

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

ORDER

Presently before me are Defendant's motion to Preclude the New Damages Theories Raised by Plaintiff (D.I. 601) and Plaintiff's Motion for Reargument and Reconsideration (D.I. 602). For the reasons set out below, I will **DISMISS** Defendant's motion as **MOOT** and **DENY** Plaintiff's motion.

The Parties completed the current briefing on Plaintiff's damages case in great haste and with a focus on the impending trial. (*See* D.I. 601, 603, 609). The quality of the briefing reflects the circumstances of the drafting. Moreover, I suspect Plaintiff's articulation of its damages case will evolve as it supplements its expert reports and develops its proffer. Briefing directed specifically to Plaintiff's proposed case as articulated in its proffer will be substantially more helpful to me in resolving whether Plaintiff has a legally-sufficient damages theory based on admissible evidence. Therefore, I will dismiss Defendant's motion to Preclude the New Damages Theories Raised by Plaintiff (D.I. 601) as moot.

Plaintiff argues that I committed legal error requiring reconsideration when I precluded introduction of an agreement between Microsoft and Defendant related to use of the Xbox

platform. Reconsideration is appropriate based on “(1) an intervening change in the controlling law; (2) the availability of new evidence that was not available when the court granted the motion . . . ; or (3) the need to correct a clear error of law or fact or to prevent manifest injustice.” *Max's Seafood Cafe ex rel. Lou-Ann, Inc. v. Quinteros*, 176 F.3d 669, 677 (3d Cir. 1999). I do not agree with Plaintiff that I committed error. When evaluating Plaintiff’s proposed method of establishing a reasonable royalty, I held, “[A] document showing a royalty Defendant pays to Microsoft [is] inadmissible to prove a 15.5% royalty rate.” (D.I. 600 at 7). That is, I held that the Microsoft agreement (“Agreement”) is not a comparable license such that it might be relevant as an independent basis for a jury to set a reasonable royalty. Plaintiff was and is precluded from pulling a licensing rate from the Agreement and presenting it as comparable to the ultimate rate a jury should apply. It is not a patent license and therefore not a license comparable to the one which would have resulted from a hypothetical negotiation. It is not relevant to the question of comparable licenses.¹ Thus, I will deny Plaintiff’s Motion for Reargument and Reconsideration (D.I. 602).

Defendant’s motion to Preclude the New Damages Theories Raised by Plaintiff (D.I. 601) is **DISMISSED** as **MOOT** and Plaintiff’s Motion for Reargument and Reconsideration (D.I. 602) is **DENIED**.

IT IS SO ORDERED this 30 day of October 2018.


United States District Judge

¹ Whether an expert is precluded from considering the Agreement among the ancillary indicators of the value of the patented invention is not the issue that was presented to me. Thus, I have not, and do not now, express any view on that issue.