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

MEMORANDUM OPINION

Presently before me are Plaintiff's Motion to Exclude Opinions of Catharine M. Lawton (D.I. 647), Defendant's Motion in Response to Acceleration Bay's Damages Proffer (D.I. 650), and Defendant's Motion to Strike Supplemental Expert Damages Report (D.I. 651). I resolve these motions as follows.

I. BACKGROUND

Acceleration Bay LLC ("Acceleration") filed suit against Activision Blizzard Inc. ("Activision") on June 17, 2016. (D.I. 1). It alleges that certain versions of Activision's World of Warcraft ("WoW"), Call of Duty ("CoD"), and Destiny video games infringe its patents. (*Id.*). I scheduled this case for a jury trial to start on October 29, 2018. (D.I. 545). That trial did not happen, however, as it was unclear on the eve of trial whether Plaintiff had an admissible damages case. (D.I. 619 (describing the sequence of events that led me to continue the trial)). I postponed the trial indefinitely, pending resolution of the cloud of issues hanging over Plaintiff's case. (D.I. 613).

Following the cancellation of trial, I issued an order allowing Plaintiff a final opportunity to present an admissible damages case. (D.I. 619 at 2). I granted Plaintiff permission to supplement its expert reports and allowed Defendant a chance to respond. (*Id.*). Plaintiff later requested that it be allowed to submit a report from a new damages expert, Mr. Russell Parr, rather than supplementing its earlier expert's report. (D.I. 630). I permitted Plaintiff to submit such a report with the caveat that I may limit the report depending on its contents. (*Id.* at 3 n.1).

In his report, Mr. Parr opines on seven royalties derived using three approaches: cost savings, revenue-based, and user-based. The following chart provides a summary of those opinions:

No.	Title	Equation	Amount in Millions	Inputs:		
				Dr. Valerdi	Boeing/ Panthesis License	Survey
1	Cost Savings: Licensing History	$ 2.4 Billion x 12%	$288.30	Y	Y	[redacted]
2	Cost Savings: Rate of Return	$2.54 Billion x 12%	$304	Y	Y[1]	
3	Cost Savings: Replacement Cost of Capital	$2.4 Billion x 5.9%	$141.70	Y	[redacted]	
4	[Alt.] Cost Savings: Replacement Cost of Capital	$2.4 Billion x 5.9% x 2	$283.50	Y		

[1] Plaintiff disagrees with listing the Boeing/Panthesis License as an input in the Rate of Return analysis. It argues, "[Mr. Parr's] only reference to the Boeing/Panthesis rate was to use the lesser of the two rates to make the analysis even more conservative." (D.I. 665 at 14 n.7). I do not agree with Plaintiff's conclusion. For example, Mr. Parr opines that 30.3% of WoW revenues are associated with the patented invention. (D.I. 642-1, Exh. A at ¶ 196). He then says, "The 30.3% of revenues associated with the patent[ed] invention provides significant support for the Boeing/Panthesis royalty rate of 12%. These calculations yield a total royalty of approximately $304 million ($2,536,822,551 times 12%)." (*Id.*). While it is true that Mr. Parr appears to use the Boeing/Panthesis License as a means of cutting down a potentially higher rate, the result is that Mr. Parr input the rate from the license directly into his Rate of Return analysis.

5	Cost Savings: Maintenance Costs	$132 Million x 2	$264.80	Y	[redacted]	
6	Revenue-Based	$4.5 Billion x 57% x 12%	$305	[redacted]	Y	Y
7	User-Based	$57 x 12% x 57% x 61 Million	$240	[redacted]	Y	Y

II. LEGAL STANDARDS

A. Daubert

Federal Rule of Evidence 702 sets out the requirements for expert witness testimony and states:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702. The Third Circuit has explained:

> Rule 702 embodies a trilogy of restrictions on expert testimony: qualification, reliability and fit. Qualification refers to the requirement that the witness possess specialized expertise. We have interpreted this requirement liberally, holding that a broad range of knowledge, skills, and training qualify an expert. Secondly, the testimony must be reliable; it must be based on the methods and procedures of science' rather than on 'subjective belief or unsupported speculation; the expert must have good grounds for his or her belief. In sum, *Daubert* holds that an inquiry into the reliability of scientific evidence under Rule 702 requires a determination as to its scientific validity. Finally, Rule 702 requires that the expert testimony must fit the issues in the case. In other words, the expert's testimony must be relevant for the purposes of the case and must assist the trier of fact. The Supreme Court explained in *Daubert* that Rule 702's helpfulness standard requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility.
>
> By means of a so-called "*Daubert* hearing," the district court acts as a gatekeeper, preventing opinion testimony that does not meet the requirements of qualification, reliability and fit from reaching the

> jury. *See Daubert* ("Faced with a proffer of expert scientific testimony, then, the trial judge must determine at the outset, pursuant to Rule 104(a) of the Federal Rules of Evidence whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue.").

Schneider ex rel. Estate of Schneider v. Fried, 320 F.3d 396, 404–05 (3d Cir. 2003) (cleaned up).[1]

B. Motions to Strike

Federal Rule of Civil Procedure 37(c)(1) provides,"If a party fails to provide information . . . as required by Rule 26(a) or (e), the party is not allowed to use that information . . . to supply evidence on a motion, at a hearing, or at trial, unless the failure was substantially justified or is harmless." To determine whether a failure to disclose was harmless, courts in the Third Circuit consider the *Pennypack* factors: (1) the prejudice or surprise to the party against whom the evidence is offered; (2) the possibility of curing the prejudice; (3) the potential disruption of an orderly and efficient trial; (4) the presence of bad faith or willfulness in failing to disclose the evidence; and (5) the importance of the information withheld. *Konstantopoulos v. Westvaco Corp.*, 112 F.3d 710, 719 (3d Cir. 1997) (citing *Meyers v. Pennypack Woods Home Ownership Ass'n*, 559 F.2d 894, 904–05 (3d Cir. 1977)). "[T]he exclusion of critical evidence is an 'extreme' sanction, not normally to be imposed absent a showing of willful deception or 'flagrant disregard' of a court order by the proponent of the evidence." *Id.* The determination of whether to exclude evidence is within the discretion of the district court. *Id.*

III. ANALYSIS

Defendant moves to strike Mr. Parr's report or, in the alternative, to exclude large portions of Mr. Parr's report on *Daubert* grounds. I will grant Defendant's motion to strike in

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[1] The Court of Appeals wrote under an earlier version of Rule 702, but the 2011 amendments to it were not intended to make any substantive change.

two significant respects: (1) I will strike Mr. Parr's reliance on Dr. Valerdi for "cost savings" opinions and (2) I will strike Mr. Parr's use of certain Activision surveys as the grounds for apportioning the royalty base. I recognize that exclusion of those two aspects of Mr. Parr's report leaves Plaintiff with no intact damages theories. For completeness, however, I address each of Defendant's other *Daubert* arguments and Defendant's motion to strike Mr. Parr's entire report. I also address Plaintiff's motion to exclude certain opinions of Defendant's damages expert.

A. Defendant's Motion to Exclude Mr. Parr's Opinions

Defendant moves to exclude Mr. Parr's expert opinion on several grounds, including: (1) reliance on an unreliable cost savings opinion, (2) failure to properly apportion, (3) reliance on a non-comparable license, (4) failure to address negative facts, and (5) failure to apprehend the scope of the alleged method claim infringement. I address each of its arguments in turn.

1. "Cost Savings" Opinions: Reliance on Dr. Valerdi[2]

Five of Mr. Parr's reasonable royalty calculations rely on "cost savings" calculations done by Dr. Ricardo Valerdi. (*See* D.I. 444-1, Exh. C-2 (Valerdi expert report)). Dr. Valerdi specifically opines on "the cost of rearchitecting each of the Accused Products in this case in

[2] Defendant previously objected to Dr. Valerdi's opinion based on the computer program he used to generate his $7 billion redesign estimate. (D.I. 442 at 48-49). I dismissed Defendant's argument as a "failure of proof argument." (D.I. 578 at 30-31). Plaintiff characterizes that decision as an approval of Dr. Valerdi's opinion. (D.I. 665 at 3). It was not. My decision was a resolution of the specific issues Defendant chose to raise given the status of Plaintiff's damages case at that time. Defendant does not renew its earlier arguments in this briefing. Rather, it "raises new arguments germane to Mr. Parr's extended reliance on Dr. Valerdi's estimates." (D.I. 650 at 23 n.12). Defendant's decision to identify more specific issues with Dr. Valerdi's opinion at this juncture makes sense. Never before has Plaintiff relied on Dr. Valerdi as a source of its damages base. Accordingly, I will address Defendant's new arguments related to Dr. Valerdi's opinion.

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