

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

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

**DEFENDANT ACTIVISION BLIZZARD INC.'S REPLY BRIEF IN SUPPORT OF
MOTION TO STRIKE EXPERT REPORT OF RUSSELL PARR**

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I. INTRODUCTION

Acceleration's opposition fails to cure the glaring deficiencies in Mr. Parr's damages report, specifically that (1) it is not a supplemental report as contemplated by this Court's order, and (2) a large portion of the report relies upon an unproduced, unexecuted technology transfer agreement that was never identified by Acceleration during fact or expert discovery as a basis for its damages theories despite multiple orders compelling Acceleration to disclose all facts supporting its damages theories. Because Acceleration's new report exceeds the bounds of this Court's order, as well as case law that defines the scope and purpose of supplemental reports, the entirety of the report should be stricken.

Acceleration has repeatedly failed to present an admissible damages case, and now seeks to offer a brand new damages case under the guise of a "supplemental" report based on a purported agreement, the final version of which has never been produced, and that was not identified by Acceleration in over three years of litigation as being the basis for its damages theories. Activision respectfully requests that this Court reject Acceleration's impermissibly broad interpretation of its order, and strike Mr. Parr's expert report.

II. ARGUMENT

A. The Court's Order Did Not Contemplate a Brand New Damages Report

Acceleration asserts that it understood that the Court "intended to permit Acceleration [] to assert appropriate damages claims for Activision's infringement without merely rehashing the same claims the Court already excluded." D.I. 667, at 4. Activision objects to Mr. Parr's wholesale reworking of Acceleration's damages case in direct contradiction to Dr. Meyer's report.

The Court permitted Acceleration to "*supplement* its expert reports" as a "final opportunity to present [the Court] with an admissible damages case." D.I. 619, at 2 (emphasis added). And, while it allowed Acceleration "to submit a damages report from a new damages expert, [it]

reserve[d] the right to strike or limit it depending on its contents.” D.I. 630, at 3 n.1. The Court’s order was clear—it permitted Acceleration to supplement Dr. Meyer’s expert damages report and would exercise discretion to strike if warranted. Instead of supplementing, Acceleration employed a new expert whose report is completely divorced from Dr. Meyer’s damages case record.¹

Acceleration attempts to distinguish *Robocast* and *Intellectual Ventures* by focusing on irrelevant aspects of the procedural posture of those cases. See D.I. 667, at 4. Regardless of whether the supplemental reports in those cases were authorized or not, the guidance regarding the definition and bounds of a supplemental report still applies. In *Robocast*, the Special Master and the Court found “that the supplemental report added new theories that could have been contained in the original report” and guidance was offered regarding the role of supplementation—a supplemental report is to “correct inadvertent errors or omissions” not to advance opinions that “should have been included in the [original] expert witness’ report.” *Robocast, Inc. v. Apple Inc.*, No. 11-235-RGA, 2014 WL 334199, at *1 (D. Del. Jan. 28, 2014) (quoting *Gallagher v. Southern Source Packaging, LLC*, 568 F. Supp. 2d 624, 630–31 (E.D.N.C. 2008)). The procedural posture in *Robocast* does not minimize the guidance regarding the proper bounds of a supplemental report.

Similarly, in *Intellectual Ventures*, defendants challenged plaintiff’s expert report because it “offer[ed] a new theory and improperly relie[d] on evidence that was not produced or relied upon in” the opening report. *Intellectual Ventures I LLC v. AT&T Mobility LLC*, No. 12-193-LPS, 2017 WL 478565, at *3 (D. Del. Jan. 31, 2017). The court struck that portion of plaintiff’s report because the

¹ Acceleration argues that the Court should not strike Mr. Parr’s report in its entirety because Activision does not challenge all of the substantive damages opinions offered in Mr. Parr’s report. D.I. 667, at 2, 5, 9. Activision’s motion to strike is based on procedural and evidentiary deficiencies in Mr. Parr’s report. Activision’s substantive challenges to Mr. Parr’s report are addressed in its proffer challenge briefing. D.I. 650.

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