

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

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

**ACCELERATION BAY LLC’S
RESPONSE BRIEF REGARDING JULY 19, 2023 ORDER (D.I. 781)**

OF COUNSEL:

Paul J. Andre
Lisa Kobialka
James Hannah
KRAMER LEVIN NAFTALIS
& FRANKEL LLP
333 Twin Dolphin Drive, Suite 700
Redwood Shores, CA 94065
(650) 752-1700

Aaron M. Frankel
KRAMER LEVIN NAFTALIS
& FRANKEL LLP
1177 Avenue of the Americas
New York, NY 10036
(212) 715-9100

Philip A. Rovner (#3215)
Jonathan A. Choa (#5319)
POTTER ANDERSON & CORROON LLP
Hercules Plaza
P.O. Box 951
Wilmington, DE 19899
(302) 984-6000
provner@potteranderson.com
jchoa@potteranderson.com

*Attorneys for Plaintiff
Acceleration Bay, LLC*

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INTRODUCTION

To answer the Court’s question: there is a distinction, for purposes of determining whether a network is configured to maintain m-regularity, between actions taken by the player during the game and actions taken by the player before the game starts. D.I. 781 at 5. Judge Andrews’ prior orders require that a network be configured to try to get to an m-regular state. D.I. 275 at 14 (“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”). However, neither Judge Andrews’ prior orders nor anything in the intrinsic record *preclude* pre-game player actions from impacting how *particular connections* are formed, so long as the network itself is configured to form an m-regular network as a whole. Thus, a network that is designed to seek an m-regular state meets this construction (as is the case for all of Activision’s accused products).

Activision’s submission goes beyond answering the Court’s straightforward question and requests a new claim construction that would obscure this critical distinction by adding a confusing and incorrect negative limitation. Specifically, Activision asks the Court to rule that so long as players’ actions have any impact on “how connections are formed, then the network is not configured to maintain an m-regular state.” D.I. 784 at 1. There is no basis to read such a negative limitation into the claims. To the contrary, doing so would violate a fundamental canon of claim construction by reading out preferred embodiments. Thus, the Court should reject Activision’s request for a revised claim construction.

NATURE AND STAGE OF THE PROCEEDINGS

Acceleration Bay filed suit against Activision on March 11, 2015. Since then, the Court held six hearings on claim construction issues (after Activision contended that more than 50 claim terms required construction). *See* D.I. 206. Activision has already had numerous attempts to

prevent this case from going to trial on the merits. Activision, its related parties, and defendants in related actions collectively filed twenty petitions for *inter partes* review of Acceleration Bay's patents. Activision filed a fifty-page summary judgment motion (D.I. 442), a motion for leave to file summary judgment on purported new facts (D.I. 654), and an additional summary judgment motion based on the decision in *Acceleration Bay LLC v. Take-Two Interactive Software, Inc.*, C.A. No. 16-455-RGA ("*Take Two*") (D.I. 731).

Activision previously briefed the same claim construction question at issue now. D.I. 731 at 8 ("This Court's un-appealed ruling in *Take Two* that a network cannot satisfy the m-regular limitation if 'the players' actions determine how connections are formed,' when applied to the undisputed facts in this record, disposes of all infringement in this case."). Judge Andrews rejected Activision's request for additional summary judgment briefing, finding Activision failed to meet the standard for reconsideration as to the denial of summary judgment on this same issue. D.I. 743 at 15.

In response to Activision's latest request for more summary judgment briefing, the Court directed the parties "to submit briefs outlining their positions as to where there is a distinction, for purposes of determining whether a network is configured to maintain m-regularity, between actions taken by the player during the game and actions taken by the player before the game starts. The parties briefs should address *only that question.*" D.I. 781 at 5 (emphasis added).

Activision's submission exceeds this permitted scope and contends that the Court should add to the construction of (1) "m-regular," (2) "each participant being connected to three or more other participants," and (3) "fully connected portal computer" a negative limitation that "[i]f the player's actions, either before or during a game, determine how connections are formed, then the network is not configured to maintain an m-regular state." D.I. 784 at 1, 5. Activision's new

proposed limitation should be rejected for exceeding the scope of the Court’s order, being another failed attempt to meet the standard for reconsideration, and as contrary to the intrinsic record.

ARGUMENT

I. Activision’s Proposed Construction is Overbroad and Inconsistent with the *Take-Two* Order

Activision’s proposed construction should be rejected because it is overbroad and inconsistent with Judge Andrews’ decision in the *Take-Two* Order.¹ The *Take-Two* Order was based on the Court’s prior claim constructions that an m-regular network is a network that is configured to seek an m-regular state (when conditions permit it to do so). D.I. 275 at 14-15. Judge Andrews did not hold then, or at any other time, that player actions cannot have any impact on the connections that are formed.

Specifically, Judge Andrews determined that because the accused Grand Theft Auto V networks were only m-regular when players took actions during the game the network itself was not configured to form an m-regular network. *Take-Two* Order, 612 F. Supp. 3d at 420. That claim construction is not disputed for purposes of this briefing. Judge Andrews explained that because player actions were *necessary* for the network to reach an m-regular state, the network itself was not configured to maintain an m-regular state:

A reasonable jury could not find that the “proximity connection rules” make the networks m-regular. The players control their own avatars and choose where to move throughout the game environment. The fact that players share more data when they are near each other does not suggest that the network is m-regular. Instead, it suggests that the players’ actions determine how connections are formed, *and the network is not “configured to maintain” any particular state*. Dr. Mitzenmacher said at his deposition that the infringing state “just arises naturally [as] ... the players are moving throughout the game.” (Mitzenmacher Tr. at

¹ The “*Take-Two* Order” refers to Judge Andrews’ decision in the matter *Acceleration Bay LLC v. Take-Two Interactive Software, Inc.*, 612 F. Supp. 3d 408, 420 (D. Del. 2020), *aff’d in part, dismissed in part sub nom*, 15 F.4th 1069 (Fed. Cir. 2021).

175:17-19). But if a system is designed to achieve a desired result, one would not normally say the result “just arises naturally.” The result would be designed, not natural.

Id. (emphasis added).

Activision focuses on Judge Andrews’ observation that “players’ actions determine how connections are formed” but ignores his dispositive finding that because only the players’ actions dictate if the network will or will not be m-regular the network itself is not “configured to maintain” any particular state. *Id.* The key part of the finding was the network’s lack of configuration to maintain an m-regular state without specific player actions. *Id.*

Judge Andrews did not broadly hold that a network cannot be “configured to maintain” an m-regular state if player action at any time determines how connections are formed. D.I. 784 at 3. To the contrary, Judge Andrews explicitly contemplated that there may be player actions that impact how network connections are formed but that do not undermine that the network is “configured to maintain” an m-regular state, such as when network connections are temporarily disrupted when a player leaves a game. *Take-Two Order*, 612 F. Supp. 3d at 420 (“My construction does not require Plaintiff to show that the accused networks are m-regular 100 percent of the time. For example, if there is a split-second transition after a player disconnects from the game, that would not be enough to make the network not m-regular.”). Thus, the *Take-Two Order* is limited to holding that the network cannot depend on player actions post-formation to **transform** the already existing network from a non-m-regular state into an m-regular state.

Such a game is therefore not “designed to achieve [the] desired result” of forming an m-regular network, which was at the heart of Judge Andrews’ reasoning in the *Take-Two Order* that gives rise to the instant claim construction issue. Specifically, Judge Andrews distinguished between a game wherein players’ movements during gameplay may cause an m-regular state to “naturally arise” as players move throughout the game, from a game that is “designed to achieve

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