

**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.	)	
<hr style="width: 45%; margin-left: 0;"/>		

**JOINT STATUS REPORT AND PROPOSED SCHEDULING ORDER**

Pursuant to the Court’s October 25, 2022 Oral Order (D.I. 745), Plaintiff Acceleration Bay LLC (“Acceleration Bay”) and Defendant Activision Blizzard, Inc. (“Activision”) provide the following Joint Status Report and proposed Scheduling Order.

**Joint Summary of Case Status:** On April 21, 2020, the Court sua sponte stayed this action pending the resolution of the appeal from related case *Acceleration Bay LLC, v. 2K Sports, Inc.*, 1:16-cv-00455 (the “*Take Two* Action”). D.I. 711.

The Court of Appeals for the Federal Circuit issued a decision in the appeal from the *Take Two* Action, No. 2020-01700 (Fed. Cir.) (the “*Take Two* Appeal”) on October 4, 2021. D.I. 725-1. Based on that decision, Activision filed a motion for summary judgment of non-infringement based on collateral estoppel. D.I. 730. The Court denied-in-part and granted-in-part Activision’s motion. D.I. 744.

The following is a summary of the Asserted Patents and Accused Products at issue in this case:

Patent	Accused Products
6,701,344	World of Warcraft
6,714,966	World of Warcraft
6,732,147	Call of Duty: Black Ops III; Call of Duty: Advanced Warfare; Destiny
6,910,069	Call of Duty: Black Ops III; Call of Duty: Advanced Warfare; Destiny

**Acceleration Bay's Proposal:** With the conclusion of summary judgment motions, this case should be set for trial in early May 2023. This will allow ample time for the parties to supplement discovery on the issue of damages (as described below), provide damages reports, and prepare for trial.

At the time the Court stayed this action pending resolution of the appeal of the *Take Two* Action, Acceleration Bay's damages proffer was pending before the Court. D.I. 700. The proffer was based on a combination of factual evidence and expert opinion. *Id.* Activision submitted objections to Acceleration Bay's damages proffer. D.I. 702. Given the stay, the Court did not resolve Activision's objections.

Since then and while the case has been dormant, there have been material intervening events relevant to the measure of damages in this case. Specifically, Acceleration Bay entered into a license agreement with another video game company and Activision entered into an agreement to be acquired by Microsoft for \$68.7 billion, a significant portion of which is related to value generated by the accused products. Accordingly, rather than adjudicate the proffer, which was provided several years ago, the parties should exchange supplemental document productions relating to these important intervening developments. As is customarily done prior to trial, Activision should supplement its revenue and usage data for the accused products so the

information is up to date. The parties can then engage in expert discovery based on the updated disclosures.

Acceleration Bay proposes the following schedule for updating the damages portion of the case and indicates the dates it is available for trial. Activision declined to provide counter-proposed dates and declined to indicate dates that it is available for trial.

Event	Acceleration Bay's Proposed Date
Parties exchange documents relating to damages: Acceleration Bay will produce new license agreement. Activision will produce (1) updated revenue and usage data for the accused products and (2) documents regarding the valuation of the accused products in the Activision/Microsoft acquisition	12/2/22
Burden of Proof Expert Reports to Address Damages Issues	1/20/23
Rebuttal Expert Reports to Address Damages Issues	2/24/23
Close of expert discovery	3/3/23
<i>Daubert</i> Motion Opening Briefs regarding damages reports (15 pages total)	3/16/23
<i>Daubert</i> Motion Opposition Briefs regarding damages reports (15 pages total)	3/30/23
<i>Daubert</i> Motion Reply Briefs regarding damages reports (10 pages total)	4/6/23
Joint proposed final pretrial order	TBD
Pre-trial Conference	TBD
Trial (5 days)	Subject to the Court's calendar: Acceleration Bay is available 5/1/23 and 5/8/23

Activision should not be heard to complain that Acceleration Bay now seeks to update its damages case in view of significant intervening events since the entry of the stay. Activision just engaged in six months of proceedings based on the alleged impact of the intervening *Take-Two* appeal on Acceleration Bay's infringement case against Activision. With the case having been effectively stayed for two and a half-years, there is no prejudice to Activision from participating in an orderly process for the parties to update their damages cases. Once the parties have completed expert discovery, any objections that Activision has to the admissibility of the evidence upon which Acceleration Bay will rely can be addressed in connection with *Daubert* briefing or through *in limine* motions.<sup>1</sup> Activision's proposal to have an initial round of briefing on its objections before the parties even exchange updated information and expert reports would be highly inefficient and just inject further delay into the resolution of this dispute.

**Activision's Proposal:**

At the time the Court stayed this action, the Court had excluded Acceleration Bay's expert opinions on damages. Pending before the Court was Acceleration Bay's "fact-based damages proffer," (D.I. 700) which Activision opposed as inadmissible. (D.I. 702).

With the conclusion of summary judgment motions, there are two outstanding issues for the Court. The first is whether Acceleration Bay is entitled to yet again attempt to come forward with a submissible damages case after it repeatedly failed to do so. The second is case scheduling, including trial, if appropriate and necessary.

---

<sup>1</sup> Activision's objections set forth below are without merit. For example, the Federal Circuit has confirmed that a patent license agreement entered into in settling an earlier patent suit may be admissible evidence of the damages in later patent suits. *Prism Techs. LLC v. Sprint Spectrum LP*, 849 F. 3d 1360, 1370-1371 (Fed. Cir. 2017).

**Damages.** After several orders excluding Acceleration Bay’s many improper damages theories in this case, this Court granted Acceleration Bay one “final opportunity to present [the Court] with an admissible damages case.” D.I. 619 at 2. Acceleration Bay submitted the Court-ordered proffer on February 15, 2019. This Court struck all aspects of Acceleration Bay’s “final opportunity” on September 4, 2019, and specifically recognized that its “exclusion of those two [challenged] aspects of Mr. Parr’s report leaves Plaintiff with no intact damages theories.” D.I. 692 at 5. In that same order, this Court noted that the rejected proffer was “Plaintiff’s final opportunity to present a damages case,” and that “Plaintiff will not have an opportunity to submit revised expert reports” again. *Id.* at 7. Acceleration Bay moved for reconsideration of the Court’s order, *see* D.I. 695, which this Court denied shortly before the case was stayed pending Acceleration Bay’s appeal in *Take-Two*. D.I. 705; D.I. 711.

In view of the above, Acceleration Bay squandered its “final opportunity” to develop a submissible expert damages case for trial. Acceleration Bay has presented no cause—let alone good cause—for seeking yet another opportunity to submit an expert damages report and reconsideration of this Court’s prior orders, including its determination that Acceleration Bay has no “intact damages theories” to present at trial. D.I. 692 at 5; *see also* 705 (denying motion for reconsideration).

The two “intervening events” identified by Acceleration Bay above shed no light on the proper reasonable royalty at the hypothetical negotiation, or otherwise warrant reconsideration of the Court’s rulings. As to Acceleration Bay’s “license agreement with another video game company” entered sometime since April 2021, this litigation-induced settlement<sup>2</sup> says nothing about the reasonable royalty from a hypothetical negotiation 10-15 years earlier. *See Sprint*

---

<sup>2</sup> *See Epic Games, Inc. v. Acceleration Bay LLC*, No. 19-cv-4133 (N.D.Ca.).

# 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.