

May 4, 2016

BY CM/ECF & HAND DELIVERY

The Honorable Richard G. Andrews
U.S. District Court for the District of Delaware
U.S. Courthouse
844 North King Street
Wilmington, DE 19801

Re: Acceleration Bay LLC v. Activision Blizzard, Inc.
D. Del., C.A. No. 15-228-RGA

Re: Acceleration Bay LLC v. Electronic Arts Inc.
D. Del., C.A. No. 15-282-RGA

Re: Acceleration Bay LLC v. Take-Two Interactive Software, Inc., et al.,
D. Del., C.A. No. 15-311-RGA

Dear Judge Andrews:

Defendants' motion to stay these cases that have been pending for more than one year is based entirely on the legally and factually flawed argument that Acceleration Bay is just a licensee and not the owner of the Holt Patents. As established at the hearing and in Acceleration Bay's briefing, Acceleration Bay is the owner of the Holt Patents (as Boeing, the defendants in IPR proceedings, and the PTAB have all stated). Thus, by definition, Acceleration Bay has all substantial rights in the patents and prudential standing does not come into play. Even if the clear intent of the parties to the contract is ignored, then, as demonstrated in Acceleration Bay's opposition to Defendants' motion to dismiss, Acceleration Bay has prudential standing because it is the only party that has the right to sue these Defendants on these claims. Further, even if the Court found otherwise, Defendants' motion to dismiss is not necessarily case dispositive, which is sufficient grounds alone to deny Defendants' request for a stay. Because Acceleration Bay may cure any defect in prudential standing, there is no benefit to staying the cases while the motion is resolved.¹

¹ Defendants' constitutional standing arguments are also not case dispositive because they are limited to specific games and versions, and do not apply to many of the accused products. *See*

Master. At no time during any of those hearings did Defendants raise the issue of a stay. The Defendants also failed to raise it in their motion to dismiss. Then, on April 19, 2016, after briefing on the motion to dismiss was finished, the Special Master issued Order Number 2 (D.I. 129), ordering Defendants to provide witnesses for deposition and allow source code inspection of additional products. Defendants' three month delay in moving for a stay only highlights their true motivation of continuing to stall discovery.

The three factors the Court considers when deciding a motion to stay do not support granting Defendants' motion. *FMC Corp. v. Summit Agro USA, LLC*, Civil Action No. 14-51-LPS, 2014 WL 3703629, at *2 (D. Del. July 21, 2014) ((1) whether granting the stay will simplify the issues for trial (it will not, as noted above, given Acceleration Bay's ability to cure); (2) the status of the litigation, particularly the stage of discovery and whether a trial date has been set; and (3) whether a stay would cause the non-movant to suffer undue prejudice from any delay, or allow the movant to gain a clear tactical advantage).

While there is no benefit to be obtained from granting Defendants' request for a stay, doing so would be highly disruptive to the case schedule. Claim construction deadlines begin on May 25, 2016, and were intended to be done with the benefit of significant discovery into the accused products. The deadline to file motions to join other parties and to amend or supplement the pleadings is July 22, 2016, document production is to be completed by September 14, 2016, and the close of fact discovery is set for January 20, 2017. The parties are also in the process of negotiating ESI search terms. Trial dates have been set in all three cases. Indefinitely postponing depositions and other discovery would be prejudicial to all of these deadlines.

The prejudice from a stay is exacerbated by Defendants' failures to cooperate with deposition discovery. These cases were all filed well over a year ago, and core technical discovery was scheduled to begin in December 2015. The Defendants have produced little in the way of relevant technical documents (Blizzard and Take Two have not produced any technical documents at all), relying instead on offering source code for inspection. Since January 5, 2016, Acceleration Bay has been attempting to take the depositions of Defendants on the accused products to advance discovery. After initially agreeing to depositions well in advance of Acceleration Bay's initial infringement claim charts, Defendants reneged, forcing Acceleration Bay to move the Court to compel depositions. Even though the Court ordered Defendants to proceed with depositions after Acceleration Bay served its initial claim charts on March 2, 2016, Defendants declined to do so. 2/12/16 Hearing Tr. at 15:18-16:7. Acceleration Bay sought relief from the Special Master, who ordered Defendants to proceed with depositions on April 19, 2016.

Acceleration Bay LLC v. Activision Blizzard Inc., C.A. No. 15-228-RGA, D.I. 109 ("Opposition Brief") at 15, n.6, 18. All citations herein are to the *Acceleration Bay v. Activision* action.

Under these circumstances, a stay is not warranted. *Kruji Foods Grp. Brands LLC v. FC Heartland LLC*, C.A. No. 14-28-LPS, D.I. 32 (D. Del. Jan. 7, 2015) (oral order denying defendants' request to stay entry of a scheduling order due to a pending motion to dismiss). In particular, Chief Judge Stark denied a request for a stay under similar circumstances where a motion for lack of prudential standing was not case dispositive, the case was advanced and a stay would disrupt upcoming case deadlines:

A stay would not necessarily simplify the issues for trial, as the Court may permit [Plaintiff] to amend its Complaint in lieu of dismissing it should the Court ultimately find that [Plaintiff] lacks prudential standing. A stay would unduly prejudice [Plaintiff] because, at the time [Defendant] filed its motion, the parties had already invested significant time over several months, including two Rule 16 conferences, in finalizing the Scheduling Order . . . The Scheduling Order . . . was entered before the parties were done briefing the motion to stay, and it has set a trial date for June 2017. Currently, opening claim construction briefs in the three coordinated cases . . . are due in 18 days. Further, [Defendant] has not explained how it would be unduly prejudiced in the absence of a stay.

Orthophoenix LLC v. Stryker Corp., No. 1:13-cv-01628 (D. Del. Aug. 31, 2015) (oral order).

Other courts have similarly denied requests to stay discovery where a motion to dismiss is pending. *See e.g., Sonix Tech. Co., Ltd. v. Kenji Yoshida*, No. 12-cv-380 (S.D. Cal. Nov. 25, 2015) (denying request to stay expert discovery where “the filing of Defendants’ motion to dismiss [was] not an extraordinary circumstance warranting further delay of discovery”); *White Knuckle, IP, LLC v. Electronic Arts Inc.*, No. 1:15-cv-00036-64 (D. Utah Aug. 23, 2015) (denying stay even where “if the [motion] is successful the case may be dismissed” because “[s]taying discovery [] may only serve to slow down litigation and delay the case’s resolution”); (citations omitted); *Homesafe Inspection, Inc. v. John Hayes*, No. 3:14-cv-209 (N.D. Miss. Mar. 19, 2015) (denying request to stay because “the parties are expected to promote efficiency in th[e] litigation” and if a discovery stay is appropriate, the court “should determine [as such] after ruling on the motions”); *WDI, Inc. v. Beneterra*, No. 1:09-cv-0164 (D. Wy. Nov. 4, 2009) (denying defendant’s motion to stay discovery, noting that, “it is markedly uncommon for courts to grant dispositive motions which fully dispose of the case”).

For the forgoing reasons, Acceleration Bay respectfully requests that the Court deny Defendants’ request for a stay.

PAR/mah/1222973

cc: All Counsel of Record – by CM/ECF and E-mail