

# EXHIBIT 11

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’S OPPOSITION TO  
PLAINTIFF’S MOTION FOR REARGUMENT AND RECONSIDERATION**

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Activision's Motion to Dismiss was not based on the Sony Publisher Agreement in any respect. Rather, Activision's Motion to Dismiss was based exclusively on the Boeing-Sony Patent License Agreement. D.I. 19. Indeed, Activision specifically limited its Motion to Dismiss to issues of constitutional standing (which is plaintiff's burden to establish) and avoided the affirmative defense of licensing so that the issue could be resolved on a motion to dismiss at the outset of the case rather than years later during summary judgment. D.I. 235 (7/10/17 Hearing Tr.) at 36:20-37:19. Neither the Motion to Dismiss nor the Court's Order granting the Motion was based on the Sony Publisher Agreement. D.I. 268. Of course, even if Activision had relied on the Sony Publisher Agreement for its standing argument, that reliance could not by some magic transform all publisher agreements into comparable licenses relevant to damages because no one opined such agreements are comparable. The Special Master, plaintiff's damages expert, and this Court have all agreed that there is no comparability. Acceleration's motion should be denied.<sup>2</sup>

**B. The Court Reached The Correct Conclusion in Excluding the Microsoft Publisher Agreement.**

Both the Court and Special Master correctly concluded that the Microsoft Publisher Agreement is not relevant to damages. As a matter of law, the Microsoft Publisher Agreement is not relevant to a reasonable royalty analysis,<sup>3</sup> because the agreement is not a comparable license

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<sup>2</sup> Even if Acceleration were correct, the history of the Motion to Dismiss and the Sony Publisher Agreement were known for over a year. Acceleration did not raise these issues in its opposition brief. D.I. 583. Acceleration has therefore has waived these arguments.

<sup>3</sup> Acceleration notes that Activision "did not redact the royalty rate or other information from the Microsoft Publisher Agreement." Mot. at 4. Activision produced the agreement because it was relevant to identifying who "makes" allegedly infringing products. 35 U.S.C. § 271(a). Activision disclosed the royalty rate so to avoid an unnecessary discovery dispute, not because it believed the royalty rate to be relevant. Sony objected to the production of its publisher agreement without redaction and intervened to oppose Acceleration's motion to compel. D.I. 278.

agreement — *i.e.*, it is not comparable to the hypothetical patent license agreement that the would-be licensor (Boeing) and the would-be licensee (Activision) would have entered for a license under the patents-in-suit, had the parties negotiated and entered into a patent license on the eve of the alleged infringement. The Microsoft Publisher Agreement is not a patent license and does not relate to or cover the patents-in-suit. The Microsoft Publisher Agreement establishes the terms under which Activision may publish video games for use on Microsoft’s video-game platforms, such as the XBox console. The multifaceted agreement covers issues like: (1) a license to Microsoft’s software development tools; (2) loans of hardware from Microsoft to Activision; (3) Microsoft’s right of approval for any games and marketing material to be released on Microsoft’s platforms; (4) requirements that the games be localized for foreign markets; and (5) post-release bug-fixing obligations. Pltf’s Ex. 1 at ATVI0030937–940. The agreement also provides that Microsoft oversees the manufacturing of the finished games and their distribution on Microsoft’s online services. *Id.* at ATVI0030941. Therefore, the Microsoft Publisher Agreements sets forth a complex business relationship between Activision and Microsoft having nothing to do with a patent license, let alone a license for the patents-in-suit within the context of a hypothetical negotiation between Activision and Boeing on the eve of infringement.

No witness has testified that the Microsoft agreement is technically or economically comparable to the patented technology. In fact, as the Court correctly observed, Plaintiff’s experts made no effort at all to tie the Microsoft Publisher Agreement to a royalty in this case. D.I. 600 at 6-7. Moreover, Acceleration’s damages expert, Dr. Meyer, admitted the Microsoft Agreement was “not directly comparable to a patent license.” Meyer Report (D.I. 444, Ex. C-3) ¶¶ 11, 72. Plaintiff now argues that Dr. Meyer opined that it provides “valuable insight” into the