

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 LEAVE TO FILE A REPLY**

Plaintiff Acceleration Bay’s request for leave to file a reply brief on its motion for reconsideration is an attempt to get the last word on a motion for which the local rules do not allow a reply. D. Del. LR 7.1.5. Acceleration originally accused Activision of making “new arguments” as its ground for requesting a reply (Ex. 1, 9-27-19 email from Acceleration counsel), but its motion is devoid of any such accusation and, instead, makes the unfounded claim that it seeks to address alleged “mischaracterizations” by Activision. (D.I. 697, p. 1). These grounds are baseless, and Acceleration’s proffered reply merely recycles its old unsuccessful arguments and alleges admissions by Activision where none exist.

First, Acceleration claims that “[f]or the first time, Activision concedes that the SEER-SEM model is not unreliable.” (D.I. 697-1, p. 1). This is incorrect. Activision merely explained that the reliability of the SEER-SEM software is not an issue before the Court on Acceleration’s motion for reconsideration, because the reliability of that software was not the basis for the Court striking Mr. Parr’s opinions that relied on Dr. Valerdi. Activision continues to believe that the SEER-SEM software is unreliable, as it previously argued, but “Activision does not renew that argument here.” (D.I. 650, p. 23 n.12).

Second, Acceleration argues that if the SEER-SEM software is itself reliable, then Dr. Valerdi's opinions are necessarily admissible because inputs into the software are the province of cross-examination and not exclusion. (D.I. 697-1, p. 1). This, too, is incorrect. As the Court found, by choosing inputs having no relation to the facts of the case (*i.e.*, the number of lines of code to develop a non-infringing alternative that Acceleration contends does not exist), Dr. Valerdi's fundamental assumptions underlying his purported cost savings model (as opposed to the SEER-SEM software itself) render his opinions unreliable and inadmissible. Such determinations are squarely within the Court's gatekeeping functions for experts because the law requires that all expert opinions have "a valid scientific connection to the pertinent inquiry as a precondition to admissibility." (D.I. 692, p. 3) (quoting *Schneider ex rel. Estate of Schneider v. Fried*, 320 F.3d 396, 404-05 (3d Cir. 2003)).<sup>1</sup>

Third, Acceleration re-hashes its same unsuccessful arguments for why Dr. Valerdi's inputs to his model are allegedly "tied to the facts of the case." (D.I. 697-1, p. 1). But Acceleration continues to miss the fundamental point that both Activision and this Court have explained in detail. It is the failure of Acceleration and its experts to establish the existence of a non-infringing network—let alone articulate the characteristics of such a non-infringing network—that makes its "costs savings" model untestable and unreliable. Acceleration adds nothing new when it repeats its same argument that the number of lines of code inputted to

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<sup>1</sup> Acceleration's reliance on *Apple v. Motorola*, 757 F.3d 1286, 1319 (Fed. Cir. 2014), is inapposite. There, the Federal Circuit noted that the district court "did not point to any specific flaws in Napper's Trackpad comparison" and found that the "expert has applied reliable methods to demonstrate a relationship between the benchmark and the infringed claims." *Id.* at 1319. In sharp contrast, here, the Court correctly found 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," and that "he cannot justify this conclusion because he has no basis in fact for concluding that an alternative network might exist at all." (D.I. 692, p. 7).

Dr. Valerdi's model was allegedly based on "replicating the same functionality as the infringing network." (D.I. 697-1, p. 1). Acceleration's experts were still "estimating the code for a network that, in their opinion, *must* infringe," in contravention of the Federal Circuit's requirements for an admissible cost-savings opinion (D.I. 696, p. 3). That Activision could have replicated Dr. Valerdi's estimates of rebuilding the same allegedly *infringing* networks does not render his model "testable and reliable" for estimating the cost of a *non-infringing* alternative.

Fourth, Acceleration accuses Activision of misrepresenting *Prism v. Sprint*, arguing that, there, the defendant "challenged every aspect of Prism's damages case, including the use of actual leasing costs as a basis for estimating the cost of a hypothetical, non-infringing network." (D.I. 697-1, p. 2). Activision did not claim otherwise. Rather, Activision merely noted that in *Prism*, both parties agreed that a backhaul network owned by the Defendant would (1) have the same functionality as the leased backhaul network accused of infringement; but (2) not infringe. (D.I. 696, p. 1).<sup>2</sup> Here, as this Court correctly found, Acceleration's refusal to acknowledge the existence of any non-infringing network, let alone one with the same functionality as Activision's current network, distinguishes this case and precludes Acceleration from using Dr. Valerdi's purported costs-savings model. (D.I. 692, p. 6).

Activision therefore respectfully requests that the Court deny Acceleration's request to depart from the rules to file a cumulative (and inaccurate) reply. *See Johns Hopkins Univ. v. Alcon Labs., Inc.*, No. 15-525-LPS-SRF, 2017 WL 5172395, at \*3 (D. Del. Nov. 8, 2017) ("The Court sees no basis to deviate from its standard practice to limit briefing on motions for reconsideration only to an opening and answering brief.").

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<sup>2</sup> *See Prism Techs. LLC v. Sprint Spectrum L.P.*, 849 F.3d 1360, 1376 (Fed. Cir. 2017) (noting that the defendant "stipulated not to introduce argument or evidence of a different non-infringing alternative").

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**CERTIFICATE OF SERVICE**

I hereby certify that on October 2, 2019, I caused the foregoing to be electronically filed with the Clerk of the Court using CM/ECF, which will send notification of such filing to all registered participants.

I further certify that I caused copies of the foregoing document to be served on October 2, 2019, upon the following in the manner indicated:

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