IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

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

ACTIVISION BLIZZARD'S OPENING BRIEF IN SUPPORT OF ITS SUPPLEMENTAL MOTION FOR SUMMARY JUDGMENT OF NON-INFRINGEMENT BASED ON COLLATERAL ESTOPPEL

MORRIS, NICHOLS, ARSHT & TUNNELL LLP
Jack B. Blumenfeld (#1014)
Cameron P. Clark (#6647)
1201 North Market Street
P.O. Box 1347
Wilmington, DE 19899
(302) 658-9200
jblumenfeld@morrisnichols.com
cclark@morrisnichols.com

Attorneys for Defendant

OF COUNSEL:
B. Trent Webb
Aaron E. Hankel
John Garretson
Jordan T. Bergsten
Maxwell C. McGraw
SHOOK HARDY & BACON LLP
2555 Grand Boulevard
Kansas City, MO 64108
(816) 474-6550

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INTRODUCTION

The parties do not dispute how Activision's networks operate, and Plaintiff's arguments for why those undisputed facts show patent infringement were fully litigated and resolved against Plaintiff in the *Take Two* case.[1] Plaintiff chose not to appeal those key rulings in *Take Two*. Now that the Federal Circuit has affirmed that judgment of no infringement, those un-appealed rulings have full collateral estoppel, or "issue preclusion," effect in this case. This case is thus like *Aspex Eyewear*, where the Federal Circuit affirmed judgment that a plaintiff who failed to show infringement once was collaterally estopped from arguing its infringement theories in a second case, explaining: "The district court correctly defined the issue as infringement by magnetic rimless clip-on eyewear in view of the final construction of 'retaining mechanisms' as requiring rims," holding the plaintiff "had a full and fair opportunity to litigate this issue." *Aspex Eyewear, Inc. v. Zenni Optical Inc.*, 713 F.3d 1377, 1382 (Fed. Cir. 2013).

In *Take Two*, plaintiff likewise fully litigated three issues that, if given proper collateral estoppel effect here, establish non-infringement across this entire case. As in *Take-Two*, the Court construed each asserted claim in this case to require the accused videogame networks to be configured to maintain m-regularity, meaning every "participant" in the network must connect to the exact same number of participants as everyone else. As in *Take Two*, Plaintiff's descriptions of Activision's networks here, even if taken as true, cannot satisfy this Court's claim constructions.

Precluded Issue One: A network is not "configured to maintain" m-regular connections where "the players' actions determine how connections are formed," especially when a plaintiff merely argues "that the combination of various rules and constraints 'drives the formation' of an m-regular network" in response to these player actions. *Take Two*, at *8. Plaintiff fully litigated

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[1] *Acceleration Bay LLC v. Take-Two Interactive Software, Inc.*, No. 16-455-RGA, 2020 WL 1333131 (D. Del. Mar. 23, 2020) ("*Take-Two*").

this issue in *Take Two*, with the Court ruling that such networks do not infringe. *Id.* Here, the only examples of alleged m-regularity provided by plaintiff's experts are completely dependent on players' actions, that is, where the player chooses to move their character within the game or (for one network) how the player configures security settings. Collateral estoppel bars re-litigation of this issue, and prevents infringement on all asserted claims and accused games.

Precluded Issue Two: A network is not "configured to maintain" m-regular connections where a server is connected to every player in the network, and "transfers data back and forth between other network participants." *Id.* at *9. Plaintiff fully litigated this issue in *Take Two*, with the Court ruling that such networks do not infringe. *Id.* Here, for two of the three accused games it is undisputed that a server transfers data back and forth between every player, making m-regularity and thus infringement impossible under the *Take Two* rulings.[2] This issue is also precluded, creating an independent basis for summary judgment of non-infringement.

Precluded Issue Three: A network that does not literally satisfy the "m-regular" requirement does not infringe under the doctrine of equivalents by otherwise "optimizing" the network "by limiting each participant's connections." *Id.* at *8. Plaintiff fully litigated this issue in *Take Two* as well, with the Court rejecting this theory because it would "read[] the m-regular limitation out of the patent." *Id.* at *8-9. Plaintiff's nearly identical statements of equivalence from the same experts here also "do[] not save Plaintiff's infringement theory." *Id.* at *8.

Plaintiff's doctrine of equivalents arguments are thus also barred by claim preclusion and, given the two independent bases for barring literal infringement above, Activision respectfully submits that summary judgment of no infringement is proper.

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[2] For the third game, World of Warcraft ("WoW"), plaintiffs' only examples of alleged m-regularity likewise require the fact finder to ignore additional servers that "transfer[] data back and forth between other network participants," so collateral estoppel applies there as well. *Id.* at *9.

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