

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., ) **REDACTED –**  
) **PUBLIC VERSION**  
Defendant. )

**ACTIVISION BLIZZARD’S REPLY BRIEF IN SUPPORT OF  
SUPPLEMENTAL SUMMARY JUDGMENT OF NON-INFRINGEMENT  
BASED ON COLLATERAL ESTOPPEL**

OF COUNSEL:

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

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@morrisonichols.com  
cclark@morrisonichols.com

*Attorneys for Defendant*

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## INTRODUCTION

It is undisputed that Plaintiff is collaterally estopped from re-litigating certain infringement issues in this case, and Plaintiff identifies no material differences to prevent estoppel here. Plaintiff's sole argument against collateral estoppel from this Court's rulings in *Take Two*<sup>1</sup> is that the networks at issue in this case are "different" than the networks in *Take Two* and were developed by different entities. Although Plaintiff explains in detail the insubstantial differences between these networks, Plaintiff has little, if anything, to say about any differences material to the *Take Two* non-infringement issues that are collaterally estopped here. Indeed, on this crucial issue, Plaintiff consistently fails to address Activision's main arguments, or makes conclusory claims without any citation to the record. For all of the accused networks, Plaintiff fails to address the main collateral estoppel issues arising from this Court's decision in *Take Two*, namely that, as a matter of law: (1) a network is not configured to maintain an m-regular state when Plaintiff merely contends that the network "converges" onto m-regularity based on a set of dynamic variables dependent on user inputs, such as player movements and router settings; and (2) Plaintiff cannot ignore selective servers and connections in the accused network when alleging m-regularity.

In the face of admittedly estopped issues, Plaintiff's scattershot and unsupported responses fall far short of creating a genuine fact issue for a jury. For example, Plaintiff does not even try to defend its Call of Duty ("CoD") "gameplay logics network" theory against estoppel. And for the CoD "connectivity graph network," Plaintiff acknowledges the undisputed fact that players are each connected to a central server, but argues (incorrectly), without any factual support or citation that [REDACTED] messages are exclusively distributed over the connectivity graph network.

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<sup>1</sup> *Acceleration Bay LLC v. Take-Two Interactive Software, Inc.*, No. 16-455-RGA, 2020 WL 1333131 (D. Del. Mar. 23, 2020) ("*Take-Two*"). As in *Take Two*, here "the asserted claims of these patents are limited to networks that are 'incomplete' and 'm-regular.'" *Id.* at \*1.

This is insufficient to create a genuine fact issue. For the Destiny game, Plaintiff discusses how “fire teams” are created, but ignores the “██████████” that are critical to its infringement theory and are undisputedly created by player movements in the game (D.I. 735, pp. 9-10), which Activision explained in detail to be the reason for estoppel here. (D.I. 731, pp. 10-11). For the World of Warcraft (“WoW”) game, Plaintiff relies on a single footnote for the conclusory argument that it can ignore dozens of server connections because it points to a broadcast channel that is allegedly m-regular. (D.I. 735, p. 16, n.2). But the claims require that the underlying network must be m-regular and Plaintiff fails to address that issue raised by Activision. (D.I. 731, p. 17, n.11).

Because these shortcomings extend across multiple independent grounds for granting summary judgment of no infringement for each accused game, Activision respectfully requests that the Court apply collateral estoppel and enter judgment of non-infringement in this case.

### **ARGUMENT**

The issue on this motion is a relatively narrow one. Plaintiff appears to agree that Activision has accurately identified three fully litigated issues from the *Take Two* case that Plaintiff is estopped from re-litigating here. In brief: “Issue one (player actions driving connections) was the reason the accused Grand Theft Auto Online game did not literally infringe; issue two (server connected with everyone) was the reason the accused NBA 2K game did not literally infringe;” and “issue three (claim vitiation) was the reason neither game infringed under the doctrine of equivalents.” (D.I. 731, pp. 7-8). Plaintiff’s sole argument why these issues do not estop all of Plaintiff’s infringement theories in this case is that the issues in the case are not “identical” because Activision “fails to carry its heavy ‘burden of showing that the accused devices are essentially the same as those in the prior litigation.’” (D.I. 735, p. 1). While Plaintiff adds the word “heavy” to this statement of burden from the case it cites, the controlling law is clear that the requirement for

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