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)<br><br>**REDACTED PUBLIC VERSION** |
| ACCELERATION BAY LLC,<br><br>Plaintiff,<br><br>v.<br><br>ELECTRONIC ARTS INC.,<br><br>Defendant. | ) | C.A. No. 16-454 (RGA)<br><br>**REDACTED PUBLIC VERSION** |
| 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)<br><br>**REDACTED PUBLIC VERSION** |

**DEFENDANTS' RESPONSE TO PLAINTIFF'S SUPPLEMENTAL MEANS-PLUS-FUNCTION CLAIM CONSTRUCTION BRIEF**

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## I. Introduction

Plaintiff's brief reconfirms for a third time that its construction for Term 4 is limited to a portion of Figure 8 that includes "black box" algorithms and does not incorporate other portions of the specification that actually carry out the functions of these "black boxes" and which are integral to the "connecting" function of this term. Plaintiff also relies heavily on a particular "black box" algorithm (block 806 in Fig. 8) that is not even relevant to the claimed function, as is evident from the specification and as was recently confirmed by inventor Bourassa. For Terms 1-3, Plaintiff relies on parts of the specification that simply do not support the recited functions.

Seizing on Defendant's response to a question from the Court, Plaintiff alleges that Defendants have changed their position and that "the parties now agree that the structures for the MPF terms are disclosed in the patents, but disagree as to what they are." C.A. 16-453, D.I. 225, "Supp. Br." at 1. This is incorrect. Defendants' position regarding the disputed means-plus-function limitations has been consistent: the means-plus-function terms are indefinite because Plaintiff has failed to identify corresponding algorithms in the specification that support the claimed functions. *See*, e.g., D.I. 226, Colucci Decl., Ex. 1 ("*Markman* Tr.") at 100:11-101:25 (explaining that Defendants' position remains that Term 4 is indefinite).

Lastly, the Court should reject Plaintiff's cursory fallback arguments that certain undefined "additional structural support" should be included in the construction of Terms 1-4 "to preserve the validity of the claim[s]." Supp. Br. at 7, 9, 10. Plaintiff was advised of this issue (*Markman* Tr. at 105:16-106:8; 112:16-19) and was given 10 additional pages of briefing but still did not identify what additional structure would supposedly save the claims. The Court should decline Plaintiff's invitation to scour the patents for a construction to save the validity of the patents when Plaintiff has steadfastly insisted on proposed constructions that render the claims indefinite. If, however,

the Court chooses to address Plaintiff's fallback position, Defendants believe that all necessary structures should be included, without reliance on indefinite "black box" algorithms.

## II. '344 and '966 Patents: Term 4

### a. Plaintiff Continues to Advance the Wrong Function for this Term

Plaintiff begins its analysis by, once again, misstating the claimed function as "connecting a [participant] to *an* identified broadcast channel." Supp. Br. at 4 (emphasis added). Plaintiff does this despite admitting at the hearing that "the" is correct. *Markman* Tr. at 106:9-12. The use of the word "the" in the claim is important because it makes it clear that the broadcast channel to which the participant is connecting is not any broadcast channel, but is "the" broadcast channel identified in the preceding elements of the claim. D.I. 191, Ex. L ("Kelly Sur-Reply Declaration" or "KSR Decl.") at ¶ 27. This broadcast channel is one that is "m-regular" and "non-complete" with "each participant" in the broadcast channel "having connections to at least three neighbor participants." *See, e.g.*, A-2 ('966 Patent) at 30:39-56 (claim 13). Thus, the function of "connecting" in Term 4 is connecting to a previously identified broadcast channel having particular claimed features. *Id.* Beginning the analysis with the correct function is essential. *ACTV, Inc. v. Walt Disney Co.*, 346 F.3d 1082, 1087 (Fed. Cir. 2003) ("Correctly identifying the claimed function is critical, because 'an error in identification of the function can improperly alter the identification of the structure . . . corresponding to that function.'") (citation omitted).

This change from "the" to "an" is material and the basis for many of Plaintiff's flawed arguments. Plaintiff repeats this misstatement throughout its brief. For example, Plaintiff alleges that a "POSA would understand that a processor programmed to perform at least one of the algorithms disclosed in steps 801 to 806 in Figure 8 is sufficient to perform the function of connecting a participant to *a* broadcast channel." Supp. Br. at 4. Relying on this misstated

function, Plaintiff then identifies structure that falls short of performing the function of connecting a participant to the *claimed* broadcast channel. There are multiple reasons why steps 801-806 are clearly not an algorithm that will support the claimed function of Term 4, each addressed below.

**b. The Identified "Algorithms" Include "Black Boxes" that Improperly Cover a Range of Algorithms**

Plaintiff relies on six blocks in Fig. 8, two of which are mere "black boxes" that invoke other software algorithms. Allowing Plaintiff to limit the support to "black boxes" would impermissibly expand the scope of Term 4 to cover a range of potential algorithms. *See, e.g., ePlus, Inc. v. Lawson Software, Inc.*, 700 F.3d 509, 518 (Fed. Cir. 2012) (finding "black box" labeled "Purchase Orders" did not disclose sufficient structure for a "generate purchase orders" function); KSR Decl. at ¶ 33. Perhaps more significantly, the primary "black box" on which Plaintiff relies, block 806, is not even relevant to the claimed function because it is used only for the first participant to join a new network, before the network becomes m-regular and non-complete, as required by the claims. The relevance of block 806 is addressed in the next section.

Regarding the "black box" issues, block 803 invokes a "seek portal computer routine" and the steps of that routine, which are disclosed in Fig. 9, are not included in the portion of the specification on which Plaintiff relies. A-2 ('966 Patent) at 19:5-8. Seeking, and then finding, a portal computer is unquestionably integral to the process of connecting a new participant to the broadcast channel. *See, e.g.*, A-2 ('966 Patent) at 5:18-22; 6:41-46; 12:30-33; 12:63-13:3; 13:13-18; 15:20-23. A seeking participant cannot connect to a broadcast channel until it finds a portal computer through which it can connect. *Id.* And structure that is "integral to performing the stated function" constitutes corresponding structure. *Gemstar–TV Guide Intern., Inc. v. International Trade Com'n*, 383 F.3d 1352, 1362 (Fed.Cir. 2004). If the corresponding structure was merely limited to this "black box" the claim would effectively and impermissibly cover *any* algorithm for

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