IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

REALTIME ADAPTIVE STREAMING LLC, Plaintiff, v. SLING TV L.L.C., SLING MEDIA, L.L.C., DISH NETWORK L.L.C., DISH TECHNOLOGIES L.L.C. AND ARRIS GROUP, INC., Defendants.	**Case No. 1:17-cv-02097-RBJ**

PLAINTIFF REALTIME ADAPTIVE STREAMING LLC'S NOTICE OF SUPPLEMENTAL AUTHORITY REGARDING DEFENDANTS' MOTION TO DISMISS (D.I. 47) / MOTION FOR JUDGMENT ON THE PLEADINGS (D.I. 48)

Plaintiff Realtime Adaptive Streaming LLC ("Realtime") respectfully submits this Notice to bring to the Court's attention two recent, precedential Federal Circuit opinions: *Berkheimer v. HP Inc.*, 881 F.3d 1360 (Fed. Cir. Feb. 8, 2018) (Ex. A) and *Aatrix Software, Inc. v. Green Shades Software, Inc.*, -- F.3d --, 2018 WL 843288 (Fed. Cir. Feb. 14, 2018) (Ex. B). These opinions provided significant additional guidance on the proper standard for patent-eligibility under §101, and further compel a denial of Defendants' motions (D.I. 47 and D.I. 48).

In *Berkheimer*, the Federal Circuit confirmed that any *Alice* step 2 analysis involves underlying factual issues. 881 F.3d at 1368-69. Specifically, "[t]he question of whether a claim element or combination of elements is well-understood, routine and conventional to a skilled artisan in the relevant field is ***a question of fact***." *Id.*[1] As to that fact question, the court made clear that "[t]he mere fact that something is disclosed in a piece of prior art ***does not mean it was well-understood, routine, and conventional***." *Id.* And finally, the court confirmed that "any fact, such as this one, that is pertinent to the invalidity conclusion ***must be proven by clear and convincing evidence***." *Id.* After reviewing the intrinsic record, the court held that "[t]he improvements in the specification, to the extent they are captured in the claims, create a factual dispute regarding whether the invention describes well-understood, routine, and conventional activities." *Id.* The district court committed legal error in granting summary judgment despite this factual dispute. *Id.*

In *Aatrix Software*, the court applied these principles to vacate a district court's §101 ruling on a Rule 12(b)(6) motion. 2018 WL 843288 at *6. The court held that "patent eligibility can be determined at the Rule 12(b)(6) stage … ***only when*** there are no factual allegations that, taken as true, prevent resolving the eligibility question as a matter of law." *Id.* at *2. Moreover, "sources properly considered on a motion to dismiss [include] the complaint, the patent, and materials subject to judicial notice." *Id.* at *5. The court then reviewed those sources and held that the district court erred in granting the motion to dismiss because plaintiff's "allegations at a minimum raise

[1] All emphasis added, unless otherwise stated.

factual disputes underlying the §101 analysis, such as whether the claim term 'data file' constitutes an inventive concept, alone or in combination with other elements." *Id.* at *4-5.

The *Aatrix* court did not end its analysis there. The court also found that the district court abused its discretion in denying leave to amend complaint. In remanding, the court expressly allowed the amended complaint, holding that, "[v]iewed in favor of [plaintiff], as the district court must at the Rule 12(b)(6) stage, the complaint alleges that the claimed combination improves the functioning and operation of the computer itself. These allegations, if accepted as true, contradict the district court's conclusion that the claimed combination was conventional or routine." *Id.*

Applying the Federal Circuit's guidance in *Berkheimer* and *Aatrix Software* further compel denial of Defendants' motions because the intrinsic record, at a minimum, raise factual disputes. The asserted patents claim unconventional technological solutions, namely, the combination of (1) asymmetric compressors, (2) two or more compressors, (3) selecting compressor based on parameter such as throughput of a communication channel, and/or (4) access profile.[2] Per the intrinsic record, the unconventional solutions recited in the claims solve the problems in the state of the art at the time of the invention. Those problems include, to name a few:

- "[D]ata storage and retrieval bandwidth limitations" '535 patent at 1:61-62;
- "[M]agnetic disk mass storage devices currently employed in a variety of [] computing applications suffer from significant seek-time access delays along with profound read/write data rate limitations." *Id*. at 2:58-61; and
- "[T]he compression ratio to encoding and decoding speed achieved." *Id.* at 4:57-60.

In applying compression, the patentees further recognized that:

- "What is not apparent from these algorithms, that is also one major deficiency within the current art, is knowledge of their algorithmic efficiency." *Id.* at 5:5-10;
- "[A] compromise between efficient data storage, access speed, and addressable data space." *Id.* at 6:39-42;

[2] *See, e.g.*, '535 patent cl. 1 ("plurality of access profiles," "asymmetric data compression") & cl. 15 ("asymmetric compressors," "plurality of compressors"); '610 patent cl. 1 ("plurality of compression algorithms," "asymmetric" compression, selecting compression based on "throughput of a communication channel").

- "[F]ile systems are not able to randomly access compressed data in an efficient manner." *Id.* at 6:51-53; and
- "Competing requirements of data access bandwidth, data reliability/redundancy, and efficiency of storage space are encountered." *Id.* at 7:41-45.

After describing these technological problems, the patents confirm that "[t]hese and other limitations within the current art are solved with the present invention." *Id.* at 7:46-47. And the remainder of the patents make clear that the patented solutions are unconventional.

For example, the inventors recognized that "a system and method that would provide dynamic modification of compression system parameters so as to provide an optimal balance between execution speed of the algorithm (compression rate) and the resulting compression ratio, is highly desirable." *Id.* at 1:56-60; *see also id.* at 9:55-59. In other words, this dynamically modified compression system—which can use two or more compressors and selects compression based on "***throughput of a communication channel***"—was unconventional. As another example, the inventors of the Fallon patents also recognized the unconventional effect of using asymmetrical compression in specific situations. *See id.* at 12:14-35. In short, the claimed solutions (e.g., asymmetric compressors, two or more compressors, selecting compressor based on throughput of a communication channel) improve the functioning of a computer—e.g., increase the capacity of a computer system to store or transfer data more efficiently in a flexible way.

But there is more. The novel and unconventional aspects are further confirmed by the intrinsic patent file histories. For example, in granting patent issuance, the USPTO stated that "the claimed subject matter in claims is allowable because the arts of record fail to teach or fairly suggest in combinations" recited in the claims, including, e.g., "asymmetric compressors," "plurality of compressors," "compression routing … depend[] on the throughput," and/or "access profile." Ex. C ('535 FH, Notice of Allowability, July 22, 2014) at 6-8.[3] The inclusion of these

[3] Realtime respectfully requests the Court to take judicial notice of the file histories of the asserted patents, as the facts are part of the public record not subject to any reasonable dispute. *See Aatrix*, 2018 WL 843288 at *5 ("[S]ources properly considered on a motion to dismiss [include] the complaint, the patent, and materials subject to judicial notice."); Fed. R. Evid. 201(b).

facts are even more compelling because "setting forth of reasons for allowance is not mandatory on the examiner's part." MPEP §1302.14. The intrinsic record confirms that the claims improve computer capabilities, and that they recite unconventional solutions. At the very least, they raise factual issues on these points. Applying *Berkheimer* and *Aatrix Software*, these factual issues preclude dismissal and, thus, Defendants' motions must be denied.[4]

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Respectfully submitted,

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[4] Should the Court be inclined to grant dismissal, Realtime respectfully requests that dismissal be without prejudice to Realtime amending the complaint because "there certainly [are] allegations of fact that, if [plaintiff's] position were accepted, would preclude the dismissal." *Aatrix*, 2018 WL 843288 at *3.

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