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February 7, 2018

BY CM/ECF & HAND DELIVERY

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

Re: *Acceleration Bay LLC v. Activision Blizzard, Inc. et al.*
D. Del., C.A. No. 16-453-RGA, 16-454-RGA, 16-455-RGA

Dear Judge Andrews:

Pursuant to the Court's request at the January 29, 2018 hearing, Acceleration Bay respectfully submits this summation of the experts' testimony regarding the construction of Term 4 ("means for connecting to the identified broadcast channel").

I. Summary

Based on the testimony at the January 29, 2018, hearing, the algorithm in Column 5 is clearly "sufficient to define the structure and make the bounds of the claim understandable," and that "one skilled in the art would understand from that disclosure" the structure corresponding to the function of Term 4. D.I. 388 at 3 (*citing Noah Sys., Inc. v. Intuit Inc.*, 675 F.3d 1302, 1313-14 (Fed. Cir. 2012); *see, e.g.*, Tr. at 72:16-19, 74:9-10. Accordingly, the Court's construction identifying Column 5 and Figure 8 as alternate embodiments is correct.

Defendants' own expert, Dr. John Kelly, conceded that the algorithm in the '344 Patent at Column 5 Lines 33-55 (the "Column 5 Disclosure") discloses to a POSA the function of "connecting to the identified broadcast channel." Although Defendants solicited testimony from Dr. Kelly to suggest that the Column 5 Disclosure is not sufficient, Dr. Kelly's May 19, 2017 claim construction declaration ("May Declaration") contradicted his testimony. D.I. 191-4, Ex. H (5/19/2017 Kelly Decl.) at pg. ¶ 71. Confronted with his May Declaration, on cross-examination Dr. Kelly was forced to concede these points. Specifically, Dr. Kelly conceded that the Column 5 Disclosure defines the bounds of the claim via a series of steps describing the process for connecting to a broadcast channel. Tr. at 71:25-72:9. Further, Dr. Kelly conceded that the steps are understandable to a POSA. Tr. at 74:9-10. Indeed, Dr. Kelly ultimately admitted that his prior May Declaration quoted the Column 5 Disclosure and characterized it as "disclos[ing] the following procedure for connecting to a broadcast channel with m-regular

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network graph.” Tr. at 77:1-14; D.I. 191-4, Ex. H (5/19/2017 Kelly Decl.) at pg. ¶ 71. While Dr. Kelly tried to point to portions of his May Declaration citing to Figure 8 and corresponding specifications (the “Figure 8 Disclosure”), on cross-examination Dr. Kelly was forced to admit that his citations to the Figure 8 Disclosure relate to the separate functions of identifying and selecting ports and are the subject of different inventions in the related patents—not Term 4. Tr. at 76:10-17 (finding and reordering port); Tr. at 78:1-14 (admitting portions of his May Declaration on port selection and port reordering are related to different patents and claims).

Plaintiff’s expert Dr. Michael Mitzenmacher also confirmed that the Column 5 Disclosure is sufficient to define the structure and make the bounds of the claim understandable. Dr. Mitzenmacher explained that the function of “connecting to a broadcast channel” is high-level and requires only a few basic steps to perform that function. Tr. at 15:15-25, 16:15-21. Dr. Mitzenmacher explained that all of the steps necessary to perform the connecting function are described in the Column 5 Disclosure, such that the bounds of the claim are understandable. Tr. at 20:4-22:6. Dr. Mitzenmacher also explained that the disclosures in the Figure 8 Disclosure are a second, different embodiment that includes optional features not necessary to perform the connecting function. Namely, the Figure 8 Disclosure includes steps for performing other functions that precede or follow the function of *connecting*, such as identifying the broadcast channel, ports and reordering ports. Tr. at 22:11-25:3. Those functions are the subject of different patents and claims.

II. The Disclosure in Column 5 Sufficiently and Understandably Describes the Steps to Perform the Function of Term 4

A. Term 4 Describes a High-Level Function of Connecting

The Column 5 Disclosure describes the structure, and more specifically, an algorithm, to perform the function of “connecting to the identified broadcast channel.” An algorithm, as explained by Dr. Mitzenmacher, is simply “a process to accomplish some task . . . a sequence of steps.” Tr. at 12:7-8. Further, Dr. Mitzenmacher explained that a POSA would understand that the disclosures needed to perform a function depend on the complexity and nature of the function. Tr. at 14:17-22 (“when we’re talking about a high-level functionality, you expect to see a corresponding high-level description.”).

Dr. Mitzenmacher explained that because the function of Term 4 is high-level—connecting to the identified broadcast channel—a POSA would expect there to be a high-level description of the steps to perform the function. Dr. Mitzenmacher then explained why, here, the high-level function of *connecting* to the identified broadcast channel is well within the skill-level of a POSA with the benefit of the teachings of the specifications:

We’re talking about making a connection within a network, a particular type of connection.

They identify a broadcast channel. But again, that’s a very high level of function, one that people understand readily . . . because they have to deal with managing connections to the networks. They would have seen that and understood that.

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And so, one would expect that . . . the corresponding description of an algorithm to do that would be a corresponding high-level.

* * *

But here we're talking about a high level networking function where there is already in place various protocols such as TCP/IP and so on for individual connections

And so, people understand the methodologies for doing connections. You would expect a description to take into account that people have this knowledge.

Tr. at 15:15-25, 16:15-21. Dr. Mitzenmacher further contrasted the high-level function of Term 4 with low-level functions requiring significantly more detail such as a something that needs to be implemented at the chip level. Tr. at 16:2-21.

Dr. Kelly did not dispute Dr. Mitzenmacher's definition of an algorithm, his explanation that the complexity of functions determines the level of detail needed for an algorithm, or that connecting is a high-level function.

B. The Column 5 Disclosure Describes a Series of Understandable Steps to Perform the Function of Term 4

1. The Experts Confirmed that a POSA Would Understand that the Column 5 Disclosure is Sufficient to Perform the Connect Function

Dr. Mitzenmacher explained that the Column 5 Disclosure describes three basic steps to perform the function of connecting to the identified broadcast channel:

[1] Each computer is aware of one or more "portal computers" through which that computer may locate the broadcast channel. A seeking computer locates the broadcast channel by contacting the portal computers until it finds one that is currently fully connected to the broadcast channel.

[2] The found portal computer then directs the identifying of four computers (i.e., to be the seeking computer's neighbors) to which the seeking computer is to connect.

[3] Each of these four computers then cooperates with the seeking computer to effect the connecting of the seeking computer to the broadcast channel

'344 Patent at 5:32-48; Tr. at 20:4-22:6.

Dr. Mitzenmacher explained that the above steps are sufficient for a POSA to understand the bounds and perform the high-level "connecting" function. For example, Dr. Mitzenmacher explained that if he were to give the Column 5 Disclosure to a senior level undergraduate student, who is taking a networking and algorithm course and who has some experience (i.e.,

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someone with even less experience than a POSA), the student could implement the function of connecting a computer to a portal computer using this disclosure. Tr. at 20:4-16. Dr. Mitzenmacher further explained that additional details were not needed because the series of steps disclosed in the Colum 5 Disclosure is sufficient to inform a POSA (or even an undergraduate student) how the function should be performed. Tr. at 21:7-2, 21:4-22:6.

Dr. Kelly did not rebut this opinion. Instead, Dr. Kelly admitted that the Column 5 Disclosure describes a series of steps that would be understood by a POSA. Tr. at 73:8-9 (“It’s fair to say that there are three steps here associated with connecting to a broadcast channel.”); Tr. at 74:6-10. Further, Dr. Kelly admitted that “Column 5 is basically a broad-brush overview of what *you would have to do in order to connect to the broadcast* channel.” Tr. at 65:24-66:1 (emphasis added).

2. Dr. Kelly’s Prior May Declaration Contradicted His Testimony

On direct examination Dr. Kelly testified that the Column 5 Disclosure does not disclose the procedure for connecting to the broadcast channel. The Court should disregard this testimony because it directly contradicts his prior May Declaration. Specifically, in his May Declaration Dr. Kelly admitted the exact opposite, stating that the Colum 5 Disclosure describes the procedure for “connecting to a broadcast channel.” D.I. 191-4, Ex. H (5/19/2017 Kelly Decl.) at pg. ¶ 71.

71. Having shown the advantages of a broadcast channel whose network graph is m-regular, the asserted patents then describe procedures by which a computer can connect to the m-regular broadcast channel and have the resulting network again be m-regular. For example, the asserted patents discloses the following procedure for connecting to a broadcast channel with m-regular network graph (*see A-1 at 5:18-48*) (emphasis added):

“To connect to the broadcast channel, the computer seeking the connection first locates a computer that is currently fully connected to the broadcast channel and then establishes a connection with [m] of the computers that are already connected to the broadcast channel.”

“Thus, the process of connecting to the broadcast channel includes locating the broadcast channel, identifying the neighbors for the connecting computer, and then connecting to each identified neighbor.”

“A seeking computer locates the broadcast channel by contacting the portal computers until it finds one that is currently fully connected to the broadcast channel. The found portal computer then directs the identifying of [m] computers (i.e., to be the seeking computer’s neighbors) to which the seeking computer is to connect. Each of these [m] computers then cooperates with the

Although Dr. Kelly tried to claw back the concessions in his May Declaration by pointing to other portions of his declaration citing to the Figure 8 Disclosure, on cross-examination Dr.

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Kelly was forced to admit that these additional citations related to different claims and different functions, not Term 4. Tr. at 75:18-76:17 *compare with* Tr. at 78:1-14.

3. Defendants' Expert Dr. Kelly Ignores the Knowledge and Understanding of a POSA

Dr. Kelly does not dispute that a POSA would have knowledge of and familiarity with networking protocols such as TCP/IP which are used to connect computers to a portal computer as explained by Dr. Mitzenmacher. Tr. at 21:7-22:6, 73:12-74:10. To the contrary, Dr. Kelly contends that a POSA would have even more knowledge and experience than Dr. Mitzenmacher's POSA, and would have a deeper understanding of networking tools and protocols for connecting computers. Tr. at 73:12-74:10. Further, Dr. Kelly admits that a POSA could read and understand the steps in Column 5. Tr. at 72:16-19, 73:4-9. In the face of these concessions (1) that a POSA would understand Column 5 to disclose the steps of connecting and (2) a POSA would have extensive networking experience on how to connect computer; there is no basis to find that the Column 5 Disclosure is not sufficient to perform the function of connecting to an identified broadcast channel to a POSA. *See* Tr. at 52:17-22; 60:16-23

4. Dr. Kelly Confused the Subject Matter of the Asserted Patents

Dr. Kelly incorrectly argued that the Column 5 Disclosure was incomplete because it did not include functionality that is the subject of *different patents*. Dr. Kelly asserted that the Column 5 Disclosure does not disclose how to identify and re-order ports:

The issue here is that there are tens of thousands of potential ports and it is just not practical for a seeking computer to dialing those one after the other. It would take far too long. And to make it to a point where you've exhausted every possible port on a portal computer, and you still don't have a connection.

So you've got to find some mechanism for identifying or increasing the likelihood that you will identify the port. And that's what the port ordering algorithm is used for.

Tr. at 66:25-67:9; *see also* Tr. at 66:8-22, 67:10-68:3. However, on cross-examination, Dr. Kelly admitted this issue is the subject of the '147 and '497 Patents. Tr. at 78:4-11. Thus, these functions have no bearing on the functionality covered by Term 4 of the '344 and '966 Patents

Dr. Kelly also testified that the Column 5 Disclosure does not disclose how to overcome the problems of "elongating the network." Tr. at 68:16-69:2. On cross-examination, however, Dr. Kelly conceded this is the functionality of the '069 Patent. Tr. at 75:21-76:6, 78:1-3. This also is not relevant to the construction of Term 4.

C. Figure 8 is an Alternate Embodiment with Optional Features

There is no reason to construe Term 4 as requiring all functionality described in the Figure 8 Disclosure Dr. Mitzenmacher explained that Figure 8 includes optional features (e.g.,

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