IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ACCELERATION BAY LLC,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 16-454 (RGA)
	)	
ELECTRONIC ARTS INC.,	)	
	)	
Defendant.	)	

REPLY BRIEF IN SUPPORT OF DEFENDANT'S MOTION FOR LEAVE TO FILE A SUPPLEMENTAL SUMMARY JUDGMENT BRIEF

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Acceleration argues that there are "no new issues" here, but that is simply wrong. There are at least three new issues raised by a recent outside legal development, namely by this Court's summary judgment opinion in *Take-Two*. First, this Court clarified its constructions on the same patent claims at issue is this case.[1] Acceleration does not dispute this. Second, this Court held that no reasonable jury could conclude that the same type of network (client-server) infringes the same limitations of the same claims of the same patents. Third, the Court held that prosecution history estoppel bars Acceleration's doctrine of equivalents assertions for the '344, '966, and '147 patents. Judges on this Court have heard (and granted) renewed motions for summary judgment where there have been outside legal developments. *See, e.g., Acierno v. New Castle County*, No. 92-385-SLR, 2002 WL 125679 (D. Del. Jan. 8, 2002) (granting a renewed motion for summary judgment in view of a "clarifying ordinance" passed by the County Council).

Acceleration's argument that the infringement issues in the two cases are "very different" is belied by the facts. There is no daylight between Acceleration's allegations in the two cases. Rather than take on any of the evidence of similarity marshalled in EA's motion (D.I. 558 at 2–7), Acceleration merely states that, in this case, "infringement is based on EA's use of game logics to control connections between participants." Acceleration Opposition (D.I. 559 at 4). In support of that proposition, the Opposition Brief cites pages 3–6 of Acceleration's earlier summary judgment brief (D.I. 467). Those pages assert that the EA client-server networks "apply logics rules in the selective distribution of gameplay data, including VoIP data." D.I. 467 at 3. In *Take-Two*, Acceleration's experts similarly alleged that the NBA2K client-server network infringed because: "the logics and other rules control the selective direct distribution of

[1] Indeed, the claim construction proceedings were consolidated in *Take-Two* and in this case.

gameplay and VoIP data." *Take-Two* D.I. 463 Ex. A-5 (Med.Reply) at ¶¶ 35, 64, 169. These supposedly "very different" allegations from the two cases are virtually identical, and both rely on assertions that the network's application layer can sometimes be m-regular by happenstance. In *Take-Two,* this Court rejected that theory of infringement, by clarifying its claim construction.

The support for a renewed motion is even stronger with respect to Acceleration's allegations of infringement under the doctrine of equivalents. In the *Take-Two* Opinion, the Court noted that "Plaintiff's doctrine of equivalents argument is especially weak for the '344, '966, and '147 patents because the patentee added the m-regular limitation during prosecution." *Take-Two* D.I. 492 at 16. The Court held that, because of those amendments, "Plaintiff is barred by prosecution history estoppel from now attempting to erase that limitation from the patents." *Id.* In this case, the Court has already found non-infringement of the '069 patent. D.I. 545 at 11-12. Thus, the only m-regular limitations that remain in this case are the very same '344, '966, and '147 patents that the Court has already held are barred from equivalents under prosecution history estoppel. Prosecution history estoppel is a legal doctrine that depends upon the prosecution history of the asserted patents. *See Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co., Ltd.*, 344 F.3d 1369, 1367-68 (Fed. Cir. 2003) (prosecution history estoppel is "a question of law" that is "to be determined by the court."). Acceleration offers no reason why the prosecution history estoppel holding in *Take-Two* does not apply in this case other than to reassert that the accused EA client-server network is "very different" from Take-Two's client-server network. D.I. 558 at 5. As shown above and in EA's motion, the allegations are not "very different;" they are virtually identical, and both depend on a theory the Court has rejected as a matter of law.

In short, the opposition brief presents no argument that would support denying EA an opportunity to present summary judgment briefing to address Acceleration's legally infirm theories in this case. EA respectfully requests that the Court grant its motion.

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CERTIFICATE OF SERVICE

I hereby certify that on April 20, 2020, I caused the foregoing to be electronically filed with the Clerk of the Court using CM/ECF, which will send notification of such filing to all registered participants.

I further certify that I caused copies of the foregoing document to be served on April 20, 2020, upon the following in the manner indicated:

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