IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

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

PLAINTIFF ACCELERATION BAY LLC'S
SUPPLEMENTAL SUBMISSION FOLLOWING SUMMARY JUDGMENT HEARING

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Further to the Court's instructions at the May 17, 2018 hearing on the parties' motions for summary judgment, and pursuant to the Court's oral order (D.I. 557), Plaintiff Acceleration Bay LLC ("Acceleration Bay") submits this further submission.

I. The Court Should Correct the "Obvious Error" in Claim 19 of the '634 Patent

Acceleration Bay moved the Court to correct the obvious grammatical error in claim 19 of the '634 Patent, by moving the adjective "non-routing table based" to modify "method" instead of "computer readable medium." D.I. 438; D.I. 473. During oral argument, Activision incorrectly stated that the Court's power to correct errors in claims is limited to "scrivners' errors" or "typos." Ex. 1 (5/17/18 Tr.) at 35:23-36:16. To the contrary, the Court's powers to correct are not so limited and the controlling test is if "(1) the correction is not subject to reasonable debate based on consideration of the claim language and the specification and (2) the prosecution history does not suggest a different interpretation of the claims." *CBT Flint Partners, LLC v. Return Path, Inc.*, 654 F.3d 1353, 1358 (Fed. Cir. 2011), quoting *Novo Indus., L.P. v. Micro Molds Corp.*, 350 F.3d 1348, 1357 (Fed. Cir. 2003) (reversing the district court's summary judgment of invalidity based on indefiniteness because the court could have corrected an obvious error within the claim). Moreover, "[a]bsent evidence of culpability or intent to deceive by delaying formal correction, a patent should not be invalidated based on an obvious administrative error." *Hoffer v. Microsoft Corp.*, 405 F.3d 1326, 1331 (Fed. Cir. 2005).

The Court's ability to correct errors in claims is not limited to fixing "typos." This District and others have repeatedly corrected obvious errors in a patent, including those that go beyond a mere "typo." *See, e.g., In re Cyclobenzaprine Hydrochloride Extended-Release Capsule Patent Litig.*, 794 F. Supp. 2d 517, 530 (D. Del. 2011), *aff'd in part, vacated in part, rev'd in part*, 676 F.3d 1063 (Fed. Cir. 2012) (rearranging words in claim element to correct

obvious error); *Intermec Techs. Corp. v. Palm Inc.*, 811 F. Supp. 2d 973, 984-85 (D. Del. 2011) (removing extraneous phrase that was "nonsensical as written" and correcting five other errors); *Koninklijke Philips N.V. v. AsusTek Computer Inc.*, C.A. No. 15-1125-GMS, 2017 WL 2957927, at *4 n.16 (D. Del. July 11, 2017) ("the court notes that it is authorized to add the word 'means' to the term 'gravitation-controlled sensor [means]' in order to resolve obvious antecedent basis informalities"), citing *H–W Tech. L.C. v. Overstock.com, Inc.*, 758 F.3d 1329 (Fed. Cir. 2014); *Finjan, Inc. v. Blue Coat Sys., Inc.*, No. 13-cv-03999-BLF, 2014 WL 5361976, at *2, 7-8 (N.D. Cal. Oct. 20, 2014) (removing "the method" from preamble to clarify nature of claim); *CheckFree Corp. v. Metavante Corp.*, No. 3:12-CV-15-J-34JBT, 2013 WL 12156049, at *3 (M.D. Fla. Aug. 22, 2013) (using logic and review of specification to identify correction for missing term); *Fairfield Indus., Inc. v. Wireless Seismic, Inc.*, No. 4:14-CV-2972, 2015 WL 1034275, at *21 (S.D. Tex. Mar. 10, 2015) (correcting obvious error by adding antecedent basis for claim element).

Activision incorrectly contended during oral argument that the Court should not correct the error in claim 19 because "non-routing table based" could also be moved to modify "network," and repeatedly argued that Acceleration Bay previously characterized both the network and the method as non-routing table based. Ex. 1 at, *e.g.*, 31:24-32:9. As Acceleration Bay explained, they mean the same thing – the network and the method controlling the network do not rely on routing-tables to move messages through the network. *Id.* at 52:19-53:16.

But even if Activision is correct (which it is not), the fact that an error can be corrected in multiple ways does not preclude the Court from correcting the claim. In *CBT Flint Partners, LLC v. Return Path, Inc.*, the Federal Circuit found that a district court rightly identified that there were three alternative but reasonable corrections for an error in a claim

term. 654 F.3d at 1358. Nevertheless, the Federal Circuit held that the district court erred in finding that it was unauthorized to correct the error. *Id.* at 1358–59. The Federal Circuit reiterated the district court's responsibility to consider the alternatives "from the point of view of one skilled in the art," (*id.* at 1358), and found that "[b]ecause each of the three proposed reasonable interpretations would result in the same claim scope . . . a person of skill in the art would readily know that the meaning of the claim requires insertion of the word 'and' between the words 'detect' and 'analyze.'" *Id.* at 1359; *see also, e.g.*, *Fairfield Indus.*, 2015 WL 1034275, at *21 ("Although Wireless Seismic is correct that the error can be corrected in two ways, the mere fact that multiple reasonable corrections exist does not prevent the Court from correcting the term."); *CheckFree Corp.*, 2013 WL 12156049, at *3 (correcting term notwithstanding several alternative corrections proposed by defendant).

II. The Computer-Readable Medium Claims Are Patent Eligible

The computer readable medium (CRM) claims are patent eligible because they are directed to inventive methods. D.I. 475 at 32-33. Activision ignores this fact and incorrectly argues that drafting the method in the form of a CRM claim somehow renders a patent eligible method claim into a patent ineligible CRM claim. However, the Federal Circuit dictates that the Court's analysis of the patent eligibility of the CRM claims should be based on the "underlying invention," not the formality that the claims were drafted as CRM claims. *Cybersource Corp. v. Retail Decisions, Inc.*, 654 F.3d 1366, 1373-74 (Fed. Cir. 2011) ("***Regardless of what statutory category*** ('process, machine, manufacture, or composition of matter,' 35 U.S.C. §101) a claim's language is crafted to literally invoke, ***we look to the underlying invention for patent-eligibility purposes***. Here, it is clear that the invention underlying both claims 2 and 3 is a method for detecting credit card fraud, not a manufacture for storing computer-readable

information.")(emphasis added). Activision repeatedly suggested, without citation to any authority, that *Cybersource* was directed to an "*Alice*" inquiry that is somehow different from the patent eligibility standard of 35 U.S.C. § 101. But there are not two separate inquiries. In the quote above from *Cybersource*, the Federal Circuit clearly states that it is addressing the statutory eligibility test of § 101.

Numerous decisions have followed this mandate and looked to the substance of the claims for purposes of patent eligibility. *See, e.g., Bancorp Servs., L.L.C. v. Sun Life Assur. Co. of Canada (U.S.)*, 687 F.3d 1266, 1277 (Fed. Cir. 2012) ("the form of the claims should not trump basic issues of patentability"), citing *Parker v. Flook*, 437 U.S. 584, 593, 98 S.Ct. 2522, 57 L.Ed.2d 451 (1978) (advising against a rigid reading of § 101 that "would make the determination of patentable subject matter depend simply on the draftsman's art"); *CLS Bank Int'l v. Alice Corp.*, 717 F.3d 1269, 1288 (Fed. Cir. 2013), *aff'd* 134 S.Ct. 2347 (2014) ("under § 101 we must look past drafting formalities and let the true substance of the claim guide our analysis. Here, although the claim's preamble appears to invoke a physical object, the claim term 'computer readable storage medium' is stated in broad and functional terms—incidental to the claim—and every substantive limitation presented in the body of the claim (as well as in dependent claims 40 and 41) pertains to the method steps of the program code 'embodied in the medium.'"); *Crypto Research, LLC v. Assa Abloy, Inc.*, 236 F.Supp.3d 671, 680 (E.D.N.Y. 2017) (finding claim patent eligible: "while the Patents-in-Suit recite apparatus, computer-readable medium, and method claims, in practical effect, the claims cover the same concept related to the efficient computation of hash values in a one-way chain. Consequently, the claims warrant similar substantive treatment."); *Rovi Guides, Inc. v. Comcast Corp.*, No. 16-CV-9278 (JPO), 2017 WL 3447989, at *23 (S.D.N.Y. Aug. 10, 2017) ("The Federal Circuit has instructed

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