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May 3, 2016

The Honorable Richard G. Andrews
United States District Court
844 North King Street
Wilmington, DE 19801

VIA ELECTRONIC FILING

Re: *Acceleration Bay LLC*; C.A. Nos. 15-228 (RGA); 15-282 (RGA); and 15-311 (RGA)

Dear Judge Andrews:

I. Introduction

Defendants' Motion to Dismiss for Lack of Standing presents a serious question whether this Court has subject matter jurisdiction over the three cases. At the hearing, Plaintiff for the first time stated that it knew that Boeing would not join this suit. Thus, if the Court grants Defendants' Motion, these cases must be dismissed. Defendants have already been forced to expend countless hours and millions of dollars defending these cases and should not be forced to expend further resources until the issue is finally and fully resolved. Defendants request that the Court stay the cases pending the resolution of Defendants' motion to dismiss.

II. The Cases Should Be Stayed

Federal courts have frequently granted stays of discovery in patent suits where subject matter jurisdiction is in doubt. *See, e.g., Wyers Prods. Group v. Cequent Performance Prods.*, Inc., 2013 WL 2466917, at *2-3 (D. Colo. June 7, 2013) (granting stay pending decision on defendant's motion to dismiss for lack of standing due to inadequate transfer of patent ownership) (*citing Gilbert v. Ferry*, 401 F.3d 411, 415–16 (6th Cir.2005) (finding stay permissible pending ruling on a dispositive motion asserting a jurisdictional issue)); *DDB Techs., L.L.C. v. MLB Advanced Media, L.P.*, 676 F.Supp.2d 519, 533 (W.D. Tex. 2009) (granting certification for interlocutory appeal on the issue of patent ownership and staying litigation pending appeal); *Bradley v. L'Oreal USA, Inc.*, 2010 WL 3463203, at *4 (S.D. Ill. Aug. 30, 2010) (granting stay pending appellate decision in parallel litigation on the issue of standing, citing interest of judicial economy and lack of undue burden or great prejudice on the parties); *San Francisco Tech., Inc. v. Adobe Sys. Inc.*, 2010 WL 1463571, at *4 (N.D. Cal. Apr. 13, 2010) ("Mere delay in any eventual monetary recovery is not sufficient to require going forward where the threshold issue of standing can be conclusively resolved by waiting for the Federal Circuit to

rule."); *Moss v. Moss Tubes, Inc.*, 1997 WL 727611, at *5 (N.D.N.Y. Aug. 21, 1997) (granting stay pending decision in parallel state litigation on the issue of patent ownership).

Courts in the Third Circuit recognize it is appropriate to stay discovery while evaluating a motion to dismiss where its resolution would render "discovery futile." *Mann v. Brenner*, 375 F. App'x 232, 239 (3d Cir. 2010).[1] "Parties who file motions which may present potentially meritorious and complete legal defenses to civil actions should not be put to the time, expense and burden of factual discovery until after these claimed legal defenses are addressed by the court." *Payne v. Wetzel*, 2013 WL 1935356, at *2 (M.D. Pa. May 9, 2013). This is plainly the case here. If the Court finds that Plaintiff lacks prudential standing, the cases will be dismissed. Therefore, all discovery expenses that have been and continue to be incurred by the multiple Defendants will have been futile.[2]

Defendants' timely filings on the standing issues and the requested stay weigh against a finding of prejudice. Discovery opened in early October, and Defendants' promptly served discovery on this issue to both Plaintiff and Boeing. Boeing finally produced the Patent Purchase Agreement on January 15, 2016. Defendants quickly secured additional discovery on the issue by moving to compel the Hamilton Capital loan agreement on February 10, 2016. Plaintiff produced the loan agreement on February 22, 2016. After receiving confirmation from Plaintiff's counsel that there were no additional agreements, Defendants brought its Motion on March 1, 2016. Defendants promptly asked for a stay after Plaintiff represented that Boeing would not join the case and attempt to cure the standing problem. If Plaintiff had produced the Agreement in a timely fashion, Defendants' Motion could have been brought in 2015, thus saving the parties, the Court, and the Special Master significant resources. Under the circumstances, there can be no inference that Defendants are attempting to or will gain any unfair tactical advantage from the requested stay.

The status of the cases favor a stay as well. *Kaavo*, 2015 WL 1737476, at *1. Depositions, claim construction and email discovery have not commenced – but each of these expensive and time consuming activities is on the immediate horizon. The engineers who would be required to testify are key people, critical to creating Defendants' games and making sure they are published on time against very tight production schedules. Losing these top engineers for even a few days can jeopardize Defendants' ability to publish on time, which can have serious, irreparable effects. Proceeding with depositions at this point is both unfair and inefficient. Moreover, because Defendants brought this motion to stay as soon as they could have, the potential benefit of the stay is maximized. If the case is not stayed, the parties will incur significant additional costs in the next 60-90 days, including depositions, electronic discovery

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[1] *Kaavo Inc. v. Cognizant Tech. Solutions Corp.*, 2015 WL 1737476, at *1 (D. Del. 2015) ("A court has discretionary authority to grant a motion to stay."). Other factors include: (1) "whether a stay will simplify the issues for trial," (2) "whether a stay would unduly prejudice or present a clear tactical disadvantage to the non-moving party," and (3) "whether discovery is complete and a trial date has been set." *Kaavo*, 2015 WL 1737476, at *1.

[2] Plaintiff's lack of constitutional standing, as asserted in Defendants' motion, goes only to certain claims.

and claim construction. Accordingly, all of these expenses may be avoided until the standing issue is resolved. In contrast, if this case is allowed to proceed before the issue is fully resolved, including any related appeals, Defendants may be required to litigate their cases only to find out at trial that Plaintiff never had standing and should not have been permitted to bring these cases in the first place. This factor weighs strongly in favor of granting Defendants' motion for stay.

There is an opportunity to save significant costs without prejudice or tactical delay. While entering a stay will delay the progress of the litigation by the time necessary to decide Defendants' dispositive motion, this "alone does not warrant a finding that [Plaintiff] will be unduly prejudiced." *Enhanced Sec. Research, LLC v. Cisco Sys., Inc.*, 2010 WL 2573925, at *3 (D. Del. June 25, 2010). Rather, Plaintiff must particularize why the stay would unduly prejudice its rights to enforce the Asserted Patents. *See id.*, at *3; *see also Celorio v. On Demand Books LLC*, 2013 WL 4506411, at *1 (D. Del. Aug. 21, 2013) (explaining that mere possibility of a resulting delay is not dispositive and insufficient to establish undue prejudice; listing following sub-factors to determine undue prejudice: timing of the stay request, relationship between the parties, and whether plaintiff may be compensated through money damages).

Plaintiff cannot show undue prejudice. The Asserted Patents were more than nine years old before Plaintiff initiated this suit. All the Defendants are well known and have been operating visible and successful companies since well before the patents issued. Activision has even been selling World of Warcraft, one of the Accused Products, since 2004. Accordingly, Plaintiff/Boeing cannot demonstrate that there is any particular urgency. Instead, their delay in bringing these suits illustrate the lack of prejudice that would result from a stay. *See Kaavo*, 2015 WL 1737476, at *4 n.9 (finding that plaintiff waiting over two years between issuance of patent and filing of law suit weighed against a finding of undue prejudice).

Further, Plaintiff has represented that it and Defendants do not compete. Tr. (3/16/16) (D.I. 118-2, Exh. G) at 48:1-2. The absence of a direct competitive relationship means that the rationales which might counsel against a stay—protection of market share and good will—are not implicated in this case. *Celorio*, 2013 WL 4506411, at *1. Thus, this is not a case between competitors where irreparable harm can be claimed, or where an injunction would be remotely appropriate. In short, there will be no prejudice to Plaintiff if the requested stay is granted.

Defendants request that the Court stay the cases pending the resolution of Defendants' motion to dismiss. Plaintiff has forced Defendant to spend substantial resources to discover that these cases should not have been filed in the first place. Plaintiff acknowledged, in open court, that the jurisdictional defect could not have been corrected at the outset because Boeing would not agree to join in these lawsuits, even though Plaintiff's counsel admits that Boeing knew Plaintiff planned to assert the patents against the Defendants.

Respectfully,

/s/ Stephen J. Kraftschik

Stephen J. Kraftschik (#5623)

SJK/bac
cc: All Counsel of Record