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November 20, 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:

We write on behalf of Activision regarding the scope and schedule of the Court's Order regarding damages issues in this case. (D.I. 619). The parties dispute whether the Court's Order permitting Acceleration to "supplement its expert reports" permits Acceleration to start over with a brand new expert unbounded by Acceleration's prior disclosures or whether Acceleration is limited to supplementing reports for experts disclosed during discovery and within the scope of Acceleration's damages disclosures provided after multiple orders to compel. The parties also disagree about the appropriate schedule.

Acceleration should not be allowed to add a new expert. The expert disclosure deadline in this case was over a year ago. D.I. 62 at 8–9. The Court's October 30, 2018 Case Management Order gave Acceleration a "final opportunity to present ... an admissible damages case," and said "Plaintiff may supplement its expert reports if it wishes to do so." D.I. 619 at 2. On November 7, 2018, Acceleration disclosed a new, previously undisclosed damages expert, Russell Parr. Acceleration says it intends to submit a damages report from Mr. Parr. During the parties' meet and confer, Acceleration would not agree that Mr. Parr would be bound by Acceleration's prior discovery disclosures or why Acceleration needs a new (eighth) expert at this stage.

Introducing an entirely new expert and report more than a year after the discovery deadline is not supplementation. Although the Court's Order stated that Acceleration "may supplement its expert reports," it did not open the door for Acceleration to submit a report from a new expert. Activision has spent considerable time and resources responding to Dr. Meyer. Acceleration should not be allowed to whitewash the record and distance itself from the numerous admissions and concessions by Dr. Meyer under the guise of supplementation. If

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Acceleration believes it can modify Dr. Meyer's existing opinions to correct their many deficiencies, the Court's Order allows it to attempt to do so. But Acceleration should not be allowed to erase Dr. Meyer's record and undo the consequences of four years of litigation. Allowing Acceleration a complete restart at this stage is prejudicial.

Acceleration should not be allowed to exceed its prior damages disclosures. Acceleration was ordered to provide its damages theories, factual support for them and for the hypothetical negotiation date during fact discovery. Special Master Order 3, D.I. 155 at 7–9, D.I. 193. Acceleration's Court-Ordered response promised to provide all of its damages theories and evidence in its opening expert reports. Ex. A, 8/18/17 Resp. Interrogatory No. 1 at 6-10. The Special Master also ordered that Plaintiff was "bound by" its decision to use the filing date of the complaint as the hypothetical negotiation date. Special Master Order 6 ("Plaintiff stated that the date of hypothetical negotiation was the date of service of the complaints Plaintiff is bound by that statement...."). Acceleration has refused to explain the nature or scope of the theories it will be advancing, or to agree that that its damages supplementation will be limited to Acceleration's discovery disclosures.

Allowing Acceleration to go beyond its prior damages disclosures would unfairly prejudice Activision and vitiate the multiple discovery orders on these issues. Activision has built its defense on the damages record and opinions advanced by Acceleration. Activision's experts have already formulated their theories in response to the theories and evidence advanced by Dr. Meyer. Allowing Acceleration to expand its damages disclosures could require reopening of discovery to explore the evidentiary bases for any new disclosure and could require the identification of new witnesses to respond. It is too late to start over to rebut a new expert with a different methodology. If Acceleration believes it can supplement its reports based on the existing record, including its disclosures, the Court's Order allows it to do so. But the Order does not allow Acceleration to scrap and replace its entire damages case.

Activision's Schedule Is Reasonable. The parties also disagree on the schedule in two key respects: (1) the deadline for Activision to provide a responsive report and (2) the amount of time for Activision to respond to Acceleration's proffer. Acceleration proposes that Activision provide its response disclosures by January 18, 2019. Activision has proposed that this date be extended to January 25, 2019 because its damages expert, Ms. Lawton, has a report in another matter due on January 18. Further, given the upcoming holidays, Activision wants to ensure it has sufficient time to respond to Acceleration's supplementation. The other scheduling dispute is how much time Activision should have to respond to Acceleration's proffer. Given the unknown nature and length of the proffer or of the supplemental report to be served, Activision requests four weeks. Acceleration, however, insists that Activision only needs two weeks to respond, even as it gives itself three weeks to reply. Acceleration's demand would unfairly limit Activision's time to respond properly, and should be rejected.

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Respectfully,

/s/ Jack B. Blumenfeld

Jack B. Blumenfeld (#1014)

JBB/bac

Attachment

cc: Clerk of Court (via hand delivery; w/attachment)
All Counsel of Record (via electronic mail; w/attachment)