

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’S BRIEF IN OPPOSITION
TO PLAINTIFF ACCELERATION BAY’S MOTION TO EXCLUDE OPINIONS OF
CATHARINE M. LAWTON**

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. STATEMENT OF FACTS 2

III. ARGUMENT 3

 A. Standards of Admissibility..... 3

 B. Ms. Lawton Makes an Assumptecyion of Fact and Does Not Offer Technical Opinions.. 3

 i. Ms. Lawton’s Commonsense Opinions and Assumptions Are Well-Supported..... 4

 ii. Acceleration is Not Prejudiced by Ms. Lawton’s Opinions 7

 iii. Acceleration Cannot Employ a “Head-in-the-Sand” Approach to Non-Infringing Alternatives 8

 C. Ms. Lawton’s Criticisms of Mr. Parr’s Use of Dr. Valerdi’s Purported Cost Estimate Report Are Admissible Damages Opinions..... 9

 i. Ms. Lawton Criticizes Mr. Parr’s Reliance on Dr. Valerdi, Not the Technical Reliability of Dr. Valerdi’s Source Code Inputs..... 10

 ii. Ms. Lawton is Qualified to Consult Studies on the Reliability of SEER-SEM to Assess Whether it Should be Used in a Damages Model 12

IV. CONCLUSION..... 13

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Cryovac Inc. v. Pechiney Plastic Packaging, Inc.</i> , 430 F. Supp. 2d 346 (D. Del. 2006).....	7
<i>Grain Processing Corp. v. Am. Maize-Prod. Co.</i> , 185 F.3d 1341 (Fed. Cir. 1999).....	8
<i>Kannankeril v. Terminix Intern., Inc.</i> , 128 F.3d 802 (3d Cir. 1997).....	3
<i>Micro Chem., Inc. v. Lextron, Inc.</i> , 317 F.3d 1387 (Fed. Cir. 2003).....	4
<i>Presidio Components, Inc. v. Am. Tech. Ceramics Corp.</i> , 875 F.3d 1369 (Fed. Cir 2017).....	8
<i>Stecyk v. Bell Helicopter Textron, Inc.</i> , 295 F.3d 408 (3d Cir. 2002).....	4
<i>W.L. Gore & Assocs., Inc. v. C.R. Bard, Inc.</i> , No. 11-515-LPS-CJB, 2015 WL 12806484 (D. Del. Sept. 25, 2015)	5
Rules and Statutes	
FED. R. EVID. 702	3, 5

I. INTRODUCTION

Plaintiff Acceleration Bay does not challenge the economic credentials of Activision's damages expert, Ms. Cathy Lawton, but moves to strike two portions of Ms. Lawton's rebuttal report by incorrectly claiming they include technical analysis. D.I. 648. Because these opinions need not, and do not, include any technical analysis from Ms. Lawton, this Court should deny Acceleration's motion.

First, Acceleration claims that Ms. Lawton provides a new technical analysis on non-infringing alternatives to the accused videogames, when in reality she merely evaluates the value to Activision of prior versions of the accused games. For this opinion she does not conduct any technical analysis on whether those prior versions infringe. Rather, she relies on Acceleration's own litigation positions, as Acceleration recently abandoned its infringement claims against these prior versions, and its new damages expert who now opines that these prior versions were successful before Activision allegedly "began infringement." Ms. Lawton's analysis of the value of these non-accused, successful, prior versions of the accused games—and the role they would play at a hypothetical negotiation—is solidly within her economic expertise.

Second, Acceleration incorrectly claims that Ms. Lawton goes outside her expertise to criticize the SEER-SEM cost estimation model used by Dr. Valerdi. But in truth, Ms. Lawton merely questions Mr. Parr's decision to use Dr. Valerdi's calculations as a direct input in determining damages without appropriate safeguards.¹ For example, Ms. Lawton points out that in an alleged attempt to measure the cost of developing a non-infringing alternative, Dr. Valerdi input all [REDACTED] source code files for one accused game into his model, even though Dr. Medvidovic's infringement report only cited [REDACTED] distinct source code files in connection with his

¹ Notably, Acceleration's prior damages expert, Dr. Meyer, rejected using Dr. Valerdi's estimates as inputs into a damages calculation.

infringement theories for that game. *See* Ex. A, 2019 Lawton Report at ¶ 229. Likewise, Ms. Lawton points to articles questioning the reliability of the SEER-SEM model, compared to Dr. Valerdi’s conclusory claim, without citation, that it is reliable. It is perfectly appropriate for Ms. Lawton to opine that Mr. Parr should not have directly used Dr. Valerdi’s calculations without any explanation of these and similar discrepancies.

Ms. Lawton’s responsive opinions are well within her economic expertise and Acceleration’s motion should be denied.

II. STATEMENT OF FACTS

After this Court struck Acceleration’s damages case for the third time prior to trial, Acceleration was granted “a final opportunity to present [the Court] with an admissible damages case.” D.I. 619 at 2. This Court continued trial indefinitely, allowed Acceleration to make a “proffer of the case it intends to submit to the jury on damages,” and explained that “Plaintiff may supplement its expert reports if it wishes to do so.” *Id.*

Acceleration then hired a brand new damages expert, Russell Parr, and served his “supplemental” expert report on December 7, 2018. Ex. B, Parr Report. In his supplemental report, Mr. Parr opines on seven separate royalties across three “Approaches” (“Cost-Savings,” “Revenue-Based,” and “User-Based”). *See* Ex. B, Parr Report at ¶ 18.

In response, Activision utilized its original damages expert in this case, Ms. Lawton, and served her supplemental rebuttal expert report on January 25, 2019. Ex. A, 2019 Lawton Report. Acceleration does not challenge her credentials as an economics expert, as she has a Bachelor of Science in Finance and Economics, *id.* at ¶ 16, with over 30 years of experience as a damages expert in patent infringement disputes involving computer system and video game technology. Ex. C, 2017 Lawton Report at ¶¶ 8, 13.

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