

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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October 23, 2018

Acceleration's request that the Court reverse its exclusion of the Microsoft Publisher Agreement rests on the incorrect assertion that the Court allowed Activision to rely on its publisher agreement with Sony ("Sony Publisher Agreement") to limit Acceleration's damages. In truth, Defendants' Motion to Dismiss for Lack of Standing (D.I. 19) had nothing to do with the Sony Publisher Agreement; the motion was based solely on a 2006 patent license agreement between Boeing and Sony ("Boeing-Sony Patent License Agreement"). The motion to dismiss, which was filed on behalf of all three defendants, did not mention Activision's (or any other) publisher agreement with Sony, and that agreement was not the basis for this Court's Order granting Activision's motion (D.I. 268).

Second, Acceleration cannot show the Court committed clear error. The Court did not "overlook" or "misapprehend" these arguments – Acceleration did not even present them. Nor can Acceleration show "manifest injustice." The Special Master correctly found the publishing agreements were not relevant. This occurred in 2017, and Acceleration Bay did not appeal.

Most importantly, the Court's ruling that the "Microsoft Publisher Agreement is inadmissible because it is irrelevant" is correct. The Microsoft Publisher Agreement 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. Acceleration has presented no witness who could possibly testify about technical or economic comparability, and Acceleration's damages expert correctly opined the Agreement was not comparable. Acceleration has presented no new facts or law suggesting otherwise. Accordingly, Acceleration has failed to identify any appropriate grounds for reconsideration and Acceleration's Motion should be denied.

I. FACTS

A. Activision's Motion to Dismiss Relied on Sony's Agreement with Boeing And Did Not Mention Sony's Publisher Agreement With Activision.

On October 4, 2016, Activision moved to dismiss as to the accused Sony platform games, because Acceleration lacked constitutional standing. D.I. 19 (opening brief); D.I. 32 (reply brief). That motion was based entirely on the Boeing-Sony Patent License Agreement and never mentioned the Sony Publisher Agreement. *Id.* Under the Boeing-Sony Patent License Agreement, Boeing granted Sony a “license to the Asserted Patents¹ that allows Sony, at its own unfettered discretion, to grant Defendants a license to the Asserted Patents with the Sony ‘Field of Use.’” D.I. 19 at 1. “Sony’s authority to sublicense to the Defendants all of the Asserted Patents deprive[d] Acceleration Bay of constitutional standing to assert claims within the Sony Field of Use.” *Id.*; *see also* D.I. 32 at 1. Activision’s standing argument relied on Sony’s “authority to sublicense” and not any actual sublicense. *Id.*

During the hearing on the Motion to Dismiss, counsel for Activision made clear that the Motion to Dismiss was not based on a license agreement resulting from the Sony Publisher Agreement, but rather was based exclusively on a standing issue resulting from the Boeing-Sony Patent License Agreement:

THE COURT: Everybody’s licensed to Sony or Sony has some kind of license in that field.

MR. ENZMINGER: Sony has --

THE COURT: When you say, they have a license in 2006, none of the defendants have a license, right?

MR. ENZMINGER: **No, that’s not in their motion.** Well, I’m sorry. Let me be clear. All of the defendants are licensed. **But that is an affirmative defense, and we would rather not have to go through expert reports on half the products in this case to get to an affirmative defense.** So, if the Court would indulge a Summary Judgment on license defense, we can do that. All of these products are licensed products. And they are licensed not only because of directly through the Sony license, which does not require us to be licensed, by the way, because all

these products are manufactured by Sony. All we do is provide code to the products to Sony, who makes the games and distributes them. **So -- but that's not what this motion is about. What this motion is about is the fact that they are accusing products which Boeing, the predecessor in interest on this patent, released from all future liability. So there is no injury to the successor plaintiff, Acceleration Bay, because there is no right to seek damages against Sony products.**

D.I. 235 (7/10/17 Hr'g Tr.) at 36:20-37:19 (emphasis added). Similarly, the Court's August 24, 2017 Order granting Activision's Motion to Dismiss did not rely on the Sony Publisher Agreement. D.I. 268.

B. Activision's Discovery Conduct Was Proper

Acceleration alleges that Activision engaged in discovery misconduct with respect to the Sony Publisher Agreement even though the Special Master denied Acceleration's motion on this issue. In an effort to avoid the Special Master's conclusion that both the Sony and Microsoft agreements were not sufficiently relevant to the case to warrant production of unredacted copies, Acceleration attempts to argue that Activision conceded the issue of relevance. This is incorrect.

Acceleration's Motion expressly asked the Special Master Order each of the Defendants to produce all of its publisher agreements, and in fact sought "to preclud[e] Defendants from using at trial, or in any motion made in these actions, any agreements they have with Sony, Microsoft and Bungie, or at a minimum, compelling them to produce unredacted copies of these agreements." D.I. 261 at 2 (emphasis added).¹ The Defendants all argued that these agreements were not relevant, and Special Master denied Acceleration's motion on that basis, finding that "Sony, Microsoft and Bungie redacted portions of their agreements with Defendants are extremely confidential and not likely to be relevant to Plaintiff's damages, because of the lack of

¹ Sony filed a motion to intervene to oppose Acceleration's motion because it involved commercially sensitive information belonging to Sony, which the Special Master granted. D.I. 267, 272, 273. Sony filed its opposition to Acceleration's motion explaining the commercial sensitivity of the redacted information. D.I. 278.

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