

**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.	)	

**ACCELERATION BAY LLC’S OPPOSITION TO  
ACTIVISION BLIZZARD, INC.’S MOTION FOR LEAVE  
TO FILE A SECOND SUPPLEMENTAL SUMMARY JUDGMENT BRIEF**

**INTRODUCTION**

The Court should deny Defendant Activision Blizzard, Inc.’s motion for leave to file a second supplemental summary judgment brief (D.I. 708, “Motion”). Activision already moved for summary judgment on nearly 40 issues, submitted two supplemental summary judgment briefs, and twice moved for leave to submit yet further supplemental summary judgment briefing. Moreover, the Court already ruled against Activision on the issues it now seeks to reargue, and Activision did not timely move for leave to reargue them (nor would it have had a basis to do so).

Activision bases its request for a sixth summary judgment brief on purported developments in a different case concerning different defendants, different products, and different infringement contentions—*Acceleration Bay LLC v. Take-Two, et al.*, Case No. 1:16-cv-000455-RGA, D.I. 492 (D. Del. Mar. 23, 2020) (“*Take-Two*”). The outcome in *Take-Two* has no impact on how Activision’s own products operate or on Activision’s own acts of infringement. As set forth below, the infringement issues in *Take-Two* are very different from the infringement issues in this case. Nothing has changed in this case that warrants burdening

the Court with yet further summary judgment briefing. Therefore, Activision's Motion should be denied.

### **NATURE AND STAGE OF THE PROCEEDINGS/**

In this action alone, the Court authorized each party to submit 125 pages of briefing on summary judgment and *Daubert* motions. D.I. 425. Activision submitted an opening brief on summary judgment that raised approximately 40 different issues (D.I. 442), an opposition brief to Acceleration Bay's motion for summary judgment (D.I. 474), a reply brief in support of its own motion for summary judgment (D.I. 505), a first supplemental summary judgment brief (D.I. 565), and a reply supplemental summary judgment brief (D.I. 572).

In its prior summary judgment motion, Activision moved for the same rulings it seeks in the current Motion: findings of (1) no infringement of the m-regular limitation (2) no infringement under the participant limitation, and (3) no infringement under the doctrine of equivalents. D.I. 442 at 10–19, 29–31. On August 29, 2018, the Court denied Activision's motion for summary judgment on these specific issues. D.I. 578.

When Activision changed counsel, it moved for leave to file yet another summary judgment motion based on purportedly new facts. D.I. 654. Activision once again argued that it was entitled to summary judgment of no infringement of the same m-regular and participant limitations. *Id.* at 1, 6, 7. Activision raised the same argument it repeats in the current Motion, i.e., it should be permitted to reargue these issues because on its first motion for summary judgment it raised too many issues to sufficiently brief them.<sup>1</sup> The Court rejected that request for additional summary judgment briefing. D.I. 661.

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<sup>1</sup> Compare D.I. 654 at 1 (“The Court previously denied Activision's motion on these issues, noting that they were ‘at best cursorily briefed.’”) with Motion at 1, n.3 (“Activision moved for summary judgment on non-infringement . . . raising multiple theories, including those at issue in

The Court later issued an order granting summary judgment in *Take-Two* based on the specific factual issues presented in that case. *Take-Two*, D.I. 492 (the “*Take-Two* Order”).

Acceleration Bay filed a notice of appeal in that case. *Take-Two*, D.I. 497.

Activision now moves for leave to submit further supplemental summary judgment briefing in this case. Acceleration Bay opposes that request.

### **ARGUMENT**

#### **I. Activision Lacks Good Cause to Submit Further Summary Judgment Briefing**

Activision had many opportunities and pages to present its best arguments for summary judgment. Activision’s Motion fails to demonstrate good cause for yet further summary judgment motion practice, especially given that it already moved for summary judgment and already sought leave to submit additional briefing on these very issues.

That the Court rejected similar previous arguments is confirmed by Activision’s citations in the current Motion to the same portions of Acceleration Bay’s expert reports that it cited to in its prior motion for summary judgment. *Compare* Motion at 3 (citing Medvidovic Rpt. at ¶ 204; Mitzenmacher Rpt. at ¶ 121) *with* D.I. 442 (Activision’s Motion for Summary Judgment) at 11 (citing Medvidovic Rpt. at ¶ 204), 19 (citing Mitzenmacher Rpt. at ¶ 121).

Accordingly, the Court should deny the Motion as simply rehashing arguments the Court has already heard and denied. *Liger6, LLC v. Sarto Antonio*, No. 13-4694 (JLL)(JAD), 2017 WL 3574845, at \*2-3 (D.N.J. Aug. 17, 2017) (denying motion for leave to file summary judgment where there were no new issues); *Bernstein v. Virgin Am., Inc.*, No. 15-cv-02277-JST, 2017 WL

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this motion . . . . 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 disputed of material facts, but I do not see them.’”), citing D.I. 578, at p. 23.

7156361, at \*2 (N.D. Cal. Dec. 29, 2017) (denying motion for leave to file a second summary judgment motion where the “[defendant] makes plain that its proposed second summary judgment motion will address the same arguments that [it] made in its first motion.”).

**II. The *Take-Two* Order is Not a Reason to Reconsider Infringement of the M-Regular and Participant Limitations in This Case**

Activision did not move for reargument when the Court denied its motion for summary judgment of non-infringement as to the m-regular and participant limitations in this case.

Activision also did not move for reargument when the Court denied its first motion for leave to file further summary judgment briefing on the m-regular and participant limitations in this case.

And Activision did not move for reargument or clarification of the Court’s prior claim construction orders as to any of the issues it now seeks to reargue in its Motion.<sup>2</sup> Such motions are due within 14 days after the Court issued these decisions and, as a result, have long since been waived. Local Rule 7.1.5(a).

Nor does the order in *Take-Two* warrant reargument on infringement issues in this case. The infringement issues in *Take-Two* are very different from the infringement issues in this case. In the *Take-Two* Order, the Court concluded that Grand Theft Auto V Online’s proximity rules and NBA 2K’s park relay server are not infringing networks. *Take-Two* Order at 14-15, 18-19. In contrast, in this case:

- World of Warcraft infringes through the use of a network made up of servers. D.I. 448 at 28-31. Neither of the networks at issue in *Take-Two* are server-to-server networks.
- Call of Duty infringes through the use of a peer-to-peer connectivity graph relay network for distributing quality of service messages and voice data (VoIP). *Id.* at 24-28. Call of Duty’s connectivity relay network was not at issue in the two games in *Take-Two*. See *Take-Two* Order at 13-19.

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<sup>2</sup> Activision did move for clarification of two unrelated claim terms, demonstrating its willingness to avail itself of this procedure when it thought it had good reason to do so. D.I. 302.

- Destiny infringes through the use of a custom-built peer-hosted “bubble” network. *Id* at 18-23. The Destiny network topology does not resemble either of the networks at issue in *Take-Two*.

Because the infringement issues in *Take-Two* and this case are different, the *Take-Two* summary judgment order is not a basis for the Court to hear reargument on summary judgment in this case.

### **III. There is No Reason to Reconsider Infringement Under the Doctrine of Equivalents**

The Court should also deny Activision’s request for leave to present arguments on the doctrine of equivalents (DOE). Activision raised DOE in its first 150+ pages of summary judgment briefing in this case. D.I. 442 at 29–31. And, as stated above, Activision never moved for reconsideration once the Court issued its order denying summary judgment. Moreover, the Court’s decision in *Take-Two* on DOE was based on its conclusion that the jury could not find Take Two’s accused networks equivalent to the claimed network. *Take-Two* Order at 19 (“a reasonable jury would have to conclude that the architecture of the NBA 2K network, which relies on a central relay server, is fundamentally different from the m-regular networks of the asserted claims, precluding a finding for Plaintiff under the doctrine of equivalents.”).

Because the accused networks in this case are very different from the *Take-Two* networks, as described above, the DOE ruling in *Take-Two* does not control here, and the Court should deny Activision’s Motion as to DOE arguments.

### **CONCLUSION**

For the reasons set forth above, the Court should deny Activision’s motion for leave to file a second supplemental summary judgment brief.

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