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 LLC'S REBUTTAL TO
DEFENDANTS' PROPOSED ORDER REGARDING TERMS 24 & 25

Defendants' Proposed Order (D.I. 412[1]) does not reflect Plaintiff's agreement. On Friday December 15, 2017, Defendants submitted proposed constructions for Terms 24 and 25. D.I. 381. On Monday December 18, 2017, prior to the Markman Hearing, the parties met and conferred regarding Defendants' newly proposed constructions. Plaintiff did not agree, and has

[1] Citations to "D.I.__" refer to C.A. No 16-453-RGA unless specifically stated.

never agreed, that the preambles identified in Terms 24 and 25 are limitations. Plaintiff only agreed that the constructions proposed by Defendants reflected the plain and ordinary meaning as stated at the Markman Hearing. *See* Markman Tr. at 6:5-13 (D.I. 391).

Further, there is a presumption that preambles are generally not limitations and Defendants bear the burden to show the preambles are limitations. *Allen Eng'g Corp. v. Bartell Indus., Inc.*, 299 F.3d 1336, 1346 (Fed. Cir. 2002) ("Generally, the preamble does not limit the claims."). To the extent Defendants contend there has been a waiver on this issue, it is Defendants that have waived the issue by failing to argue this point at the Markman Hearing, despite Plaintiff's statements that it only agreed to the constructions and not Defendants' additional arguments.

Specifically, Plaintiff stated at the Markman Hearing that it believed no constructions were needed for these terms, but that it would agree to Defendants' proposed constructions:

> THE COURT: All right. Tell me about this happy news.
>
> MR. HANNAH: It's indeed happy, Your Honor. ***So, again, we reiterated our position that, you know, these terms and all of the terms in the subsequent briefing, the plain and ordinary meaning should apply and that would resolve the parties' dispute.*** However, to the extent the Court wishes to construe these terms, we've agreed to the construction of term -- for term 10.

Markman Tr. at 6:5-13 (D.I. 391) (emphasis added).

Plaintiff also stated that it did not agree with Defendants' additional arguments, i.e., whether Terms 24 and 25 are limitations or invalid:

> MR. HANNAH: We would agree that defendant's proposed construction, which is a computer-readable medium containing instructions that control communications of a participant of a broadcast channel within a network that does not use routing tables, we would ***agree with that construction for claim***, for term 24, which is claim 19 of the '634 patent.

Id. at 8:3-9 (emphasis added).

> MR. HANNAH: And that was a submission on Friday. We haven't had a chance to respond to that and so we analyzed it over the weekend.
>
> THE COURT: All right. Yes. I'm not apparently sure I even saw that. All right. ***In any event, whatever is in defendant's letter, you agree with that***?
>
> MR. HANNAH: Yes, which I just stated.
>
> THE COURT: Yes.
>
> MR. HANNAH: ***I mean, I say I agree to the construction. I'm not agreeing to the positions that they're taking***.

Id. at 8:16-9:2 (emphasis added).

Plaintiff's position that Terms 24 and 25 are not limitations has been consistent. Indeed, in submitting its proposed constructions in the Joint Claim Construction Chart ("JCCC") (D.I. 236), Plaintiff did not take the position that the preambles for Terms 24 and 25 are limitations. In contrast, Plaintiff specifically identified other preambles that are limitations, such as Terms 26 and 28. *Id*. This distinction clearly indicated that Plaintiff did not agree that the preambles for Terms 24 and 25 were limitations.

Additionally, Defendants' contention that it makes no sense to construe terms if they are not limitations ignores Plaintiff's position that no construction was or is required. Plaintiff only proposed constructions after being prompted by the Court, following Defendants' complaint that Plaintiff proposed the plain and ordinary meaning. D.I. 206 at 2. Defendants should not be permitted to argue that preambles are limitations simply because Plaintiff was required by the Court to propose constructions.

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