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May 25, 2018

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:

Following the May 17, 2018 hearing on pending summary judgment issues, the Court asked the parties to provide additional submissions on two issues by May 23, 2018. (D.I. 557.) Defendants understood those issues to be limited to providing additional law on (1) whether source code can be prior art under §102(b) as it relates to the "corset case," and (2) patent ineligibility for computer readable medium claims following *Cybersource*. (5/17/18 Hr'g Tr. 30:17-20; 78:8-14). Defendants submitted two letter briefs on these issues on May 23. Acceleration Bay, without seeking leave from the Court, submitted a "Supplemental MSJ submission" (D.I. 563) that addressed these issues and two additional issues – the request for correction of claim 19 and certain ActiveNet prior art issues. To the extent the Court considers Acceleration Bay's unauthorized additional briefing, Defendants respectfully request that the Court also consider the responses below to these two additional issues.

Request for Correction of Claim 19

"A district court can correct a patent only 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." *Novo Industries L.P. v. Micro Molds Corp.*, 350 F.3d 1348, 1354 (Fed. Cir. 2003). The correction now requested by Acceleration does not meet this standard because there are at least three alternatives for moving the "non-routing table based" clause – (1) "non-routing table based network" (proposed by Acceleration for over a year and rejected by this Court during claim construction), (2) "non-routing table based broadcast channel" (as recited, e.g., in claim 10 of the '634 patent), and (3) "non-routing table based method" (now proposed by Acceleration), and because these three alternatives would result in substantially different claim scope.

In *Novo*, the Federal Circuit reversed a correction by the district court, which merely changed the word "a" to "and," because other possibilities for correction existed with substantive impact on the claims. *Id.* at 358-59. Similarly, in *Fargo Electronics, Inc. v. Iris, Ltd., Inc.*, the Federal Circuit affirmed the district court's refusal to make a correction because there were different ways to correct the claim resulting in different scope. 287 Fed.Appx. 96, 99-101 (Fed. Cir. 2008). District courts have reached the same conclusion against correction of claim language. *See Magnetar Technologies Corp. v. Six Flags Theme Parks, Inc.*, 61 F.Supp.3d 437, 442-43 (D. Del. 2014) (Court refused to

correct claim in spite of a clear error because different possible corrections left the "scope of the claim subject to reasonable debate."); *Smartflash LLC v. Apple Inc.*, 77 F.Supp.3d 535, 561 (E.D. Texas 2014) (court refused to correct an alleged error "[b]ecause the purported error is more than a misspelling or a missing letter.").

Acceleration's reliance on *CBT Flint Partners v. Return Path, Inc.* 654 F.3d 1353 (Fed. Cir. 2011) is misplaced because there the Court found that the claim would have the "same scope and meaning under each of the three possible" corrections. *Id*. at 1358. Here, the placement of "non-routing table based" to modify "network," "broadcast channel" or "method" would result in markedly different claim scope, as it would alter which of those different items may or may not use a routing table. This difference is scope is analogous to the difference between describing a "non-subway based city" and a "non-subway based *method* for getting from point A to point B in the city." The former would require that the *city* not have subways, whereas the latter would merely require that the *method* doesn't use any subways that are present in the city. Acceleration Bay never grapples with the clearly different scope that results from these different possible corrections, providing only the conclusory statement that "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." D.I. 563 at 2. But the *network* clearly is not the same thing as the *method*, so it is certainly a different scope to require that the network does not use routing tables as opposed to just requiring that the method not using routing tables.

The Public Use of ActiveNet In Heavy Gear II Demo

Defendants provided evidence that (1) Dr. Karger evaluated two versions of ActiveNet and concluded they were indistinguishable in relevant part, and (2) that even if Dr. Karger had no personal knowledge of a public use of ActiveNet, Mr. Kegel did. D.I. 474, 32. Mr. Kegel's declaration states that "'Heavy Gear 2 demo was released using the version of ActiveNet current in November 1998, and it was released [to the public] in the weeks immediately thereafter.'" D.I. 488, Ex. E-18, Kegel Dep. Tr. 103:19-104:10.

Acceleration Bay argues for the first time that there is no evidence of what code was "compiled" into Heavy Gear II Demo. This is wrong. Mr. Kegel's declaration explains that his technique was embodied in software code and was used by at least Heavy Gear II Demo. It is this technique that is described in his web publication and implemented by the relevant ActiveNet code. A December 14, 1998 web posting corroborates Mr. Kegel's recollection. *See* D.I. 488, (Kegel Decl.), Attachment 10 ("The first games known to use [Mr. Kegel's techniques] are Heavy Gear 2 Demo and Battlezone . . . .").

Respectfully,

/s/ Jack B. Blumenfeld

Jack B. Blumenfeld (#1014)

JBB/dlw
cc: All Counsel of Record (via Electronic Mail)