

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

ACCELERATION BAY LLC,)	
)	
Plaintiff,)	
)	C.A. No. 16-453-RGA
v.)	
)	PUBLIC VERSION
ACTIVISION BLIZZARD, INC.,)	
)	
Defendant.)	

**PLAINTIFF ACCELERATION BAY LLC'S
OPPOSITION MOTION REGARDING DAMAGES ISSUES**

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Acceleration Bay is entitled to no less than a reasonable royalty under 35 U.S.C. §284 for Activision's infringement. The reasonable royalty can be based on: (1) Activision's cost savings from its infringement and/or (2) apportioned revenues from Activision's sales of the accused products implicated by the infringing networks. Here, Acceleration Bay's reasonable royalty claims are supported by admissible evidence, including Activision's financial records, testimony of fact witnesses, expert opinion and an analysis of the *Georgia-Pacific* factors based on the specific facts of this case. Activision has long known about this evidence and these claims because Acceleration Bay timely disclosed them early in discovery, and Activision either failed to challenge them or already unsuccessfully attempted to exclude the evidence and opinions upon which Acceleration Bay's damages case is based.

Activision's motion is based on the fundamentally incorrect premise that for a jury to determine a reasonable royalty, there *must be* a royalty rate applied. That is not the law. The Federal Circuit has held that there are many acceptable methods of calculating a reasonable royalty, and confirmed a reasonable royalty can be based on cost-savings that does not apply a royalty rate. *See Apple Inc. v. Motorola, Inc.*, 757 F.3d 1286, 1315 (Fed. Cir. 2014) (confirming that there are multiple approaches to determine a reasonable royalty); *Powell v. Home Depot U.S.A., Inc.*, 663 F.3d 1221, 1238-41 (Fed. Cir. 2011) (approving a cost-savings based verdict that was not based on a royalty rate). In *Powell*, the Federal Circuit rejected the same argument Activision advances, *i.e.*, that a royalty rate is necessary to sustain a damages award. *Id.*

Activision's motion also should be denied because it parrots the same arguments the Court already rejected in finding that Acceleration Bay's experts' cost savings estimate and apportionment opinions are admissible under *Daubert*, as well as regarding their hypothetical negotiation date. Activision was fully heard on those issues and, significantly, never moved for

reconsideration of those rulings. Regardless, Activision provides no basis for the Court to reach a different result to the extent it even entertains these same recycled arguments that it already denied. Activision's critiques are grist for cross-examination, not a basis for exclusion. D.I. 578 (Memorandum Opinion) at 28, 30-31. Accordingly, the Court should permit Acceleration Bay to present its admissible evidence from which the jury can determine, as required by law, the reasonable royalty owed for Activision's infringement.

A. A Reasonable Royalty Based on Cost-Savings

Acceleration Bay seeks a reasonable royalty based on Activision's cost savings from infringement. Acceleration Bay first disclosed this methodology (as well as its revenue based model described below) in response to Activision's interrogatory regarding the methods for determining damages, on March 30, 2017, and in supplemental responses thereafter. Ex. 1 at 7; Ex. 2 at 6, 8; Ex. 3 at 11-12 (identifying a reasonable royalty based on "cost savings to Defendant from using the Asserted Patents" and its "forthcoming expert reports").

As evidence for the cost-savings claim, Acceleration Bay, through Dr. Meyer, will present Activision's internal documents that identify the development costs for each accused game. Acceleration Bay will also offer the opinion of Dr. Valerdi regarding the cost to rebuild the infringing network. Specifically, Dr. Valerdi's cost estimate is if there was "an alternative" or non-infringing alternative, "it would require rearchitecting the game to develop a new network architecture and associated functionality" and his opinion is "to estimate the cost to do so." *See* D.I. 444, Ex. C-2 ("Valerdi Rpt.") at 3. In other words, Dr. Valerdi's opinion is regarding the expense that Activision avoided by not having to build a non-infringing network, and he discloses in his report his assumptions and the factual inputs into his estimate. These assumptions and inputs include his reliance on Acceleration Bay's technical experts' analysis of the accused products and numerous characteristics of the software and the hypothetical

rearchitecting project, all of which are unrebutted by Activision. *See id.* at 2-13; *see also id.* at Errata to Valerdi Rpt. served on October 23, 2017.

Dr. Valerdi's opinion is tied directly to the footprint of the patented invention which is the same as an apportioned base because he assesses what it would cost to build a non-infringing alternative based on the lines of infringing code. Contrary to Activision's misrepresentation, Dr. Valerdi did not just count lines of source code untethered to the infringement issues in this case. As explained in his report and in the deposition testimony collected in the following section, the scope of Dr. Valerdi's cost-estimate was "just the networking code," based on his discussions and understanding of infringement from the infringement experts Dr. Mitzenmacher and Dr. Medvidovic, and it is not the cost to re-architect the entire game. D.I. 444, Ex. C-2 at 8 ("Since all source code printed relates to networking functionality, this is a reasonable subset to analyze for purposes of the cost estimate.").

Dr. Valerdi, therefore, estimated the cost to replace the infringing networking functionality in the accused products with a non-infringing alternative, to the extent it is even possible, guided by the opinions of Acceleration Bay's technical experts. In doing so, Dr. Valerdi's cost estimate is directly tied to infringing technology at issue. His opinion is not the cost to develop the existing games, but rather the cost to implement a non-infringing alternative to the extent one is available.

Acceleration Bay relies on additional admissible evidence to support this claim. Activision itself identified the documents that enumerate the amount that it spent to develop each of the accused games. D.I. 455, Ex. 61 at 7-9. Acceleration Bay further relies on supporting deposition testimony, including that of Activision's corporate designees, Byron Beede, Saralyn Smith, Robert Kostich, for the specific identification of the costs spent to develop the each of the

accused products, which indicate a minimum amount that Activision was willing to spend to use the infringing technology to develop its accused products. Ex. 3 at 11-12.

Thus, Acceleration Bay will present relevant and admissible evidence in support of its cost-savings claim. Acceleration Bay timely disclosed all of these opinions and all of this evidence during discovery and in its experts' reports. *Id.*; *see also* D.I. 444, Ex. C-2 (Valerdi Rpt.); D.I. 480, Ex. 69 (Opening Expert Report of Dr. Meyer) ("Meyer Opening Rpt.").

Therefore, Activision has been on notice of all of the methodologies and related evidence that Acceleration Bay will present to support its cost savings damages claim.

1. The Court Already Found Dr. Valerdi's Cost Savings Opinions to Be Admissible.

Acceleration Bay's technical expert, Dr. Valerdi, provided a detailed estimate of Activision's cost savings using the leading cost estimation tools. *See* D.I. 444, Ex. C-2 at 2-13. The Court already confirmed that this cost savings analysis is admissible under *Daubert*, and rejected the same arguments that Activision recites for this Motion, *i.e.* criticism of Dr. Valerdi's computer model and Activision's claim that Dr. Valerdi's analysis was not tied to the specific products or technology in this case. *See* D.I. 578 at 30-31; D.I. 442 (Activision's Br.) at 48-49.

As Acceleration Bay previously explained, Dr. Valerdi's computer model is a commercially available, leading tool for estimating costs. Dr. Valerdi provided a detailed explanation of the variables and inputs that he used, such as the quality of the code, the nature of the code, the number of relevant lines of code that would need to be generated, the time frame, the programming language, the labor costs, the cost reduction due to significant reuse of prior code, and reliance on his professional expertise, Acceleration Bay's infringement experts and his analysis of the accused products to select those variables and inputs. D.I. 444, Ex. C-2 at 3-12.

As noted in Acceleration Bay's opposition to Activision's unsuccessful *Daubert* motion raising these same arguments, one of Activision's technical experts acknowledged that Dr.

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