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.	)	

DEFENDANT ACTIVISION BLIZZARD, INC.'S OPPOSITION TO ACCELERATION BAY'S MOTION FOR RECONSIDERATION

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I. INTRODUCTION

This Court properly excluded Acceleration Bay's expert damages opinions that relied on Acceleration's "cost savings" expert, Dr. Valerdi, because Dr. Valerdi's model used untestable inputs with no connection to the facts of this case. Unlike other cases permitting use of a cost-savings model, Acceleration and its experts claim no network exists that both: (1) has the functionality of Activision's accused networks, and (2) does not infringe. But Dr. Valerdi nevertheless attempted to estimate the cost of building such a non-existent network. In doing so, Dr. Valerdi assumed every line of code in the accused game would need to be rewritten, including code not related to the accused networks. This Court correctly excluded Dr. Valerdi's opinions as "entirely speculative, untestable, and divorced from the facts of this case." (D.I. 692, p. 7).

Acceleration has no proper basis for reconsideration of this Court's Order. First, Acceleration's reliance on *Prism Techs. LLC v. Sprint Spectrum LP*, 849 F.3d 1360 (Fed. Cir. 2017), is misplaced and only confirms the correctness of this Court's Order. Unlike here, the parties in *Prism* agreed that building a non-infringing backhaul network—with the same technical characteristics of the accused backhaul network—would allow the defendant to: (1) maintain the same functionality as its current network; (2) ***without*** infringing. *Id.* at 1376.

Second, Acceleration attempts to characterize this Court's Order as finding the SEER-SEM model inherently unreliable. But this Court made no such finding, ruling instead that Dr. Valerdi's ***inputs*** to that model were "divorced from the facts of this case." (D.I. 692, p. 7). Acceleration's efforts to bolster the general reliability of the SEER-SEM model miss the point entirely.

Third, Acceleration argues that Dr. Valerdi's opinion on "Maintenance Costs" is

somehow "separate" from his other opinions. This argument is both new and incorrect. Acceleration does not and cannot deny that Dr. Valerdi's "Maintenance Costs" opinion relies on exactly the same inputs that this Court properly found to be "divorced from the facts of this case."

The Court should deny Acceleration's motion for reconsideration.

II. LEGAL STANDARD

"Motions for reargument or reconsideration should only be granted sparingly and should not be used to rehash arguments already briefed." *Int'l Constr. Prod. LLC v. Caterpillar Inc.*, No. 15-108-RGA, 2016 WL 4445232, at *2 (D. Del. Aug. 22, 2016). "The movant must show at least one of the following: (1) an intervening change in the controlling law; (2) the availability of new evidence that was not previously available; or (3) the need to correct a clear error of law or fact or to prevent manifest injustice." *Id.* (internal quotation and alterations omitted). "Motions for reargument or reconsideration may not be used as a means to argue new facts or issues that inexcusably were not presented to the court in the matter previously decided." *Mondero v. Lewes Surgical & Med. Assocs. P.A.*, 233 F. Supp. 3d 414, 416 (D. Del. 2017).

III. ARGUMENT

a. The *Prism* Case Affirms that, Unlike Here, Cost-Savings Opinions Must be Based on Known, Acceptable, Non-Infringing Alternatives

Acceleration argues that Dr. Valerdi's opinion is like the cost-savings theory that was permitted in *Prism*, 849 F.3d 1360. In *Prism*, a key limitation in the asserted patent was the use of an "untrusted" network. *Id.* at 1364. Plaintiff argued that the defendant's accused practice of leasing backhaul networks from various third parties—rather than building one private backhaul network itself—met this requirement because "no single organization controls the[se networks] in the aggregate." *Id.* at 1365. Critically, the plaintiff's experts also agreed that the defendant

could "provide its customers the kind of service it wanted to offer them," but avoid infringement, by "building a private backhaul network instead of leasing backhaul services from third-party providers." *Id.* at 1375. Plaintiff's expert was thus allowed to rely on his own experience and on industry publications to estimate the costs of building a backhaul network with the same characteristics as the existing backhaul network, except that it was wholly owned (and controlled) by the defendant. *Id.* at 1377.

Here, Dr. Valerdi's opinion is entirely different from the one allowed in *Prism*. Far from pointing to an agreed upon, acceptable, non-infringing alternative with known characteristics and testable costs (like the private backhaul network in *Prism*), here "Dr. Valerdi does not articulate any characteristics of a non-infringing alternative and, indeed, adopts the position that such a network does not exist." (D.I. 692, p. 7). The omission of any description of this alternative network's characteristics squarely distinguishes this case from *Prism*, and renders his opinion untestable, unscientific, and unsound.

These key distinctions between this case and *Prism* show that Acceleration is wrong when it attributes to this Court "misapprehensions" of fact. It is irrelevant that Acceleration's experts allegedly opined on "the size of the code required to achieve the desired functionality" (D.I. 695, p. 5), because they were estimating the code for a network that, in their opinion, ***must*** infringe. Indeed, as this Court noted, Acceleration's technical experts themselves opine that no non-infringing networks exist that provide the same functionality as the accused networks. (D.I. 692, p. 6) (quoting D.I. 444-1, Exh. C-2, at 3).[1] As this Court correctly found, and as

[1] Further, while Acceleration claims these estimates are based on conversations with technical experts (D.I. 695, p. 5), Acceleration's technical expert reports are entirely devoid of any discussion of the size of the code that Dr. Valerdi purportedly used as an input. But Dr. Valerdi's cost estimates assume all of the code for the accused games would need to be re-

Acceleration has failed to rebut, the "Federal Circuit's precedent on cost savings does not, however, support the admissibility of the estimated cost to switch to an undefined alternative that the patentee contends does not exist." (D.I. 692, p. 6).

It is also irrelevant that the private backhaul network in *Prism* "did not yet exist." (*Id.*). In *Prism,* the plaintiff identified a particular type of network with known characteristics and testable costs that it admitted would be acceptable and non-infringing. Because of that, the parties had an acceptable and known alternative to form a concrete basis for the cost of building that network. The lack of that type of concrete basis here makes Dr. Valerdi's opinion "untestable." (D.I. 695, pp. 6-7).[2]

b. This Court Properly Found that Dr. Valerdi's Inputs to the SEER-SEM Model Were Unreliable, Not that the Model Itself was Unreliable

Acceleration next incorrectly characterizes the Court's Order as an attack on the SEER-SEM cost estimation model itself. But the Court made no such attack. Rather, the Court made clear that it was excluding Dr. Valerdi's opinions because of Dr. Valerdi's unreliable ***inputs*** to the SEER-SEM model. For example, the Court specifically found that Dr. Valerdi "bases his estimate of the cost on the number of lines of codes in the current games" and that "[e]ssentially, he estimates the cost of developing the software 'as is.'" (D.I. 692, p. 6). The Court then explained that "Dr. Valerdi provides no justification as to why developing an alternative network would, in theory, cost exactly the same amount as developing the existing network." (D.I. 692, p.

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written, including code unrelated to the accused networks. (D.I. 650, p. 25). Neither Dr. Valerdi, nor Acceleration's technical experts provide any explanation for this in their reports.

[2] Acceleration is incorrect when it argues that "Dr. Valerdi is required to adopt the position that the non-infringing network does not exist." (D.I. 695, p. 6). *Prism* establishes the very opposite. To the extent that Acceleration is arguing Dr. Valerdi was "required to adopt the position that the non-infringing network does not exist" as a prerequisite to using the SEER-SEM model, then such an argument proves that the model is incompatible with Federal Circuit law, which as *Prism* holds, requires the opposite assumption for a cost-savings approach.

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