IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ACCELERATION BAY LLC, Plaintiff, v. ACTIVISION BLIZZARD, INC. Defendant.	Civil Action No. 16-453-RGA
ACCELERATION BAY LLC, Plaintiff, v. ELECTRONIC ARTS INC. Defendant.	Civil Action No. 16-454-RGA
ACCELERATION BAY LLC, Plaintiff, v. TAKE-TWO INTERACTIVE SOFTWARE, INC., ROCKSTAR GAMES, INC., AND 2K SPORTS, INC. Defendants.	Civil Action No. 16-455-RGA

ORDER

In response to Defendants' Motion for Clarification to the Court's Claim Construction Opinion and Order (No. 16-453, D.I. 302; No. 16-454, D.I. 275, No. 16-455, D.I. 271) and

Plaintiff's Opposition (No. 16-453, D.I. 318; No. 16-454, D.I. 286; No. 16-455, D.I. 281), I directed the parties to submit additional briefs (No. 16-453, D.I. 340, 345, 354; No. 16-454, D.I. 307, 312, 321; No. 16-455, D.I. 302, 307, 316) on the issues of (1) whether there is a substantive difference between the algorithm/"process of a new computer Z connecting to the broadcast channel" of Figures 3A and 3B and corresponding specifications and the algorithm /"processing of the connect routine" of Figure 8 and corresponding specifications, and (2) if there is a difference, whether Figures 3A and 3B and corresponding specifications constitute a separate algorithm.

As to issue (1), Defendants argue, "The specifications first broadly disclose various concepts, including how a new computer is added to the claimed network," in Figures 3A and 3B and corresponding specifications. (D.I. 340 at 2).[1] Then, Defendants argue, Figure 8 and corresponding specifications "provide details, including the components of such a computer in the network and the algorithms that can be used to implement the functions introduced earlier in the specification." (*Id.*). Plaintiff does not disagree that Figures 3A and 3B and corresponding specifications are a broader "embodiment" than the "more complex" Figure 8 and corresponding specifications, which add "additional steps" and "routines." (D.I. 345 at 6-7). Thus, the parties seem to agree that the Figure 3A/3B algorithm and the Figure 8 algorithm are describing the same algorithm, but at different levels of detail.

The level of detail might matter. It might matter for infringement, but that is clearly an issue for another day. It might matter for invalidity. In essence, the increased level of detail for the Figure 8 algorithm might mean that it is not indefinite, while the lower level of detail for the Figure 3A/3B algorithm might mean that it is indefinite.

[1] Subsequent citations to "D.I. ___" are to the docket in C.A. No. 16-453 only.

That brings us to issue (2), where Defendants argue that Figures 3A and 3B and corresponding specifications are a "black box" and do not provide an independent algorithm for "connecting." (D.I. 340 at 4-6, D.I. 354 at 2-6). Plaintiff, on the other hand, argues that Figures 3A and 3B and corresponding specifications do in fact provide an independent algorithm for "connecting," citing a new declaration from Dr. Medvidović (D.I. 346). (D.I. 345 at 9-10).

Federal Circuit "case law regarding special purpose computer-implemented means-plus-functions claims is divided into two distinct groups: First, cases in which the specification discloses no algorithm; and second, cases in which the specification does disclose an algorithm but a defendant contends that disclosure is inadequate." *Noah Sys., Inc. v. Intuit Inc.*, 675 F.3d 1302, 1313 (Fed. Cir. 2012). "Where no structure appears, the question is not whether the algorithm that was disclosed was described with sufficient specificity, but whether an algorithm was disclosed at all. . . . When the specification discloses some algorithm, on the other hand, the question is whether the disclosed algorithm, from the viewpoint of a person of ordinary skill, is sufficient to define the structure and make the bounds of the claim understandable." *Id.* Here, Figures 3A and 3B and corresponding specifications disclose some structure. Thus, the issue is whether that structure is "sufficient," which "requir[es] consideration of what one skilled in the art would understand from that disclosure, whether by way of expert testimony or otherwise." *Id.* at 1313-14.

Accordingly, the parties are directed to produce expert witness testimony on this second issue at a hearing to be scheduled.

IT IS SO ORDERED. Entered this 20 day of December, 2017.

United States District Judge