IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ACCELERATION BAY LLC,	)	
	)	
Plaintiff,	)	
	)	C.A. No. 16-453 (RGA)
v.	)	
	)	
ACTIVISION BLIZZARD, INC.,	)	**PUBLIC VERSION**
	)	
Defendant.	)	
	)	

PLAINTIFF ACCELERATION BAY'S DAMAGES PROFFER

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I. NATURE AND STAGE OF PROCEEDINGS

Pursuant to the Court's October 15, 2019 Order (D.I. 699), Acceleration Bay submits this proffer of its damages case in view of the Court's Memorandum Opinion on damages issues (D.I. 692) and an explanation of it compliance with D.I. 619.

II. COMPLIANCE WITH CASE MANAGEMENT ORDER (D.I. 619)

Acceleration Bay will present a fact-based damages case with expert support that fully complies with the Court's orders in this case, which did not exclude presentation of the underlying facts. These facts relating to apportionment of revenue are identified below, and were disclosed in Acceleration Bay's original damages proffer (D.I. 614), as well as its supplemental expert report.[1] Specifically, for each apportionment methodology, Acceleration Bay disclosed in its original damages proffer all of the factual evidence and the expert opinions it will rely upon. Moreover, all of the expert opinions Acceleration Bay will rely on were approved by the Court in its Memorandum Opinion on Damages (D.I. 692, the "Damages Order"), unobjected to by Activision. For trial and as explained below, these facts will be presented through fact witnesses and to the extent appropriate, in summary format by Acceleration Bay's expert.

III. APPORTIONMENT PROFFER

Acceleration Bay proffers the following apportionment methodologies:[2]

- **royalty based on application of a 12% royalty rate to the revenues for the accused products:** the 12% royalty rate is derived from the comparable

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[1] Activision submitted responsive expert reports and deposed Acceleration Bay's damages expert on his supplemental report, as permitted by the Court's Case Management Order. D.I. 619 at 2.

[2] The Federal Circuit confirmed that it is acceptable to apportion the royalty base ***or*** the royalty rate to adequately and reliably apportion between the improved and conventional features of the accused product. *Exmark Mfg. Co. v. Briggs & Stratton Power Prods. Grp.,* LLC, 879 F.3d 1332, 1348 (Fed. Cir. 2018).

Boeing/Panthesis license that already reflected an apportionment to the footprint of the invention;

- **royalty based on two-years of maintenance fees**: this is a cost-based methodology, with the royalty base apportioned to the footprint of the invention;[3]

A. Apportioned 12% Royalty Rate Derived from Boeing/Panthesis License

Acceleration Bay will demonstrate that a 12% royalty rate applied to Activision's revenues from the accused products is a reasonable royalty for Activision's infringement. This 12% rate is based on the comparable Boeing/Panthesis license for Panthesis' use of the Patents-In-Suit. D.I. 642-1, Ex. A (Parr Report) at ¶¶63-147, 156. The Court already found that Acceleration Bay sufficiently disclosed the Boeing/Panthesis license to rely on it to establish a royalty rate. D.I. 692 at 13.

Factual Evidence: Acceleration Bay will present testimony from Drs. Fred Holt and Virgil Bourassa, the inventors and founders of Panthesis, regarding the license that Boeing and Panthesis negotiated for Panthesis' use of the Patents-in-Suit in the videogame field. Acceleration Bay disclosed its intention to offer this evidence in its Damages Proffer. D.I. 641 at 24. The testimony of Dr. Holt and Mr. Bourassa will demonstrate that the Boeing/Panthesis license is comparable to the license that Boeing would have negotiated with Activision in a hypothetical reasonable royalty negotiation and that the 12% royalty rate that Boeing and Panthesis agreed upon was already apportioned, i.e., that Boeing and Panthesis agreed that 12% of the revenue generated by Panthesis from using the technology of the Patents-in-Suit was a fair royalty to compensate Boeing for the contributions of the Patents-in-Suit to the video games that Panthesis was developing.

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[3] The cost savings royalty based on maintenance fees is the subject of Acceleration Bay's pending Motion for Reconsideration (D.I. 695), which will impact whether it can be presented to the jury. Acceleration Bay presents it to preserve this apportionment approach while that Motion is pending.

Expert Opinion: Acceleration Bay will present the expert opinion of Mr. Parr to support the royalty based on the application of the 12% rate. All of the opinions Mr. Parr will offer were disclosed in his expert report and left undisturbed by the Court in its Damages Order:

- the *Georgia-Pacific* hypothetical negotiation framework and how it applies to the Boeing/Panthesis license. D.I. 642-1, Ex. A (Parr Report) at ¶¶ 61-71;
- how the negotiations and agreement that resulted from the arms-length negotiation between Boeing and Panthesis, wherein Boeing granted to Panthesis an exclusive license to sell products and services based on the patented technology is comparable to the circumstances between Boeing and Activision because it involved parties similarly situated as Boeing and Activision, in an arms-length negotiation, for the same technology and in the same field. *Id.* at ¶¶ 63-71.
- at the time of the Boeing/Panthesis license, the value of the technology was somewhat speculative and the validity of the Patents-in-Suit was unproven. In contrast, in the hypothetical negotiation between Boeing and Activision, the parties would know that Activision was infringing the Asserted Patents and that the Patents-in-Suit were valid, increasing the value of the hypothetical license. *Id.* at ¶¶ 67-70;
- the Boeing/Panthesis license included additional considerations of an upfront payment and stock that would not occur in the hypothetical negotiation but would drive a higher royalty rate *Id.*;
- the Boeing/Panthesis license was an exclusive license with the right to sublicense, which is a broader license than the license it would grant to Activision (and its subdivisions) in the hypothetical negotiation, but the narrower rights to Activision would be anticipated to be much higher in value to Activision than to Panthesis given the profitability of the games. D.I. 642-1, Ex. A (Parr Report) at ¶¶ 68-70.

After reviewing the record and applying the *Georgia-Pacific* factors, Mr. Parr determined that the parties would have agreed to a royalty rate of 12%. *Id.* at e.g., ¶ ¶ 71, 142, 156, 204.

In view of the Damages Opinion, Mr. Parr will not address the specific issue of the apportionment of the rate. However, as noted above, Acceleration Bay will use the factual testimony of Dr. Holt and Mr. Bourassa to establish that the 12% royalty constitutes an already apportioned rate, accounting for the value of the contributions of the patented technology to Panthesis' planned video games.

B. Apportioned Reasonable Royalty Based on Ongoing Maintenance Fees

Acceleration Bay will offer evidence that Activision's estimated maintenance fees for a two-year period represent an already-apportioned reasonable royalty for Activision's infringement. Acceleration Bay fully disclosed this claim in its Damages Proffer. D.I. 641 (Proffer at 12-13).

Mr. Parr looked at these estimated maintenance costs, which Activision would be willing to pay to operate the accused World of Warcraft game in the real world, as a proxy for the "floor of the amount Activision would pay to realize the over $2.4 billion in profits for World of Warcraft alone" in the hypothetical world of the reasonable royalty negotiation. D.I. 642-1, Ex. A (Parr Report) at ¶ 202. In other words, Activision would pay these estimated amounts to continue to achieve the revenue stream from the game, so it would be willing to pay at least that much as a cost to unlock the same revenue stream in the hypothetical world where it obtains a license.

While the Court excluded this damages theory, it is one of the subjects of Acceleration Bay's pending Motion for Reconsideration (D.I. 695). As set forth in that Motion, Mr. Parr's maintenance cost-based damages opinion is distinct from the other excluded damages opinions based on Dr. Valerdi's development calculations. D.I. 695; D.I. 642-1, Ex. A (Parr Report) at ¶¶ 200-203. Separate from the cost to develop a non-infringing alternative, Dr. Valerdi determined the cost of ongoing maintenance for the theoretical non-infringing alternative by estimating the *maintenance costs* for the accused systems (which Activision never provided during discovery) based on the estimated lines of code and complexity of the actual World of Warcraft game. D.I. 480, Ex. 71 (Valerdi Report) at pages 12-13. This opinion is not based on "the cost of rearchitecting each of the Accused Products in this case in order to develop a new networking platform for each of the accused games," but rather, estimating the cost to maintain

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