IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

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

REPORT AND RECOMMENDATION

In this action filed by Plaintiff Techno View IP, Inc. ("Plaintiff") against Oculus VR, LLC and Facebook, Inc. (collectively, "Defendants"), Plaintiff alleges infringement of United States Patent Nos. 7,666,096 (the "'096 patent") and 8,206,218 (the "'218 patent"). Presently before the Court is the matter of claim construction. The Court recommends that the District Court adopt the constructions as set forth below.

I. BACKGROUND AND STANDARD OF REVIEW

The Court hereby incorporates by reference the summary of the factual and procedural background of this matter set out in its August 15, 2018 Report and Recommendation ("August 15 R&R"). (D.I. 74 at 1-3) It additionally incorporates by reference the legal principles regarding claim construction set out in the August 15 R&R. (*Id.* at 3-5)

II. DISCUSSION

The parties had disputes regarding eight terms or sets of terms (hereafter, "terms"). The August 15 R&R addressed the first four terms. The instant Report and Recommendation addresses terms five and six. The final two terms will be addressed in a forthcoming Report and Recommendation.

A. "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 recite the steps "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.]" The recitation of these steps is representative in claim 1, and for ease of reference the Court again reproduces that claim below, with these steps emphasized:

> **1.** A method of displaying images in a videogame system that supports two-dimensional and three-dimensional display of the images, said method comprising the computer implemented steps of:
> clearing left and right backbuffers in the videogame system;
> *storing an image into the left backbuffer;*
> *determining if the image is in a two-dimensional format or a three-dimensional format*, wherein when the image is in a three-dimensional format, calculating the coordinates of a second view position of the image and storing a second view position image into the right backbuffer;
> displaying the image stored in the left backbuffer onto one or more displays when the image is in a two-dimensional format; and
> simultaneously displaying the images stored in the left and right backbuffers onto the one or more displays to create a three dimensional perspective of the image to a user when the image is in a three-dimensional format.

('096 patent, col. 13:39-58 (emphasis added))

The parties' sole dispute with respect to this claim term is whether these two steps (the "storing" step and the "determining" step) must be performed in the order in which they appear in the claim (i.e., that the storing step must be performed before the determining step). (D.I. 52 at 6; D.I. 53 at 6; Tr. at 75) Plaintiff asserts that they do not need to be performed in this order; Defendants argue that they do. (D.I. 52 at 6; D.I. 53 at 6)

Federal Circuit caselaw states that "unless the steps of a method claim actually recite an order, the steps are not ordinarily construed to require one." *Mformation Techs., Inc., v. Research In Motion Ltd.*, 764 F.3d 1392, 1398 (Fed. Cir. 2014) (internal quotation marks, citation and brackets omitted); *see also Altiris, Inc. v. Symantec Corp.*, 318 F.3d 1363, 1369 (Fed. Cir. 2003). In determining whether steps "actually recite an order," a two-part test is used. *Altiris, Inc.*, 318 F.3d at 1369 (citing *Interactive Gift Express, Inc. v. Compuserve Inc.*, 256 F.3d 1323 (Fed Cir. 2001)). First, a court looks to the claim language to determine whether, as a matter of logic or grammar, the steps must be performed in the order written. *Mformation Techs., Inc.*, 764 F.3d at 1398-99; *Altiris, Inc.*, 318 F.3d at 1369. If not, then the court examines the rest of the specification, in order to assess whether *it* directly or implicitly requires such a construction. *Mformation Techs., Inc.*, 764 F.3d at 1398-99; *Altiris, Inc.*, 318 F.3d at 1370. If it does not, then the sequence in which such steps are written is not a requirement. *Altiris, Inc.*, 318 F.3d at 1370.

With respect to step one of this test, Plaintiff contends that there is no matter of logic or grammar that requires the storing step to be performed prior to the determining step. (D.I. 52 at 7)[1] Specifically, Plaintiff argues that the claim does not use language such as "first," "then," or "after," which would explicitly require such an order. (Tr. at 77) Plaintiff also points to a

[1] Plaintiff also argues, without any citation to the patent specification, that if the storing and determining steps were to be switched (such that the determining step came first), this would be advantageous in that it would "save a significant amount of processing time" because "[s]ubstantial processing time is inherently lost if the processor has to run a separate determining step after each storage step for each image." (D.I. 52 at 7) However, as Defendants note, (D.I. 57 at 6-7), Plaintiff's assertion amounts to nothing more than attorney argument, since the Court has been presented with nothing in the intrinsic or extrinsic record to support it, *see Virginia Innovation Scis., Inc. v. Samsung Elecs. Co.*, 614 F. App'x 503, 511 (Fed. Cir. 2015) ("[A]ttorney arguments are not relevant intrinsic or extrinsic evidence[.]").

limitation in claim 1 that surely does make clear that an order is required—"displaying the image stored in the left backbuffer . . . [.]" (D.I. 59 at 9) Obviously, the way this "displaying" step is written (i.e., that "the image [already] stored" is the thing to be displayed), it cannot occur until after the storing step has taken place. Thus, Plaintiff argues, when the patentee wanted to recite a specific order, it knew how to do so.

In the Court's view, the matter is in fact settled at step one, but not in Plaintiff's favor. (D.I. 53 at 7 (Defendants arguing that "there is no need to proceed beyond the first step because the grammar and logic of the claims clearly require that the steps be performed in the order recited")) Most significant to the Court's decision here is the importance of certain language in the determining step. After claim 1 recites "storing *an image* into the left backbuffer," the next listed step is "determining if *the image* is in a two-dimensional format or a three-dimensional format[.]" ('096 patent, col. 13:45-47 (emphasis added))[2] What image is it that the videogame system is making this determination about? The answer, grammatically and logically seems obvious: it is the "image" that has previously been stored (the only "image" that is referred to in the body of the claim before the "determining" step is set out).[3] (D.I. 53 at 7; D.I. 57 at 6; Tr. at 83, 85, 87); *see Wi-Lan, Inc v. Apple, Inc.*, 811 F.3d 455, 462 (Fed. Cir. 2016) ("Subsequent use of the definite articles 'the' or 'said' in a claim refers back to the same term recited earlier in the claim."); *SCVNGR, Inc. v. DailyGobble, Inc.*, CASE NO. 6:15-CV-493-JRG-KNM, 2017 WL

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[2] Substantially similar language also appears in claims 8 and 16. ('096 patent, cols. 14:17-18, 15:17-19)

[3] The fact that the storing step refers to "*an* image" also seems significant. The use of the word "an" suggests that this is purposefully the first time that the image is referred to in the body of the claim. Thus when that image is referred to again in the determining step, it is referred to as "*the* image"—the one previously stored.

4270200, at *10 (E.D. Tex. Sept. 26, 2017) ("Step (b) recites 'transmitting . . . the code' generated in step (a), so step (a) must be performed before step (b).") (emphasis omitted).

In addition to the strength of this "antecedent basis" argument, the Court notes that the structure of the remaining claim limitations also suggests that the storing and determining steps (and indeed, certain other steps) must occur in their listed order. The first limitation in claim 1 requires the "clearing [of the] left and right backbuffers in the videogame system." ('096 patent, col. 13:43-44) And then the storing step is listed, stating that the method requires "storing an image into the left backbuffer." (*Id.*, col. 13:45) It makes both grammatical and logical sense that the method would *first* require clearing the left backbuffer so that the backbuffer is *then* ready for an image to be stored in it. Next, the limitation immediately after the storing and determining steps is the displaying step. Above, the Court has already explained why that limitation must follow the storing step; it must also come after the determining step, because the displaying step requires that the system know whether the image to be displayed is two-dimensional, and that analysis happens in the determining step. As for the last claim limitation—the "simultaneously displaying" limitation—it requires that images already stored in the left and right backbuffers must be displayed simultaneously. (*Id.*, col. 13:54-57) And so it stands to reason that this step has to come after the storing and determining steps set out before it in the claim, since, *inter alia*, those two limitations are the ones that describe how images are stored in the left and right backbuffers in the first place.[4]

For these reasons, the Court will construe the "storing" and "determining" steps to require that the steps must occur in the order recited in the claims.

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[4] Again, though claims 8 and 16 use somewhat different language, they too suggest a required order for their steps. ('096 patent, cols. 14:12-32, 15:12-16:9)

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