

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE**

ACCELERATION BAY LLC,

*Plaintiff,*

v.

ACTIVISION BLIZZARD INC.,

*Defendant.*

§  
§  
§  
§  
§  
§  
§  
§  
§  
§  
§

Civil Action No. 16-453-WCB

**MEMORANDUM OPINION AND ORDER**

In this patent case, the parties disagree about the appropriate path for moving the case forward. Plaintiff Acceleration Bay LLC (“Acceleration”) argues that additional expert discovery is needed regarding damages, and after discovery is completed, the case should proceed to trial. Dkt. No. 746 at 3. Defendant Activision Blizzard Inc. (“Activision”) argues that the case should be dismissed because Acceleration lacks an admissible damages theory and has therefore waived the right to a reasonable royalty. Dkt. No. 750 at 9. Acceleration’s request for additional discovery is DENIED. Activision’s request to dismiss the action is also DENIED.

**I. Background**

This case was originally assigned to Judge Andrews. After substantial pretrial proceedings, he stayed the case pending the Federal Circuit’s disposition of the appeal in the related action of *Acceleration Bay LLC v. 2K Sports, Inc.*, No. 16-455 (D. Del.) (“*Take-Two*”). Following the Federal Circuit’s issuance of its opinion in *Take-Two*, Judge Andrews lifted the stay and granted in part the motion for summary judgment that Activision filed in light of the Federal Circuit’s decision. Dkt. No. 743.

Prior to the appeal in the *Take-Two* case, Acceleration made multiple unsuccessful proffers of expert testimony on the issue of damages in this case. In August 2018, Judge Andrews struck a portion of the reasonable royalty opinion of Dr. Christine Meyer, a damages expert retained by Acceleration. Dkt. No. 578. Dr. Meyer’s opinion relied on a jury verdict from another case. *Id.* at 27–28. Because Judge Andrews viewed the exclusion of Dr. Meyer’s opinion as significantly hindering Acceleration’s ability to put on an acceptable damages case, he requested additional briefing from the parties regarding whether Acceleration had any remaining admissible damages theories. Dkt. No. 619 at 1. That briefing was completed in October 2018, just five days prior to the scheduled trial. Judge Andrews then continued the trial because he determined that “it would not be possible to reach a decision on [Acceleration’s] damages case prior to the scheduled start of trial.” *Id.* at 2.

In his order continuing the trial, Judge Andrews stated that he would give Acceleration “a final opportunity to present [the court] with an admissible damages case,” and that Acceleration could “supplement its expert reports if it wishe[d] to do so.” *Id.* Judge Andrews further instructed Acceleration that after all supplementation and expert discovery was completed, Acceleration would be required to provide the court with “a proffer of the case it intends to submit to the jury on damages.” *Id.* That proffer, he explained, needed to consist of “a fulsome explanation of all of Plaintiff’s damages theories, all the evidence it plans to put on in support of those theories, and citations to Federal Circuit precedent supporting its admissibility and sufficiency.” *Id.* at 2–3. Acceleration then requested that it be permitted to submit a report from a new damages expert, Russell Parr. Judge Andrews granted that request. Dkt. No. 630.

Acceleration filed its damages proffer on February 15, 2019. Dkt. No. 641. That proffer outlined three approaches to the reasonable royalty analysis offered by Mr. Parr: a “cost-saving”

approach, *id.* at 4–14; a “revenue-based” approach, *id.* at 15–20; and a “user-based” approach, *id.* at 21. The proffer also pointed to other documentary and testimonial evidence, as well as expert opinions that, according to Acceleration Bay, provided additional support for Mr. Parr’s reasonable royalty analysis. *Id.* at 22–26.

With respect to the cost-saving approach, each of Mr. Parr’s damages theories under that approach relied on the expert opinion of Dr. Ricardo Valerdi, who offered opinions 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 [video] games.” Dkt. No. 692 at 5–6 (quoting Dkt. No. 444-1, Exh. C-2, at 1). Judge Andrews excluded Dr. Valerdi’s opinion because it provided “no basis in fact to conclude that the creation of the infringing network saved Defendant any money over a theoretical alternative.” *Id.* at 7. He also excluded Mr. Parr’s testimony regarding the cost-saving approach because his testimony relating to that approach “depend[ed] entirely on Dr. Valerdi’s opinion.” *Id.*

With respect to the revenue-based approach, Mr. Parr’s theory depended on two inputs: the “Boeing/Panthesis license” and internal customer surveys conducted by Activision. The Boeing/Panthesis license is a July 2002 agreement between Boeing Management Company (“Boeing”) and Panthesis Inc. that granted Panthesis an exclusive license to the asserted patents in this case and other intellectual property, along with the right to sublicense.<sup>1</sup> *Id.* at 11–12; Dkt. No. 756-1 at 4.<sup>2</sup> In return, Panthesis agreed to provide Boeing with five percent of Panthesis’s stock, \$5.6 million paid over time, and 12 percent of future revenue from the licensed products. Dkt. No.

---

<sup>1</sup> Boeing was the assignee of the asserted patents until December 10, 2014. Dkt. No. 642-1, Exh. A ¶ 19. Accordingly, the hypothetical negotiation in this case, which Acceleration argues would have taken place in September 2012, is treated as if it were conducted between Boeing and Activision. Dkt. No. 749 at 1.

<sup>2</sup> All citations to Dkt. No. 756-1 refer to the page number of the PDF document.

692 at 11; Dkt. No. 756-1 at 16–17. Mr. Parr adopted the 12 percent figure from the Boeing/Panthesis license as the royalty rate for his revenue-based approach to determining a reasonable royalty. Dkt. No. 641 at 16. The royalty base in Mr. Parr’s analysis was the “world-wide revenues for the [accused] games.” Dkt. No. 641 at 16.

Mr. Parr attempted to further apportion the revenues using Activision’s internal surveys regarding the accused video games. Specifically, Mr. Parr relied on survey data indicating that “57 to 62 percent” of purchasers of Call of Duty: Black Ops III, one of the accused games, purchased the game “because of the infringing multiplayer modes.” *Id.* at 19. Because that percentage was the lowest among the accused games, Mr. Parr took what he described as a “very conservative approach” and further apportioned the revenues for all the accused games by 57 percent. *Id.* at 19–20. What resulted was a measure of damages that multiplied the total revenues by the 12 percent royalty rate from the Boeing/Panthesis license, then multiplied that product by 57 percent based on the Activision survey information. *Id.* at 20.

Judge Andrews excluded Mr. Parr’s revenue-based approach for failure to apportion adequately. In particular, Judge Andrews explained that the Activision surveys did not “attempt to discern what portion of a gamer’s decision to buy the game is driven by the multiplayer functionality versus all of the other unpatented features.” Dkt. No. 692 at 9. Judge Andrews also rejected Acceleration’s suggestion—raised in two sentences in Acceleration’s brief relating to the damages proffer—that the Boeing/Panthesis license could provide “built-in apportionment” for the revenue-based approach. *Id.* at 10. The court observed that Mr. Parr “d[id] not even mention the Boeing/Panthesis License in the apportionment section of his expert opinion,” and that “Mr. Parr’s apportionment opinion cannot survive on an opinion that he d[id] not express.” *Id.* Because the Boeing/Panthesis license was a license to the patents-in-suit, Judge Andrews found that the

license was sufficiently technically comparable to the hypothetical license that would be applicable to a reasonable royalty calculation in this case. Moreover, although Judge Andrews noted that there were differences between the Boeing/Panthesis license and the hypothetical license in this case, he rejected Activision's argument that the Boeing/Panthesis license is not economically comparable to the hypothetical license. *Id.* at 12–13. He also ruled that Mr. Parr's reliance on that license did not itself provide a basis for excluding Mr. Parr's opinions at trial. *Id.*

With respect to the user-based approach, Mr. Parr again relied on the Boeing/Panthesis license and the Activision customer surveys. Mr. Parr determined that the average price of the accused games was \$57, then multiplied that number by the 12 percent royalty rate from the Boeing/Panthesis license and the 57 percent apportionment factor he derived from the surveys. Dkt. No. 641 at 21. That figure, which represented a “per-user royalty,” was then multiplied by the number of users of the infringing games. *Id.* Judge Andrews excluded that approach for the same reason that he excluded the revenue-based approach: because the user-based approach did not properly apportion the value of the patented features. Dkt. No. 692 at 9.

Having excluded Mr. Parr's cost-based, revenue-based, and user-based approaches, Judge Andrews recognized that his decision left Acceleration “with no intact damages theories.” *Id.* at 5; *see also id.* at 7 (“As this was Plaintiff's final opportunity to present a damages case, Plaintiff will not have the opportunity to submit revised expert reports . . .”).

Undeterred, Acceleration notified the court a week later that it intended to “present a fact-based damages case based on the already developed fact record and evidence with expert support.” Dkt. No. 694 at 1. Specifically, Acceleration proposed that Mr. Parr would testify regarding (1) the *Georgia-Pacific* factors; (2) “the Boeing/Panthesis license as comparable to the hypothetical negotiation in this case”; and (3) financial information regarding the accused games. *Id.*

# 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.