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October 12, 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. et al.*
D. Del., C.A. No. 16-453-RGA, 16-454-RGA, 16-455-RGA

Dear Judge Andrews:

We represent Acceleration Bay in the above-referenced actions. After filing initial motions to dismiss in July 2016, Defendants recently filed another round of motions and have used this second round of motions as an excuse not to answer the complaints and thereby delay the progress of these cases. While Acceleration Bay believes that Defendants should be ordered to answer the complaints (and their motions to dismiss be converted to motions for judgment on the pleadings under Rule 12(c)), Acceleration Bay requests that, regardless of how the motions are treated procedurally, the Court schedule a Rule 16 conference so that discovery can resume and a scheduling order entered. The parties have met and conferred and Defendants oppose Acceleration Bay's request.

Acceleration Bay filed actions against Defendants in early 2015 and the parties began discovery in December 2015. On June 20, 2016, the Court dismissed the 2015 actions without prejudice for lack of prudential standing in favor of the present actions. On June 17, 2016, after fixing the prudential standing issue, Acceleration Bay filed the instant actions. Rather than continue where discovery left off and negotiate a new scheduling order, Defendants have engaged in an endless campaign of delay

First, on June 16, 2016, Defendants filed mirror declaratory judgment actions in the Northern District of California. Then, on July 8, 2016, in lieu of answering the 2016 Complaints, Defendants filed a motion to dismiss under the first-to-file rule (in favor of the Northern District of California declaratory judgment actions), to transfer venue under 28 § 1404

and to stay (D.I. 6, the "Motion to Dismiss").[1] Those motions were fully briefed as of August 4, 2016 and submitted to the Court for adjudication. Shortly after briefing was completed, Defendants abandoned their Motion to Dismiss when the Northern District of California granted Acceleration Bay's motion to transfer Defendants' declaratory judgment actions to this Court, finding that Defendants' declaratory judgment actions had been filed in anticipation of these litigations and that this Court was the proper venue for the parties' dispute. D.I. 13, 14.

Believing that Defendants intended to answer and were procedurally barred from filing serial motions to dismiss, Acceleration Bay agreed to extend the time for Defendants to respond to the 2016 Complaints until October 4, 2016. Defendants, however, rather than answering Acceleration Bay's complaints, filed two new motions to dismiss under Rule 12; one seeking to dismiss Acceleration Bay's claims against certain versions of the accused products and the other to find some of Acceleration Bay's asserted claims patent ineligible. There is no reason, other than creating additional work for the Court and Acceleration Bay and further delaying the adjudication of these cases, that Defendants could not have filed these motions with their first motion to dismiss. If they had, the motions would be fully briefed and likely decided in the near future. Instead, Defendant's procedural tactics have already delayed these cases by at least four months.

Moreover, Defendants' motions do not apply to the majority of the accused products or to the eligibility of three of the six patents at issue. D.I. 18, 21. Consequently, there is no dispute that, even if the Court grants Defendants' improper second and third motions to dismiss, discovery will occur and a new scheduling order will need to be entered. Therefore, there is no reason to delay scheduling a Rule 16 conference.

Acceleration Bay already warned Defendants that, having already once moved to dismiss and transfer venue in lieu of answering, Defendants' filing of two additional motions to dismiss instead of answering was improper under Rule 12(g), which limits a party to a single such motion. Fed. R. Civ. P. 12(g)(2) ("a party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion.").

Defendants' first Motion to Dismiss is a motion under Rule 12(b), even though it was not labelled as such by Defendants. Courts routinely consider motions to dismiss under the first-to-file-rule as motions to dismiss under Rule 12(b). *See, e.g.*, *Boston Sci. Corp. v. Wall Cardiovascular Techs., LLC*, 647 F. Supp. 2d 358, 360–61 (D. Del. 2009) (considering motion to dismiss under first-to-file rule as part of Rule 12(b) Motion to Dismiss); *Port Auth. of New York & New Jersey v. Kraft Power Corp.*, No. 11 CV 5624 HB, 2012 WL 832562, at *1 (S.D.N.Y. Mar. 13, 2012) (characterizing motion to dismiss under the first-to-file rule as "a motion to dismiss . . . pursuant to Rule 12(b)(3)); *O2COOL, LLC v. Discovery Commc'ns, LLC*, No. 12 C 3204, 2013 WL 157703, at *1 (N.D. Ill. Jan. 15, 2013) (treating motion to dismiss under first-to-

[1] All docket citations are to *Acceleration Bay LLC v. Activision Blizzard, Inc.*, C.A. No. 16-453-RGA. Substantially similar pleadings were filed in the related actions.

file rule as motion to dismiss under Rule 12(b)(3)); *E-Z-EM, Inc. v. Mallinckrodt, Inc.*, No. 2-09-CV-124, 2010 WL 1378820, at *1 (E.D. Tex. Feb. 26, 2010) (report & recommendation) (motion to dismiss under first-to-file rule is a motion to dismiss under Rule 12(b)(3) for improper venue).[2]

Regardless of how they are treated procedurally, Defendants should not be permitted to use their latest motions to dismiss as a means to delay the progress of these actions. Accordingly, Acceleration Bay respectfully requests that the Court schedule a Rule 16 conference so that discovery can resume and a scheduling order entered. Defendants should also be ordered to answer Acceleration Bay's complaints.

Respectfully,

/s/ Philip A. Rovner

Philip A. Rovner (#3215)

cc: All Counsel of Record (Via ECF Filing, Electronic Mail)
1235733

[2] Motions to transfer under 28 U.S.C. § 1404 have also been deemed a motion to dismiss under Rule 12(b)(3) for purposes of Rule 12(g). *Elderberry of Weber City, LLC v. Living Centers-Se., Inc.*, No. 6:12-CV-00052, 2013 WL 1164835, at *2–3 (W.D. Va. Mar. 20, 2013) (finding "that a ***motion to transfer venue is so similar to a motion to dismiss for improper venue that Rule 12(g)'s consolidation requirement applies*** . . . to hold otherwise would subvert the purpose of the consolidation rule") (emphasis added); *Sangdahl v. Litton*, 69 F.R.D. 641, 642–43 (S.D.N.Y. 1976) (defendant waived personal jurisdiction defense by failing to include it in § 1404 motion to transfer).