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October 24, 2018

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 v. Activision Blizzard Inc.*
C.A. No. 16-453 (RGA)

Dear Judge Andrews:

The Court should continue the trial while it considers the issues before it. Trial begins in four days, and the impact of bifurcating the trial on case presentation would be dramatic and highly prejudicial to Activision. Plaintiff in this case seeks enormous damages and the stakes are high. Pivoting to a liability trial at this late date would invariably impact Activision's preparation for trial and its ability to present its best defense.

Activision has not had time to consider all of the effects, but a trial focused solely on liability would affect the witnesses to be called, the testimony to be elicited, witness examinations, and the overall strategy for defending this case. Preparing for a case on liability only is not a mere matter of subtracting a few witnesses and documents. It substantially changes the way the case would be presented to a jury, and it would be unfairly prejudicial to Activision to rework its trial plan three days before trial. In addition, nearly all of the pretrial materials would need to be revised, including exhibits lists, deposition designations, demonstratives, jury instructions, and more. This is simply not feasible in four days. Further, bifurcating damages from liability subjects Activision to the possibility of two trials.

These potential trials would require substantial overlap in evidence, witnesses and case presentations. As Activision has explained, any damages theory must be apportioned and "sufficiently tie[d] ... to the facts of the case." *Exmark Mfg. Co. Inc. v. Briggs & Stratton Power Prod. Grp., LLC*, 879 F.3d 1332, 1351 (Fed. Cir. 2018). Issues related to non-infringing alternatives, state of the art, and the role of the allegedly infringing functionality in the accused products would be presented in both trials. A second jury would be required to be empaneled to hear

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from many of the same witnesses and see much of the same evidence as the jury would hear and see next week. Moreover, many of the same witnesses would have to testify in both trials, taking them away from their jobs and families. The resulting inefficiency and waste can be avoided by simply continuing trial until clarity can be provided as to how to proceed. Under these circumstances, Acceleration cannot show that bifurcation will “avoid prejudice, conserve judicial resources, enhance juror comprehension” or be more likely to “result in a just final disposition of the litigation.” Fed. R. Civ. P. 42(b).

Moreover, there remains a serious question as to whether Plaintiff is entitled to a jury trial, or any trial at all, based on the pending motion. *In re Tech. Licensing Corp.*, 423 F.3d 1286, 1290–91 (Fed. Cir. 2005). The Court’s decision on the motion could moot the issue of a jury trial or otherwise dispose of the case. The Court should be afforded sufficient time to evaluate these issues before a potentially unnecessary or improper jury trial commences. For this additional reason, a continuance is merited.

Finally, we note that the issue is entirely of Acceleration Bay’s making, and Activision should not be prejudiced by it.

Respectfully,

/s/ Jack B. Blumenfeld

Jack B. Blumenfeld (#1014)

JBB/bac

cc: Clerk of the Court (via hand delivery)
All Counsel of Record (via electronic mail)