EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ACCELERATION BAY LLC,

Plaintiff,

v.

TAKE-TWO INTERACTIVE SOFTWARE, INC., ROCKSTAR GAMES, INC., and 2K SPORTS, INC.,

Defendants.

Civil Action No. 16-455-RGA

MEMORANDUM OPINION

Philip A. Rovner and Jonathan A. Choa, POTTER ANDERSON & CORROON LLP, Wilmington, DE; Paul J. Andre, Lisa Kobialka, and James Hannah, KRAMER LEVIN NAFTALIS & FRANKEL LLP, Menlo Park, CA; Aaron M. Frankel and Marcus A. Colucci, KRAMER LEVIN NAFTALIS & FRANKEL LLP, New York, NY, attorneys for Plaintiff.

Jack B. Blumenfeld and Stephen J. Kraftschik, MORRIS, NICHOLS, ARSHT & TUNNELL LLP, Wilmington, DE; Michael A. Tomasulo, Gino Cheng, David K. Lin, and Joe S. Netikosol, WINSTON & STRAWN LLP, Los Angeles, CA; David P. Enzminger and Louis L. Campbell, WINSTON & STRAWN LLP, Menlo Park, CA; Daniel K. Webb and Kathleen B. Barry, WINSTON & STRAWN LLP, Chicago, IL; Michael M. Murray, WINSTON & STRAWN LLP, New York, NY; Andrew R. Sommer, Paul N. Harold, and Joseph C. Masullo, WINSTON & STRAWN LLP, Washington, DC, attorneys for Defendants.

March 23, 2020

/s/ Richard G. Andrews
ANDREWS, U.S. DISTRICT JUDGE:

This is a patent case about three video games: Grand Theft Auto Online, NBA 2K15, and NBA 2K16. Currently before me is the Motion for Summary Judgment of Non-Infringement filed by Defendant Take-Two Interactive Software, Inc. and its subsidiaries, Defendants Rockstar Games, Inc. and 2K Sports, Inc. (D.I. 462). I have considered the parties' briefing (D.I. 463, 472, 477), and I heard oral argument on February 4, 2020 (D.I. 490). Because no reasonable jury could conclude Defendants infringed the asserted patents, it is "game over" for Plaintiff Acceleration Bay, LLC's infringement claims. The Motion for Summary Judgment is granted.

I. BACKGROUND

A. The Patents

Plaintiff alleges online features of the three accused video games infringe five patents: U.S. Patent Nos. 6,701,344 ('344 patent), 6,714,966 ('966 patent), 6,920,497 ('497 patent), 6,732,147 ('147 patent), and 6,910,069 ('069 patent). Plaintiff initially sued Defendants for infringing these patents in 2015. *Acceleration Bay LLC v. Take-Two Interactive Software Inc.*, No. 15-cv-311-RGA (D. Del.). I dismissed that case because Plaintiff lacked standing to assert the patents. No. 15-cv-311-RGA, D.I. 149. Plaintiff resolved the standing issue by reaching a new patent purchase agreement with the Boeing Company, which was the original owner of the patents. (D.I. 1 at 1). The parties agree Plaintiff cannot seek damages for any infringement that occurred before April 2015. (D.I. 463 at 43; D.I. 472 at 14).

Plaintiff asserts the following claims:

- '344: Claims 12, 13, 14, and 15;
- '966: Claims 12 and 13;
- '497: Claims 9 and 16;
- '147: Claim 1; and

The m-regular limitation is also part of the asserted '344 and '966 claims. Summary judgment is therefore appropriate for those claims on two bases: because Defendants' products do not meet the m-regular limitation, and, as discussed above, because Defendants did not "make," "sell," "offer to sell" or "use" those claimed inventions.

Because the games operate differently, I discuss each in turn.

1. Grand Theft Auto Online

Plaintiff's infringement theory is that the GTAO software applies various rules and constraints that cause the gameplay network to "converge to the same number of connections for each participant." (D.I. 472 at 3). In his report, Plaintiff's expert Dr. Nenad Medvidović explained that the GTAO software is "configured to have a maximum number of participants, a maximum number of connections, reserved connections, [and] limited available ports." (Medvidović Report ¶ 163). The software also uses "load balancing rules, including prioritized channels, to distribute the flow of data evenly between participants." (*Id.*). Dr. Medvidović concluded the combination of these constraints "drives the formation of an incomplete and m-regular network." (*Id.*). Dr. Michael Mitzenmacher, also a Plaintiff's expert, similarly concluded: "Because these rules and constraints cause the network to converge to the same optimal number of connections, each player tends to send data to the same number of participants during game play." (D.I. 464, Ex. A-2, "Mitzenmacher Report" ¶ 121). These rules and constraints exist when players wander through the online open-world mode and when they compete in specific games, but the limits are more restrictive in the specific games. (Medvidović Report ¶ 163).

Part of Plaintiff's theory is that GTAO transfers data based on the players' positions in the virtual world. When two players' avatars are closer together, there is a higher rate of data exchange between those two players. (D.I. 473, Ex. 2, "Conlin Report" ¶ 26). According to Dr.

Mitzenmacher, "when the players are geographically dispersed throughout the gameplay area, the proximity connection rules will cause the network to form m-regular graphs." (Mitzenmacher Report ¶ 121). At his deposition, Dr. Mitzenmacher further explained that "in the course of players wandering through the environment, there will be various local data available to subsets of players, and there will be the natural configurations when players are distributed geographically where the resulting network will be m-regular . . . . Again, I think that just arises naturally. Again, in the course of gameplays, the players are moving throughout the game." (D.I. 464, Ex. E-5, "Mitzenmacher Tr." at 173:24-174:5, 175:17-19).

Even viewing this evidence in the light most favorable to Plaintiff, no reasonable jury could find GTAO meets the m-regular limitation. Under my claim construction, a network is not m-regular if the participants just happen to connect to the same number of other participants occasionally. Rather, the network must be "configured to maintain" an m-regular state. In my claim construction opinion, I explained: "My construction 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. 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." (D.I. 244 at 14).

Plaintiff's experts are not describing a network that meets this construction. They have not identified any source code that directs the participants to connect to the same number of other participants. Dr. Medvidović concluded that the combination of various rules and constraints "drives the formation" of an m-regular network. (Medvidović Report ¶ 163). Dr. Mitzenmacher concluded that each participant "tends" to connect to the same number of other participants. (Mitzenmacher Report ¶ 121). Those descriptions are not enough to show that the network is

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