

MORRIS, NICHOLS, ARSHT & TUNNELL LLP

1201 NORTH MARKET STREET
P.O. BOX 1347
WILMINGTON, DELAWARE 19899-1347

(302) 658-9200
(302) 658-3989 FAX

JACK B. BLUMENFELD
(302) 351-9291
(302) 425-3012 FAX
jblumenfeld@mnat.com

October 27, 2017

The Honorable Richard G. Andrews
United States District Court
for the District of Delaware
844 North King Street
Wilmington, DE 19801

VIA ELECTRONIC FILING

Re: Acceleration Bay LLC; C.A. Nos. 16-453 (RGA); 16-454 (RGA); and 16-455 (RGA)

Dear Judge Andrews:

Defendants write in response to Plaintiff's October 24 letter. As explained below: (1) Defendants properly identified and gave clear notice of their intent to rely on the Alagar reference; and (2) Defendants have good cause to elect Alagar given Plaintiff's claim construction positions and infringement reports. In addition, on October 20, 2017, days before filing its letter, Plaintiff moved to strike some of Defendants' invalidity expert report, including contentions based on Alagar, with the Special Master. There is no reason for both the Court and the Special Master to deal with these issues at the same time.

Alagar Was Disclosed, and Defendants Have Good Cause. Both before this Court and before the Special Master, Plaintiff alleges violations of the Scheduling Order and seeks to preclude Defendants from relying on Alagar. Plaintiff's sole basis is that Defendants supposedly did not properly elect Alagar as required by the Scheduling Order and Defendants cannot show good cause to rely on Alagar. In its Motion to the Special Master, Plaintiff also argues that Defendants' invalidity contentions did not disclose Alagar-based obviousness combinations.

In fact, Defendants advised Plaintiff in their May 6, 2016 Invalidity Contentions And Election Of Prior Art that they would elect Alagar in their final election of prior art if Plaintiff read the claims onto cited prior art. The Election of Prior Art for each patent specifically states:

Also, the patentee amended the asserted claims during prosecution to include limitations which Plaintiff now ignores in its infringement contentions. By ignoring these limitations, Plaintiff attempts to recapture subject matter rejected by the examiner and/or disclaimed by the patentee. If Plaintiff construes the claims to read out these limitations, Defendants reserve the right to argue that

The Honorable Richard G. Andrews

October 27, 2017

Page 2

the Asserted Claims are invalid in view of the references cited by the examiners during prosecution of the Asserted Claims. Ex. A at 24-26.¹

Plaintiff has done just that. But at the same time it seeks to strip the record of the Alagar prior art around which it amended its applications to secure the asserted claims. Plaintiff's desire to exclude the Alagar reference is understandable – Alagar is far closer to the Asserted Claims than any of Defendants' products are. Indeed, Alagar falls squarely within Plaintiff's interpretations of the claims. It discloses “a dynamic computer network” for “reliable communications,” which, like the Asserted Claims, relies on “flooding” to broadcast a message through the network. (“Our solution is based on simple (restricted) flooding To broadcast a message, a mobile host transmits the message to all of its neighbors. On receiving a broadcast message, an intermediate mobile host retransmits the message to all of its neighbors.”). Alagar also discloses the concept of an incomplete network, where some, but not all, members of the network are connected “neighbors.” Two members of the Alagar network (called “mobile hosts”) “are *neighbors* if they can ‘hear’ each other.” Alagar, p. 238. Each mobile host has an “optimal” number of neighbors. *Id.* at 237 (“the optimum throughput occurs with a cell size defined by a range that includes an average of six nearest neighbors”). In one example, Alagar discloses a computer network where each mobile host is connected to exactly four neighbors. *Id.* at 237 (Fig. 1).

During prosecution, to avoid Alagar, Applicants amended the claims to add the m-regular and incomplete limitations. They argued that the amended claims were “precisely the opposite” of Alagar and “require[] that each participant in the network connects to and forms a neighbor bond to exactly an m number of neighbors.” Ex. C at 10. Applicants explained that Alagar only appeared to disclose an m-regular network because only part of the network was shown: “the Alagar reference is deceiving in that it coincidentally shows a 4-regular network. However, that is not the typical situation...[and] the Alagar reference clearly indicates that there is in fact nonregularity in a computer network formed because the number of neighbors is not set at a predetermined number Claim 1 as amended requires that the computer network be m regular at substantially all times where there are not new nodes entering or leaving the network.” Ex. C at 10.

Plaintiff's expert reports ignore the Court's claim construction, requiring “a state that the network is configured to maintain, where each participant is connected to exactly m neighbor participants,” and argue that the accused networks are “m-regular” simply because they purportedly have the very same features disclosed in Alagar. For instance, one accused network is supposedly m-regular because it “includes setting the optimal or maximum number of neighboring participants to which any participant connects.” Ex. D, EA Medvidovic Rpt. at 5. The allegedly infringing feature is identical to Alagar, which explains that each “mobile host” optimally will connect to 6 neighbors. *Alagar*, p. 237. For another accused network, Plaintiff alleges that supposed “proximity rules” cause players to connect to each other when they are near each other, which supposedly makes the network m-regular: “when the players are

¹ In the invalidity contentions, Alagar is referred to by its title “Reliable Broadcast in Mobile Wireless Networks, 1995.”

The Honorable Richard G. Andrews

October 27, 2017

Page 3

geographically dispersed through the gameplay area, the proximity connection rules will make the network m-regular.” Ex. E, TT Medvidovic Rpt. at 3. Yet, this very same feature is disclosed in Alagar, which explains that connections are also formed by proximity rules: mobile hosts become neighbors when they are close enough to each other to “hear” each other.” *Alagar*, p. 238. Defendants deny that these features are present or meet the claim limitations. But, because Plaintiff is attempting to recapture claim scope it gave up during prosecution, Defendants should be permitted to rely on Alagar, just as they said they would do, so they can fairly meet Plaintiff’s evolving infringement allegations.

The Special Master recently found good cause in an analogous situation. Plaintiff moved to preclude Defendants from relying on invalidity materials produced after fact discovery closed. Plaintiff’s motion was denied because Plaintiff had only recently disclosed a “new alleged infringement theory,” and Defendants could respond to this theory. Special Master Order No. 10 at 5 [D.I. 290].

Moreover, as set forth above, Defendants disclosed and identified Alagar as a reference at the first opportunity in their initial invalidity contentions dated May 6, 2016. Defendants then continued to reiterate that Alagar was a relevant prior art reference in response to Plaintiff’s infringement contentions. Ex. A at 14; Ex. F at 14. Defendants have certainly been diligent.

Finally, Plaintiff has not been prejudiced. The claim construction order construed the claims to require that “the network is configured to maintain, where each participant is connected to exactly m neighbor participants.” D.I. 275 at 15. The Court adopted this construction to avoid sweeping in “accidental” or structures that become m-regular and incomplete by chance. *Id.* Nevertheless, Plaintiff asserts infringement by networks that appear m-regular by chance. Under this infringement theory, Alagar is invalidating prior art. Plaintiff is not prejudiced by responding to the Alagar reference that it claimed around during prosecution.

Plaintiff Seeks Similar Relief Before The Special Master. Defendants did not delay the presentation of this issue. Any delay was caused by Plaintiff’s desire to seek the same relief before both this Court and the Special Master. When Plaintiff first raised the issue, it insisted that Defendants be the moving party and that the issue could not proceed before the Special Master. Yet, just last Friday, Plaintiff brought a motion before the Special Master seeking relief for purported violations of the Scheduling Order, including with respect to the Alagar reference. Defendants know of no reason that these issues should proceed separately.

Defendants also wish to advise the Court that there are other prior art issues that they are likely to raise with the Special Master. Defendants learned about a week ago of material prior art that was in Plaintiff’s possession before the suits were filed, but which does not appear to have been produced. Defendants learned of that art from a supplemental privilege log from Hamilton Capital’s lawyers. That log identified several prior art references that Plaintiff’s counsel sent to Hamilton Capital in January 2015. Defendants are in the process of meeting and conferring with Plaintiff’s counsel about these events, and anticipate that they will raise this issue with the Special Master shortly.

The Honorable Richard G. Andrews

October 27, 2017

Page 4

Respectfully,

/s/ Jack B. Blumenfeld

Jack B. Blumenfeld (#1014)

JBB:ncf

Enclosures

cc: Clerk of Court (Via Hand Delivery)
All Counsel of Record (Via Electronic Mail)