

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ACCELERATION BAY LLC,

Plaintiff,

v.

ELECTRONIC ARTS INC.,

Defendant.

Civil Action No. 1:16-cv-00454-RGA

MEMORANDUM OPINION

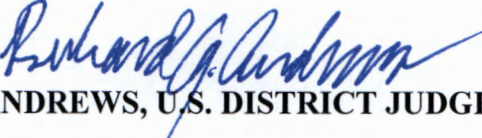
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March 27, 2019


ANDREWS, U.S. DISTRICT JUDGE:

Presently before me are Defendant's Motion for Summary Judgment (D.I. 424) and Plaintiff's Motion for Partial Summary Judgment (D.I. 435). The Parties have briefed the issues. (D.I. 426, 437, 465, 467, 476, 478). I heard argument on February 28, 2019. (D.I. 525 ("Tr.")). I ordered supplemental briefing on the issues addressed during the argument. (D.I. 526, 534, 535). For the reasons set out more fully below, I will partially grant Defendant's Motion for Summary Judgment and deny Plaintiff's Motion for Partial Summary Judgment.

I. BACKGROUND

Plaintiff brought this suit against Electronic Arts Inc. ("EA") on June 17, 2016, alleging that certain multiplayer features of the FIFA, NHL, PGA Tour,¹ and Plants v. Zombies: Garden Warfare ("PvZ") games infringe U.S. Patent Nos. 6,701,344 ("344 Patent"), 6,714,966 ("966 Patent"), 6,732,147 ("147 Patent"), 6,829,634 ("634 Patent"), 6,910,069 ("069 Patent"), and 6,920,497 ("497 Patent"). (D.I. 1). On the same date, Plaintiff filed suit against several other entities, including Activision Blizzard Inc. ("Activision"). (C.A. 16-453 (the "Activision Case")).

On August 8, 2018, after the Parties completed their initial briefing on the pending motions, I granted summary judgment of invalidity of the asserted claims of the '634 Patent and claims 11, 15, and 16 of the '147 Patent. (D.I. 499 at 7-9, 20-23, 500). I also granted Activision summary judgment of noninfringement of the '344, '966, and '497 Patents as to certain accused games in that case. (*Id.* at 10-20).

¹ The current briefing makes no mention of the PGA Tour games.

II. LEGAL STANDARDS

A. Summary Judgment

“The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). The moving party has the initial burden of proving the absence of a genuinely disputed material fact relative to the claims in question. *Celotex Corp. v. Catrett*, 477 U.S. 317, 330 (1986). Material facts are those “that could affect the outcome” of the proceeding, and “a dispute about a material fact is ‘genuine’ if the evidence is sufficient to permit a reasonable jury to return a verdict for the nonmoving party.” *Lamont v. New Jersey*, 637 F.3d 177, 181 (3d Cir. 2011) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). The burden on the moving party may be discharged by pointing out to the district court that there is an absence of evidence supporting the non-moving party’s case. *Celotex*, 477 U.S. at 323.

The burden then shifts to the non-movant to demonstrate the existence of a genuine issue for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986); *Williams v. Borough of West Chester, Pa.*, 891 F.2d 458, 460–61 (3d Cir. 1989). A non-moving party asserting that a fact is genuinely disputed must support such an assertion by: “(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations . . . , admissions, interrogatory answers, or other materials; or (B) showing that the materials cited [by the opposing party] do not establish the absence . . . of a genuine dispute” Fed. R. Civ. P. 56(c)(1).

When determining whether a genuine issue of material fact exists, the court must view the evidence in the light most favorable to the non-moving party and draw all reasonable inferences in that party’s favor. *Scott v. Harris*, 550 U.S. 372, 380 (2007); *Wishkin v. Potter*, 476 F.3d 180, 184 (3d Cir. 2007). A dispute is “genuine” only if the evidence is such that a

reasonable jury could return a verdict for the non-moving party. *Anderson*, 477 U.S. at 247-49. If the non-moving party fails to make a sufficient showing on an essential element of its case with respect to which it has the burden of proof, the moving party is entitled to judgment as a matter of law. *See Celotex Corp.*, 477 U.S. at 322.

B. Infringement

A patent is infringed when a person “without authority makes, uses, offers to sell, or sells any patented invention, within the United States . . . during the term of the patent” 35 U.S.C. § 271(a). A two-step analysis is employed in making an infringement determination. *See Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 976 (Fed. Cir. 1995) (en banc), *aff’d*, 517 U.S. 370 (1996). First, the court must construe the asserted claims to ascertain their meaning and scope. *See id.* The trier of fact must then compare the properly construed claims with the accused infringing product. *See id.* at 976. This second step is a question of fact. *See Bai v. L & L Wings, Inc.*, 160 F.3d 1350, 1353 (Fed. Cir. 1998).

“Literal infringement of a claim exists when every limitation recited in the claim is found in the accused device.” *Kahn v. Gen. Motors Corp.*, 135 F.3d 1472, 1477 (Fed. Cir. 1998). “If any claim limitation is absent from the accused device, there is no literal infringement as a matter of law.” *Bayer AG v. Elan Pharm. Research Corp.*, 212 F.3d 1241, 1247 (Fed. Cir. 2000). If an accused product does not infringe an independent claim, it also does not infringe any claim depending thereon. *See Wahpeton Canvas Co. v. Frontier, Inc.*, 870 F.2d 1546, 1553 (Fed. Cir. 1989). However, “[o]ne may infringe an independent claim and not infringe a claim dependent on that claim.” *Monsanto Co. v. Syngenta Seeds, Inc.*, 503 F.3d 1352, 1359 (Fed. Cir. 2007) (internal quotations omitted). A product that does not literally infringe a patent claim may still infringe under the doctrine of equivalents if the differences between an individual limitation of the claimed invention and an element of the accused product are insubstantial. *See Warner—*

Jenkinson Co. v. Hilton Davis Chem. Co., 520 U.S. 17, 24 (1997). The patent owner has the burden of proving infringement and must meet its burden by a preponderance of the evidence. *See SmithKline Diagnostics, Inc. v. Helena Lab. Corp.*, 859 F.2d 878, 889 (Fed. Cir. 1988) (citations omitted).

When an accused infringer moves for summary judgment of non-infringement, such relief may be granted only if at least one limitation of the claim in question does not read on an element of the accused product, either literally or under the doctrine of equivalents. *See Chimie v. PPG Indus., Inc.*, 402 F.3d 1371, 1376 (Fed. Cir. 2005); *see also TechSearch, L.L.C. v. Intel Corp.*, 286 F.3d 1360, 1369 (Fed. Cir. 2002) (“Summary judgment of noninfringement is . . . appropriate where the patent owner’s proof is deficient in meeting an essential part of the legal standard for infringement, because such failure will render all other facts immaterial.”). Thus, summary judgment of non-infringement can only be granted if, after viewing the facts in the light most favorable to the non-movant, there is no genuine issue as to whether the accused product is covered by the claims (as construed by the court). *See Pitney Bowes, Inc. v. Hewlett-Packard Co.*, 182 F.3d 1298, 1304 (Fed. Cir. 1999).

III. DISCUSSION

The Parties raised numerous issues in their summary judgment briefing. Most were not adequately briefed, and I do not consider them any further. I asked the Parties to specifically address certain issues during oral argument and in 75 pages of additional briefing. (D.I. 524). I will address those issues in detail and deny summary judgment on the rest.

A. Infringement of the Asserted Claims of the '344, '966, and '497 Patents

The Parties agree that, under my reasoning in the Activision Case, Defendant does not make or sell the inventions claimed in the '344, '966, and '497 Patents. Plaintiff also agrees that my opinion in the Activision Case limits its use argument to Defendant’s alleged use by testing

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