IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ACCELERATION BAY LLC, Plaintiff, v. ACTIVISION BLIZZARD, INC., Defendant.	)	C.A. No. 16-453 (RGA)
ACCELERATION BAY LLC, Plaintiff, v. ELECTRONIC ARTS INC., Defendant.	)	C.A. No. 16-454 (RGA)
ACCELERATION BAY LLC, Plaintiff, v. TAKE-TWO INTERACTIVE SOFTWARE, INC., ROCKSTAR GAMES, INC., and 2K SPORTS, INC., Defendants.	)	C.A. No. 16-455 (RGA)

PLAINTIFF ACCELERATION BAY'S
LETTER BRIEF IN SUPPORT OF ITS MOTION FOR LEAVE
TO AMEND ITS PRELIMINARY ELECTION OF ASSERTED CLAIMS

Dear Judge Andrews,

Further to the Court's April 13, 2017 Order (D.I. 116),[1] Plaintiff moves for leave to amend its preliminary election of asserted claims to (1) withdraw its election of claims found unpatentable in *inter partes* review (IPR) proceedings; (2) replace previously asserted Claim 1 of U.S. Patent No. 6,701,344 (the "'344 Patent") with its dependent Claim 12, confirmed valid in the IPR proceedings; and (3) replace previously asserted independent Claim 1 with Claim 10 of U.S. Patent No. 6,829,634 (the "'634 Patent"), confirmed valid in the IPR proceedings.

"The key factor courts look at to determine whether good cause exists to grant an amendment to a contention is the diligence of the moving party." *Bayer Cropscience AG v. Dow Agrosciences LLC*, Civil No. 10-1045 (RMB/JS), 2012 WL 12904381, at *2 (D. Del. Feb. 27, 2012) (finding a good cause to amend infringement contentions)(citation omitted). Another key factor is whether the proposed amendment will prejudice the non-moving party. *Id.*, at *3. "[M]otions to amend contentions are fact sensitive, and the ultimate decision whether to grant or deny a motion to amend contentions is a matter left to the broad discretion afforded a trial court." *Id.*, at *1, n.1. Here, there is good cause for Acceleration Bay to amend its preliminary election of asserted claims in view of recently issued decisions in IPR proceedings regarding certain claims of the asserted patents. The claims are also not new to the parties' dispute. Defendants put them at issue in the IPRs, and they have already been the subject of extensive briefing and expert analysis, including on claim construction issues, in those proceedings.

A. Acceleration Bay Acted Diligently in Seeking Leave to Amend its Preliminary Election

Acceleration Bay diligently sought leave to amend its Preliminary Election. "Diligence has two aspects to it. One is whether the moving party acted diligently to discover that a supplement or amendment was appropriate. The second aspect is whether the moving party promptly moved to amend its contentions after it learned an amendment was necessary." *Id.*, at *2 (citing *O2 Micro Int'l Ltd. v. Monolithic Power Sys., Inc.*, 467 F.3d 1355, 1364 (Fed. Cir. 2006)). Acceleration Bay acted diligently on both counts. Defendants have not asserted otherwise either in its prior letter to the Court on this issue (D.I. 113) or during the parties' meet and confers. On March 23, 2017 and March 29, 2017, the Patent Trial and Appeal Board ("PTAB") issued Final Written Decisions regarding the validity of certain claims of the Asserted Patents. *See* D.I. 106. The PTAB confirmed the validity of various claims asserted by Acceleration Bay, found other claims valid once narrowed through amendment, and found certain claims unpatentable. *See* D.I. 108. On April 5, 2017, within one week of the final decision, Acceleration Bay served its Amended Preliminary Election of Asserted Claims based on these developments in the IPRs. Shortly after the Court's initial Order asking Acceleration Bay to make a showing of good cause (D.I. 116), Acceleration Bay reached out to Defendants, and the parties jointly sought guidance from the Court as to how best to present this issue. Thus, Acceleration Bay diligently pursued this relief.

[1] All docket citations are to *Acceleration Bay LLC v. Activision Blizzard, Inc.* C.A. 16-453 (RGA). Substantially similar documents have been issued by the Court or filed or served by the parties in the related actions.

B. There is No Prejudice to Defendants From the Proposed Amendments

There is no prejudice to Defendants from Acceleration Bay's proposed amendments. In deciding the prejudice to the non-moving parties, such prejudice must be "material," "significant" or "vexatious." *Bayer Cropscience AG*, 2012 WL 12904381, at *3. Simply requiring Defendants to undertake "some additional work" does not constitute material prejudice. *Id.* Moreover, given the number of asserted claims Acceleration Bay is withdrawing, even with the addition of two new claims, the total number of asserted claims (22) is markedly less than in Acceleration Bay's initial selection of 32 claims.

There is also ample time to address these claims (to the extent they raise any new issues), as fact discovery closes July 31, 2017, opening expert reports are due September 22, 2017, and trials are respectively scheduled for April, July and August 2018. D.I. 62. The Court has scheduled a *Markman* hearing for July 10, 2017. Defendants thus have plenty of time to address any claim construction issues raised by the two claims Acceleration Bay seeks to add (to the extent there are any). If permitted to add these two claims, Acceleration Bay will, within 10 days, provide infringement contentions for the new claims. Defendants will then have an opportunity to provide amended invalidity contentions, to the extent necessary, to address the two claims.

The Court has found no material prejudice and granted leave to amend under similar circumstances where the proposed amendments will not affect the trial date and the case is still at an early stage. *Bayer Cropscience AG*, 2012 WL 12904381, at *3. As is the case here, the Court granted leave where "the bulk of the fact discovery remains to be taken" and "[n]o experts reports have been produced and the *Markman* briefs have not been served." *Id.*, at *1, 3.[2]

1. <u>Claim 12 of the '344 Patent</u>

Acceleration Bay seeks to add Claim 12 of the '344 Patent to replace previously asserted Claim 1, from which it depends, based on unforeseen claim construction developments in the IPR proceedings. Defendants have already put Claim 12 at issue in the parties' dispute by including it in IPRs, thus making it the subject of extensive briefing and expert opinion by the parties. As shown below, Claim 12 does not raise any new issues because it adds to previously asserted Claim 1 only the requirement that the "the interconnections of participants form a broadcast channel for a game of interest":

> Claim 1. **A computer network for providing a game environment for a plurality of participants**, each participant having connections to at least three neighbor participants, wherein an originating participant sends data to the other participants by

[2] On April 28, 2017, Acceleration Bay served its opening claim construction brief, more than three weeks after serving its Amended Preliminary Election of Asserted Claims identifying the claims it seeks to add to the case. Claim construction briefing does not conclude until the filing of the parties' joint brief on June 21, 2017.

> sending the data through each of its connections to its neighbor participants and wherein each participant sends data that it receives from a neighbor participant to its other neighbor participants, further wherein the network is m-regular, where m is the exact number of neighbor participants of each participant and further wherein the number of participants is at least two greater than m thus resulting in a non-complete graph.
>
> Claim 12. The computer network of claim 1 wherein the interconnections of participants form a **broadcast channel for a game of interest**.

During the IPRs, the PTAB found that the bolded portion of Claim 1 was not a limitation. D.I. 119, Ex. C-1 (Final Written Decision) at 13. In response to this decision and without conceding that the PTAB's construction is correct, Acceleration Bay seeks to add Claim 12, which recaptures the game broadcast channel requirement of Claim 1. Thus, Claim 12 does not present any new subject matter, as the parties were already addressing the game element limitation in the context of Claim 1. Additionally, Defendants previously conceded that this claim does not raise any new claim construction issues. *See* D.I. 113 at 3. Therefore, the proposed amendment to add Claim 12 will not prejudice the defendants. *Bayer Cropscience AG*, 2012 WL 12904381, at *3.

2. <u>Claim 10 of the '634 Patent</u>

Acceleration Bay also seeks to add independent Claim 10 of the '634 Patent to replace previously asserted independent Claim 1. Defendants have already put Claim 10 at issue in the parties' dispute by including it in IPRs and putting Acceleration Bay to the burden to defend its validity. Claim 10 has also been the subject of the parties' briefing and expert analysis in the IPRs. Defendants contend that Claim 10 of the '634 Patent includes several new terms that require construction, but failed to identify any such terms, despite having almost a month to do so. *See* D.I. 113 at 3. Moreover, the parties already briefed claim construction in the context of the IPRs, including with respect to this claim. Even if the addition of Claim 10 presented one or two new terms for construction, Defendants have ample time to identify such terms and propose constructions. Given Defendants' insistence on including over 50 terms in the claim construction briefing, there is little additional burden to address one or two additional claim elements, to the extent Defendants contend it is even necessary to do so (Acceleration Bay does not believe that any of the elements in the two claims it seeks to add require construction). Thus, there is no material prejudice to Defendants from permitting Acceleration Bay to amend its Preliminary Election.

*** * ***

Accordingly, there is good cause to grant Acceleration Bay leave to amend its Preliminary Election to: (1) withdraw claims found unpatentable in IPR proceedings; (2) add Claim 12 of the '344 Patent; and (3) add Claim 10 of the '634 Patent.

POTTER ANDERSON & CORROON LLP

OF COUNSEL:

Paul J. Andre
Lisa Kobialka
KRAMER LEVIN NAFTALIS
& FRANKEL LLP
990 Marsh Road
Menlo Park, CA 94025
(650) 752-1700

Aaron M. Frankel
KRAMER LEVIN NAFTALIS
& FRANKEL LLP
1177 Avenue of the Americas
New York, NY
(212) 715-9100

By: */s/ Philip A. Rovner*
Philip A. Rovner (# 3215)
Jonathan A. Choa (#5319)
1313 North Market Street 6th Floor
Wilmington, Delaware 19801
Telephone: (302) 984-6000
Facsimile: (302) 658-1192
provner@potteranderson.com
jchoa@potteranderson.com

Attorneys for Plaintiff
Acceleration Bay LLC

Dated: May 1, 2017
5115495