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August 7, 2017

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

VIA ELECTRONIC FILING

Re: *Acceleration Bay LLC*; C.A. Nos. 16-453 (RGA); 16-454 (RGA); and 16-455 (RGA)

Dear Judge Andrews:

In light of the Court's July 5, 2017 Order extending claim construction briefing through late November, Defendants request that the Court modify the existing schedule so that election of prior art, expert reports, *Daubert*, summary judgment and trial all proceed in an orderly fashion after claim construction is complete. Defendants also note that they have pending motions to dismiss and have not yet answered. Acceleration Bay opposes any amendments to the case schedule. A proposed order, including a table comparing the current schedule with Defendants' proposed revised schedule, is attached as Exhibit A.

Procedural Background. The current schedule was set in February 2017 and follows this Court's traditional sequence, with a claim construction hearing on July 10, 2017, final election of asserted claims and prior art, and opening expert reports in September, and summary judgment and *Daubert* motions the following February. The first trial was set for April 2018.

On July 5, 2017, the Court ordered that claim construction occur over five phases, with the final joint claim construction brief being due on November 30, 2017. C.A. No. 16-453, D.I. 206; D.I. 274.[1] On July 10, the Court held the first of the five claim construction hearings. Defendants' motions to dismiss were heard that day as well. After rulings on the motions to dismiss, Defendants will need to answer. The Court has not scheduled hearings for the last four claim construction briefs, and presumably claim construction will not be complete until early 2018.

[1] References to docket entries in this letter refer to C.A. No. 16-453.

Argument. Courts in Delaware and around the country have recognized that final election of prior art, expert reports, *Daubert*, and summary judgment should all follow claim construction. The practice is more cost effective and efficient because the Parties do not have to prepare expert reports with each party's proposed alternative constructions and without knowing the Court's claim constructions, which may be different from the parties' proposed constructions.

At the scheduling conference, Defendants specifically raised the very issue of receiving a claim construction order ***before*** election of prior art and expert reports. *See* Ex. B, Feb. 17, 2017 Tr. at 26, 27. The Court took this into account, and explained that it would set a claim construction hearing in July and try to issue a claim construction order by the end of August. *Id*. Defendants then agreed to a schedule that accounted for the Court's expected *Markman* decision – that schedule set final election of asserted claims and prior art, and opening expert reports for late September, at least three weeks after the expected *Markman* decision.

The practice of having expert reports after the pleadings are settled and the issuance of claim construction rulings is particularly appropriate in these three cases. Plaintiff is asserting 21 claims from six different patents, and has accused at least 8 distinct product lines across the three cases. The parties have vastly different claim construction positions on over 40 terms across the six patents. D.I. 236 (Joint Claim Construction Chart, Exhibit 2). Plaintiff specifically raised the issue of claim construction as a basis for opposing Activision's Motion to Dismiss. D.I. 28 (Plaintiff's Answering Brief) at 18. Plaintiff has also steadfastly resisted the idea of limiting the length of expert reports, and has indicated at a meet and confer it would only consider limiting its expert reports to ***5,000 pages*** in each of the three cases.

Scheduling final elections of asserted claims and prior art, expert reports and dispositive motions after the pleadings are settled and after claim construction will streamline the case. Claim construction briefing will conclude in late November, and no hearing dates have been set. Thus, the parties are likely not to have final rulings on claim construction until early 2018. Under the current schedule, the parties will need to elect asserted claims and prior art and prepare expert reports before they have even completed claim construction briefing. They will have to complete all expert discovery and prepare *Daubert* and dispositive motions (due February 2, 2018) without claim construction rulings. Given the significance of claim construction, the parties would likely seek to amend or supplement their expert reports given the claim constructions. And certainly any summary judgment briefing or *Daubert* motion briefing already filed would need to be modified. It would be highly prejudicial to Defendants to force them to make a final election of prior art and prepare dispositive motions before the scope of the claims is determined. In contrast, Plaintiff provides no reason to prepare expert reports when the parties will likely seek to amend or supplement those reports after the claim construction ruling. Thus, waiting for claim construction to conclude and the pleadings to be closed before expert reports will lead to a more efficient and orderly resolution of disputes in these actions.

Expert reports, *Daubert* Motions, and motions for summary judgment will all be substantially less burdensome on both the parties and Court after claim construction. This is all the more so because at least 14 of the 21 Asserted Claims may be held invalid as indefinite or as directed to unpatentable subject matter. *See* Ex. C. The parties and Court will benefit from knowing the Court's constructions and what claims have survived claim construction before the parties elect asserted claims and prior art, prepare expert reports and file *Daubert* and summary judgment motions.[2]

On the other hand, proceeding with expert reports without claim constructions and before the claims and defenses are presented in the pleadings provides no guarantee that the schedule will not be moved later. Given Plaintiff's infringement contentions and responses to interrogatories, Defendants are concerned that Plaintiff's expert reports will be inadequate or identify brand new theories not previously disclosed in Plaintiff's infringement contentions or responses to interrogatories. Defendants have prevailed on multiple motions to compel regarding Plaintiff's explanation of how the Accused Products allegedly infringe. In response to the latest Motion, the Special Master explained that "if Plaintiff's expert reports set forth infringement contentions that had not been previously disclosed, it may be appropriate to reconsider Defendants' motion for sanctions and appropriate relief." Special Master Order No. 6.

The current schedule leaves little time for the Special Master to thoroughly review Plaintiff's expert reports before summary judgment papers are due. Defendants are justifiably concerned that Plaintiff will seek to add new theories in its expert reports. As noted, Plaintiff will likely object to page limits on expert reports and has indicated it may serve incredibly voluminous expert reports. With this large volume of expert reports, the Special Master will likely need to resolve disputes regarding whether Plaintiff has added new theories of infringement. Such resolution is not practical until after the claim construction rulings are issued.

Finally, Plaintiff has not identified any prejudice from an extension of the schedule. The patents issued more than a decade ago and Plaintiff does not sell or manufacture any products and seeks only reasonable royalty damages. There can be no prejudice to it from a few months delay to ensure that the remainder of the case is prepared efficiently and correctly.

Pursuant to Federal Rule of Civil Procedure 16(b)(4), Defendants, therefore, request that all currently pending scheduling order dates be reset. Defendants' proposed schedule in Exhibit A anticipates that the Court would have ruled on all pending motions to dismiss and issued rulings on all claim construction issues by February 2018. Otherwise, the proposed schedule maintains the same amount of time between the various events.

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[2] Defendants' Motions to Dismiss also may significantly reduce the scope of the case. Defendants have moved to dismiss Plaintiff's claims against Sony products. About half of all accused products in this case are games on the Sony platform, and as explained in the motion to dismiss, Plaintiff lacks standing to sue on those products. Given the lack of standing, there should be no expert reports at all on the Sony products.

Respectfully,

/s/ Jack B. Blumenfeld

Jack B. Blumenfeld (#1014)

JBB:cjl
Enclosure
cc: Clerk of Court (Via Hand Delivery; w/enclosure)
All Counsel of Record (Via Electronic Mail; w/enclosure)
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