

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.,)	REDACTED
)	PUBLIC VERSION
Defendant.)	

**DEFENDANT ACTIVISION BLIZZARD INC.'S OPENING BRIEF IN SUPPORT OF ITS
MOTION TO STRIKE PLAINTIFF'S SUPPLEMENTAL EXPERT DAMAGES REPORT**

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I. NATURE AND STAGE OF THE PROCEEDINGS

Activision moves to strike Acceleration's "supplemental" damages report submitted by Russell Parr. Mr. Parr's report introduces new, contradictory, and undisclosed damages theories resulting in far increased damages numbers. His report is based on facts withheld during discovery (despite multiple orders compelling disclosure) and his theories squarely contradict Acceleration's original damages expert, Dr. Meyer. The Court gave Acceleration a chance to supplement, not supplant. Acceleration's last-minute facts, opinions, and theories should be stricken and excluded.

II. SUMMARY OF ARGUMENT

Acceleration has been given multiple chances to make its case. It has failed to do so at every turn, which is the only consistency Acceleration has provided thus far. Seizing on this Court's latitude for one "final opportunity" to "supplement" its case, Acceleration abused this Court's leave by hiring a new expert to render new and contradictory opinions predicated on withheld and undisclosed facts. Mr. Parr's opinions do not simply deviate from Acceleration's earlier theories, they are flatly contrary to the entire record developed during fact and expert discovery. These new theories are do not "supplement" any fairly and timely disclosed position. Instead, they assault the record, attack the discovery process, and ambush Activision at the eleventh hour. Exclusion is warranted,

Mr. Parr's report relies on facts withheld during discovery, despite Activision's extensive efforts to learn about Acceleration's theories. Mr. Parr's expert report opines on a single royalty rate of ■■■ that is based entirely on a purported Boeing-Panthesis license agreement. The Special Master compelled full disclosure of Acceleration's damages case, but Acceleration never even identified this agreement as relevant to its damages case, let alone a basis for its requested

compensation. Nor was the final, executed version of the agreement ever produced. As a result, Activision never had a chance to explore—let alone test—the veracity of Mr. Parr’s assumptions or his off-the-record sources, such as an inventor’s recollection of an almost two-decade old agreement.

The Court should not excuse Acceleration’s irresponsible advocacy and should hold Acceleration accountable for its own its strategic decisions in developing its damages case in this matter. This is particularly true where, as here, Acceleration’s approach to damages deprived Activision of any meaningful opportunity to vet its newly-proffered trial theories during fact and expert discovery.

At the end of the day, discovery and the Federal Rules serve a vital role in every litigation. So do deadlines. For these reasons, as detailed below, Activision respectfully request the Court to strike and exclude the new opinions and theories stated in Mr. Parr’s “supplemental” report pursuant to Rules 26 and 37, as well as this Court’s inherent discretion in its application of the Third Circuit’s *Pennypack* factors.

III. STATEMENT OF FACTS

Two months prior to the start of trial, this Court struck Acceleration’s expert damages opinion offered by Dr. Meyer for improperly relying upon the *Uniloc* jury verdict. D.I. 578 at 27–28.

Following this ruling, Activision sought clarification from Acceleration as to what damages evidence it intended to present at trial. In response, Acceleration pivoted and said it would then rely upon a royalty rate of [REDACTED] which it derived from a random website. On September 28, 2018, one month before trial, Activision filed a Motion to Preclude Acceleration’s “revised” damages case. *See* D.I. 581. This Court granted Activision’s motion in-part and

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