Exhibit 12

"***fundamental computer operations***," not "suspicious computer operations. *See* '639 Provisional, Pg. 18, l. 9–13. Petitioner ignores the disclosure from the '194 Patent, which actually relates to "***suspicious computer operations***." '194 Patent at 5:50–54 (disclosing listing the operations that could be ***deemed*** potentially hostile). Additionally, the '194 Patent provides "An ***Example*** List of Operations ***Deemed*** Potentially Hostile," meaning that there is no *a priori* understanding of what constitutes a "suspicious computer operation." *See* '194 Patent at 5:58–6:4 (emphasis added). Rather, some subset of all possible computer operations must first be deemed suspicious in order to derive a list of suspicious computer operations for a Downloadable. *See id.* at FIG. 7; 9:20–42.

Furthermore, this argument is contrary to the law as the Board now attempts to equate standard MS-DOS functions as "suspicious computer operations" by relying on knowledge gleaned from the '494 Patent itself—namely the insight to deem some subset of "calls made to an operating system, a file system, a network system, and to memory" as suspicious in deriving a list of the suspicious computer operations that may be attempted by a Downloadable. *See* Institution Decision at 22 ("Petitioner provides evidence that such function numbers were known in the prior art to correspond to, among other functions, the same four types of operations that are recited as 'suspicious computer operations in challenged dependent claims 6 and 15."). To the contrary, in assessing obviousness Petitioner may consider

trail" improperly reads out the "storing . . . in a database" claim limitation which is prohibited. *mFormation Techs., Inc. v. Research in Motion Ltd.*, 764 F.3d 1392, 1399 (Fed. Cir. 2014) (reaffirming that claim limitations cannot be construed in a way that "would render another limitation superfluous.") (citation and internal quotations omitted).

Consequently, the unequivocal disclosure in the '494 Patent and Petitioner's misleading attempt to conflate claim terms require that this construction be adopted to make clear that "deriving DSP data" is separate from "storing the DSP data in a database," and that the DSP data is only placed in the database upon derivation of the profile, including the list of suspicious computer operations.

IV. SWIMMER DOES NOT INVALIDTE THE '494 PATENT

A. Swimmer was not Publically Available

Inter partes review may only be requested based on prior art that consists of patents or printed publications that were publically available. 35 U.S.C. § 311(b). Public accessibility is the key factor in determining whether a reference is deemed a "printed publication." *In re Hall*, 781 F.2d 897, 898–99 (Fed. Cir. 1986); *see also L-3 Commc'n Holdings, Inc. v. Power Survey, LLC*, IPR2014-00832, Paper 9 at 11–12 (PTAB Nov. 14, 2014). Swimmer, however, was not publically accessible. Swimmer makes this clear by stating: "No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form without the

writing audit records one-by-one to the audit trail." *Id.* at ¶ 79. As a result, each individual audit record (*e.g.* <CS=3911 Type=0 Fn=30 arg() ret (AX=5)>) merely includes a single DOS function number (Fn=30), as highlighted below:

```
<CS=3911 Type=0 Fn=30 arg() ret( AX=5)>
<CS=3911 Type=0 Fn=29 arg() ret( BX=128 ES=3911)>
<CS=3911 Type=0 Fn=64 arg( AL=61 CL=3 str1=*.COM) ret( AL=0 CF=0)>
<CS=3911 Type=0 Fn=51 arg( AL=0 str1=COMMAND.COM) ret( AL=0 CX=32 CF=0)>
<CS=3911 Type=0 Fn=51 arg( AL=1 str1=COMMAND.COM) ret( AL=0 CX=32 CF=0)>
<CS=3911 Type=0 Fn=45 arg( AL=2 CL=32 str1=COMMAND.COM) ret( AL=0 AX=5 CF=0)>
<CS=3911 Type=0 Fn=73 arg( BX=5) ret( CX=10241 DX=6206 CF=0)>
<CS=3911 Type=0 Fn=27 arg() ret( CX=5121 DX=8032)>
<CS=3911 Type=0 Fn=47 arg( BX=5 CX=3 DX=828 DS=3911) ret( AX=3 CF=0)>
<CS=3911 Type=0 Fn=50 arg( AL=2 BX=5 CX=0 DX=0) ret( AL=0 AX=50031 DX= CF=0)>
<CS=3911 Type=0 Fn=48 arg( BX=5 CX=648 DX=313 DS=3911) ret( AX=648 CF=0)>
<CS=3911 Type=0 Fn=50 arg( AL=0 BX=5 CX=0 DX=0) ret( AL=0 AX=0 DX=0 CF=0)>
<CS=3911 Type=0 Fn=48 arg( BX=5 CX=3 DX=831 DS=3911) ret( AX=3 CF=0)>
<CS=3911 Type=0 Fn=74 arg( BX=5 CX=10271 DX=6206) ret( CF=0)>
<CS=3911 Type=0 Fn=46 arg( BX=5) ret( CF=0)>
<CS=3911 Type=0 Fn=51 arg( AL=1 str1=COMMAND.COM) ret( AL=0 CX=32 CF=0)>
```

Swimmer at 000009, Figure 3. Accordingly the system activity data within a single audit record cannot be equated with the claimed DSP data because each audit record can only include a single MS-DOS function number, not a list of computer operations, let alone a list of ***suspicious*** computer operations, as required by the claims.

Moreover, independent claim 10 requires "a Downloadable scanner coupled with said receiver." However, Swimmer does not disclose the "Downloadable scanner," and actually teaches against the use of scanners by reasoning that they are easily circumvented. Swimmer at 000003, ¶¶ 1–5. In fact, Dr. Davidson admitted that the Swimmer system does not use a scanner at all. Davidson Tr. at

not disclose the underlying facts or data on which the opinion is based is entitled to little or no weight," Petitioner's argument is entitled to little or no weight."

Furthermore, a POSITA would understand the difference between a "flat file" or log file, like Swimmer's audit record, and a "flat file database:"

- **flat file** a file consisting of records of a single record type in which there is no embedded structure information that governs relationships between records.
- **flat file database** a database that takes the form of a table, where only one table can be used for each database.

Ex. 2024, Microsoft Press Computer Dictionary Third Edition at 199. As Dr. Medvidovic explains, a POSITA would have understood Swimmer's audit record to be a flat file—and in particular a log file—not a flat file database because the audit trail is not in the form of a ***table*** but rather a large sequential file of consisting of audit records of a single generically formatted record type (i.e. "an MS-DOS audit record"). *See* Medvidovic, ¶ 140; *see also id.* at ¶ 121.

Moreover, contrary to Petitioner's argument that a POSITA would consider the audit record format illustrated in Swimmer's Figure 3 to be a type of database, Swimmer's "audit trail" does not meet the Board's construction because it does not contain a database schema. *See* Medvidovic, ¶ 121. As Dr. Medvidovic explains, "a person skilled in the art at the time would understand a 'database schema" to be 'a description of a database to a database management system (DBMS) in the

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