magnitude of the implications of my ruling in its Motion to Preclude on September 28, 2018, one month before trial. (D.I. 581). I reviewed Plaintiff's revised damages case and precluded certain inadmissible pieces of evidence in an order issued on October 17, 2018, twelve days before trial. Plaintiff advocated during the pre-trial conference that it still had admissible damages theories. I requested that the Parties brief the theories. The Parties completed that briefing on October 24, 2018, five days before the scheduled trial. (See D.I. 601, 603, 609). Defendant argued that Plaintiff did not properly

disclose its theories and that the theories failed to meet the standards set by the Federal Circuit. (D.I. 601, 603). Based on the briefing, I determined that it would not be possible for me to reach a decision on Plaintiff's damages case prior to the scheduled start of trial. Accordingly, I suggested that the trial could go forward without damages or the trial could be continued pending the resolution of issues with Plaintiff's damages case. The Parties were unable to reach an agreement on the proper course of action. (*See* D.I. 611, 612). I heard the Parties' various concerns during a teleconference on October 25, 2018, four days before the scheduled trial.

Considering the last-minute scramble going to trial would have caused, I determined that it was appropriate to continue the trial indefinitely, pending resolution on the admissibility of Plaintiff's damages case. It may be that Defendant would have presented an acceptable infringement defense, but it would probably have been prejudicial to require a significant alteration in what was being tried on the eve of trial. Defendant is not to blame for the present state of affairs and it would have been unfair to force it to proceed with a last-minute bifurcation of the trial. However, neither party should interpret my decision to continue the trial as an indication of my disposition toward the proper resolution of issues surrounding Plaintiff's damages case.

Now that the trial has been continued, I will permit Plaintiff a final opportunity to present me with an admissible damages case. Plaintiff may supplement its expert reports if it wishes to do so. If Plaintiff supplements, Defendant may do so also. Once any supplementation has occurred, and any further expert depositions have been conducted, Plaintiff shall provide me with a proffer of the case it intends to submit to the jury on damages. The proffer shall contain a fulsome explanation of all of Plaintiff's damages theories, all the evidence it plans to put on in support of those theories, and citations to Federal Circuit precedent supporting its admissibility

and sufficiency. Plaintiff may use as many pages as it requires to make the proffer. If Defendant objects to Plaintiff's proposed damages case as outlined in the proffer, or Plaintiff's supplemented expert reports, Defendant shall file an appropriate motion. The parties should confer regarding a schedule for the above items and submit an agreed schedule to the Court within 14 days.

IT IS SO ORDERED this 30 day of October 2018.



United States District Judge