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.,	)	
	)	
Defendant.	)	

JOINT STATUS REPORT

As requested by the Court and in view of the September 4, 2019 Order on various damages-related motions (D.I. 693, the "Order"), the parties have met and conferred and submit the following joint status report.

Acceleration Bay's Statement on How the Case Should Proceed:

With the Court having resolved the various outstanding damages motions, this case is now ready to proceed to trial. Acceleration Bay proposes that the Court set a date for trial in February or March 2020.

Acceleration Bay will present a fact-based damages case based on the already developed fact record and evidence with expert support. Consistent with the Order, Acceleration Bay's damages expert Russell Parr will summarize key facts and provide opinions which will assist the jury in determining a reasonable royalty. Mr. Parr's opinions to be rendered at trial are contained in his report and were not stricken by the recent decision. Specifically, Mr. Parr will provide facts and opinions regarding: (i) the *Georgia-Pacific* factors and framework, (ii) the Boeing/Panthesis license as comparable to the hypothetical negotiation for this case, and (iii) revenue and summaries of relevant financial information regarding the alleged infringing games. Acceleration Bay will introduce factual evidence to establish the appropriate apportionment to

the footprint of the inventions, as Acceleration Bay is entitled to no less than a reasonable royalty based on the facts of the case.

Finally, Acceleration Bay has informed Activision that it intends to file a motion for partial reconsideration of the Order by the September 18, 2019 deadline. Acceleration Bay is prepared to proceed as set forth above, even if the Court does not grant its motion for reconsideration.

Activision's Statement on How the Case Should Proceed:

The Court's September 4, 2019 Order left Acceleration Bay "with no intact damages theories." (D.I. 692 at 5). Because Acceleration failed in its fourth and "final opportunity" to present "an admissible damages case," this Court should enter judgment of no damages and end this case. (D.I. 619 p. 2).

The Court specifically stated that Acceleration's proffer would be its "final opportunity" and must "contain a fulsome explanation of all of Plaintiff's damages theories, all evidence it plans to put on in support of those theories, and citations to Federal Circuit precedent supporting its admissibility and sufficiency." (*Id.*, pp. 2-3). The Court also continued trial indefinitely to accommodate this process and allowed Acceleration to "use as many pages as it requires to make the proffer." (*Id.*) In response, Acceleration set forth seven expert opinions from Mr. Parr, each of which this Court excluded. (D.I. 692).

Acceleration's proffer did not provide any damages theories outside the excluded opinions of Mr. Parr. Specifically, Acceleration's proffer provides no details, let alone "a fulsome explanation" of the evidence upon which it intends to rely to support a damages award under the "fact-based damages case" or alleged "factual evidence to establish the appropriate apportionment to the footprint of the inventions" it now seeks to present. Acceleration should

not be allowed yet another opportunity to conjure an undisclosed "fact-based damages theory" after failing to do so in its final proffer. *See Hampton v. Miller*, 933 F.2d 1012 (Table), 1991 WL 82838, at *1 (7th Cir. 1991) ("[I]t undercuts the force of a federal court's orders if 'final' chances are just preludes to other opportunities").

Nor should the Court allow Acceleration to present opinions from Mr. Parr applying the Boeing/Panthesis rate to the bare un-apportioned revenues of the accused products.[1] The Court already excluded Mr. Parr's revenue-based and user-based opinions on the basis that they were not properly apportioned. (D.I. 692 at 8). Acceleration failed to provide any other apportionment evidence in its proffer and should not be allowed to present a new apportionment theory now.[2] Nor can Acceleration present an apportionment theory through a lay witness. (D.I. 600, p. 3) (excluding lay opinion on "the appropriate reasonable royalty").

In its pursuit of exorbitant damages numbers, Acceleration failed in its "final opportunity" to disclose an admissible damages case that it can present to the jury.[3] Entry of judgment of no damages is therefore appropriate:

- *Gustafson, Inc. v. Intersystems Indus. Prods., Inc.*, 897 F.2d 508, 509 (Fed. Cir. 1990) ("[W]e find no reversible error in the district court's . . . awarding no damages to [the patentee] because none were proven");

[1] Mr. Parr's discussion of Georgia-Pacific factors separate from his excluded damages opinions were not set forth in Acceleration's proffer and in any case are not independently admissible.

[2] Unlike *AVM Techs, LLC v. Intel Corp.*, 15-33-RGA, 2017 WL 1753999 (D. Del. May 1, 2017), where this Court allowed a patentee to proceed to trial on damages by calling the defendant's damages expert as a witness, nothing in Acceleration's final proffer reserves the right to call Activision's damages expert, Cathy Lawton. Even if it had reserved such a right, Ms. Lawton did not rely on Activision's revenues and thus conducted no apportionment exercise on those revenues.

[3] Acceleration's proffer conspicuously omitted other evidence of value that might withstand scrutiny and preserve a damages case for the jury—such as Boeing's patent license with Sony as well as its offers to sell these patents—which plainly cannot support the nine-figure values Acceleration repeatedly has demanded in this case.

- *Promega Corporation v. Life Technologies Corporation*, 875 F.3d 651, 665 (Fed. Cir. 2017) (affirming judgment of no damages: "[The patentee] declined to use this opportunity to prove any lesser damages amount. The district court acted within its discretion when it concluded that [defendant] and the judicial system should not suffer the consequences of [the patentee]'s deliberate choice.");

- *AVM Techs, LLC v. Intel Corp.*, 10-610-RGA, D.I. 294 (D. Del. Mar. 29, 2013) (excluding patentee's damages proffer and granting judgment against patentee, explaining that "although the exclusion of [co-inventor]'s testimony will leave [the patentee] without evidence of damages . . . this situation is of [the patentee]'s making"); and

- *Unicom Monitoring, LLC v. Cencom, Inc.*, No. CIV.A. 06-1166 MLC, 2013 WL 1704300, at *7-*8 (D.N.J. Apr. 19, 2013) (granting judgment of no monetary damages, including because "[the patentee] does not have an expert to delve into hypotheticals; [the patentee] does not have an analogous practice of licensing that can be uniformly applied; and [the patentee] has no rationale to support its suggested reasonable royalty calculation").

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