IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

TECHNO VIEW IP, INC., Plaintiff, v. OCULUS VR, LLC, and FACEBOOK, INC., Defendants.	Case No. 17-cv-386-VAC-CJB

PLAINTIFF TECHNO VIEW IP INC.'S OBJECTIONS TO THE AUGUST 30, 2018 REPORT AND RECOMMENDATION CONSTRUING DISPUTED CLAIM TERMS

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Pursuant to Fed. R. Civ. P. 72(b)(2) and (b)(3) and D. Del. LR 72.1(a)(3) and (b), plaintiff Techno View IP, Inc. ("TVIP") respectfully objects to Magistrate Judge Burke's August 30, 2018 Report and Recommendation (D.I. 76)[1] construing several disputed claim terms (Terms 5-6) of TVIP's U.S. Patent Nos. 7,666,096 (the "'096 patent") and 8,206,218 (the "'218 patent").[2]

Term: "storing a[n] [videogame] image in[to] the [left/first] [back]buffer; determining [if/when] the [videogame] image is [in] a two-dimensional [format/image] or a three-dimensional [format/image]" (Claims 1, 8, and 16 of the '096 patent)

TVIP objects to the ruling of the Report and Recommendation that Term 1 ("storing …; determining …") should be construed as requiring that the storing step occur prior to the determining step. *See* D.I. 77 at 2-5.

The Report and Recommendation relies on a flawed antecedent basis argument. Antecedent basis is a judicially created requirement that stems from Section 112(b) of the Patent Statute, which mandates that claims, "particularly point [] out and distinctly claim [] the subject matter which the inventor or a joint inventor regards as the invention." This is referred to as definiteness—a claim is indefinite when it contains words or phrases whose meaning is unclear. *See In re Packard*, 751 F.3d 1307, 1314 (Fed. Cir. 2014). Thus, the requirement is that each claim element must have an antecedent basis. To satisfy this requirement, an indefinite article (e.g., "a" or "an") must be used before a noun or noun phrase the first time that noun or noun phrase is introduced. When that noun is used subsequently throughout the claim, it must then be preceded by a definite article (e.g., "the" or "said"). This relates to definiteness, not claim construction and order of steps.

[1] Unless otherwise noted, the docket entries referred to in these objections are those in Case No.: 17-cv-386-VAC-CJB

[2] Pursuant to D. Del. LR 72.1(b), TVIP's objections should be reviewed by the Court *de novo*.

The Report cites to two cases: *Wi-Lan, Inc v. Apple, Inc.*, 811 F.3d 455 (Fed. Cir. 2016) and *SCVNGR, Inc. v. DailyGobble, Inc.*, CASE NO. 6:15-CV-493-JRG-KNM, 2017 WL 4270200 (E.D. Tex. Sept. 26, 2017), neither of which stands for the proposition that the use of indefinite and definite articles are determinative of the order in which steps must be performed. The Report and Recommendation first cites to *Wi-Lan*, quoting "Subsequent use of the definite articles 'the' or 'said' in a claim refers back to the same term recited earlier in the claim." D.I. 76 at 4. This simply describes part of the requirements for definiteness. The Report and Recommendation then cites to a portion of *SCVNGR* that states, "Step (b) recites 'transmitting ... the code' generated in step (a), so step (a) must be performed before step (b)." D.I. 76 at 4-5. The Court in *SCVNGR* did not find the steps needed to be performed in the claimed order based on an antecedent basis analysis. Rather, the antecedent basis requirement was only used to show that the code transmitted in step (b) was the same code generated in step (a). The Court in *SCVNGR* relied on simple logic to find that a code must be generated before it can be transmitted, and therefore step (a) must occur before step (b).

Here, much like in *SCVNGR*, the antecedent basis requirement clearly shows that the image referred to in the storing step is the same as the image referred to in the determining step. However, there is no logical reason why the determining step cannot occur prior to the storing step, nor is there a grammatical reason (such as displaying the *stored* image, which grammatically requires an image to be stored first) for restricting the order of storing and determining. For example, the patent describes an example of the determining step as simply checking a flag. *See* '096 patent, col. 11:12-13 ("VERIFIES IF IT IS [3D] BY CHECKING THE FLAG"). There is no logical or technical reason why the verifying of a programming flag cannot happen before or after a left eye image is placed in a buffer.

The Report and Recommendation then appears to conclude that, because logic and grammar can be used to describe why the *other* steps mentioned in the claim are required to be in their claimed order, then the only two steps actually in question must therefore also occur in the claimed order. However, even assuming, *arguendo*, that the other steps must be performed in their claimed order, the logic or grammar that applies to other steps does not apply here. It is clear, logically and grammatically, that the step of "displaying *the image stored in the left backbuffer* …" must occur after the image is actually stored in the left backbuffer. Similarly, the step "simultaneously displaying the images stored in the left and right backbuffers …" must occur after the images are actually stored in the left and right backbuffers. But no such logical or grammatical argument can be made for the "storing" and "determining" steps to be carried out in one particular order.

Accordingly, TVIP proposes that the Court adopt TVIP's construction of the term "storing a[n] [videogame] image in[to] the [left/first] [back]buffer; determining [if/when] the [videogame] image is [in] a two-dimensional [format/image] or a three-dimensional [format/image]" such that the storing step and the determining step may be performed in any order.

Term: "videogame" (Claims 1, 5, 8, 12, and 16 of the '096 patent; claims 1, 2, 7, and 8 of the '218 patent)[3]

The words of a claim are generally given their ordinary and customary meaning as understood by a person of ordinary skill in the art when read in the context of the specification and prosecution history. *See Phillips v. AWH Corp.*, 415 F.3d 1303, 1313 (Fed. Cir. 2005) (en banc). There are only two exceptions to this general rule: 1) when a patentee sets out a definition

[3] The term "videogame" generally appears in the patent claims as part of a phrase, e.g., "videogame system," (*see, e.g.*, '096 patent, col. 13:39), but also as a standalone term (i.e., "the videogame"). (*id.*, col. 14:3).

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