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24 UNITED STATES DISTRICT COURT
 25 CENTRAL DISTRICT OF CALIFORNIA

26 U.S. EQUAL EMPLOYMENT
 27 OPPORTUNITY COMMISSION,

28 Plaintiff,

vs.

ACTIVISION BLIZZARD, INC.,
 BLIZZARD ENTERTAINMENT, INC.,
 ACTIVISION PUBLISHING, INC.,
 KING.COM, INC., and DOES ONE
 through TEN, inclusive,

Defendants.

CASE NO. 2:21-cv-07682-DSF-JEM

**JOINT APPLICATION OF
 PLAINTIFF U.S. EQUAL
 EMPLOYMENT OPPORTUNITY
 COMMISSION AND
 DEFENDANTS ACTIVISION
 BLIZZARD, INC., BLIZZARD
 ENTERTAINMENT, INC.,
 ACTIVISION PUBLISHING,
 INC., AND KING.COM, INC.
 FOR LEAVE TO SUBMIT
 PROTECTED MATERIALS FOR
 IN CAMERA REVIEW**

Courtroom: 7D
 Judge: Hon. Dale S. Fischer

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1 TO THE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF RECORD:

2
3 Pursuant to Local Rule 79-6, Plaintiff, the United States Equal Employment
4 Opportunity Commission (“EEOC”), and Defendants Activision Blizzard, Inc.,
5 Blizzard Entertainment, Inc., Activision Publishing, Inc., and King.com, Inc.
6 (collectively, “Activision Blizzard”), hereby jointly seek leave to submit for *in*
7 *camera* review certain confidential conciliation and confidential mediation
8 materials (the “Protected Materials”) to provide further information to assist the
9 Court in its review of the Proposed Amended Consent Decree, lodged on January 4,
10 2022 (Dkt. 50-1).

11
12 Good cause exists to conduct that review *in camera* under the United States
13 District Court, Central District of California Local Rule 79-6 (“Local Rule 79-6”).
14 The Protected Materials contain highly confidential information that is protected
15 from disclosure under federal statute, federal common law, the Federal Rules of
16 Evidence, and the California Evidence Code. *See* Fed. R. Evid. 408, 42 U.S.C.
17 § 2000e-5(b), Cal. Gov’t Code § 12932(b), 2 Cal. Code Regs. § 10024, Cal. Evid.
18 Code §§ 1119, 1121.

19
20 This Application is based on Local Rule 79-6, Fed. R. Evid. 408, 42 U.S.C.
21 § 2000e-5(b), the attached Memorandum of Points and Authorities, the Declaration
22 of Elena R. Baca dated January 5, 2022 in support hereof, the Declaration of Taylor
23 Markey dated January 5, 2022 in support hereof, the [Proposed] Order concurrently
24 filed herewith, and the files and records of this case.

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DATED: January 5, 2022

U.S. EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION

By: /s/ Taylor Markey
 TAYLOR MARKEY
 Senior Trial Attorney, EEOC

DATED: January 5, 2022

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By: /s/ Elena R. Baca
 ELENA R. BACA

Attorneys for Defendants
ACTIVISION BLIZZARD, INC.,
BLIZZARD ENTERTAINMENT, INC.,
ACTIVISION PUBLISHING, INC., AND
KING.COM, INC.

1 **MEMORANDUM OF POINT AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Pursuant to the United States District Court, Central District of California
4 Local Rule 79-6, Plaintiff, the United States Equal Employment Opportunity
5 Commission (“EEOC”), and Defendants Activision Blizzard, Inc., Blizzard
6 Entertainment, Inc., Activision Publishing, Inc., and King.com, Inc. (collectively,
7 “Activision Blizzard”), seek leave to submit for *in camera* review certain
8 confidential conciliation and confidential mediation materials (“Protected
9 Materials”) to assist the Court in its review of the Proposed Amended Consent
10 Decree (Dkt. 50-1). *See* Declaration of Elena R. Baca in Support of Joint
11 Application of EEOC and Activision Blizzard for Leave to Submit Protected
12 Materials for *In Camera* Review, dated January 5, 2022 (“Baca Decl.”) ¶ 2;
13 Declaration of Taylor Markey in Support of Joint Application of EEOC and
14 Activision Blizzard for Leave to Submit Protected Materials for *In Camera* Review,
15 dated January 5, 2022 (“Markey Decl.”) ¶ 2.

16 Specifically, during the December 13, 2021 hearing (“December 13
17 Hearing”), the Court inquired as to the \$18,000,000 Settlement Fund:

18 THE COURT: Where did the 18 million come from?
19 You’ve made some comments Ms. Baca today about the
20 ten thousand people but very few. This seems like very
21 few that you and the EEOC are actually going to be eligible
22 claimants. But -- and you said you think this money is
23 more than going to take care of those. I don’t have any
24 information at all about this. All I have is a \$18 million
25 number.

26 MS. BACA: Understood, Your Honor. And I’ll let the
27 EEOC -- look we all disagree on -- no surprise to this Court.
28

1 THE COURT: Been there, yeah.

2 MS. BACA: Right? No surprise to this Court in the
3 slightest. But ultimately, and what I'm struggling with in
4 part, Your Honor, is mediation privilege and what I can --
5 and what we can disclose or not particularly in open court;
6 and so if the Court would -- well, if you would like a further
7 submission --

8 THE COURT: If you would like to submit an under-seal
9 filing. But I think this deference is one thing and here's a
10 number and I know nothing else about it.

11 MS. BACA: Understood, Your Honor.

12 THE COURT: And so --

13 MS. BACA: If the Court would permit an under-seal
14 filing, then I'm sure we could find what we could put
15 forward and you won't be surprised that we all have
16 different views.

17 THE COURT: No, I won't. I'm sure there were.

18 . . .

19 MS. PARK: Your Honor, this is the EEOC. I'm sorry.
20 I'm sorry.

21 THE COURT: That's okay.

22 MS. PARK: We would agree with the defendants. Based
23 on particularly -- based on our investigation and claimants
24 are reluctant to have their stories and facts and
25 circumstances revealed.

26 THE COURT: I don't need stories and facts. I really just
27 -- maybe as we go on, it may become more clear but as I
28

1 said I know nothing and nothing is not enough for me to
2 give deference.

3 MS. PARK: We would be happy to send that in camera or
4 under seal for the Court to consider, yes.

5 THE COURT: And if you came up with some estimate --
6 and I don't know whether this needs to be under seal or not.
7 I'll leave that to you until I see. It but if there is some
8 estimate of what number of people and what they're likely
9 to get, I mean --

10 See Baca Decl., Ex. A (Rep.'s Tr. of Proceedings, Dec. 13, 2021, at 36:2-38:5).¹

11 In response to the Court's inquiry and with the Court's permission, the
12 parties will submit to the Court these the Protected Materials for *in camera* review.
13 The Protected Materials will allow the Court to evaluate the parties' respective
14 positions as to the \$18,000,000 Settlement Fund available to eligible claimants (*i.e.*,
15 someone who submits a claim form, is deemed eligible, and elects to sign the
16 release form). See Baca Decl. ¶ 4.

17 Good cause exists for the Court to conduct its review of the Protected
18 Materials *in camera* under Local Rule 79-6 because they consist of information
19 disclosed during the confidential conciliation and mediation processes that are
20 protected from disclosure under federal statute, federal common law, the Federal
21 Rules of Evidence, and California Evidence Code. See Fed. R. Evid. 408, 42
22 U.S.C. § 2000e-5(b), Cal. Gov't Code § 12932(b), 2 Cal. Code Regs. § 10024, Cal.
23 Evid. Code §§ 1119, 1121.

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27 ¹ While the Court's inquiry related to the Proposed Consent Decree lodged on
28 September 27, 2021, the parties lodged a Proposed Amended Consent Decree on
 January 4, 2022; should the Court grant this Application, the parties will submit for
 in camera review the Protected Materials for evaluation of the Proposed Amended
 Consent Decree.

1 **II. THE COURT SHOULD PERMIT *IN CAMERA* REVIEW OF THE**
2 **PROTECTED MATERIALS**

3 Under Local Rule 79-6.2, a party may apply to the Court for approval to
4 submit papers for *in camera* review. The Court may then review the papers without
5 the need for formal public filing or service thereof. See Local Rule 79-6.1. A
6 showing of “good cause” can be sufficient. See *Kamakana v. City & County of*
7 *Honolulu*, 447 F.3d 1172, 1180 (9th Cir. 2006). (“A ‘good cause’ showing under
8 Rule 26(c) will suffice to keep sealed records attached to non-dispositive
9 motions.”).

10 The Court has “much flexibility in balancing and protecting the interests of
11 private parties.” *Id.* at 1180. When there are concerns about privacy issues or
12 disclosure of confidential or privileged information, *in camera* inspection is an
13 appropriate way to address the issue. See *K.S. ex rel. Isserlis v. Ambassador*
14 *Programs, Inc.*, No. CV-08-243-RMP, 2010 WL 605274, at *4 (E.D. Wash.
15 Feb. 18, 2010 (finding that the disputed agreements “should be reviewed *in camera*
16 by the Court to determine if those documents contain, in the Court’s view,
17 privileged, confidential and/or proprietary information”); *Broyles v. Gould*,
18 No. 3:14-cv-00198-TMB, 2016 WL 4719885, at *2 (D. Alaska Feb. 19, 2016)
19 (“[T]he Court finds an *in camera* review of the documents to be an appropriate
20 method to proceed in balancing the Defendants’ privacy concerns with the broad
21 discovery directive of Rule 26.”).

22 Here, the Court posed questions surrounding the number of estimated eligible
23 claimants in relation to the proposed \$18,000,000 Settlement Fund. See Baca
24 Decl., Ex. A (Rep.’s Tr. of Proceedings, Dec. 13, 2021, at pp. 36:2-9). The
25 \$18,000,000 figure was the result of negotiations during the conciliation and
26 mediation processes and based on the parties’ respective calculations during the
27
28

1 conciliation process.² See Baca Decl. ¶ 4. The Protected Materials will provide the
2 Court with the information sought as to how the parties settled on an \$18 million
3 fund. These materials, however, are protected from disclosure under federal statute,
4 federal common law, the Federal Rules of Evidence, and California Evidence Code.
5 See Fed. R. Evid. 408, 42 U.S.C. § 2000e-5(b), Cal. Gov’t Code § 12932(b), 2 Cal.
6 Code Regs. § 10024, Cal. Evid. Code §§ 1119, 1121. Specifically, the Protected
7 Materials include information protected from disclosure by the confidentiality of
8 conciliation, mediation privilege, attorney-client privilege, and attorney work
9 product that have not been waived. *Id.*

10 Thus, good cause exists to conduct the review of the Protected Materials *in*
11 *camera*. See *Folb v. Motion Picture Indus. Pension & Health Plans*, 16 F. Supp. 2d
12 1164, 1177 (C.D. Cal. 1998) (recognizing a mediation privilege in California would
13 “serve important public ends by promoting conciliatory relationships”); *Cassel v.*
14 *Superior Court*, 51 Cal. 4th 113, 136 (2011) (mediation privilege provides “broad
15 protection for the confidentiality of communications exchanged in relation to that
16 process.”), *aff’d* 216 F.3d 1082 (9th Cir. 2000); 42 U.S.C. § 2000e-5(b) (“Nothing
17 said or done during and as a part of [conciliation] endeavors may be made public by
18 the Commission, its officers or employees, or used as evidence in a subsequent
19 proceeding without the written consent of the persons concerned. Any person who
20 makes public information in violation of this subsection shall be fined not more
21 than \$1,000 or imprisoned for not more than one year, or both.”).

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28 ² By complying with the Court’s request and submitting the Protected Materials for *in camera* review, neither party intends to waive any applicable privilege.

1 **III. CONCLUSION**

2 For the foregoing reasons, the parties respectfully request the Court grant this
3 application for *in camera* review of the Protected Materials. As required by the
4 Local Rules, the parties will retain the Protected Materials should they later be
5 necessary for appeal or later proceedings.

6
7 DATED: January 5, 2022

U.S. EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION

8
9
10 By: /s/ Taylor Markey
11 TAYLOR MARKEY
12 Senior Trial Attorney, EEOC

13 DATED: January 5, 2022

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