IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

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

**DEFENDANTS' REPLY TO PLAINTIFF'S REBUTTAL REGARDING TERMS 24 & 25**

In its pleading filed on Friday, January 12, 2018 (D.I. 417 in C.A. No. 16-453), Plaintiff stated that "Plaintiff did not agree, ***and has never agreed***, that the preambles identified in Terms 24 and 25 are limitations." Plaintiff's Rebuttal Regarding Terms 24 & 25 at 1-2 (emphasis

added).[1] This is incorrect. In fact, more than just agreeing that these preambles are limitations, Plaintiff has repeatedly ***argued*** that the preambles identified in Terms 24 and 25 are limitations.

On June 28, 2016, Plaintiff explicitly argued to the PTAB that Term 24 is limiting:

> ***The preamble for Claim 19 is limiting because it breathes life and meaning into Claim 19 and because it requires a non-routing table based network that controls communications of a participant of broadcast network and the antecedent basis of participant is found in the preamble***.

Patent Owner's Preliminary Response, p. 20, IPR2016-00727 (U.S. Patent No. 6,829,634) (emphasis added) (attached hereto as Ex. 1).

More recently, on October 12, 2017, Plaintiff characterized Term 25 as a "claim element" and argued extensively that the PTAB should deny institution based on the Petitioner's failure to meet this claim element:

> Thus, neither Francis nor Gilbert discloses [Term 25] "a non-routing table based, nonswitch based method for adding a participant to a network of participants, each participant being connected to three or more other participants." For at least the foregoing reasons, the Board should decline to institute inter partes review of independent claim 1 ….

Patent Owner's Preliminary Response, pp. 42, 47, 50-51. IPR2017-01600 (U.S. Patent No. 6,910,069) (attached hereto as Ex. 2). Thus, Plaintiff is bound by the statements it made before the PTAB that the preambles of Terms 24 and 25 were limiting. *See Aylus Networks, Inc. v. Apple Inc.*, 856 F.3d 1353, 1360 (Fed. Cir. 2017). ("Extending the prosecution disclaimer doctrine to IPR proceedings will ensure that claims are not argued one way in order to maintain their patentability and in a different way against accused infringers.").

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[1] Terms 24 and 25 are the preambles for '634 Claim 19 and '069 claim 1.

Term 24 is "A non-routing table based computer readable medium containing instructions for controlling communications of a participant of a broadcast channel within a network."

Term 25 is "A computer-based, non-routing table based, non-switch based method for adding a participant to a network of participants."

Similarly, before this Court, Plaintiff repeatedly challenged Defendants' arguments that the preambles covered unpatentable subject matter and were indefinite by arguing that the preambles were limiting and definite. For instance, in Phase 1, Plaintiff argued that the "computer readable medium" was ***limited*** to non-fleeting media because "the claims ***require*** that the computer readable medium ***contain*** or store instructions. Defendants have no basis for reading out this requirement." *See* D.I. 281, Joint Claim Const. Br. (Phase 1) at 4 (emphasis retained).

In Phase 3, to challenge Defendants' arguments that the claims cover printable matter and are indefinite, Plaintiff argued that the preamble for Term 24 "limit[] the design of the network," and should be given "patentable weight:"

> Here, Terms 26 and 24 do not cover the non-functional content of information. Rather, the preamble defines the environment in which the functional steps of locating/identifying a portal computer are performed. Thus, ***the preamble*** falls squarely within the exceptions to the printed matter doctrine and ***should be given patentable weight***.

* * *

> Terms 26 and 24 are definite and respectively recite "a computer-readable medium containing instructions for controlling disconnecting of a computer from another computer" and "non-routing table based computer-readable medium." Plf. Br. at Terms 24-26. Thus, the system is configured to include computer instructions that control and functionally ***limit the design of the network***."

*See* D.I. 366, Joint Claim Const. Br. (Phase 3) at 54, 57 (emphasis added).

Plaintiff argued that the preamble of Term 25 ***limits*** the scope of the method by adding certain ***requirements***:

> ***The preamble limits the method*** by ***requiring*** that it is performed to add participants to a network that is not based on routing tables or switch-based methods to move messages between participants.

*See id* at 58-59 (emphasis added).

Throughout Phase 3 briefing, Defendants expressed their understanding that both sides agreed that the preambles were limiting. *See id* at 43, 50, 60 ("Plaintiff does not dispute that the preamble of claim 19 [Term 24] is limiting"; "Plaintiff agrees the preamble [Term 25] is limiting"; "Plaintiff does not dispute that these preambles are limitations and indeed offers constructions.").

The constructions Defendants filed with the Court on December 15, 2017 clearly stated that the preambles were limiting. D.I. 381. Before the December 18, 2017 hearing, Plaintiff's counsel told Defendants' counsel that it ***accepted*** the claim constructions Defendants had filed with the Court on December 15. Defendants agreed that Plaintiff could inform the Court that the parties had reached an agreement, but that Defendants maintained their indefiniteness and invalidity positions. When Plaintiff advised the Court of the agreement, it did not advise the Court that it considered the preambles to be non-limiting. *See* D.I. 412, Ex. A (December 18, 2017 Markman Tr.); *see also* D.I. 413. In response to the Court's question, Plaintiff characterized the issues as "resolved" and "tak[en] off the table." *See* Dec. 18, 2017 Tr. at 6:1-3, 9:3-5. Plaintiff's position that it somehow made or preserved an argument that the preambles are non-limiting is not supported by the record.

If it was Plaintiff's position, at the hearing or at any other time, that the preambles were not limiting, it should have advised Defendants and the Court of its position. It never did either. By failing to do so, and indeed by repeatedly taking the opposite position in briefing and before the PTAB, Plaintiff should be foreclosed from reversing course at this late date and arguing that the preambles are non-limiting. *See Aylus,* 856 F.3d at 1360.

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