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October 13, 2016

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

VIA ELECTRONIC FILING

Re: *Acceleration Bay LLC v. Activision Blizzard, Inc., et al*,
C.A. Nos. 16-453, 16-454, 16-455-RGA

Dear Judge Andrews:

We write on behalf of defendants Activision Blizzard, Inc., Electronic Arts Inc., Take-Two Interactive Software, Inc., Rockstar Games, Inc., and 2K Sports, Inc., (the “Video Game Companies”) in response to Acceleration Bay’s October 12, 2016 letter (D.I. 25¹). In that letter, Acceleration Bay objects on procedural grounds to the Video Game Companies’ October 4 12(b) motions to dismiss (D.I. 18, 21), and requests that the Court schedule a Rule 16 conference before resolving those motions. Contrary to Acceleration Bay’s assertions, the motions to dismiss are procedurally proper. Further, because each of these motions may independently dispose of approximately half of the cases, the Video Game Companies respectfully suggest that a Rule 16 conference be held after the Court has ruled on the motions.

First, the pending motions are procedurally proper. By stipulation and Order, the Video Game Companies had until October 4, 2016 “to respond to Acceleration Bay’s complaints . . .” (D.I. 16 at 3). It is axiomatic that “a civil defendant may respond to a complaint with a motion to dismiss.” *United States v. \$8,221,877.16 in U.S. Currency*, 330 F.3d 141, 153 (3d Cir. 2003). There is no doubt that “the rules provide that such a motion may be filed in lieu of an answer.” *Yan Yan v. Pennsylvania State Univ.*, 623 F. App’x 581, 582 (3d Cir. 2015) (citing Fed. R. Civ. P. 12(b)(6)).

Acceleration Bay nevertheless argues that the October 4 date was the deadline *to answer*, not to respond. It bases this tortured reading on Fed. R. Civ. P. 12(g)(2), arguing that the Video Game Companies’ previous motion to dismiss, stay or transfer, which was based on the “first-to-file” rule and the convenience of the parties, bars any subsequent motion to dismiss.

Acceleration Bay’s reading of Rule 12(g)(2) is incorrect. “By its own terms, Rule 12’s waiver provision applies only to defenses raised under Rule 12.” *Veverka v. Royal Caribbean Cruises Ltd.*, 649 F. App’x 162 (3d Cir. 2016) (unpublished table decision) (discussing Rule 12(g)(2)). Thus, “a party that makes a motion under *this rule* must not make another motion

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.

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under *this rule* raising a defense or objection that was available to the party but omitted from its earlier motion.” Fed. R. Civ. P. 12(g)(2) (emphasis added). The Video Game Companies’ Motions to dismiss or stay were based on the first-to-file rule and transfer under 28 U.S.C. § 1404 not Rule 12 or any ground there enumerated. (*See* D.I. 7).

Acceleration Bay nonetheless asserts that the Video Game Companies’ motion should be “deemed” a Rule 12 motion. But it does not cite a single case holding that a first-to-file motion is deemed a Rule 12 motion. *Cf. Main Iron Works LLC v. Rolls Royce Marine N. Am., Inc.*, 2015 WL 3952709, at *2 (E.D. La. June 29, 2015) (“Rolls Royce has not argued, and this Court could find no case stating, that a motion under the first-to-file rule is a Rule 12 Motion.”). Some of the cases cited by Acceleration Bay describe first-to-file motions as 12(b) motions, but these descriptions are unconsidered dicta, untethered to any holding, let alone an application of Rule 12(g)(2). Nor does Acceleration Bay cite a single case holding that a motion for transfer based *purely on convenience* should be deemed a Rule 12 motion. Instead it cites two decisions that deemed motions for transfer to be Rule 12 motions because they were based on the same facts as the defendants’ subsequent motions to dismiss for lack of personal jurisdiction. That is not the case here. In any event, these decisions are contrary to the plain language of the rule and the weight of authority:

- “Technically speaking, motions to transfer are made pursuant to a motion under the statute rather than under Rule 12(b)(3), although little, other than the possible application of the consolidation requirement in Rule 12(g), turns on this distinction.” Wright & Miller, 5B Fed. Prac. & Proc. Civ. § 1352 (3d ed.).
- “Although School-Link cited Rule 12(b)(3) and 28 U.S.C. § 1404(a) as the grounds for its motion, the motion was technically made under the transfer statute. . . . Accordingly, the current Rule 12(b)(3) motion is not a successive Rule 12 motion that is barred by the consolidation and waiver principles of Rules 12(g) and (h)(1).” *Sch.-Link Techs., Inc. v. Applied Res., Inc.*, 2005 WL 2269182, at *2 (D. Kan. Sept. 16, 2005).
- “A motion to transfer venue for the convenience of parties or witnesses or in the interests of justice, brought pursuant to 28 U.S.C. § 1404(a), is not a motion under Rule 12(b)(3) of the Federal Rules of Civil Procedure, so the waiver provision of Rule 12(h) is inapplicable.” *Red Wing Shoe Co. v. B-JAYS USA, Inc.*, 2002 WL 1398538, at *2 (D. Minn. June 26, 2002).

In any event, Acceleration Bay waived its argument when it stipulated to extend the Video Game Companies’ “time to respond” to the Complaints (D.I. 16 at 3). That stipulation was an agreement between the parties where the Video Game Companies—while “reserving all rights”—agreed to withdraw their motions to dismiss, stay or transfer and to dismiss their declaratory judgment actions, in exchange for an extension of their “time to respond to Acceleration Bay’s complaints.” (D.I. 16 at 2–3). Acceleration Bay’s apparent “[b]elie[f] that Defendants intended to answer and were procedurally barred from filing serial motion to dismiss,” is implausible in light of the unambiguous language of the stipulation and Order.

Accordingly, the motions are procedurally proper and the Video Game Companies should not be ordered to answer while their motions are pending.

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Additionally, the Video Game Companies submit that a Rule 16 conference should not be scheduled until the Court has ruled on the motions to dismiss. Resolution of those motions may greatly simplify and streamline the case. If the motion to dismiss the claims concerning the Sony-compatible products for lack of standing is granted, that would foreclose technical and damages discovery on effectively half of the case, and limit the need for third-party discovery that would otherwise be required from Sony.² Resolving the motion to dismiss for lack of standing first would be particularly appropriate, given “[t]he requirement that jurisdiction be established as a threshold matter.” *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 94–95 (1998).

Furthermore, the motion to dismiss for lack of patent eligible subject matter is directed at three of the six patents and, if it is granted, the infringement, validity and claim construction issues will be cut nearly in half. And invalidity for lack of patent eligibility is also an issue frequently decided at the outset of the case, as it will also result in a similar saving of resources. Those same three patents are also the subject of IPR proceedings that are due for decisions no later than March 2017. The March 2017 decisions from the Patent Office on these IPRs may also resolve nearly half of this case and will also address certain claim construction disputes.

Discussions about scheduling held while these motions are pending would be conducted in the shadow of substantial uncertainty about the amount and scope of discovery needed and would not produce an informed scheduling order. There is simply no reason to set a schedule or to commence discovery when Acceleration Bay’s standing to assert infringement by half of the accused products and the validity of half of the asserted patents are at issue before the Court. The grant of either or both of the Video Games Companies’ motions will dramatically affect how these cases should proceed. Waiting until these motions are resolved would conserve the resources of the Court and the parties.

Although Acceleration Bay complains about delay, it identifies no prejudice in its letter to the Court and provides no reason not to wait until the motions are resolved. It suggests that the Video Game Companies brought these motions to dismiss as a delay tactic. That is not so. The patents-in-suit are all more than a decade old, having issued in 2004 and 2005. Thus, any delay can hardly be attributed to the defendants. Moreover, Acceleration Bay invited a round of motions to dismiss, because it asserted claims against Sony-compatible products knowing that the Video Game Companies had previously objected to those claims on standing grounds. Finally, given that Acceleration Bay is a non-practicing entity, there can be no harm to it in the marketplace from waiting until the resolution of the pending motions.

The motions to dismiss are procedurally proper and may cut the discovery needed roughly in half and resolve most of the claims and half of the patents. The Video Game Companies submit that judicial economy counsels in favor of resolving those motions before scheduling a Rule 16 conference.

² All but one of the accused games are played primarily on specialized computers called video game consoles. Sony, Microsoft, and Nintendo are the three major console manufacturers, with Sony’s PlayStation line of consoles representing approximately half of the worldwide market.

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Respectfully,

/s/ Jack B. Blumenfeld

Jack B. Blumenfeld (#1014)

JBB/dlw

cc: Clerk of Court (Via Hand Delivery)
All Counsel of Record (Via Electronic Mail)