

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ACCELERATION BAY LLC,)	
)	
Plaintiff,)	
)	
v.)	C.A. No. 16-453 (RGA)
)	
ACTIVISION BLIZZARD, INC.)	
)	
Defendant.)	
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ACCELERATION BAY LLC,)	
)	
Plaintiff,)	
)	
v.)	C.A. No. 16-454 (RGA)
)	
ELECTRONIC ARTS INC.,)	
)	
Defendant.)	
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ACCELERATION BAY LLC,)	
)	
Plaintiff,)	
)	
v.)	C.A. No. 16-455 (RGA)
)	
TAKE-TWO INTERACTIVE SOFTWARE,)	
INC., ROCKSTAR GAMES, INC. and)	
2K SPORTS, INC.,)	
)	
Defendants.)	

**DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION TO CORRECT CLAIM 19
OF THE '634 PATENT**

I. INTRODUCTION

This the second time in less than a month that Plaintiff has advanced a new and previously undisclosed claim construction position to avoid a ruling that Term 24, the preamble of Claim 19 of the '634 patent, is indefinite. Just last month, Plaintiff argued for the first time that Term 24 is not even a limitation. The Court rejected that argument, specifically admonished Plaintiff's national counsel for advancing it, and found Term 24 indefinite. D.I. 422; D.I. 423 at 14.

Now, Plaintiff offers yet another construction for Term 24, this time under the guise of a Motion to Correct Claim 19 (D.I. 438)¹ ("Motion"). The Motion is not supported by any expert testimony and contradicts Plaintiff's prior five different positions on this term. The Motion should be rejected as untimely, unreasonable, and not meeting the very high standard for judicial correction of a patent claim.

This latest position is one of many constructions Plaintiff has offered for Term 24 including:

1. the preamble should have its plain and ordinary meaning. *See, e.g.*, D.I. 117, Ex. 1 at 76; D.I. 186 at 94;
2. "non-routing table based" modifies the "network" and means that the network does not "need" routing tables to "move messages between participants." *See, e.g.*, D.I. 366 at 33;
3. "non-routing table" modifies network and means that the network "does not use routing tables." *See, e.g.*, Exh. C (December 18, 2017 *Markman* transcript) at 8:3-9;
4. "non-routing table based" modifies the entire preamble beginning with "computer readable medium." *See* Exh. A (Nov. 21, 2017 *Markman* Transcript) at 91:1-92:25);
5. the preamble is not actually limiting. D.I. 417 at 1-2; and

¹ All citations to docket items refer to C.A. No. 16-453 unless otherwise stated.

6. via the present motion, the placement of “non-routing table based” in the claim is an “obvious” error (albeit one Plaintiff never even mentioned during the lengthy *Markman* process) and should modify the “method.” See D.I. 438 at 2.²

The circumstances of this newest position are reminiscent of Plaintiff’s fifth position, where Plaintiff argued that the preamble was not limiting after agreeing on the record to a construction that specifically stated the preamble *was* limiting. The Court rejected Plaintiff’s “preamble is not limiting” position out of hand, finding it to be unreasonable as well as waived. See D.I. 423 (“Plaintiff waived the issue, and the preamble is limiting.”); D.I. 422 (questioning reasonableness of Plaintiff’s position). Plaintiff’s latest attempt to salvage this claim is similarly unreasonable and untimely, and therefore should be deemed waived.

Even if not waived, Plaintiff’s position should be rejected. The standard for judicial correction is that the supposed error is so obvious that the proposed correction is *beyond reasonable debate*. Plaintiff now says that “non-routing table based” modifies the word “*method*.” Yet, up until now, Plaintiff’s principal position was that the phrase “non-routing table based” modified a different part of the claim altogether, the “*network*.” See, e.g., D.I. 366 at 33, 58. For example, at the December 18, 2017 hearing, Plaintiff forcefully argued that the claim was “clear” on that point. Exh. C (December 18, 2017 *Markman* transcript) at 67:19-68:4 (“And when you read it in the context of the claim itself and you read the entire phrase, it’s *clear that it’s talking about a non-routing table-based network*. It doesn’t use routing tables as part of the overlay network. So I think it becomes *very clear* when you read it in context.”). Thus, even if the Court were to accept Plaintiff’s unsupported assertion that there was a drafting “error” for claim 19 and endeavor to rewrite the claim to fix the error, it is not at all “obvious” how claim 19 should be

² Plaintiff’s prior positions are illustrated in the accompanying chart. See Exh. B.

corrected. At the very least, it is open to reasonable debate whether “non-routing table based” should define the network (as Plaintiff argued during *Markman*) or define the method (as Plaintiff argues now).

If Plaintiff reasonably thought that the claim included an obvious error that could be corrected by simply moving the phrase “non-routing table based” to precede “method,” it should have advanced that position earlier, and it also should not have argued and agreed that it modified a different part of the claim. Yet, Plaintiff proceeded with nearly 12 months of claim construction on this issue and never once argued that there was an error in claim drafting, let alone an error that was “obvious” to correct. This Court has already held that Term 24 is indefinite and that the Court “cannot rewrite the patent” to correct the indefiniteness. D.I. 423 at 14, 17. That should be the end of the inquiry.

II. ARGUMENT

A. A District Court May Only Correct Obvious Errors and Only When There Is No Reasonable Debate About Claim Scope

A “district court may correct an obvious error in a patent claim... ‘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.’” *CBT Flint Partners, LLC v. Return Path, Inc.*, 654 F.3d 1353, 1358 (Fed. Cir. 2011) (citing *Novo Indus., L.P. v. Micro Molds Corp.*, 350 F.3d 1348, 1357 (Fed. Cir. 2003)). In *CBT Flint Partners*, the Federal Circuit found that the claim contained an obvious error, which was “confirmed by the fact that a person of skill in the art would find the claim to have *the same scope and meaning* under each of the three possible [corrections] that the court found reasonable.” *Id.* at 1358-59 (emphasis added). In *Novo Indus.*, however, the Federal Circuit

reversed a correction by the district court which merely changed the word “a” to “and” because other possibilities for correction existed. *Novo Indus.*, 350 F.3d at 1357.

As a general matter, the Federal Circuit has made it clear that “[c]ourts do not rewrite claims; instead, [they] give effect to the terms chosen by the patentee.” *K-2 Corp. v. Salomon S.A.*, 191 F.3d 1356 (Fed. Cir. 1999); *see also Chef Am., Inc. v. Lamb-Weston, Inc.*, 358 F.3d 1371, 1374 (Fed. Cir. 2004) (“This court, however, repeatedly and consistently has recognized that courts may not redraft claims, whether to make them operable or to sustain their validity.”). Indeed, judicial correction of a patent has been called a “nearly impossible standard.” *LG Elecs., Inc. v. Quanta Computer Inc.*, 566 F. Supp.2d 910, 913 (W.D. Wis.2008); *see also 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.”).

Furthermore, even in the case of an obvious error, correction is precluded if the appropriate correction may be subject to reasonable debate. *See, e.g., Fargo Electronics, Inc. v. Iris, Ltd., Inc.*, 287 Fed. Appx. 96, 99-101 (2008) (declining to correct claims where different reasonable ways to correct the error result in different claim scope.). For example, in *Magnetar Technologies Corp. v. Six Flags Theme Parks, Inc.*, Judge Stark found an obvious error in the claim language, noting “‘said wheels,’ ‘said rails,’ or ‘said track’ are plausible substitutions for the erroneous recital of ‘said tracks.’” 61 F. Supp. 3d 437, 442-43 (D. Del. 2014). But the Court refused to exercise its narrow discretion to redraft the claim because those different corrections left the “scope of the claim subject to reasonable debate.” *Id.*

The standard for correction is a high bar because patent claims are not merely intended to grant rights to a patentee, but also to inform the public as to the boundaries of those rights. *See, e.g., Exh. D (D. Del. Parallel Networks Opinion)* at 7 (noting that “it is important to remember that

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