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.	)	

ACCELERATION BAY LLC'S MOTION FOR RECONSIDERATION OF THE COURT'S MEMORANDUM OPINION (D.I. 692) STRIKING THE SEER-SEM METHODOLOGY USED BY DR. RICARDO VALERDI

OF COUNSEL:

Paul J. Andre
Lisa Kobialka
James Hannah
KRAMER LEVIN NAFTALIS
& FRANKEL LLP
990 Marsh Road
Menlo Park, CA 94025
(650) 752-1700
pandre@kramerlevin.com
lkobialka@kramerlevin.com
jhannah@kramerlevin.com

Aaron M. Frankel
KRAMER LEVIN NAFTALIS
& FRANKEL LLP
1177 Avenue of the Americas
New York, NY 10036
(212) 715-9100
afrankel@kramerlevin.com

Philip A. Rovner (#3215)
Jonathan A. Choa (#5319)
POTTER ANDERSON & CORROON LLP
Hercules Plaza
P.O. Box 951
Wilmington, DE 19899
(302) 984-6000
provner@potteranderson.com
jchoa@potteranderson.com

Attorneys for Plaintiff
ACCELERATION BAY LLC

Dated: September 13, 2019

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Federal Cases

INTRODUCTION

Pursuant to Local Rule 7.1.5, Plaintiff Acceleration Bay LLC ("Acceleration Bay") respectfully moves for reconsideration of the Court's Order striking the SEER-SEM methodology used by Dr. Ricardo Valerdi for estimating the costs to build new software because: (1) the Court misapprehended the SEER-SEM methodology, and (2) the Court erred finding the SEER-SEM methodology unreliable, as this model for estimating the cost to develop new software is the preferred approach that numerous government agencies and many of the largest corporations in the world use for cost estimation of software to be built. Thus, it is not only reliable – it is the ***actual*** methodology used in the marketplace.

Acceleration Bay also seeks reconsideration of the Court's exclusion of Mr. Russell Parr's damages opinion based on software maintenance cost, which is distinct from Mr. Parr's other damages opinions and should be separately evaluated.

BACKGROUND

A. The Hypothetical Negotiation Construct for Damages

A consideration during the hypothetical negotiation mandated by U.S. patent law is costs and savings. Dr. Valerdi determined the cost to build a hypothetical, non-existing non-infringing alternative network that functioned in the same manner as the existing infringing system. This analysis identified the money Activision would save if it decided to license the existing infringing network instead of building a new non-infringing network with the specific functionalities. The costs that Activision did not have to expend are its savings and a reasonable basis for assessing the amount of a reasonable royalty.

Indeed, the primary tool for assessing a reasonable royalty is the hypothetical negotiation from the seminal *Georgia-Pacific Corp. v. United States Plywood Corp.* decision in 1970. 318 F.Supp. 1116 (S.D.N.Y. 1970). This imaginary construct assesses all the considerations real patentees and infringers would have when determining the appropriate royalty for use of a patented

invention at the time of first infringement. Thus, an admitted infringer of valid patents (Activision in this case) engages in a hypothetical negotiation with the patent owner (Boeing in this case) for a license to the infringed patents. For the cost savings in this case, Acceleration Bay alleged that Boeing's hypothetical negotiation with Activision in this imaginary world would have involved certain real-world considerations that would play into what reasonable royalty the parties would agree upon.

The first consideration for the hypothetical negotiation is whether there is an existing suitable non-infringing alternative to the infringing software that infringer Activision could use instead of paying patent owner Boeing for a license. Acceleration Bay's technical experts all agree that there is not a suitable non-infringing alternative, which means a feasible equivalent, not that one cannot exist. A non-infringing alternative must be available at the time of infringement and both technically and commercially acceptable. *Mars, Inc. v. Coin Acceptors, Inc.*, 527 F.3d 1359, 1373 (Fed. Cir. 2008).

The second consideration for the hypothetical negotiation in this imaginary world is what would be the infringer's options since there are no suitable non-infringing alternatives on the market. In this case, infringer Activision had two options: (1) use the existing infringing software and take a license, or (2) develop new non-infringing software. To figure out what is the best economic decision, infringer Activision would have to determine how much a hypothetical non-infringing alternative that had the functionalities contained within the infringing network would cost to develop. Here, an estimated cost for a non-infringing alternative was determined using the SEER-SEM methodology – the best in breed for making such estimates.[1]

The final consideration for the hypothetical negotiation in this imaginary world is how

[1] The model Dr. Valerdi used to estimate the cost of the software is SEER-SEM, widely used industry and government, is considered the gold standard by the International Society of Parametric Analysts (Parametric Estimating Handbook at A-20), NASA (NASA Handbook at 20), and the Department of Defense (Software Cost Estimation Metrics Manual at 12).

DOCKET ALARM

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts

Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research

With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips

Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS
Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS
Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS
Sync your system to PACER to automate legal marketing.