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.,	)	**REDACTED –**
	)	**PUBLIC VERSION**
Defendant.	)	

DEFENDANT ACTIVISION BLIZZARD, INC.'S
RESPONSE TO ACCELERATION BAY'S DAMAGES PROFFER

MORRIS, NICHOLS, ARSHT & TUNNELL LLP
Jack B. Blumenfeld (#1014)
Stephen J. Kraftschik (#5623)
1201 North Market Street
P.O. Box 1347
Wilmington, DE 19899
(302) 658-9200
jblumenfeld@mnat.com
skraftschik@mnat.com

Attorneys for Defendant

OF COUNSEL:

B. Trent Webb
Aaron Hankel
John D. Garretson
Jordan T. Bergsten
Maxwell C. McGraw
SHOOK, HARDY & BACON LLP
2555 Ground Boulevard
Kansas City, MO 64108
(816) 474-6550

Tanya Chaney
SHOOK, HARDY & BACON LLP
600 Travis Street, Suite 3400
Houston, TX 77002
(713) 227-8008

Original Filing Date: October 23, 2019
Redacted Filing Date: October 25, 2019

I. INTRODUCTION

Acceleration Bay has already proposed at least twelve legally deficient expert and fact-based damages theories.[1] This Court gave Acceleration a "final opportunity" to present an admissible damages case. (D.I. 619, p. 2). In response, Acceleration proffered seven new expert opinions from Mr. Parr with no alternative "fact-based" damages theories. All seven theories proposed by Acceleration were stricken. Nevertheless, flouting the Court's prior rulings and admonition, Acceleration now proposes a new, thirteenth theory that is devoid of proper analysis and results in its largest damages request to date.[2]

Acceleration's expert previously proposed a damages theory based on the alleged 12% Boeing-Panthesis license with a [redacted] apportionment based on an Activision survey. The Court struck this theory for failure to properly apportion, finding that the [redacted] apportionment failed to account for unpatented features. (D.I. 692, p. 9). Acceleration now suggests that the alleged 12% Boeing-Panthesis royalty needs no apportionment at all, without any expert testimony to explain why. Instead, Acceleration contends it will present previously undisclosed testimony from its named inventors to cure what Acceleration's expert failed to do. Acceleration does not identify where it disclosed these "facts" in its final proffer, which was required to "contain a fulsome explanation of all of Plaintiff's damages theories, [and] all evidence it plans to put on in support of those theories." (D.I. 619, p. 2). Furthermore, this testimony cannot replace a proper expert opinion on apportionment. Acceleration cites no authority allowing lay testimony on apportionment, and there is no evidence that these inventors have any personal knowledge of the

---

[1] D.I. 521, D.I. 578, pp. 27-28, D.I. 600, pp. 1-2, D.I. 692.

[2] Acceleration's new proffer applies the 12% rate from the purported Boeing-Panthesis license to the [redacted] royalty base (the total worldwide revenue of the accused products), resulting in approximately [redacted]—a 75% increase from Mr. Parr's previous calculations.

accused products, let alone the relative values of their allegedly patented and unpatented features.

Activision respectfully submits that the Court should reject this previously undisclosed and unsupported theory offered after Acceleration's "final opportunity," and should enter judgment of no damages. (*See* D.I. 694, pp. 3-5).

II. BACKGROUND

At the Court's request, the parties recently submitted a joint status report addressing how the case should proceed after the Court found that Acceleration had "no intact damages theories." (D.I. 694; D.I. 692, p. 5). Acceleration's portion of the joint submission stated that Acceleration could proceed to trial on portions of its damages theories that were not stricken, including an unidentified "fact based" apportionment theory. On October 15, 2019, the Court issued an Order requiring Acceleration to show: (1) how Acceleration's proposed damages testimony alluded to in the joint status report complies with the Court's Order on October 30, 2018 (D.I. 619); and (2) what factual evidence Acceleration will use to establish appropriate apportionment to the footprint of the inventions. (D.I. 699). Acceleration submitted a new proffer on October 18, 2019 ("October 18 proffer"), which fails to meet either of the Court's requirements. (D.I. 700).

Acceleration's latest damages theory rests entirely on the un-apportioned 12% royalty rate derived from the purported 2002 Boeing-Panthesis license agreement. The Court previously rejected this very same theory as being undisclosed by Acceleration:

> Mr. Parr's opinion does not, however, tie apportionment to the royalty rate of the Boeing/Panthesis License. He does not even mention the Boeing/Panthesis License in the apportionment section of his expert opinion. Mr. Parr's apportionment opinion cannot survive on an opinion that he does not express. Thus, as the selection of the 12% royalty rate is not a basis of Mr. Parr's opinion on apportionment, I do not find that Mr. Parr's opinion properly apportions based on the Boeing/Panthesis License alone.

(*See* D.I. 692, p. 10). In the face of the Court's order excluding this theory from Acceleration's damages expert, Acceleration now seeks to present this theory through the testimony of lay witnesses that was not previously identified in Acceleration's damages proffer.

III. ACCELERATION'S "FACT-BASED" DAMAGES PROFFER VIOLATES BOTH THIS COURT'S ORDER AND CONTROLLING APPORTIONMENT LAW.

Acceleration now attempts to support an un-apportioned 12% royalty rate against Activision's total worldwide revenues for the accused products with previously undisclosed expert opinions from lay witnesses on the wrong issue.[3] In its October 18 proffer, Acceleration discloses that it will rely upon "factual" testimony from the two named inventors (Dr. Holt and Mr. Bourassa) to establish that the 12% royalty rate from the 2002 Boeing-Panthesis license "was already apportioned" to represent the "contributions of the Patents-in-Suit to the video games that Panthesis was developing." (D.I. 700, p. 2). Acceleration discloses no other theories of apportionment, and expressly states that Mr. Parr, its damages expert, "will not address the specific issue of the apportionment of the rate." *Id.*, p. 3.

First, Acceleration's newly proposed fact-based damages theory violates the Court's prior order by advancing an undisclosed theory based on undisclosed evidence. In its October 30, 2018 Order, the Court allowed Acceleration "a final opportunity to present . . . an admissible damages case" and required that this proffer "contain a fulsome explanation of all of Plaintiff's damages theories, [and] all evidence it plans to put on in support of those theories." (D.I. 619, p. 2) (emphasis added). Acceleration's February 15, 2019 proffer ("February 15 proffer") did not

[3] Acceleration's October 18 proffer also includes its cost-based damages theory that currently stands rejected by this Court to preserve the argument pending its motion for reconsideration. (D.I. 700, p. 2 n.3). For the reasons stated in Activision's opposition (D.I. 696) this Court should deny Acceleration's motion. (*See also* D.I. 701, Ex. A) (order excluding similar opinion from the same expert).

disclose any theory that the purported 12% license is "already apportioned," and, in fact, admitted the opposite by providing testimony from Mr. Parr attempting to apportion the damages theories that relied on the purported license. (*See* D.I. 692, pp. 9-10). Further, the inventors' "factual evidence" that the 12% royalty rate was already apportioned appears nowhere in Acceleration's February 15 proffer or anywhere else in Acceleration's discovery disclosures. In fact, although Acceleration's October 18 proffer cites to its February 15 proffer for the facts surrounding the final ***terms*** of the Boeing-Panthesis license, Acceleration provides no citation to previously disclosed testimony from its inventors regarding apportionment. (*See* D.I. 700, p. 2). Because Acceleration failed to disclose until now any theory that the alleged 12% rate is "already apportioned," or its reliance on factual testimony from its inventors on apportionment, its October 18 proffer directly violates the Court's prior order and should be stricken.

Second, even if the Court were inclined to allow this new theory and factual testimony, it is insufficient to tie the alleged damages to the footprint of the invention. Acceleration's proposal improperly substitutes lay testimony where expert testimony is required and, in any event, addresses the wrong issue.

Proper apportionment is essential to a reliable expert damages opinion, and there must be admissible evidence apportioning between "the patented and unpatented features" of the "accused infringing products." *Ericsson, Inc. v. D-Link Sys. Inc.*, 773 F.3d 1201, 1226 (Fed. Cir. 2014).[4] This Court already has explained that an "opinion on a reasonable royalty is necessarily based on specialized knowledge." (D.I. 600, p. 3) (excluding lay opinion of Mr. Garland on a [redacted] royalty). This Court also has held that a named inventor cannot testify beyond his or her

[4] Acceleration states that the revenue base is "apportioned" because Mr. Parr has removed revenues from un-accused products (D.I. 700, pp. 5-6), but this does not address the required apportioning out of unpatented features of accused products.

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.