UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

ACTIVISION BLIZZARD, INC.,
ELECTRONIC ARTS INC.,
TAKE-TWO INTERACTIVE SOFTWARE, INC.,
2K SPORTS, INC.,
ROCKSTAR GAMES, INC.,
BUNGIE, INC.,
Petitioners
v.

ACCELERATION BAY, LLC,
Patent Owner

Case IPR2015-01972[1]
Patent 6,701,344

PATENT OWNER'S MOTION TO AMEND UNDER 37 C.F.R. § 42.121

[1] Bungie, Inc., who filed a Petition in IPR2016-00934, has been joined as a petitioner in this proceeding.

I. INTRODUCTION

As set forth in Patent Owner's Response, United States Patent No. 6,701,344 (IPR2015-01970, Ex. 1001) ("the '344 Patent") is valid over the prior art. However, in the event that the Board finds to the contrary despite the host of evidentiary and technical issues that warrant a finding of patentability, Acceleration Bay, LLC ("AB") submits this Motion to Amend in order to amend certain claims of the '344 Patent which demonstrates the patentability of the substitute claims beyond any doubt.

In the proceedings concerning the '344 Patent, the Board instituted *inter partes* review for sixteen claims of the '344 Patent in IPR2015-01970 and for fifteen claims of the '344 Patent in IPR2015-1972. IPR2015-01970, Paper No. 9, IPR2015-01972, Paper No. 8. Specifically in IPR2015-01970, the Board concluded that there is a reasonable likelihood that Petitioner would prevail in establishing the unpatentability of (1) claims 1–12 and 16 – 19 as obvious under 35 U.S.C. § 103(a) over DirectPlay[2] and Lin[3], and (2) claims 1–11 and 16–19 as

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[2] Bradley Bargen & Peter Donnelly, Inside DirectX®: In-Depth Techniques for Developing High-Performance Multimedia Applications (1998) (IPR2015-01970, Ex. 1003) ("DirectPlay").

[3] Meng-Jang Lin, et al., Gossip versus Deterministic Flooding: Low Message Overhead and High Reliability for Broadcasting on Small Networks, Technical Report No. CS1999-0637 (Univ. of Cal. San Diego, 1999) (IPR2015-01970, Ex. 1004 (Exhibit B)) ("Lin").

obvious under 35 U.S.C. § 103(a) over Lin. In IPR2015-01972, the Board concluded that there is a reasonable likelihood that Petitioner would prevail in establishing the unpatentability of claims 1–11 and 16–19 as obvious under 35 U.S.C. § 103(a) over Shoubridge.[4] While the evidence in these proceedings demonstrates that the prior art does not render the '344 Patent invalid, if the Board determines that claim 1 is invalid, Patent Owner seeks to substitute claim 1 with claim 20. Likewise, if the Board determines that claim 7 is invalid, Patent Owner seeks to substitute claim 7 with claim 21. Finally, if the Board determines that claim 8 is invalid, then Patent Owner seeks substitute claim 8 with claim 22. *See* 37 C.F.R. § 42.22(a)(2); *see also* 35 U.S.C. § 316(d). To be clear, AB's request to amend the claims and propose substitute claims is contingent, and needs to be considered only if the Board finds that the there is sufficient testimonial and technical evidence in the record that demonstrates that the original claims are unpatentable.

II. THE MOTION AND PROPOSED AMENDMENTS COMPLY WITH § 42.121.

Consistent with the requirements of 37 C.F.R. § 42.121, Patent Owner conferred with the Board on July 11, 2016. *See* 37 C.F.R. § 42.121(a); *see also* IPR2015-01970, Paper No. 28, IPR2015-01972, Paper No. 28. This Motion is

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[4] Peter J. Shoubridge & Arek Dadej, Hybrid Routing in Dynamic Networks, 3 IEEE INT'L CONF. ON COMMS. CONF. REC. 1381–86 (1997) (IPR2015-01972, Ex. 1105) ("Shoubridge").

timely filed. *See* 37 C.F.R. § 42.121(a)(1). In addition, Patent Owner has adhered to the requirements articulated by the Board in *Idle Free Systems, Inc. v. Bergstrom, Inc.*, Case No. IPR 2012-00027 (Paper No. 26); *Toyota Motor Corp. v. American Vehicular Science, LLC*, Case No. IPR 2013-00422, (Paper No. 25); and *MasterImage 3D, Inc. v. RealD, Inc.*, Case No. IPR 2015-00040 (Paper No. 42) as the Board advised.

Patent Owner's proposed amendments are responsive to a ground of unpatentability because trial was instituted on claims 1–12 and 16–19, and the proposed amendments are to claims 1, 7, and 8. See 37 C.F.R. § 42.121(a)(2)(i). In its two Institution Decisions involving the '344 Patent, the Board instituted *inter partes* review of claims 1, 7, and 8 on three grounds of unpatentability: (1) 35 U.S.C. § 103(a) over DirectPlay and Lin[5]; (2) 35 U.S.C. § 103(a) over Lin; and (3) 35 U.S.C. § 103(a) over Shoubridge. *See* IPR2015-01970, Paper No. 9 at 26, IPR2015-01972, Paper No. 8 at 23. In its Institution Decisions, the Board determined that Petitioner demonstrated a reasonable likelihood that it prevail in establishing the unpatentability of claims 1, 7, and 8 due, at least in part, to not recognizing that the originally-claimed m-regular, non-complete graph is a graph representing an overlay network and that the originally-claimed participants communicate at the application layer. *See* IPR2015-01970, Paper No. 9 at 17-18

[5] Patent Owner disputes whether Lin is prior art to the '344 Patent. Patent Owner further disputes whether Lin or Shoubridge were publically available prior to the priority date of the '344 Patent.

(relying on Lin's transport layer graph); IPR2015-01972, Paper No. 8 at 12-14 (relying on Shoubridge's network layer graph). The proposed amendments narrow claims 1, 7, and, 8 by clarifying that the participants are game participants that broadcast application-level gaming data to other participants and that the m-regular, non-complete graph is a graph of a network that overlays an underlying network.

Also the amendments, which affect claims 1, 7, and 8 do not enlarge the scope of the claims or introduce any new subject matter. 37 C.F.R. § 42.121(a)(2)(ii). Further, Patent Owner has presented a reasonable number of substitute claims: three substitute claims are proposed, one for each of claims 1, 7, and 8. 37 C.F.R. § 42.121(a)(3). Finally, this Motion includes a claim listing and sets forth the support in the original and earlier-filed disclosures for the proposed amendments. See 37 C.F.R. § 42.121(b)(1)-(2); *see also* Appendix A; § VII, *infra*. Accordingly, Patent Owner has met all requirements of 37 C.F.R. § 42.121.

III. CLAIM LISTING

Patent Owner's claim listing is attached hereto as Appendix A. *See* 37 C.F.R. § 42.121(a)-(b). The '344 Patent currently contains claims 1–19. Trial was instituted on claims 1–12 and 16–19. *See* IPR2015-01970, Paper No. 9, IPR2015-01972, Paper No. 8. The claim listing includes the proposed contingent substitute claims 20–22. The substitute, reformatted claims are shown below with: (1) underlining indicating inserted text, (2) italics indicating claim language previously incorporated by reference via a dependency clause and now explicitly recited, and (3) strikethrough indicating deleted text. *Toyota Motor Corp. v. American*

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