IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ACCELERATION BAY LLC,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 16-453 (RGA)
	)	
ACTIVISION BLIZZARD, INC.,	)	
	)	
Defendant.	)	

ACTIVISION BLIZZARD'S MOTION FOR LEAVE TO FILE A SUPPLEMENTAL SUMMARY JUDGMENT BRIEF BASED ON NEW LEGAL CONCLUSIONS FROM THE COURT

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INTRODUCTION

This Court's March 23, 2020 Summary Judgment Order in the related *Acceleration Bay v. Take-Two* case, Ex. A,[1] clarified its prior claim constructions and made legal holdings that foreclose any finding of infringement in the present case. Specifically, the Court's Memorandum Opinion in *Take-Two* ("*Take-Two* Order") clarified the construction of the "m-regular" and "participant" limitations in the same patents asserted here and found non-infringement as a matter of law under substantively identical infringement theories asserted against Activision Blizzard, Inc. ("Activision"). Activision requests fifteen pages for a supplemental summary judgment brief to articulate why the Court's *Take-Two* holdings also put an end to Acceleration Bay's case against Activision as a matter of law.[2] *See* D.I. 619, p. 2. Activision is prepared to file that brief by April 8, 2020. Although this case can be disposed of on the currently pending joint status report in which Activision requests that the Court enter judgment of no damages, D.I. 694, the non-infringement issue is equally dispositive.[3]

M-Regular

In *Take-Two*, the Court previously construed "m-regular" to mean "[a] state that the network is configured to maintain, where each computer is connected to exactly m neighbor computers." (D.I. 244 at 14). In that Order, the Court further explained that its "construction

[1] *Acceleration Bay LLC v. Take-Two Interactive Software, Inc., et al.*, C.A. No. 16-455 RGA, D.I. 492 (D. Del. March 23, 2020).

[2] Activision met and conferred with Acceleration Bay's counsel on March 31, 2020, and Acceleration Bay's counsel did not consent to the filing of this motion.

[3] Activision moved for summary judgment on non-infringement on February 2, 2018, raising multiple theories, including those at issue in this motion under this Court's constructions and legal holdings at that time. D.I. 440, 442, 505. The Court denied several of Activision's non-infringement arguments, explaining that the "parties may have made some valid arguments buried among their conclusorily-supported arguments and genuine disputes of material fact, but I do not see them." D.I. 578, at p. 23. On March 15, 2019, Activision requested leave to renew its summary judgment. D.I. 654. The Court denied Activision's request via oral order. D.I. 661.

does not require the network to have each participant be connected to m neighbors at all times; rather, the network is configured (or designed) to have each participant be connected to m neighbors." (*Id.*). In other words, "if the network does not have each participant connected to m neighbors, this is fine so long as, when appropriate, it tries to get to that configuration." (*Id.*).

In the *Take-Two* Order, the Court clarified the scope of this construction by explaining that the m-regular state must be "the default state of the network or that the network is in that state substantially all the time."[4] Ex. A, Memorandum Opinion, *Acceleration v. Take Two*, 16-455, D.I. 492 at 15. The Court further explained that "if the network falls out of the m-regular state, the network responds by immediately trying to return to that configuration" and that it is not sufficient "that the network might return to m-regular or it might not, depending on various factors." *Id.* The Court rejected Plaintiff's theories that various constants, maximums and rules "'drive[] the formation' of an . . . m-regular network" or that an m-regular network "tends" to be formed in practice or that the rules "cause the network to converge" on m-regularity as inconsistent with the claim construction. *Id.* at 13–14.

The arguments the Court rejected in the *Take-Two* Order are substantively the same arguments Plaintiff is making in Activision's case, alleging that even happenstance m-regularity infringes. For example, with respect to *Call of Duty,* Plaintiff relies on its expert who states, "[t]his relaying has constants and rules that **converge the network to** the same optimal number of participants to which any one participant may relay data (i.e. the same number of connections

[4] "Under *Markman*, claim interpretation is a matter of law. However, *Markman* does not obligate the trial judge to conclusively interpret claims at an early stage in a case." *Sofamor Danek Group, Inc. v. DePuy-Motech, Inc.*, 74 F.3d 1216, 1221 (Fed. Cir. 1996). Rather, the Federal Circuit has "long held that a district court may engage in rolling claim construction, in which the court revisits and alters its interpretation of the claim terms as its understanding of the technology evolves." *Wi-LAN USA, Inc. v. Apple Inc.*, 830 F.3d 1374, 1385 (Fed. Cir. 2016) (affirming summary judgment of no infringement based on construction entered after initial summary judgment order).

to neighbors)." *See* D.I. 443, Decl. of Kathleen Barry, at Ex. A-1, Sept. 23, 2017 Medvidovic Expert Report at p. 2 (emphasis added); *see also id.* at ¶ 204 ("The constants . . . [in World of Warcraft] are used in conjunction with a variety of algorithms and rules . . . to distribute data traffic among the participating application programs to form an m-regular network."); *see also* D.I.443, Decl. of Kathleen Barry, Ex. A-2, Sept. 23, 2017 Mitzenmacher Expert Report at ¶ 121 ("'M' [in Destiny] is a constant in the code that limits the number of connections that each peer application can connect with other application programs. This constant is used in conjunction with a variety of rules to distribute data traffic among the participating application programs to form an m-regular network.").

Because Plaintiff's infringement positions regarding the m-regular limitations here are substantively identical to those the Court found to be insufficient as a matter of law in *Take-Two*, Activision respectfully requests leave to submit supplemental briefing on this issue.

Participant

The Court has not previously construed "participant." The definition of "participant" is important because m-regularity is determined by the participants and their connections. In this case and in *Take-Two*, Plaintiff tries to exempt certain servers from the definition of "participants" in a network for determining m-regularity by contending that any server that would render the network non m-regular is not a participant at the "application layer."

In *Take Two*, Acceleration argued that "GTA's application layer overlay network is built on these underlying conditions," and, with respect to NBA 2K, that "[p]layers in a specific game . . . are directly connected at the application layer [redacted] making the network incomplete and m-regular." Ex. B, Acceleration Bay's Opp'n Br., *Acceleration v. Take Two*, 16-455, D.I. 475, at pp. 2, 8; *see also* Ex. C, Feb. 4, 2020 Hearing Tr., *Acceleration v. Take Two*, 16-455, at 89:17-

90:9 (arguing there are "ten application layer connections per participant," which does not count the "park server' because it "is not playing the game"), 100:11-23 ("[I]t's the number of connections at the application layer that makes the network both M-Regular and incomplete"). The Court appropriately rejected Acceleration's argument that the server in the network may be ignored for purpose of determining whether the network is m-regular.

In doing so, the Court clarified its construction of "participant" and rejected Plaintiff's attempt to sidestep the definition, finding "[t]he server is, however, a participant in the network because it transfers data back and forth between other network participants." Ex. A, Memorandum Opinion at 17. "These patent claims are directed to network management, so what matters is whether the server is a participant in the network, not whether it is making jump shots or grabbing rebounds." *Id.* This clarification and legal holding equally forecloses a finding of infringement as to each of Activision's accused products.

Plaintiff's infringement theories against all of the accused products in the Activision case similarly asks the Court to ignore participant servers, because they are purportedly not participants at the "application overlay network." There is no dispute that servers in Activision's accused products that Plaintiff identifies as network participants are ignored in Plaintiff's infringement positions. *See* D.I. 443, Decl. of Kathleen Barry, Ex. A-3, Dec. 14, 2017 Medvidovic Reply Report at ¶ 43 ("Dr. Kelly focuses on the underlying client-server network, not the application layer overlay that is the focus of my analysis."). Substantively identical infringement theories were rejected as a matter of law in *Take Two*.

In view of the Court's guidance and clarification in *Take-Two*, Activision respectfully requests supplemental summary judgment briefing to address this issue.

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