

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

ANCORA TECHNOLOGIES, INC.,

Plaintiff,

v.

LG ELECTRONICS INC. and LG
ELECTRONICS U.S.A., INC.,

Defendants.

CIVIL ACTION NO. 1:20-CV-0034

JURY TRIAL DEMANDED

ANCORA TECHNOLOGIES, INC.,

Plaintiff,

v.

SAMSUNG ELECTRONICS CO., LTD., and
SAMSUNG ELECTRONICS AMERICA,
INC.,

Defendants.

CIVIL ACTION NO. 1:20-CV-0034

JURY TRIAL DEMANDED

PLAINTIFF'S RESPONSIVE CLAIM CONSTRUCTION BRIEF

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I. INTRODUCTION

Defendants’ attempt to convince the Court to adopt constructions at odds with the claims and the specification is premised on a number of fundamental errors. Two in particular stand out: (1) Defendants’ attempt to read limitations into the claim from embodiments the specification expressly describes as “non-limiting,” and (2) Defendants’ attempt to portray Ancora as taking a “shifting sands approach” and walking away from representations Defendants claim Ancora made either during prosecution or in other litigation. Defendants are wrong.

As described below and in Ancora’s Opening Brief (Dkt. 44), Ancora’s constructions are taken directly from prior courts’ constructions and based on the plain meaning of each term as demonstrated by the entirety of the ’941 Patent. Further, Defendants’ “shifting sands” argument is a fiction, premised on statements plucked from the prosecution history that state the opposite of what Defendants argue—a reality demonstrated by the fact that many would render the invention inoperable. *i4i Ltd. P’Ship v. Microsoft Corp.*, 598 F.3d 831, 843 (Fed. Cir. 2010) (stating that, “[i]n evaluating whether a patentee has disavowed claim scope, context matters” and one cannot just “pluck[]” statements “from the prosecution history”).

Moreover, Ancora changed only three of the constructions it proposed in other litigations, and for good reason: in two cases (“program” and “volatile memory”), the Federal Circuit construed the term, and Ancora now has adopted the Federal Circuit’s construction. And in the third case (“selecting a program . . .”), Defendants explained that they understood Ancora’s prior construction to require a limitation that Ancora’s own prior briefing showed was never intended.

In short, Ancora’s approach to claim construction is and remains the correct one, and its proposed constructions should be adopted. Because—as the Federal Circuit has explained—“context matters,” *i4i Ltd.*, 598 F.3d at 843, Ancora addresses the specific flaws in Defendants’ arguments below in the context of the specific terms and arguments to which they relate.

II. DISPUTED CLAIM TERMS

Defendants have not addressed the 13 disputed terms and phrases in any discernable order. For the Court’s convenience, Ancora addresses those terms and phrases in the same order. Ancora also has noted below in super script the number corresponding to each Claim 1 term or phrase—underlining the disputed phrases and double-underlining/bolding the disputed terms:¹

1. A method of restricting software operation within a **license** for use with a computer^[6] including an erasable, non-volatile memory area of a **BIOS**^[8] of the computer, and a **volatile memory**^[11] area; the method comprising the steps of:

selecting a **program**^[10] residing in the volatile memory;^[9]

using an **agent** to **set up a verification structure** in the erasable, **non-volatile memory of the BIOS**,^[1, 2, 3, 8] the verification structure accommodating data that includes at least one **license record**,^[6]

verifying the program using at least the verification structure^[4] from the erasable non-volatile memory of the **BIOS**,^[8] and

acting on the program according to the verification.^[5]

1. “using an agent to set up a verification structure in the erasable, non-volatile memory of the BIOS” (Claims 1, 3, 7, 14)

Ancora’s Construction	Defendants’ Construction
plain and ordinary meaning “agent” means “a software program or routine”	This limitation is a means plus function limitation governed by pre-AIA 35 U.S.C. § 112 ¶ 6. Function: “set up a verification structure in the erasable, non-volatile memory of the BIOS” Structure: Algorithm found at 6:18-28; if not, indefinite due to a lack of corresponding structure.

As Ancora explained in its Opening Brief at pages 17-21, the crux of the parties’ dispute is whether “agent” is a nonce word such that 35 U.S.C. § 112 ¶ 6 applies. As explained, it is not.

As used in the ’941 Patent, the term “agent” was well understood to refer to “a software

¹ Unless otherwise noted, any emphasis in this brief has been added.

Further, Ancora Exhibits 1-17 are attached to Ancora’s Opening Brief at Dkt. 44. Ancora Exhibits 18-23 are attached to the Second Declaration of Steve Seigel filed contemporaneously with this brief. Defendants’ Exhibits 1-24 are attached to their Opening Brief filed at Dkt. 45.

program or routine.” Indeed, the Examiner volunteered that he understood “agent” to be synonymous with a software “program.” Ancora Ex. 4 at ANCORA_426-27, -428. Nothing more is needed to show that § 112 ¶ 6 does not apply. *Zeroclick, LLC v. Apple Inc.*, 891 F.3d 1003, 1008 (Fed. Cir. 2018) (holding that court erred in treating “‘program’ and ‘user interface code’ as nonce words”); *Collaborative Agreements, LLC v. Adobe Sys. Inc.*, 2015 WL 2250391, at *13 (W.D. Tex. May 12, 2015) (“Courts have consistently interpreted ‘software’ and similar terms to have sufficient structure so as to avoid an invocation of Section 112 ¶ 6.”).

But more exists. The specification and prosecution history detail both what the recited software “agent” does and how it does it, including at least at 1:60-2:1, 3:51-61, and (as Defendants admit) 6:18-28. These disclosures further show that “agent” connotes sufficient structure to avoid § 112 ¶ 6. *Zeroclick*, 891 F.3d at 1008 (looking to specification and other disclosures as further showing court erred in treating “‘program’ and ‘user interface code’ as nonce words”); *see Verizon Calif. Inc. v. Ronald A. Katz Tech. Licensing, P.A.*, 326 F. Supp. 2d 1060, 1106 (C.D. Cal. 2003) (“[A]s Verizon itself concedes, ‘interface unit’ connotes some structure. Therefore, ‘[i]n the absence of any more compelling evidence of the understanding of one of ordinary skill in the art, the presumption that § 112, ¶ 6 does not apply is determinative.” (citation omitted)).

In response, Defendants go all-in on the argument that the term nevertheless is subject to § 112 ¶ 6 because—according to Defendants—the patentee purportedly portrayed an “agent” as “a concept hitherto unknown in the prior art” during prosecution. Defs. Br. at 3. Defendants also rely on their expert’s opinion that a POSITA purportedly would not understand what an agent was. *Id.* at 7. Both assertions are demonstrably untrue. As explained below, not only did the patentee never claim that an “agent” was a novel concept, but Defendants’ expert relied on the term “agent” in his own pre-filing academic research papers—showing that, before he had an incentive to claim

otherwise, he knew exactly what “agent” meant (just as the Examiner or any POSITA would).

Because “agent” is not a nonce word, § 112 ¶ 6 does not apply.

i) As Used in the '941 Patent, “Agent” Is Not a Nonce Word

Defendants’ “nonce” word argument is incorrect for at least three reasons.

a. The Intrinsic Record Shows That Agent Was an Understood Term.

There is a reason that Defendants cite literally nothing (in the prosecution history or otherwise) supporting their assertion that the patentee purportedly represented that an “agent” was “a novel concept” that was “hitherto unknown in the prior art.” Defs. Br. at 5. No support exists.

Not only did the patentee never represent that an “agent” was a new concept, but the file history plainly shows that both the applicant and the Examiner knew exactly what an agent was. In fact, the Examiner expressly defined the term to refer to a software “program,” including routines that were encompassed within a larger “software application.” Ancora Ex. 4 at ANCORA_426-27 (“Misra et al. also teach encryption keys and programs (‘agent’) used in the license collation process”); *id.* at -428 (“Smith et al. teach a system for distributing, registering and purchasing software . . . using an agent program embedded in each software application.”).

Contemporaneous technical dictionaries further confirm this reality. Ancora Br. at 19 n.3. Indeed, even Defendants admit that “agent” is a defined term.

Defendants nevertheless argue that “agent” is a nonce word because the definitions purportedly are too “disparate”—pointing to the fact that a single dictionary states that an “agent” may be “software or hardware.” Defs. Br. at 7 (citing DICTIONARY OF COMPUTING (1996) (Defs. Ex. 24)). But perfect uniformity is not required. All that is required is “that the term, as the name for structure, has a reasonably well understood meaning in the art.” *Zeroclick*, 891 F.3d at 1007 (citation omitted); *Samsung Elecs. Am., Inc. v. Prisia Eng’g Corp.*, 948 F.3d 1342, 1353-54 (Fed. Cir. 2020) (finding presumption not overcome where “the digital processing unit recited in the

claims is ‘an image processing device that people in the art are generally familiar with’’).

Further, the point is moot here in any case because the ’941 Patent’s record makes clear that its claimed “agent” is software only. *Zeroclick*, 891 F.3d at 1008 (looking to the intrinsic record to understand scope of the term). Indeed, the Federal Circuit recognized that the “inventors stated that their method makes use of the existing computer hardware (eliminating the expense and inconvenience of using additional hardware).” *Ancora Techs., Inc. v. Apple, Inc.*, 744 F.3d 732, 735-36 (Fed. Cir. 2014) (“*Apple II*”).

Specifically, among other disclosures, in support of their amendment adding “agent” to Claim 1, the patentee submitted to the Examiner a 2001 White Paper authored by one of the inventors (Miki Mullor) titled *Hardware Stamping™ Technology Overview White Paper* (the “Beeble White Paper”). Ancora Ex. 19 (Nov. 14, 2001 Remarks Made in Amendment) at ANCORA_374 (“As requested by the Examiner during the interview, a description of a specific embodiment of the invention is attached hereto.”). That paper explained both (1) how “[i]n order for a user to access the BIOS EEPROM[,] proprietary software” needed to be developed, and (2) how Beeble (the original owner of the patent) thus had created an OS-level software agent called a “Beeble driver” or “Kernel mode driver” that—as the patent claims—could be used to set up the verification structure in the BIOS. *See* Ancora Ex. 18 (Beeble White Paper) at ANCORA_278.

Further, the Beeble Paper also described how specific E²PROM manipulation commands (including “DMI Function 52h”) could be used to write to BIOS—explaining:

Beeble will attempt to write license data by utilizing the [Desktop Management Interface] Function 52h^[2], which is designed to write DMI structures to EEPROM. If BIOS manufactures do not support DMI function 52h, then Beeble will write to a [*sic*] EEPROM generically.

[²] SMBIOS Reference Specifications, Version 2.2, 16 March 1998, page 11

Id. Further, it explained how the recited technique was to be “accomplished through software”

such that it “does not require any additional hardware to be added to the PC.” *Id.* at ANCORA_275.

And, to be clear, this disclosure was not new. The specification already taught how “the data in the second non-volatile memory may optionally be erased or modified (using E²PROM manipulation commands).” ’941 Patent at 2:1-6; *id.* at 3:4-9 (explaining that an “advantage in utilizing non-volatile memory such as that residing in the BIOS is that the required level of system programming expertise that is necessary to intercept or modify commands, interacting with the BIOS, is substantially higher than those needed for tampering with [other] data”).

Such evidence is more than sufficient to show that—as used in the ’941 Patent—“agent” would have been understood to refer to sufficiently definite structure. *Zeroclick*, 891 F.3d at 1007.

b. Defendants’ Expert Testimony Is Not Credible.

The Court also should reject Defendants’ reliance on their expert’s opinion that a POSITA “would not understand the term ‘agent’ to connote sufficient structure.” Defs. Br. at 7. Not only is such testimony at odds with the testimony of Mr. Jestice, but—contrary to his testimony in this matter—Dr. Zadok used the term “agent” in his own academic pre-filing research papers.

For example, in a July 1994 paper titled *PGMAKE: A Portable Distributed Make System*, he described a software program that includes “agent-daemons,” which “serve[] as an agent” because they “assist[] the remote [daemon] to fork a job, collect its status and output, and return it back to [the make utility].” Ancora Ex. 20 at 2. Similarly, in his 2006 *On Incremental File System Development* paper (Ancora Ex. 21 at 3), Dr. Zadok cited as an example of OS-level extensions “The Interposition Agents toolkit [Jones 1993],” which defines an “agent” as “a program.” Ancora Ex. 22 at 1. Given these references, it simply is not credible for Dr. Zadok to testify that “‘agent’ is a nonce word [that] does not provide any indication of structure.” Defs. Mot. at 7.

c. Defendants’ Cases Do Not Support Their Position.

Finally, none of the case law Defendants cite supports their nonce-word argument.

In *Synchronoss Techs., Inc. v. Dropbox Inc.*, the court held that the record in that case supported construing “synchronization agent” to refer to “hardware or software.” 2017 WL 6059302, *9-*11 (N.D. Cal. Dec. 7, 2017). This is a key distinction. Terms that refer to software or hardware generally are considered to be nonce words. *Williamson v. Citrix Online, LLC*, 792 F.3d 1339, 1350 (Fed. Cir. 2015) (holding that “module” was a nonce word because it referred generically to “software or hardware”). In contrast, terms that refer solely to software have not. *Zeroclick*, 891 F.3d at 1008. And here, as explained above, “agent” refers solely to software.

Similarly, in *Digital Retail Apps, Inc. v. H-E-B, LP*, 2020 WL 376664, at *4 (W.D. Tex. Jan. 23, 2020), this Court found that *Williamson* applied and demonstrated that the term “communications module” was a nonce term. In reaching that conclusion, the Court explained that—“although software can serve as a corresponding structure”—the patent and other intrinsic evidence “provides no specific details concerning the ‘first communication module,’ such as what type of communication it undertakes or how the module is implemented.” *Id.* at *4-6. In short, this Court emphasized the absence of the very disclosures that are present here: the disclosures at 1:60-2:1, 3:51-61, and 6:18-28, the “Beeble White Paper,” and the dictionary definitions.

Finally, it is unclear why Defendants cite *Joao Control & Monitoring Sys., LLC v. Protect Am., Inc.*, 2015 WL 4937464, at *7 (W.D. Tex. Aug. 18, 2015). There, the court held that the terms “intelligent agent,” “mobile agent,” and “software agent” were indefinite because the intrinsic evidence contained “directly contradict[ory]” descriptions of the terms and there was nothing in the specification to which a POSITA could turn to resolve to discern the “contours of [such] ‘agent’ terms with any degree of reasonable certainty.” *Id.* Defendants concede that is not the case here.

ii) The Intrinsic Evidence Confirm That “Agent” Provides Structure.

Defendants next claim that the intrinsic record proves that “agent” is a nonce word because—according to Defendants—(1) independent Claim 18 (which is not asserted in this

action) recites additional actions that, in some embodiments, an “agent” must perform and (2) as originally drafted, Claim 1 did not disclose the necessary hardware to “add, remove and modify a license record” in the BIOS Memory. Defs. Br. at 9. Neither argument is persuasive.

Defendants cite nothing to support their first position. Nor do they explain how the need for one or more agents capable of performing the Claim 18 operations shows that the more limited Claim 1 embodiment must be a means-plus-function term. The opposite is true: simpler claims require simpler disclosures. *See Zeroclick*, 891 F.3d at 1008 (relying on the fact that “[t]he basic concept behind both of the patents-in-suit is relatively simple” to hold that the terms “program” and “user interface code . . . are used not as generic terms or black box recitations”).

Regarding Defendants’ second argument, Defendants misunderstand the reason “agent” was added to the claims. Contrary to what Defendants argue, “agent” was not added to provide previously missing hardware. It was added to exclude the need for additional hardware. This is clear from the file history, which shows that—after the Examiner issued the notice Defendants cite—the applicant spoke to the Examiner and explained the specified operation was performed solely by software. *Ancora Ex. 6* (Nov. 9, 2001 Interview Summ.). After the interview, the applicant thus amended the claims to include the word “agent” to refer to such software and submitted the Beeble White Paper to provide further detail regarding how the software could operate. *Ancora Ex. 19* (Nov. 14, 2001 Remarks Made in Amendment) at ANCORA_347.

In short, even though the term “agent” standing alone connotes sufficient structure, the specification and prosecution history further clarify that this “agent” must perform a specific operation (set up of a verification structure in BIOS memory) and even provides an exemplary example of how it can perform that operation (using E²PROM manipulation commands). Nothing more is needed to avoid § 112 ¶ 6. *Linear Tech. Corp. v. Impala Linear Corp.*, 379 F.3d 1311

(Fed. Cir. 2004) (relying on the fact that the “term ‘circuit’ [wa]s coupled with a description of the circuit’s operation” to conclude that “sufficient structural meaning generally will be conveyed to persons of ordinary skill in the art, and § 112 ¶ 6 presumptively will not apply”); *see Zeroclick*, 891 F.3d at 1008 (holding that “the mere fact that the disputed limitations incorporate functional language does not automatically convert the words into means for performing such functions”—explaining “[m]any devices take their names from the functions they perform” (citation omitted)).

Techno View IP, Inc. v. Facebook Techs., LLC, 2018 WL 6427874 (D. Del. Dec. 7, 2018), does not dictate a different result. Contrary to Defendants’ portrayal, the court held that § 112 ¶ 6 categorically *does not* apply to method claims unless (a) the word “means” is used, or (b) a “structural limitation clearly constitutes the point of novelty,” in which case the accused infringer must *still* rebut the presumption that § 112 ¶ 6 does not apply. *Id.*; *see id.* at *6-8 (holding that “processor” in steps performed “with a processor” did not invoke § 112 ¶ 6).

iii) At a Minimum, Defendants’ Structure Is Incomplete.

Even if this term is subject to § 112 ¶ 6, Defendants’ construction still would be incomplete because it fails to account for the alternative disclosures at 1:60-2:1 and 3:51-61. Thus, at a minimum, Defendants’ proposed means-plus-function construction should be amended to permit the “[a]lgorithm found at 1:60-2:1, 3:51-61, and/or 6:18-28, or their equivalents.” *HTC Corp. v. IPCOM GmbH & Co., KG*, 667 F.3d 1270, 1278 (Fed. Cir. 2012) (explaining that, “[w]hen a patentee invokes such ‘means-plus-function’ claiming, the ‘claim shall be construed to cover the corresponding structure, material, or acts described in the specification and equivalents thereof’”).

2. “set up a verification structure” (Claims 1, 3, 7, 14)

Ancora’s Construction	Defendants’ Construction
plain and ordinary meaning	“forming a structure by encrypting a license record using a pseudo-unique key for each computer”

Defendants' amended construction of this term² should be rejected because it (1) misstates the specification and would read out express distinctions between independent and dependent claims; and (2) is premised on a fundamental mischaracterization of the prosecution history.

First, contrary to what Defendants suggest, the specification never limits the invention in this manner. The "Summary of Invention" states only that "[t]he present invention relates to a method of restricting software operation within a license limitation." '941 Patent at 1:39-40. And the next sentence states only that this method "strongly relies on the use of a key." *Id.* at 1:40-41. The specification never states that the "present invention" (much less this limitation) requires "forming a structure by encrypting a license record using a pseudo-unique key for each computer."

The remaining portions of the specification Defendants cite only further support Ancora's position. The teaching at 1:62-65 that the verification structure "is implemented by encrypting the license record (or portion thereof) using said key (or portion thereof) exclusively or in conjunction with other identification information)" is expressly described as "a specific non-limiting example." *Id.* at 1:44-45. Similarly, the disclosure at 6:18-28 likewise is expressly described as a portion of "the sequence of operations performed according to one embodiment of the invention."

In fact, the portions of the specification Defendants emphasize on page 11 of their opening brief itself shows why Defendants construction is wrong. As Defendants' quoted text demonstrates, even in the FIG. 2 embodiment, the specification expressly permits the "setting up" step to be satisfied by actions other than "encrypting a license record using a pseudo-unique key," including "establishing or certifying the existence of a pseudo unique key in the first non-volatile memory area." '941 Patent at 6:18-28. Thus, even if the specification contained the "present

² Defendants previously proposed construing this term to mean "forming a verification structure using a unique key for each computer and license record information in the program." Ancora addressed that prior construction in its Opening Brief.

invention” language Defendants contend, because the specification “does not uniformly refer to [Defendants’ limitation] as being co-extensive with the entire invention,” such references are not limiting. *Absolute Software, Inc. v. Stealth Signal, Inc.*, 659 F.3d 1121, 1137 (Fed. Cir. 2011).

The claims likewise show that Defendants’ construction is incorrect. Certainly, in the Claim 7 embodiment, there is no requirement that the agent “form[] a structure by encrypting a license record using a pseudo-unique key for each computer.” Rather, the claim is met so long as:

7. ... using an agent to set up the verification structure includes the steps of: establishing or certifying the existence of a pseudo-unique key in a first non-volatile memory area of the computer; and establishing at least one license-record location in the first nonvolatile memory area or in the erasable, non-volatile memory area of the BIOS.

It is not until dependent Claim 8 that the patent expressly requires the very limitation Defendants ask the Court to read into Claim 1—reciting:

8. A method according to claim 6 wherein establishing a license-record includes the steps of: forming a license-record by encrypting of the contents used to form a license-record with other predetermined data contents, using the key; and establishing the encrypted license-record in one of the at least one established license-record locations.

Ancora Br. at 3 (noting agreement that “using the key” means “using the pseudo-unique key”).

Not only would Defendants’ construction eliminate these careful claim distinctions, but it would render the underlined portion of Claim 8 entirely superfluous—both cardinal claim construction sins. *Vitronics Corp. v. Conceptronic, Inc.*, 90 F.3d 1576, 1582 (Fed. Cir. 1996) (stating that a construction that excludes an embodiment “is rarely, if ever, correct”); *InterDigital Commc’ns, LLC v. ITC*, 690 F.3d 1318, 1324 (Fed. Cir. 2012) (“The doctrine of claim differentiation is at its strongest in this type of case, where the limitation that is sought to be ‘read into’ an independent claim already appears in a dependent claim.” (citation omitted)).

Second, the prosecution history also provides no support for Defendants’ attempt to rewrite the claims—much less contains the clear and unequivocal disclaimer required. *Luminara*

Worldwide, LLC v. Liown Elecs. Co., 814 F.3d 1343, 1353 (Fed. Cir. 2016). Indeed, Defendants point to no statement by the patentee that Claim 1 requires forming a structure by encrypting a license record using a pseudo-unique key for each computer. For example, the patentee nowhere distinguished Claim 1 over Ginter on that basis in its May 23, 2001 Response. Indeed, there was no reason to do so. The December 20, 2000 Rejection did not reject Claim 1 on grounds that it recited (or Ginter disclosed) encrypting a license record using a key. Defs. Ex. 3 (Dec. 20, 2000 Non-Final Rejection) at ANCORA_324-25 (rejecting Claim 1 without referring to encryption or keys). In contrast, the Examiner expressly rejected pending Claims 3, 5, and 7-9 because it believed Ginter disclosed “data encryption using keys.” *Id.* at -325-27 (rejecting Claims 3, 5, and 7-9).

Also wrong is Defendants’ attempt to portray the patentee as having stated that every claim of the invention includes “forming a structure by encrypting a license record using a pseudo-unique key for each computer” limitation. To support that assertion, Defendants ignore statements from the May 23, 2001 Response that make clear that patentee did not intend that every claim include such a limitation. For example, prior to the statements Defendants cite, the patentee stated that some embodiments may not even use “a key”—explaining: “The present invention provides a method and system for identifying and restricting operation of an unauthorized software program. In a preferred embodiment, a key resides in a first non-volatile part of a computer’s memory.” Defs. Ex. 4 (May 23, 2001 Response) at ANCORA_338.

The patentee further explained that, in this embodiment, “a verification structure is formed to include one or more license records, described below,” i.e., those “obtained by encrypting license records extracted from the software program with the key stored in the first non-volatile part of the computer’s memory.” *Id.* The patentee confirmed, however, that this was not a requirement—explaining that, to the extent present, “[t]he key may also be used for encryption of

license record or decryption of encrypted license record all as required and appropriate.” *Id.*

Indeed, demonstrating the limited scope of the “present invention” statements to which Defendants point, the patentee pointed solely to “independent claim 20” (now Claim 18) as containing the requirement stated that the limitation that “[a] license record is extracted from the software program and encrypted using the unique key stored in the computer.” *Id.* at 8.

The Federal Circuit repeatedly has found that equivocal statements like these are not a clear and unequivocal disclaimer. *Cont’l Circuits LLC v. Intel Corp.*, 915 F.3d 788, 798 (Fed. Cir. 2019) (explaining that “descriptions of ‘the present invention’” are not limiting where they “are not uniform, or where other portions of the intrinsic evidence do not support applying the limitation to the entire patent”). Simply put, “[i]t is not true that because one sentence in the paragraph begins with the ‘present invention’ language that everything that follows in the same paragraph limits all subsequent claims.” *Unwired Planet, LLC v. Apple Inc.*, 829 F.3d 1353, 1358 (Fed. Cir. 2016).

The February 5, 2002 Response also does not limit Claim 1 to require that this step include “forming a structure by encrypting a license record using a pseudo-unique key for each computer.” Indeed, Defendants point to nothing that says otherwise. Rather, at most, Defendants have pointed to statements that (inartfully) referred to the patentee’s simultaneous amendment of Claim 16 (now Claim 12) to recite “the method of Claim 1, wherein a pseudo-unique key is stored in the non-volatile memory of the BIOS.” Defs. Ex. 8 at ANCORA_435-436, -441.

For all of the above reasons, Defendants’ erroneous construction must be rejected.

3. **“non-volatile memory of the BIOS” (Claim 1)**

Ancora’s Construction	Defendants’ Construction
This term does not require separate construction	“memory of the BIOS” means “a memory that: (i) stores the BIOS; (ii) is not recognized by an operating system as a storage device; and (iii) does not have a file system”

Defendants’ arguments fail to support any of their three limitations.

i) Ancora Never Disclaimed the Ordinary Meaning of BIOS.

Defendants concede that neither the specification nor the claims support their “(ii) is not recognized by an operating system as a storage device; and (iii) does not have a file system” limitations. Instead, Defendants argue that statements they plucked from the prosecution history show that Ancora disclaimed the ordinary meaning of BIOS. Defendants are wrong.

Courts repeatedly have held that prosecution history disclaimer does not apply where “the applicant simply describes features of the prior art,” *Computer Docking Station Corp. v. Dell, Inc.*, 519 F.3d 1366, 1375 (Fed. Cir. 2008)—particularly when a patentee does so “to illustrate differences between the invention and the prior art.” *Gemstar-TV Guide Int’l, Inc. v. Int’l Trade Comm’n*, 383 F.3d 1352, 1375 (Fed. Cir. 2004); *Kroy IP Holdings, LLC v. Safeway, Inc.*, 2015 WL 3452050, at *3 (E.D. Tex. May 29, 2015) (holding that “applicant’s discussion of . . . two references” and their limitations “do not constitute the kind of “clear and unmistakable disavowal or disclaimer” that is necessary to justify giving claim language a narrower scope than its plain meaning would suggest”). That is all the patentee did here.

As Ancora explained in its Opening Brief at pages 13-14, the statements Defendants cite simply describe the prior art shortcomings that the ’941 Patent was invented to overcome. For example, contrary to what Defendants claim at page 16, the patentee never stated that the present invention BIOS could not be considered as a storage device by the operating system. The patentee said exactly the opposite: that unlike in the prior art where a POSITA “would not consider BIOS as a possible storage medium,” “the present invention proceeds against conventional wisdom” by “[u]sing BIOS to store application data.” Defs. Ex. 8 (Feb. 5, 2002 Statement) at ANCORA_438.

In short, the patentee explained that a critical aspect of the invention was that it did not include this prior art limitation. As he explained, “[t]he cited references do not render the present invention obvious as they [the cited references] do not teach or suggest, among other things, storing

a verification structure, such as a software license information, in the BIOS of a computer **as is recited in the present claims.**” *Id.* at ANCORA_435.

The same is true of the statement that “no file system is associated with the BIOS.” Defs. Br. at 16. As the patentee explained, this prior art limitation was why “OS level application programmers would not consider the BIOS as a storage medium for license data.” Defs. Ex. 8 (Feb. 5, 2002 Statement) at ANCORA_438. In contrast, the ’941 invention did treat the “BIOS as a storage medium”—requiring that the OS-level software agent use it to set up a verification structure. And as Defendants’ own argument demonstrates, this “set up” step could not be done unless the claimed BIOS was not subject to its prior art limitations. As Defendants concede at page 17 of their brief, “a file system organizes and controls how data is stored” and, “[w]ithout it, a computer does not have a way to determine where one piece of data ends or the next begins.”

In short, if the claimed BIOS was limited to its pre-invention form such that it could not be recognized by an operating system as a storage device or have a file system (as Defendant limitations would require), it would not be possible for an OS-level software agent to “set up a verification structure in the erasable, non-volatile memory of the BIOS” as Claim 1 requires. Thus, if adopted, Defendant’s construction would make the ’941 Patent inoperable. This further shows that Defendants’ limitations cannot be correct. *Astrazeneca LP v. Apotex, Inc.*, 633 F.3d 1042, 1053 n.1 (Fed. Cir. 2010) (rejecting construction that would render “the claimed invention . . . inoperable”). Defendants are asking for a construction that would exclude the invention altogether.

Further, the Examiner understood that such prior art limitations did not apply to the ’941 Patent. Indeed, Defendants’ claims at page 17 that the Examiner “understood the claims to be limited to BIOS memory that is not recognized by OS as a storage device and does not have a file system” and “that the OS level programs were not interacting with structures stored in BIOS

memory” is baseless. The Examiner stated the opposite: that he was granting the patent because “the closest prior art systems, singly or collectively, do not teach licensed programs running at the OS level” interacting with BIOS and that “the present invention overcomes this difficulty by using an [OS-level software] agent to setup a verification structure in the erasable non-volatile memory area of the BIOS.” Ancora Ex. 2 (Reason for Allowance) at ANCORA_451.

In sum, because the statements Defendants cite describes the prior art—and not the ’941 invention—Defendants’ limitations should be rejected. *Kroy*, 2015 WL 3452050, at *3.

ii) Defendants’ “Stores the BIOS” Limitation Is Entirely Unsupported

Defendants’ “(i) stores the BIOS” limitation also should be rejected. As Ancora explained in its Opening Brief at page 12, the Federal Circuit already has held that the non-volatile memory area only needs to be “associated with” the BIOS. *Apple II*, 744 F.3d at 733. That is consistent with the specification’s teaching that the non-volatile memory at issue can comprise, e.g., portions “of a BIOS” and/or “non-volatile memory media used as a BIOS.” ’941 Patent at 4:49-58. It also is demonstrated by the specification’s teaching that “non-volatile memory such as that residing in the BIOS” may be used—showing that the BIOS may store the non-volatile memory and is not limited to being stored in the non-volatile memory as Defendants would require. *Id.* at 3:4-5.

The portions of the specification that Defendants cite do not support—much less demand—a different construction. Defendants’ quotation of 1:46-47 shows that it has nothing to do with this issue. Moreover, Defendants’ argument that the patent’s description of the second non-volatile section of the BIOS (in one embodiment) shows that “the first portion stores BIOS” makes little sense. Besides being a non-sequitur, Defendants are arguing that the same “first portion” must be read-only memory (ROM). Under that construction, it would be impossible for an agent to “set up a verification structure” in it as Claim 1 requires. Ancora Ex. 7 (Jestice Decl.) at ¶ 7.

4. “verifying the program using at least the verification structure” (Claims 1, 9, 16)

Ancora’s Construction	Defendants’ Construction
“confirming whether a program is licensed using at least the verification structure”	“confirming through an operating system (OS) level application whether a program is licensed using at least the verification structure”

As Ancora explained in its Opening Brief at pages 23-25, the specification provides no support for Defendants’ “OS-level application” limitation. Defendants apparently agree. Their brief confirms that their argument is based solely on disclaimers they assert the patentee made during prosecution. For the reasons explained below, no such disclaimers occurred. The Court thus should adopt Ancora’s construction, which mirrors the construction of the *Apple I* court.

First, Defendants state that during prosecution “the applicants described ‘the present invention’ as an operating system (OS) level program that could not ope[r]ate at the BIOS-level.” Defs. Br. at 18. That is false. The patentee expressly explained during prosecution that the invention “proceeds against conventional wisdom in the art” by enabling OS-level programs/applications to use “BIOS to store application data.” Ancora Ex. 3 at ANCORA_438.

Next, Defendants take a passage from the prosecution history out of context to suggest that the entire invention must operate “at the OS-level and not at the BIOS-level.” See Defs. Br. at 19. But as Ancora explained in its Opening Brief at page 23, that statement was directed to the distinct “setting up step”—a reality demonstrated by the patentee’s addition of the “agent” limitation to that element. Indeed, in his Reasons for Allowance, the Examiner noted his understanding that the patentee had used the term “agent” to mark when an OS-level program/application was required. Defs. Ex. 9 at ANCORA_451-52 (stating that, in the Claim 1 embodiment, “[t]he present invention” overcomes the prior art difficulties “by using an agent to set up a verification structure in the erasable, non-volatile memory of the BIOS,” while in the Claim 20 (now Claim 18) embodiment the invention also uses “an agent to verify the application software program using the

license information stored in the erasable, writable, non-volatile memory of the BIOS”).

Finally, the Examiner’s statement in his Reasons for Allowance likewise does not amount to the required a clear and unmistakable disclaimer. It is settled law that “the applicant has no obligation to respond to an examiner’s statement of Reasons for Allowance” and that such a “statement of an examiner will not necessarily limit a claim.” *Eolas Techs. Inc. v. Microsoft Corp.*, 399 F.3d 1325, 1338 (Fed. Cir. 2005) (citations and quotation marks omitted). Moreover, the statement must be read in conjunction with the Examiner’s further explanation that, in the Claim 1 embodiment at issue, the OS-level “agent” is required only to “set up a verification structure in the erasable, non-volatile memory of the BIOS.”³ Defs. Ex. 9 at ANCORA_451.

5. “acting on the program according to the verification” (Claims 1, 10)

Ancora’s Construction	Defendants’ Construction
plain and ordinary meaning	“(i) allowing the use of the program if licensed or (ii) restricting the program’s operation if not licensed, using an operating system (OS) level application”

Defendants’ construction is incorrect and should be rejected for three distinct reasons.

First, as Ancora explained in its Opening Brief at pages 26-27, the specification identifies a range of actions for the “acting on the program” step, including “informing . . . the user” of a restriction (’941 Patent at 2:24-26), “halting the operation of the program” (*id.*), “ask[ing] for additional user interactions” (*id.* at 5:60-61), “erasing the software in volatile memory, warning the license applicant/user, placing a fine on the applicant/user . . . , or scrambling sections of the BIOS of the computer (or of functions interacting therewith)” (*id.* at 6:46-52). Defendants’ binary “allowing” or “restricting” construction should be rejected because it would exclude expressly disclosed embodiments. *Broadcom Corp. v. Emulex Corp.*, 732 F.3d 1325, 1333 (Fed. Cir. 2013)

³ Defendants’ “license verifier application” argument likewise fails. Among other shortcomings, the specification states that this embodiment is a “non-limiting example.” ’941 Patent at 1:44-45.

(“[A]n interpretation which excludes a [disclosed] embodiment from the scope of the claim is rarely, if ever, correct.” (brackets in original) (citation and quotation marks omitted)).

Second, Defendants’ “if licensed” and “if not licensed” limitations are wrong for the reasons Ancora set forth below at pages 22-23 in discussing Defendants’ “license record” construction. *See* Ancora Br. at 7-8. Nor is it correct that the non-limiting portion of the preamble somehow supports Defendants’ construction. *E-Pass Techs., Inc. v. 3Com Corp.*, 343 F.3d 1364, 1370 (Fed. Cir. 2003) (“An invention may possess a number of advantages or purposes, and there is no requirement that every claim directed to that invention be limited to encompass all of them.”).

Finally, Defendants’ argument that the patentee purportedly stated “that the invention is an OS-level application” is wrong. As explained at pages 17-18, the patentee made clear that—to the extent an OS-level program/application was required—the claims were amended to expressly refer to an “agent.” The Claim 1 “acting” step includes no such requirement. Indeed, as Defendants concede, the Examiner explained that the “acting” step was not required to be performed by an “agent.” Defs. Br. at 9 n.9 (citing Ex. 9 at ANCORA_449-450 (discussing current Claim 18)).

6. “license” (Claim 1 - Preamble) / “license record” (Claims 1, 3, 6, 8-9, 14, 16)

Ancora’s Constructions	Defendants’ Constructions
The portion of the preamble reciting “A method of restricting software operation within a license...” is non-limiting, and the term “license” thus does not need to be construed.	The entire preamble is limiting, and “license” means “a legal contract between a software provider and a user that specifies the rights of the user to use, distribute or resell the software”
“license record” means “a record associated with a licensed program with information for verifying that licensed program”	“license record” means “data indicating that a program is licensed”

i) “License” Is Non-Limiting and Does Not Need to Be Construed.

As Ancora explained in its Opening Brief at pages 4-5, “license” appears only in a portion of Claim 1’s preamble. The term thus does not need to be construed unless that portion of the preamble is limiting, which requires Defendants to show that “it recites essential structure or steps,

or . . . is ‘necessary to give life, meaning, and vitality’ to the claim.” *TomTom, Inc. v. Adolph*, 790 F.3d 1315, 1323 (Fed. Cir. 2015) (citation omitted). Defendants have not met their burden.

Defendants do not argue that the portion of the preamble at issue recites essential structure or steps. Nor could they. It does not provide an antecedent basis for any later term or describe structure otherwise needed for the body to recite a structurally complete invention.⁴ *Arctic Cat Inc. v. GEP Power Prod., Inc.*, 919 F.3d 1320, 1329 (Fed. Cir. 2019) (holding preamble not limiting where it “does not supply ‘antecedent basis’ for terms in the body” nor “suppl[ies] structure needed to make the body itself a ‘structurally complete invention’” (citation omitted)).

Instead, Defendants’ sole argument is that “the entire preamble is necessary to understand the claim”—pointing to references to the term “licensed” in one proposed construction and references to other terms like “license record” and “license authentication bureau.” Defs. Br. at 22. Tellingly, Defendants do not cite a single case showing that such considerations even are relevant. Nor can they.⁵ The “license” portion of the preamble is not “necessary to give life, meaning, and vitality” to the claim. *TomTom*, 790 F.3d at 1323. Rather, it states a non-limiting purpose or intended use for the patent that mirrors “the standard pattern of such [non-limiting] language” *TomTom* identifies: “the words ‘a method for a purpose or intended use comprising,’ followed by the body of the claim, in which the claim limitations describing the invention are recited.” *Id.*

As such, Defendants’ construction is a naked attempt to limit the patent to an intended use in violation of basic claim construction principles. *Id.*; *E-Pass*, 343 F.3d at 1370 (“An invention

⁴ It is unclear why Defendants point to the word “computer” to justify their position. Defs. Br. at 23. As Ancora’s construction reflects, it does not dispute the reference in the preamble to “a computer” is limiting. As also is clear, however, the preamble’s recitation of a “license for use with a computer” does not mean that a license is “part of the computer” as Defendants’ contend.

⁵ To the contrary, Defendants have proposed a construction for “license record”—thus conceding that it can be defined on its own without requiring a separate construction of the word “license,” which never appears by itself in the body of the claim.

may possess a number of advantages or purposes, and there is no requirement that every claim directed to that invention be limited to encompass all of them.”). Indeed, Defendants eventual admit this—arguing that Ancora somehow is seeking to broaden the scope of the claim by allowing it to be used for purposes other than confirming whether a “program was actually licensed to run on the computer.” Defs. Br. at 24.

Because the “license” portion of the preamble simply states an intended use it is non-limiting and the Court does not need to construe the term “license.”

ii) Defendants’ “License” Construction Disregards the Specification.

If the Court nevertheless construes the term “license,” it should construe it consistent with the specification to mean “authorization or verification to run.”

The specification describes “license” in precisely these terms, describing methods of “restricting an unauthorized software program’s operation,” ’941 Patent at 1:6-8, setting up a “verification structure . . . so as to indicate that the specified program is licensed to run on the specified computer,” *id.* at 1:59-62, or determining whether a “program is verified to run on the computer,” *id.* at 2:14-26. The specification’s use of the term “licensed” thus is broader than Defendants’ restrictive definition. *Ancora Techs., Inc. v. HTC Am., Inc.* (“*HTC*”), 908 F.3d 1343, 1344 (Fed. Cir. 2018) (“The patent describes and claims methods of limiting a computer’s running of software not authorized for that computer to run.”); *HTC Corp. v. Ancora Techs. Inc.*, 2017 WL 6032605, at *4 (Patent Tr. & App. Bd. Dec. 1, 2017) (“[T]he claims of the ’941 patent recite a technological improvement to problems arising in prior art software and hardware methods of restricting an unauthorized software program’s operation.”).

Notably, Defendants do not even attempt to address these disclosures. Instead, they base their construction solely on extrinsic evidence. This is reason enough to reject it. *VirnetX, Inc. v. Cisco Sys., Inc.*, 767 F.3d 1308, 1317 (Fed. Cir. 2014) (explaining irrelevance of “dictionary

definition” when “the specification makes clear that the claim term in question is not so limited”).

Further, Defendants’ dictionaries do not support their narrow construction. The first definition of “license” in WEBSTER’S NEW COLLEGE DICTIONARY (2001) is “to be permitted,” which is more consistent with Ancora’s proposed construction than Defendants’. Defs. Ex. 17. And the MICROSOFT DICTIONARY (3d ed.) is irrelevant, because the only term it defines is “license agreement,” which by definition refers to a “legal contract.” Defs. Ex. 16. In any event, “heavy reliance on the dictionary divorced from the intrinsic evidence risks transforming the meaning of the claim term to the artisan into the meaning of the term in the abstract, out of its particular context, which is the specification.” *Phillips v. AWH Corp.*, 415 F.3d 1303, 1321 (Fed. Cir. 2005).

Mr. Mullor’s tutorial presentation likewise lends no support for Defendants’ position. As Mr. Mullor explained, his “concept of software license” was that, “just like a car, you may have it, but you are not allowed to operate it without a license.” Similarly, without a software license, “you can’t run the software.” Defs. Br. at 23-24 (citing Defs. Ex. 13).

Finally, Plaintiffs already have addressed Defendants’ argument that their construction must be adopted to limit the claim to the purpose of confirming whether a “program was actually licensed to run on the computer.” Defs. Br. at 24. As explained at page 20, the Federal Circuit has held that it is improper to read an intended use into a claim. *E-Pass*, 343 F.3d at 1370.

iii) Defendants Provide No Support for Their “License Record” Construction.

Ancora described at length at pages 7-8 of its Opening Brief why the Court should adopt its construction of this term, which effectively duplicates the *Apple I* construction. See 2012 WL 6738761, at *12 (construing the term to mean “a record from a licensed program with information for verifying that licensed program”). In contrast, Defendants devote a single paragraph to their “license record” argument—citing no portion of the specification or anything else to support it.

Defendants’ apparent inability to cite anything to support their construction is telling. Indeed, unlike Defendants’ construction, Plaintiffs’ is directly supported by the specification, which teaches that a “license record” can comprise information as limited as a program’s name and/or manufacturer—provided that information allows the program to be verified. ’941 Patent at 5:27-33. Plaintiffs’ construction likewise is consistent with the specification’s teaching that a “license record” does not even need to indicate whether a program is verified or authorized to run; it simply needs to provide sufficient information to allow for such verification to occur. *Id.* at 2:5-10 (“The actual format of the license may include a string of terms that correspond to a license registration entry (e.g. lookup table entry or entries) at a license registration bureau . . .”).

7. The Order of the Claim 1 Steps

Ancora’s Construction	Defendants’ Construction
<u>The “verifying a program” step cannot be completed until the “selecting a program” and “using an agent” steps have been completed, and the “acting on the program” step cannot be completed until the “verifying” step has been completed.</u>	The “verifying the program” step and “acting on the program” step of claim 1 must occur, in order, after the “selecting a program” step and “using an agent” step.

Defendants’ brief and their elimination of their “sequential” limitation add some much needed clarity to their position. Also helpful is Defendants’ clarification that they agree that the “selecting a program” and “using an agent” steps can occur in any order.

Given these clarifications, only three issues remain in dispute: (1) whether the “verifying the program” step and “acting on the program” step must occur in order; (2) whether the “verifying the program” step must occur after the “selecting a program” step and “using an agent” step; and (3) whether any step must be complete before another step can begin. The answer to each is “no.”

First, the default rule is that use of the word “‘comprising’ in a method claim indicates that the claim is open-ended and allows for additional steps.” *Solvay S.A. v. Honeywell Int’l Inc.*, 742 F.3d 998, 1005 (Fed. Cir. 2014) (citation omitted). As such, there is no basis for Defendants’

argument that the “verifying” step and “acting” step must occur in order.

Second, there also is no support for Defendants’ position that the “verifying” step must occur after the “selecting” and “using an agent” steps. Dependent Claim 4 shows why. It states that the “verifying” step can comprise the following additional sub-steps (denoted in brackets):

4. A method according to claim 2, wherein verifying the program further comprises the steps of: [i] establishing, between the computer and the bureau, a two-way data-communications linkage; [ii] transferring, from the computer to the bureau, a request-for-license verification . . . ; [iii] enabling the comparing at the bureau; and [iv] transferring, from the bureau to the computer, the result of the comparing.

’941 Patent, Claim 4. As the above reflects, neither logic nor grammar requires that sub-step (i)—establishing a communications linkage—must begin after the “selecting a program” step or “using an agent” step. The communications linkage could be established before, after, or at the same time as those steps. Thus, nothing in the claims dictates when the “verifying” step must begin. Rather, at most, the claim language requires that the “verifying” step cannot be completed until the “selecting” step and “using an agent” step likewise have been completed.

Finally, just as the above example demonstrates that the “selecting” step, “using an agent” step, and “verifying” steps may overlap, nothing in the claims or specification preclude the “acting on the program” step to overlap with any of the other steps. At most the claims require that the “acting on the program” step cannot complete ahead of the other Claim 1 steps.⁶

Indeed as Mr. Jestice explained in his declaration, it was understood at the time of the invention that a device could be programmed such that it implements multiple functions

⁶ It is unclear why Defendants’ emphasize that, in the HTC Litigation, Ancora agreed that “[t]he antecedent basis for ‘the verification’ [in the ‘acting on the program’ step] is the earlier step of ‘verifying the program.’” In this case, Ancora likewise agreed that the “the verification” in the “acting on the program” step referred to “verifying the program using at least the verification structure Ancora likewise from the erasable non-volatile memory of the BIOS.” Ancora Br. at 26.

simultaneously (either in whole or in part). Ancora Ex. 7 (Jestice Decl.) at ¶ 14. And he further confirmed that a POSITA would understand that each of the recited Claim 1 steps thus could overlap such that some “steps are initiated . . . while previous steps are still ongoing.” *Kaneka Corp. v. Xiamen Kingdomway Grp. Co.*, 790 F.3d 1298, 1306 (Fed. Cir. 2015) (explaining that, generally speaking, method “claims do not exclude a continuous process”). It thus would be error to “require that each step occur independently or separately.” *Id.*

8. “BIOS” (Claims 1, 3, 7, 9, 12, 16)

Ancora’s Construction	Defendants’ Construction
“An acronym for Basic Input/ Output System. It is the set of essential startup operations that run when a computer is turned on, which test hardware, starts the operating system, and support the transfer of data among hardware devices.”	“An acronym for Basic Input / Output System. It is the set of essential startup operations <u>stored in ROM</u> that run <u>automatically</u> when a computer is turned on, which test hardware, starts the operating system, and support the transfer of data among hardware devices.”

As Ancora explained at pages 9-11 of its Opening Brief, Defendants proposal to “tweak[]” the construction of “BIOS” already provided by the court in *Apple I* should be rejected.

i) Defendants’ “Stored in ROM” Limitation Conflicts with the Specification.

Defendants’ “stored in ROM” (read-only memory) argument requires little discussion. As Defendants’ own intrinsic citations reflect, at most, the specification states that the recited BIOS may contain a “ROM section” or “ROM portion.” Defs. Br. at 27 n.9. Consistent with the plain meaning of section and portion, the specification also makes clear, however, that the BIOS is not limited to ROM, but can contain other sections, including an E²PROM section. ’941 Patent at 4:45-49. Indeed, Defendants do not even attempt to explain how their construction is consistent with the Claim 1 requirement that an agent “set up a verification structure in the erasable, non-volatile memory of the BIOS”—something it could not do if the BIOS was limited to ROM.

The same proofs likewise show that Defendants’ dictionary definitions do not control. As the Federal Circuit has held, it is improper to rely on a “dictionary definition” when “the

specification confirms that the claim term in question is not so limited.” *VirnetX*, 767 F.3d at 1317.

ii) Defendants Cite Nothing That Supports Their “Automatically” Limitation.

The only support Defendants offer for their “automatically” limitation is Mr. Jestice’s prior testimony that, generally speaking, “BIOS automatically performs the initial steps necessary to boot the operating system.” Defs. Ex. 19 (*Apple I* Decl.) ¶ 10; Ancora Ex. 23 (Reexam. Decision) at 9-10 (construing “BIOS” to mean a “set of essential software routines that test hardware at startup, starts the operating system, and supports the transfer of data among hardware devices”).

To be clear, Ancora does not dispute that BIOS generally runs automatically when a computer turns on. But the fact that BIOS generally runs automatically at startup does not mean it must always do so or that BIOS operations cannot also be prompted, halted, or otherwise directed manually. Ancora Ex. 7 (Jestice Decl.) ¶ 9. Indeed, the specification expressly contemplates such manual intervention—stating that “[a]n important advantage in utilizing non-volatile memory [of the] BIOS is that the required level of system programming expertise that is necessary to intercept or modify commands, interacting with the BIOS, is substantially higher than those needed for tampering with data residing in volatile memory such as hard disk.” ’941 Patent at 3:4-9.

In sum, because Defendants rely entirely on Mr. Jestice’s testimony to justify their limitation, and because such testimony not only does not support Defendants’ limitation, but would be inconsistent with the specification if it did—Defendants’ limitation should be rejected.

9. “selecting a program residing in the volatile memory” (Claims 1, 6)

Ancora’s Construction	Defendants’ Construction
plain and ordinary meaning	“running a program in the volatile memory”

Defendants make only one argument in support of their construction: that Ancora proposed it in prior litigation. Defs. Br. at 28. But as Ancora has explained to Defendants, the focus of the parties’ dispute in the prior case was whether on whether “a program” sufficed (Ancora’s position)

or whether there needed to be a plurality of programs (Microsoft’s position). Indeed, in its briefing in that case, Ancora explained that its construction was intended to convey only that the limitation would be satisfied if a single program was “loaded into memory for execution.” Ex. 15 at 16.

Here, however, Defendants have explained that they understand this construction to require that the program be both loaded and executed. But that understanding is inconsistent with the specification, which discloses that selecting and running are distinct concepts and that—in some embodiments—a program must be selected and verified before it can be run. *See* Ancora Br. at 16 (citing ’941 Patent at 2:10-26, 6:7-10). Ancora thus revised its construction to avoid any possibility that Defendants might later argue that Ancora had agreed to Defendants’ understanding.

Not should there be any question what “selecting” requires. Multiple courts have held that “selecting” is easily understood such that its plain meaning should govern. *Nokia Sols. & Networks US LLC v. Huawei Techs. Co.*, 2017 WL 2226413, at *26 (E.D. Tex. May 19, 2017) (construing the term “[select/selecting] a communication resource . . .” to have its plain and ordinary meaning (alteration in original)); *Prowess, Inc. v. RaySearch Labs., AB*, 953 F. Supp. 2d 638, 672 (D. Md. 2013) (same). And such a meaning is appropriate here, where the specification demonstrates that “selecting” can include “establishing” and “loading” but is broader than either concept.

10. “program” (Claims 1, 3, 6, 9-10, 14, 16)

Ancora’s Construction	Defendants’ Construction
“a set of instructions for a computer”	“a set of instructions <u>that can be executed by</u> a computer”

The remarkable crux of Defendants’ position on this term is that Ancora somehow has improperly “shifted its position” by not adhering to the construction it offered **before the Federal Circuit expressly construed this term to mean “a set of instructions for a computer.”** Specifically, in examining the proper scope of this very term, the Federal Circuit held:

[T]he district court explained that, although the term “program” may have many different meanings depending on the context, “to a computer programmer” a program is merely a “set of instructions” for a computer. *Ancora*, 2012 WL 6738761, at *7. That clear meaning governs here, we conclude, because there is nothing sufficient to displace it.

Apple II, 744 F.3d at 734-35. Defendants have offered no credible justification for why the Federal Circuit’s construction does not control. They point to nothing in the patent (or otherwise) to support their construction. Instead, they rely entirely on *ipse dixit* attorney argument as to why what the Federal Circuit said was not what it meant. Ancora has no intention of second-guessing the Federal Circuit—particularly when it has spoken as clearly as it did here. Neither should this Court.

11. “volatile memory” (Claims 1, 6, 9, 11)

Ancora’s Construction	Defendants’ Construction
“memory whose data is not maintained <u>or becomes inaccessible</u> when the power is removed”	“memory whose data is not maintained when the power is removed”

As Ancora explained at pages 8-9 of its Opening Brief, the parties’ constructions of this term differ only in that Ancora has proposed that the Court construe the term to also include the phrase “or becomes inaccessible.” As Ancora also has explained, that language is derived from the entirety of the Federal Circuit’s detailed and explicit construction of this term. Ancora Br. at 8-9.

Specifically, as the Federal Circuit explained, while volatile memory generally refers to “memory whose data is not maintained when the power is removed,” that definition is incomplete to the extent it is understood to exclude the use of “a hard disk as ‘volatile memory.’” *Apple II*, 744 F.3d at 737-38 (quotation marks from *Apple I* omitted). The reason is simple. The Federal Circuit explained that the ’941 Patent demonstrates that “volatile memory” also encompasses situations where memory that traditionally would be thought of as “non-volatile” is used in such a way that the relevant data “become[s] inaccessible through the usual means once power is removed (even if the data can still be found on the hard disk by more sophisticated means).” *Id.* (emphasis

added). Ancora's construction is intended to capture this concept. Nothing more; nothing less.

Further, neither of Defendants' two arguments against Ancora's construction is persuasive. First, Defendants point to the fact that Ancora previously proposed the construction they prefer. Defs. Br. at 30. Notably absent from Defendants' brief, however, is any attempt to address the critical reason why Ancora tweaked its construction (which Ancora explained to Defendants during the meet and confer process): the Federal Circuit's guidance that the term includes cases where non-volatile memory is being used in such a way that the relevant data "become[s] inaccessible through the usual means once power is removed." *Apple II*, 744 F.3d at 737.

Indeed, it was only because Defendants explained during the meet and confer process that they understood Ancora's prior construction to exclude this very "inaccessible" data circumstance that Ancora was compelled to deviate from its prior construction and ask the Court to adopt a more complete one based entirely on the Federal Circuit's decision.

Second, Defendants also argue that Ancora's proposal should be rejected because it purportedly collapses the distinction between "volatile" and "non-volatile" memory because all memory becomes inaccessible when the power is removed. The argument is a red herring. As Ancora told Defendants during their meet and confer, the point is that the data becomes forever "inaccessible through the usual means once power is removed (even if the data can still be found on the hard disk by more sophisticated means)." *Id.* In other words, even after power is restored, the relevant data remains inaccessible through the usual means. If the Court believes it necessary, Ancora has no objection to construing the term to mean "memory whose data is not maintained or becomes inaccessible after the power is removed" to address Defendants' purported concern.

12. "first non-volatile memory area of the computer" (Claim 7)

Ancora's Construction	LGE Defendants' Construction
plain and ordinary meaning	"read only memory area of the computer"

As Ancora explains at pages 29-30 of its Opening Brief, this term does not require construction. Half of the Defendants agree. Defendants Samsung Electronics Co., Ltd. and Samsung Electronics America, Inc. state in their brief that they also disagree that this term should be construed in the manner Defendants LG Electronics Inc. and LG Electronics U.S.A., Inc. argue.

There is a good reason. As LGE's arguments demonstrate, their position is based entirely on the embodiments at 2:1-5; 4:50-51; and 5:12-13 that the patent expressly describes as "non-limiting" or exemplary. '941 Patent at 1:45 (describing the 2:1-5 embodiment as "a specific non-limiting example"), *id.* at 4:50-51 (stating it is "one, non-limiting, preferred embodiment"), and *id.* at 5:7-8 (noting embodiment at 5:12-13 as a "description of a preferred embodiment").

Contrary to LGE's representation that the patent states at 5:12-13 that the "first non-volatile memory area must have no option to be erased or modified, i.e., it must be read only memory (ROM)," the patent actually states only that, in that embodiment, the "computer (processor) internally contains a first non-volatile memory area (4) (e.g. the ROM section of the BIOS)." '941 Patent at 5:12-14. In short, the patent teaches only that ROM is an example of what the first non-volatile memory may comprise. *Interval Licensing LLC v. AOL, Inc.*, 766 F.3d 1364, 1374 (Fed. Cir. 2014) (stating that language in the specification introduced by the term "i.e." is understood to indicate "a definition" whereas "e.g." merely indicates "an example").

Further, consistent with that disclosure, as Ancora explained in its Opening Brief at pages 29-30, the specification recites embodiments, including one mirroring Claim 7's language, that do not require the first non-volatile memory area to be ROM. '941 Patent at 2:62-3:3; *id.* at 4:45-48.

For any of the above reasons, LGE's construction should be rejected.

III. CONCLUSION

For all of the above reasons, Ancora's proposed constructions should be adopted.

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/s/ Andres Healy
Charles Ainsworth
State Bar No. 00783521
Robert Christopher Bunt
State Bar No. 00787165
PARKER, BUNT & AINSWORTH, P.C.
100 E. Ferguson, Suite 418
Tyler, TX 75702
903/531-3535
E-mail: charley@pbatyler.com
E-mail: rcbunt@pbatyler.com

Lexie G. White (Texas 24048876)
Susman Godfrey LLP
1000 Louisiana Street, Suite 5100
Houston, Texas 77002
Tel: (713) 651-9366
Fax: (713) 654-6666
lwhite@susmangodfrey.com

Andres Healy (*pro hac vice*)
Steven M. Seigel (*pro hac vice*)
Susman Godfrey LLP
1201 Third Avenue, Suite 3800
Seattle, Washington 98101
Tel: (206) 516-3880
Fax: 206-516-3883
ahealy@susmangodfrey.com
sseigel@susmangodfrey.com

Zachary B. Savage (*pro hac vice*)
Susman Godfrey LLP
1301 Avenue of the Americas, 32nd Floor
New York, New York 10019
Tel: (212) 336-8330
Fax: (212) 336-8340
zsavage@susmangodfrey.com

COUNSEL FOR PLAINTIFF ANCORA
TECHNOLOGIES, INC.

CERTIFICATE OF SERVICE

I hereby certify that all counsel of record, who are deemed to have consented to electronic service are being served this 10th day of April, 2020, with a copy of this document via the Court's CM/ECF system.

/s/ Michelle Wimmer
Michelle Wimmer