

Hon. Richard A. Jones

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ANCORA TECHNOLOGIES, INC.

Plaintiff,

v.

HTC AMERICA, INC., a Washington
corporation, HTC CORPORATION, a
Taiwanese corporation

Defendant.

Case No. 2:16-cv-01919-RAJ

**ANCORA TECHNOLOGIES, INC.'S
OPENING *MARKMAN* BRIEF**

Due Date: OCTOBER 7, 2019

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I. INTRODUCTION

U.S. Patent No. 6,411,941 (“the ‘941 Patent,” Ex. 1) went through close-scrutiny at the Patent Office, including a Reexamination Proceeding. Microsoft requested the re-examination during an earlier dispute with Ancora. (Ex. 3.) Microsoft submitted an exhaustive list of reasons why it believed the ‘941 Patent should be invalidated. (*Id.* at Apx. 278-279.) Upon undertaking the Reexamination, the Patent Office concluded: “The patentability of claims 1-19 is confirmed.” (*Id.* at Apx. 520.) HTC also filed a petition for post-grant proceedings including a detailed expert declaration. (Ex. 4, Petition; Ex. 5, Weissman Declaration.) The ‘941 Patent prevailed against those challenges. (Ex. 6.)

Because the validity of the ‘941 Patent is now beyond dispute, HTC seeks to change the scope of the patent under the guise of claim construction. But, Judge Gonzalez Rogers in the Northern District of California extensively construed the ‘941 Patent by. (Ex. 7, 12/31/2012 Claim Construction Order.) The Federal Circuit reviewed the ‘941 Patent and its claim construction not once but twice. (Ex. 8, *Ancora v. Apple, Inc.*, 744 F.3d 732 (Fed. Cir. 2014); Ex. 9, *Ancora v. HTC*, 908 F.3d 1343 (Fed. Cir. 2018).) The Patent Office and the Courts have thus evaluated every inch of the ‘941 Patent. These evaluations were not possible if – as HTC now contends – the claims require a fundamentally different construction than that which the prior district courts, the USPTO, and the Federal Circuit applied – twice.

II. THE ‘941 PATENT

The ‘941 Patent is detailed in both Federal Circuit opinions (Ex. 8 and 9), the 2012 Claim Construction Order from the Northern District of California, (Ex. 7), and the USPTO’s decisions in the re-examination (Ex. 3) and post-grant proceedings. (Ex. 6.)

In 2014, the Federal Circuit explained:

The ‘941 patent, entitled “Method of Restricting Software Operation within a License Limitation,” describes a method of preventing unauthorized software use

1 by checking whether a software program is operating within a license and stopping
 2 the program or taking other remedial action if it is not. The specification states that
 3 methods for checking license coverage of software were known in the art at the
 4 time the inventors applied for the '941 patent. But some of those methods were
 vulnerable to hacking, the specification observes, while others were expensive and
 inconvenient to distribute. '941 patent, col. 1, lines 19-32.

5 The specification describes a method that it says overcomes those problems.
 6 In particular, it discloses using the memory space associated with the computer's
 7 basic input/output system (BIOS), rather than other memory space, to store
 8 appropriately encrypted license information to be used in the verification process.
 9 *See, e.g., id.*, col. 1, line 46, through col. 2, line 5; *id.*, col. 4, lines 45-48; *id.*, col.
 10 5, lines 19-24. It states that, while the contents of the BIOS memory space may be
 11 modified, the level of programming expertise needed to do so is unusually high,
 12 and the risk of accidentally damaging the BIOS and thereby rendering the computer
 inoperable "is too high of a risk for the ordinary software hacker to pay." *Id.*, col.
 3, lines 4-14. Thus, the inventors stated that their method makes use of the existing
 computer hardware (eliminating the expense and inconvenience of using additional
 hardware, while storing the verification information in a space that is harder and
 riskier for a hacker to tamper with than storage areas used by earlier methods.

13 *Ancora v. Apple*, 744 F.3d 732, 733-734 (Fed. Cir. 2014) (Ex. 8 at Apx. 720-721).

14 In 2018, the Federal Circuit provided further detail regarding claim 1 of the '941 Patent:

15 Describing aspects of the prior-art methods it seeks to improve, the '941 patent
 16 states that "[n]umerous methods have been devised for the identifying and
 17 restricting of an unauthorized software program's operation." '941 patent, col. 1,
 18 lines 12-14. For example, software-based methods exist that require writing a
 19 license signature on the computer's hard drive, but a flaw in those methods is that
 20 such a signature can be changed by hackers without damaging other aspects of
 computer functionality. *Id.*, col. 1, lines 19-26. Hardware-based methods exist that
 require inserting a dongle into a computer port to authenticate the software
 authorization, but those methods are costly, inconvenient, and not suitable for
 software sold and downloaded over the internet. *Id.*, col. 1, lines 27-32.

21 The '941 patent describes an asserted improvement based on assigning certain
 22 functions to particular computer components and having them interact in specified
 23 ways. The proposed method "relies on the use of a key and of a record." *Id.*, col. 1,
 24 lines 40-41. A "key," which is "a unique identification code" for the *computer*, is
 25 embedded in the read-only memory (ROM) of the computer's Basic Input Output
 26 System (BIOS) module: the key "cannot be removed or modified." *Id.*, col. 1, lines
 45-51. A "record" is a "license record" associated with a particular *application*:
 "each application program that is to be licensed to run on the specified computer[]
 is associated with a license record[] that consists of author name, program name[],
 and number of licensed users (for network)." *Id.*, col. 1, lines 52-57.

1 The asserted innovation of the patent relates to where the license record is stored in
 2 the computer and the interaction of that memory with other memory to check for
 3 permission to run a program that is introduced into the computer. The inventive
 4 method uses a modifiable part of the BIOS memory-not other computer memory-
 5 to store the information that can be used, when a program is introduced into the
 6 computer, to determine whether the program is licensed to run on that computer.
 7 BIOS memory is typically used for storing programs that assist in the start-up of a
 8 computer, not verification structures comparable to the software-licensing structure
 9 embodied by the claimed invention. Using BIOS memory, rather than other
 10 memory in the computer, improves computer security, the patent indicates, because
 11 successfully hacking BIOS memory (i.e., altering it without rendering the computer
 12 inoperable) is much harder than hacking the memory used by the prior art to store
 13 license-verification information. *Id.*, col. 3, lines 4-17; *see Ancora*, 744 F.3d at 733-
 14 34 (“Thus, the inventors stated that their method makes use of the existing computer
 15 hardware (eliminating the expense and inconvenience of using additional
 16 hardware), while storing the verification information in a space that is harder and
 17 riskier for a hacker to tamper with than storage areas used by earlier methods.”).

18 More specifically: The method calls for storage of a license record in a “verification
 19 structure” created in a portion of BIOS memory that, unlike the ROM of the BIOS,
 20 “may be erased or modified”—for example, an Electrically Erasable Programmable
 21 Read Only Memory (E²PROM), which may be altered by “using E²PROM
 22 manipulation commands.” *Id.*, col. 1, line 65 through col. 2, line 5. The role of the
 23 verification structure is to “indicate that the specified program is licensed to run on
 24 the specified computer.” *Id.*, col. 1, lines 60-62.

25 *Ancora v. HTC*, 908 F.3d 1343, 1344-1345 (Fed. Cir. 2018) (Ex. 9 at Apx. 729).

26 In this lawsuit, Ancora asserts claims 1 and 2 of the ‘941 Patent against HTC. Claim 1 is
 27 reproduced below for reference with the words and phrases bolded that HTC seeks to construe:

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

selecting a program residing in the volatile memory;

**using an agent to set up a verification structure in the erasable, non-volatile
 memory of the BIOS**, the verification structure accommodating data that includes
 at least one **license record**,

verifying the program using at least the verification structure from the erasable non-
 volatile memory of the **BIOS**, and

acting on the program according to the verification.

2. A method according to claim 1, further comprising the steps of:
 establishing a **license authentication bureau**.

III. CLAIM CONSTRUCTION LAW

“It is a bedrock principle of patent law that the claims of the patent define the invention to which the patentee is entitled the right to exclude.” *Phillips v. AWH Corp.*, 415 F.3d 1303, 1312 (Fed. Cir. 2005) (*en banc*) (internal quotation marks omitted). Claim terms should generally be “given their ordinary and customary meaning” to those skilled in the art as informed by the specification. *Id.* at 1312-14. However, it is not necessary to construe every claim. *E.g. Finjan, Inc. v. Secure Computing Corp.*, 626 F.3d 1197, 1207 (Fed. Cir. 2011) (holding that the district court did not err by rejecting defendants’ construction and instructing the jury to give the claim term its “ordinary meaning”); *U.S. Surgical Corp. v. Ethicon, Inc.*, 103 F.3d 1554, 1568 (Fed. Cir. 1997) (claim construction “is not an obligatory exercise in redundancy”).

There are only two exceptions to the general rule that words are generally given their ordinary and customary meaning: “1) when a patentee sets out a definition and acts as his own lexicographer, or 2) when the patentee disavows the full scope of a claim term either in the specification or during prosecution.” *Thorner v. Sony Computer Enter. Am. LLC*, 669 F.3d 1362, 1365 (Fed. Cir. 2012) (citing *Vitronics Corp. v. Conceptronic, Inc.*, 90 F.3d 1576, 1580 (Fed. Cir. 1996)). “To act as its own lexicographer, a patentee must ‘clearly set forth a definition of the disputed claim term’ other than its plain and ordinary meaning.” *Id.* (quoting *CCS Fitness, Inc. v. Brunswick Corp.*, 288 F.3d 1359, 1366 (Fed. Cir. 2002)). “The standard for disavowal of claim scope is similarly exacting.” *Id.* at 1366. “Absent a clear disavowal or contrary definition in the specification or the prosecution history, the patentee is entitled to the full scope of its claim language.” *Home Diagnostics, Inc. v. LifeScan, Inc.*, 381 F.3d 1352, 1358 (Fed. Cir. 2004).

Although a patentee may use the specification to assign unique definitions to claim terms, when it does so expressly and clearly as set forth above, limitations from the written description should not be imported into the claims. *Phillips*, 415 F.3d at 1315-16, 1320, 1323 ([A]lthough the specification often describes very specific embodiments of the invention, we have repeatedly warned against confining the claims to those embodiments.”); *Markman v. Westview Instruments*,

1 *Inc.*, 52 F.3d 967, 980 (Fed. Cir. 1995) (*en banc*), *aff'd*, 517 U.S. 370 (1996) (“The written
 2 description part of the specification does not delimit the right to exclude. That is the function and
 3 purpose of the claims.”) Nevertheless, a claim is read “in the context of the entire patent, including
 4 the specification.” *Id.* at 1313. In particular, the description of an embodiment in the specification
 5 does not, without more, limit the claims to that single embodiment. *Id.* at 1323 (“we have expressly
 6 rejected the contention that if a patent describes only a single embodiment, the claims of the patent
 7 must be construed as being limited to that embodiment”). A patent’s prosecution history may also
 8 be considered. *Id.* at 1317 (“Like the specification, the prosecution history provides evidence of
 9 how the PTO and the inventor understood the patent.”).

10 While the Court may consider other evidence extrinsic to the patent, the use of extrinsic
 11 evidence (such as expert testimony and dictionaries) must be secondary and subservient to the
 12 intrinsic evidence. As explained in *Phillips*, 415 F.3d at 1318, the Federal Circuit “view[s]
 13 extrinsic evidence in general as less reliable than the patent and its prosecution history in
 14 determining how to read claim terms, for several reasons.” For example, extrinsic evidence is not
 15 tied to the teachings of the patent and “undue reliance on extrinsic evidence poses the risk that it
 16 will be used to change the meaning of the claims.” *Id.* at 1319. Indeed, it is improper to rely on
 17 extrinsic evidence where “the claims, specification and file history” adequately define a claim
 18 term. *Vitronics*, 90 F.3d at 1583. The intrinsic evidence defines the public record from which the
 19 public is entitled to rely. *Id.* (citing *Markman*, 52 F.3d at 978-79.) “Allowing the public record to
 20 be altered or changed by extrinsic evidence introduced at trial, such as expert testimony, would
 21 make this right meaningless.” *Id.* (citing *Southwall Technologies, Inc. v. Cardinal IG Company*,
 22 54 F.3d 1570, 1579 (Fed. Cir. 1995).
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IV. CLAIM CONSTRUCTION DISPUTES

Claim construction is not a right. Claims are only construed when there is an “actual dispute” concerning the meaning a particular claim term. *O2 Micro Intern. Ltd. v. Beyond Innovation Technology Co., Ltd.*, 521 F.3d 1351, 1360 (Fed. Cir. 2008). And, if concluding that the ordinary meaning applies, that is all claim construction requires. *Finjan*, 626 F.3d at 1207 (holding district court did not err by rejecting defendant’s construction and instructing jury that ordinary meaning applies); *Silicon Graphics, Inc. v. ATI Tech., Inc.*, 607 F.3d 784, 798 (Fed. Cir. 2010) (affirming district court’s choice to state term’s ordinary meaning applies rather than providing construction.); *Mentor H/S, Inc. v. Med. Device Alliance, Inc.*, 244 F.3d 1365, 1380 (Fed. Cir. 2001).

No bonafide dispute over the meaning of the claim terms exist in this case. HTC seeks, instead, to improperly change the claims *as presently written* to avoid infringement. Given the extensive prior constructions and examinations, the ‘941 patent claims contain no ambiguity. The patent claims are easily understood by one skilled in the art and any further construction is unnecessary.

Until Ancora receives HTC’s claim construction brief, it is unable to understand the full nature of HTC’s alleged dispute over the identified claim terms. Accordingly, Ancora will appropriately and fully respond in its reply brief. This is especially true on any term that HTC contends is indefinite, a contention for which HTC bears the burden of proof by clear and convincing evidence. *Datamize, LLC v. Plumtree Software, Inc.*, 417 F.3d 1342, 1348 (Fed. Cir. 2005).

A. “license”

Claim Term/Phrase	Ancora Construction	HTC Construction
“license”	Plain and ordinary meaning / Preamble non-limiting	Permission granted by another entity to use a program

1 The term “license” appears only in the preamble of claim 1: “A method of restricting
 2 software operation within a *license* for use with a . . .” Such preamble language is not limiting
 3 because it merely serves as an introduction to the rest of the claim. *Catalina Marketing Int’l v.*
 4 *Coolsavings.com*, 289 F.3d 801, 809 (Fed. Cir. 2002) (“preambles describing the use of an
 5 invention generally do not limit the claims because the patentability of apparatus or composition
 6 claims depends on the claimed structure, not on the use or purpose of that structure”). Here, the
 7 preamble merely describes the use of the invention and does not limit the invention. Only
 8 preambles that “recite[] essential structure or steps, or if [] ‘necessary to give life, meaning and
 9 vitality’ to the claim” are limiting.” *Id.* at 808.

11 Moreover, limitations are not added to the claims under the guise of claim construction.
 12 *Renishaw PLC v. Marposs Societa’ Per Azioni*, 158 F.3d 1243, 1248-1249 (Fed. Cir. 1998), *citing*
 13 *McCarty v. Lehigh Val R.R.*, 160 U.S. 110, 116, 16 S.Ct. 240 (1895) (“[W]e know of no principle
 14 of law which would authorize us to read into a claim an element which is not present . . . The
 15 difficulty is that if we once begin to include elements not mentioned in the claim in order to limit
 16 such claim . . ., we should never know where to stop.”). Here, the body of claim 1 recites the
 17 process steps that define the claimed method. In fact, the last step of claim 1 states: “acting on the
 18 program according to the verification.” The claim itself does not require what HTC seeks to import
 19 under the guise of claim construction. There is no limitation to “permission granted by another”
 20 or to “use a program.” And, even though it would be improper to import limitations from the
 21 specifications, the intrinsic citations provided by HTC fail to even mention permission “by
 22 another.” (Dkt. #58-1, Parties Joint Claim Construction Statement at 1-3.) There is no basis for
 23 the limitation HTC seeks to import into the claims through claim construction. Indeed, neither
 24 Microsoft, nor Apple, nor their experts, nor the Patent Office, nor the prior district courts, nor the
 25 Federal Circuit struggled with the meaning of the term “license.” In fact, the Northern District of

California repeatedly used the term “license” in its construction. (Ex. 7 at Apx. 717-718.) *Advanced Commc’n. Design, Inc. v. Premier Retail Networks, Inc.*, 46 Fed. App’x 964, 981 (Fed. Cir. 2002) (“if a claim term is sufficiently clear such that no other definition is needed, the district court simply has no duty to wave into existence a different definition, one that uses different words than the words actually used in the claim language itself”) (emphasis added) No construction is required here.

B. “BIOS”

Claim Term/Phrase	Ancora Construction	HTC Construction
“BIOS”	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 <u>B</u> asic <u>I</u> nterface/ <u>O</u> utput <u>S</u> ystem. A memory that: (1) is not recognized by an operating system as a storage device, (2) does not have a file system, and (3) stores the essential set of start-up instructions that (a) run when a computer is turned on, (b) tests hardware, (c) starts the operating system, and (d) supports the transfer of data among hardware devices.

“BIOS” was construed in a lengthy claim construction proceeding in a prior lawsuit with Apple. (Ex. 7 at Apx. 705-708.) While the parties appealed aspects of the district court’s claim construction to the Federal Circuit, the parties did not appeal the district court’s construction of the term “BIOS” because it was correct. (*Compare* Exs. 7 and 8.) Ancora proposes the same construction here. (Dkt. #58-1, Joint Claim Construction Chart at 6.) BIOS was already construed as:

1 An acronym for Basic Input/Output System. It is the set of essential startup
2 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.

3 (Ex. 7 at Apx. 708.)

4 HTC seeks a fundamentally different construction divorced from the ordinary meaning of
5 BIOS to those skilled in the art. First, HTC improperly seeks to define “BIOS” as memory:
6 “BIOS” refers to software code as cited in the claim 1: “memory area of a BIOS of the computer.”
7 (Ex. 1 at 6:65.) BIOS is not memory. As explained by the Federal Circuit, the ‘941 patent
8 “discloses using the memory space associated with a computer’s basic input/output system
9 (BIOS)” and there are “‘non-volatile’ areas *associated with* the BIOS.” *Ancora v. Apple, Inc.*, 744
10 F.3d at 733, 739 (Fed. Cir. 2014). The Patent Office also clearly explained:

11 The Microsoft Computer Dictionary, 5th Edition, 2002 defines BIOS as “the set of
12 essential software routines that test hardware at startup, starts the operating system,
13 and supports the transfer of data among hardware devices.” This definition is
14 consistent with the specification of the ‘941 patent. ***Since a BIOS is therefore***
defined by the functional descriptive material contained within it, one skilled in
the art would consider any non-functional descriptive material, such as tables, to
be part of the BIOS only if it is made and used by the functions of the BIOS itself.
15 This does not preclude such material being also used or modified by programs
16 located outside of the BIOS, such as applications running in an operating system.
17 The fact that a program or table resides in non-volatile memory does not necessarily
18 mean that it is part of the BIOS. It is therefore the case that a reasonable examiner
would only consider a table to be in a BIOS if it were, at a minimum, created by a
function residing in the BIOS.

19 (Ex. 3 at Apx. 426-427, emphasis added.) The Northern District of California was similarly
20 express: BIOS “is software code. No one disputes that a person of ordinary skill in the art reading
21 the Claim in this context of the specification and prosecution history would understand that ‘BIOS’
22 is the location in the computer where computer code is stored. The inventive aspect of the ‘941
23 Patent was to write information onto unused memory in the BIOS area of a computer.” (Ex. 7 at
24 Apx. 707.) Using HTC’s re-write of “BIOS” as “memory” is non-sense. *Phillips v. AWH Corp.*,
25 415 F.3d 1303, 1312 (Fed. Cir. 2005) (“it is ‘unjust to the public, as well as an evasion of the law,
26 to construe it in a manner different from the plain imports of its terms”) (citing *White v. Dunbar*,
27

119 U.S. 47, 51-52 (1886) (“The context may, undoubtedly, be resorted to, and often is resorted to, for the purpose of better understanding the meaning of the claim; but not for the purpose of changing it, and making it different from what it is”))

HTC also seeks to improperly add limitations (1) and (2) that are not the ordinary meaning of “BIOS” as found by the Northern District of California. (Ex. 7 at Apx. 705-708.) HTC’s own expert admitted that “claims terms are given their ordinary and customary meaning as would be understood by one skilled in the art” and used the District Court’s construction for BIOS in his analysis before the Patent Office. (Ex. 5, Weissman Decl. at ¶ 44-48; Dkt. #58-1 at 9.) HTC’s own expert understands the meaning of BIOS and when cross-examined did not identify any different meaning for “BIOS” – and certainly not the construction now proposed by HTC. (Ex. 11, Weissman Dep. at 35:13-36:16.) Indeed, HTC’s expert admitted BIOS was a conventional term with a clear meaning during his deposition. (*Id.* at 12:8-15:12.) HTC’s expert used and endorsed the District Court construction of BIOS – not HTC’s current re-write.

In its attempt to improperly inject these limitations into the claims, HTC apparently draws from selected excerpts of the file history. (Ex. 2 at Apx. 220.) In doing so, HTC turns the file history and invention of the ‘941 Patent on their head. HTC’s proposed construction, for example, concerns the “conventional wisdom” in the prior art – no the invention that “proceeds against conventional wisdom.” In the prior art, BIOS was not considered by those skilled in the art as storage for license verification programs. HTC draws from the following portion of the February 5, 2012 Office Action response:

Moreover, the present invention proceeds against conventional wisdom in the art. Using BIOS to store application data such as that stored in Misra’s local cache for licenses is not obvious. The BIOS area is not considered a storage area for computer applications. An ordinary skilled artisan would not consider the BIOS as a storage medium to preserve application data for at least two reasons.

First, OS does not support this functionality and is not recognized as a hardware device like other peripherals. Every OS provides a set of application program interfaces (APIs) for applications to access storage devices such as hard drives, removable devices, etc. An ordinary person skilled in the art makes use of OS features to write dat[a] to storage mediums. There is no OS support whatsoever to write data to the system BIOS. Therefore, an ordinary person

1 skilled in the art would not consider the BIOS as a possible storage medium.
 2 Furthermore, it is common that all peripheral devices in the PC are listed and
 3 recognized by the OS except for the BIOS. This supports the fact that the BIOS
 4 is not considered a peripheral device. Accordingly, an ordinary person skilled in
 the art would not consider the BIOS for any operation, including writing to the
 BIOS.

5 Second, no file system is associated with the BIOS. Every writable device
 6 connected to the PC is associated with an OS file system to arrange and manage
 7 data structures. An example for such a file system would be FAT, FAT32, NTFS,
 8 HPFS, etc. that suggests writing data to the writable device. No such file system
 is associated with the BIOS. This is further evidence that OS level application
 programmers would not consider the BIOS as a storage medium for license data.

9 (Ex. 2 at Apx. 220.) Effectively, Ancora was explaining why one skilled in the art using an
 10 operating system would not consider using the area of BIOS as a storage medium for license
 11 records – this is how the claims proceed against conventional wisdom. The Federal Circuit already
 12 explained *this exact passage* from the prosecution history:

13 The applicants explained that their invention differed from the prior art in that it
 14 both operated as an application running through an operating system and used the
 15 BIOS level for data storage and retrieval – a combination that was not previously
 taught and that an ordinary skilled application writer would not employ.

16 *Apple*, 744 F.3d at 735. Ancora did not re-define the commonly understood meaning of BIOS, let
 17 alone do so clearly and unmistakably as required by Federal Circuit precedent to disturb its plain
 18 and ordinary meaning. The Federal Circuit also later explained: “BIOS memory is typically [*i.e.*,
 19 in the prior art] used for storing programs that assist in the start-up of a computer, not verification
 20 structures comparable to the software-licensing structure embodied by the claimed invention.
 21 Using BIOS memory, rather than other memory in the computer, improves computer security, the
 22 patent indicates.” *HTC*, 908 F.3d at 1345.

23 HTC’s limitations (1) and (2) seeks to revert the invention of the ‘941 patent to cover only
 24 the prior art, and not the invention as measured by the Patent Office and the Federal Circuit. Such
 25 a “construction” would exclude the use of memory of a BIOS in the claimed method of the ‘941
 26 patent – an absurd result. Moreover, any attempt to use the prosecution history to inform the
 27 construction of BIOS must be “clear and unmistakable.” *Purdue Pharma L.P. v. Endo*

Pharmaceuticals Inc., 438 F.3d 1123, 1136 (Fed. Cir. 2006) (citing *Seachange Int'l, Inc. v. C-COR Inc.*, 413 F.3d 1361, 1372-73 (Fed. Cir. 2005) and *Omega Eng'g, Inc. v. Raytek Corp.*, 334 F.3d 1314, 1323-26 (Fed. Cir. 2003)). No such redefinition exists here.

C. “using an agent to set up a verification structure in the erasable, non-volatile memory of the BIOS”

Claim Term/Phrase	Ancora Construction	HTC Construction
“using an agent to set up a verification structure in the erasable, non-volatile memory of the BIOS”	Plain and ordinary meaning “agent” is a “software program or routine”	“Agent” is a nonce word indicating that the claim limitation should be interpreted as a means-plus-function term under 35 U.S.C. § 112(f). Function: to set up a verification structure in the erasable, non-volatile memory of the BIOS Corresponding structure: There is no corresponding structure disclosed in the patent’s specification other than a general-purpose computer generically programmed to perform the function. This renders the claim indefinite under 35 U.S.C. § 112(f) because here is no disclosure of any algorithm that performs the recited function

1. “Agent” has a defined meaning in the art as a “Software Program or Routine”

Claim 1 of the ‘941 Patent recites: “using an agent to set up a verification structure in the erasable, non-volatile memory of the BIOS.” The claim defines *what* is to be stored, i.e., “a

1 verification structure.” The claim defines *where* it is to be stored, i.e., “in the erasable, non-volatile
2 memory of the BIOS.” The claim also defines *how* it is stored, i.e., using an agent.

3 The specification discloses “using E²PROM manipulation commands” to store, add and
4 modify items in the “erasable, non-volatile memory of the BIOS.” (Ex. 1, ‘941 Patent at 1:65-
5 2:9.) The Federal Circuit recently explained the ‘941 Patent claims and its specification:

6 More specifically: The method calls for storage of a license record in a “verification
7 structure” created in a portion of BIOS memory that, unlike the ROM of the BIOS,
8 may be erased or modified” – for example, an Electrically Erasable Programmable
9 Read Only Memory (E²PROM), which may be altered by “using E²PROM
manipulation commands.” *Id.*, col. 1, line 65 through col. 2, line 5.

10 *Ancora v. HTC*, 908 F.3d at 1345. These manipulation commands are well-known and
11 conventional to those skilled in the art. The “software program or routine” that uses such a
12 command with information on what is stored and where it is stored is the “agent” in claim 1 of the
13 ‘941 Patent.

14 ***Both parties agree:*** an agent is a “software program or routine.” (Ex. 12, Jestice Decl. at
15 ¶ 6; Ex. 13, Weissman Decl. at ¶ 12; Ex. 11, Weissman Dep. at 36:17-38:25.) Ancora’s expert,
16 Ian Jestice, explained that the term “agent” is defined and well-understood in the computer industry
17 as “software that performs a function for some other piece of software generally.” (Ex. 14, Jestice
18 Dep. at 18:9-24.)¹

19 The intrinsic record is replete with use of the term “agent” consistent with its meaning in
20 the computer field. During prosecution, the Examiner repeatedly applied the clear meaning of
21 “agent” as acknowledged by HTC. (Ex. 2 at Apx. 209; Ex. 11, Weissman Dep. at 66:14-17: “the
22 patent examiner equated ‘programs’ with ‘agent.’”) The Examiner also identified software
23 programs as “agents” in the prior art. (Ex. 12, Jestice Decl. at ¶ 10.) In the Microsoft *inter-partes*
24 reexamination of the ‘941 Patent, Microsoft applied the common meaning of “agent” as a
25

26 ¹ Use of the term “agent” as a “software program” distinguishes it from the to -be-verified
27 “program” recited in claim 1 of the ‘941 Patent. (Ex. 12, Jestice Decl. at ¶ 9; Ex. 13, Weissman
Decl. at ¶ 12.)

“program to perform a task” and HTC does not “take issue with that understanding.” (Ex. 3 at Apx. 272; Ex. 11, Weissman Dep. at 89:2-10.) Indeed, HTC already admitted to the Federal Circuit that the agent in the ‘941 patent claims is a “software routine.” (Ex. 15 at Apx. 856: “The claims simply direct and agent (e.g., a software routine) to do it without further explanation.”)²

In addition to this extensive intrinsic record, the extrinsic record is in full accord. HTC admits that technical dictionaries define “agent” as “a program that performs a background task.” (Ex. 11, Weissman Dep. at 77:25-79:1; *see also*, Ex. 12, Jestice Decl. at ¶ 13; Ex. 16 at Apx. 882.) Ancora also presented an expert declaration from Ian Jestice explaining:

The term “agent” is well-defined and understood term in the computer industry. An agent is a software program or routine. . . . An agent has a definite structure as a software routine as claimed in the ‘941 patent.

(Ex. 12, Jestice Decl. at ¶ 6.) And while HTC’s expert originally opined that “agent” could be anything. (Ex. 5 at ¶ 71: agent could be “software, hardware, or a combination of both.”) But, HTC’s expert *retracted* this opinion and admitted that Mr. Jestice is correct that “agent” is well-understood as a software program or routine. (Ex. 13, Weissman Decl. at ¶ 12; Ex. 11, Weissman Dep. at 36:17-38:25.) Any claim construction dispute regarding “agent” is resolved. An “agent” as used in claim 1 of the ‘941 Patent is a “software routine or program.”

2. 35 U.S.C. § 112, paragraph 6 does not apply

Means-plus-function claiming occurs when a claim is drafted as any “means” for performing a function. 35 U.S.C. § 112, ¶ 6. The Federal Circuit has long recognized the importance of the presence or absence of the word “means” in the claim to determine whether the claim construction is governed 35 U.S.C. § 112, ¶ 6. Importantly, “failure to use the word ‘means’ [in the claim] creates a rebuttable *presumption* that § 112, ¶ 6 does not apply.” *Zeroclick, LLC v. Apple, Inc.*, 891 F.3d 1003, 1007 (Fed. Cir. 2018), *citing Williamson v. Citrix Online, LLC*, 792

² HTC also continually referred to all steps of the claimed method being performed by conventional software. (Ex. 15 at Apx. 858: “The claims recite software acts only;” *Id.* at Apx. 838: “[T]he patent claims steps which use conventional software.”)

1 F.3d 1339, 1348 (Fed. Cir. 2016) (en banc). The term “means” is not used in the asserted claims,
 2 and therefore, § 112, ¶ 6 presumptively does not apply.

3 HTC contends that “using an agent to set up a verification structure in the erasable, non-
 4 volatile memory of the BIOS” should be construed as a “means” clause. HTC’s assertion is
 5 baseless. The claim does not use the term “means.” Instead, it uses the term “agent” which the
 6 parties agree is well-understood as a “software program or routine.” The claim also states what
 7 the agent does, it stores data in memory.³ Such agents are well-known and conventional in the
 8 art. The specification specifically discloses an example of “E²PROM manipulation commands”
 9 to store add data to the “E²PROM section of the BIOS.” (Ex. 1 at 1:66-2:5, 5:14-15; Ex. 11
 10 Weissman Dep. at 27:21-28:4;) The prosecution history references industry standards for storing
 11 such data. (Ex. 2 at Apx. 60-61.) HTC admits this is conventional and that one skilled in the art
 12 knows how to store such data without any further instructions. (Ex. 11, Weissman Dep. at 22:11-
 13 16; 29:15-19.) Claim 1 of the ‘941 Patent then expressly identifies *what* is to be stored (“a
 14 verification structure”) and *where* it is to be stored (“in the erasable, non-volatile memory of the
 15 BIOS.”) There is no basis to go against the presumption and hold that this detailed software and
 16 process is a “means-plus-function” limitation.

17 The Federal Circuit recently addressed similar issues in *Zeroclick, LLC v. Apple, Inc.*, 891
 18 F.3d 1003, 1007 (Fed. Cir. 2018). In *Zeroclick*, the district court held the claim terms “program”
 19 and “user interface code” invoked means-plus-function treatment under 35 U.S.C. § 112, ¶ 6
 20 because the claim included only functional language. The Federal Circuit reversed holding the
 21 district court legally erred by not giving effect to the presumption against § 112, ¶ 6. *Id.* at 1008.
 22 The Federal Circuit explained that it was error to treat “program” and “user interface code” as a
 23 substitute for “means” for at least three reasons.

24
 25
 26 ³ HTC advised the Federal Circuit that: “For the setting-up step, the claims recite ‘using an agent’
 27 to *store* license information in an erasable non-volatile memory in the computer’s BIOS. (Ex. 15
 at Apx. 841, emphasis added.) HTC does not take a contrary position here.

1 First, the Federal Circuit made clear that simply because the claim includes functional
 2 language “does not automatically convert the [program and code] words into means for performing
 3 such functions.” *Id.* at 1008. HTC makes a similar argument here, and it should be rejected. Claim
 4 1 of the ‘941 Patent expressly identifies **what** is to be stored and **where** it is to be stored. The
 5 storing is done by a conventional, simple and well-known E2PROM command as a software
 6 program or routine, i.e., the agent recited in the claims. The use of functional language does not
 7 invoke 35 U.S.C. § 112, ¶ 6. Instead, the Federal Circuit explains:

8 [F]unctional language promotes definiteness because it helps bound the scope of
 9 the claims by specifying the operations that the “processing system” must
 10 undertake. All of the asserted claims are method claims, so it makes sense to define
 the inventive method as a series of functions.

11 *Cox Communs., Inc. v. Sprint Commun. Co. LP*, 838 F.3d 1224, 1232 (Fed. Cir. 2016) (“Claims
 12 are not per se indefinite because they contain functional language.”); *O.I. Corp. v. Tekmar Co.*,
 13 115 F.3d 1576, 1583 (Fed. Cir. 1997) (“Claiming a step without recital of a function is not
 14 analogous to a means plus a function . . . if we were to construe every process claim containing
 15 steps described by an ‘ing’ verb . . . into a step-plus-function limitation, we would be limiting
 16 process claims in a manner never intended by Congress.”)

17 Second, because “the basic concept behind both the patents-in-suit is relatively simple”
 18 one skilled in the art would view the terms “as specific references to **conventional [] code, existing**
 19 **in the prior art at the time of the inventions.**” *Zeroclick*, 891 F.3d at 1008. That is exactly true
 20 here. HTC admits that using the claimed agent to write data to “erasable, non-volatile memory of
 21 the BIOS” is a conventional software routine that existed at the time of the inventions. (Ex. 11,
 22 Weissman Dep. at 22:11-16; 29:15-19; Ex. 2 at Apx. 60-61.) HTC’s expert declared:

23 The patent further explains that “the data in the second non-volatile memory [of a
 24 BIOS] may be optically erased or modified (using E2PROM manipulation
 25 commands)”. *Id.* at 2:2-4. In my opinion, a person of ordinary skill in the art would
 26 understand that these manipulation commands refer to conventional techniques.
 Therefore, in my opinion, storing data in BIOS is not transformative because it
 describes storing data in the memory of a conventional computer component using
 conventional techniques.

27 (Ex. 5 Weissman Decl. at ¶ 59.) HTC even told the Federal Circuit:

In fact, the specification merely discloses that “using E2PROM manipulation commands” allows erasing and modifying the BIOS memory. [‘941 Patent] at 2:1-5. Therefore, the patent claims steps which use conventional software on conventional computer hardware.

(Ex. 15 at p. 4.) Thus, where a claim limitation makes “specific references to *conventional* [] *code, existing in the prior art at the time of the inventions*” 35 U.S.C. § 112, ¶ 6 is not invoked. *Zeroclick*, 891 F.3d at 1008. This is further supported by the general propositions that only use of the term “means” invokes 35 U.S.C. § 112, ¶ 6 treatment in a method claim,⁴ and “[a] patent need not teach, and preferably omits, what is well known in the art.” *Epistar Corp. v. ITC*, 566 F.3d 1321, 1336 (Fed. Cir. 2009) citing *Spectra-Physics, Inc. v. Coherent, Inc.*, 827 F.2d 1524, 1534 (Fed. Cir. 1987).

Third, in *Zeroclick*, there was “no pertinent finding that compels the conclusions that a conventional graphical user interface program or code is used in common parlance as a substitute for means.” *Id.* at 1009. Here, HTC admitted that “agent” has a well-understood meaning in the computer arts. (Ex. 12, Jestice Decl. at ¶ 6; Ex. 13, Weissman Decl. at ¶ 12; Ex. 11, Weissman Dep. at 36:17-38:25.) And, although it originally presented contrary testimony, HTC retracted and admitted that “agent” is not used as a substitute to cover all means for performing a function. (Ex. 13, Weissman Decl. at ¶ 12; Ex. 11, Weissman Dep. at 36:17-38:25.) HTC’s request for 35 U.S.C. § 112, ¶ 6 treatment should be rejected.

Other cases similarly hold that the claim term “program” or other terms understood as a “software program” do not invoke 35 U.S.C. § 112, ¶ 6 treatment. For example, in *Stragent, LLC*.

⁴ 35 U.S.C. § 112, ¶ 6 does not apply to method claims unless the claim uses the word “means” or the function “clearly constitutes the point of novelty.” *Techno View IP, Inc. v. Facebook Technologies, LLC*, 2018 WL 6427874, at * 3 (D. Del. 2018)(R&R)(citing *Erfindergemeinschaft UroPep GbR v. Eli Lilly and Company*, 2016 WL 6138124 at *4, *6 (E.D. Tex. 2016)(Federal Circuit Judge Bryson sitting by designation explained that the purpose of 35 U.S.C. § 112, ¶ 6 was to avoid “conveniently functional language at the *exact point of novelty*.” *Cox Communs., Inc. v. Sprint Commun. Co. LP*, 838 F.3d 1224, 1229 (Fed. Cir. 2016) (holding “[a]ll of the asserted claims are method claims, and the point of novelty resides with the steps of these methods, not with the machine that performs them.”) *See also Techno View IP, Inc. v. Facebook Technologies, LLC*, 2018 WL 6427874, at *4 (D. Del. 2018).

1 v. *Amazon.com, Inc.*, 2011 WL 13152568, at *4 (E.D. Tex. 2011)(emphasis added), the court
2 explained:

3 The Federal Circuit has “looked to the dictionary to determine if a disputed term
4 has achieved recognition as a noun denoting structure, even if the noun is derived
5 from the function performed.” *Lighting World*, 382 F.3d at 1360-61; *see also*
6 *Linear Tech. Corp. v. Impala Linear Corp.*, 379 F.3d 1311, 1320 (Fed. Cir. 2004)
7 (looking to technical dictionaries to determine whether “circuit” connotes
8 structure). As implied above, the term “engine” conveys structure to one of
9 ordinary skill in the art. Not only did the Examiner acknowledge that an engine is
10 a “software application” or software module, but Amazon apparently agrees,
11 quoting The dictionary of Multimedia 104 (1999), which states that an engine “[i]n
12 software, [is] a program (such as a database engine or search engine) that performs
13 a function. . . .” [citation omitted] Thus, ***because the term “engine” is understood
14 to be a software program, § 112 ¶ 6 does not apply*** and the term is not indefinite.

15 Likewise, in *Collaborative Agreements, LLC v. Adobe Sys.*, 2015 U.S. Dist. LEXIS 61786,
16 at *35-36 (W.D. Tex. 2015) the court determined that “code segment” and “computer program”
17 did not invoke § 112, ¶ 6 explaining:

18 Courts have consistently interpreted “software” and similar terms to have sufficient
19 structure so as to avoid an invocation of Section 112 ¶ 6. *See Inventio AG v.*
20 *ThyssenKrupp Elevator Americas Corp.*, 649 F.3d 1350, 1359-60 (Fed. Cir. 2011)
21 (overturning district court finding that “computing unit” invoked ¶ 6); *Trading*
22 *Technologies Int’l, Inc. v. eSpeed, Inc.*, No. 04 C 5312, 2006 U.S. Dist. LEXIS
23 80153, 2006 WL 3147697, at *11 (N.D. Ill. Oct. 31, 2006) (finding “code” did not
24 invoke ¶ 6 in a computer-readable medium claim) *aff’d*, 595 F.3d 1340 (Fed. Cir.
25 2010); *WhitServe LLC v. GoDaddy.com, Inc.*, No. 3:11-CV-00948, 65 F. Supp. 3d
26 317, 2014 U.S. Dist. LEXIS 156036, 2014 WL 5668335, at *4 (D. Conn. Nov. 4,
27 2014) (finding “software executing on said computer” did not invoke ¶ 6); *RLIS,*
28 *Inc. v. Allscripts Healthcare Solutions, Inc.*, Nos. 3:12-CV-208, 3:12-CV-209,
29 2013 U.S. Dist. LEXIS 98840, 2013 WL 3772472, at *14 (S.D. Tex. July 16, 2013)
30 (finding “computer system under software control,” “computer executable database
31 software,” “an editing software utility,” “executable software,” and “computer
32 software” did not invoke ¶ 6); *Eolas Techs., Inc. v. Adobe Sys., Inc.*, 810 F.Supp.2d
33 795, 810 (E.D. Tex. 2011) (finding “computer readable program code did not
34 invoke ¶ 6); *Aloft Media, LLC v. Adobe Sys., Inc.*, 570 F.Supp.2d 887, 898 (E.D.
35 Tex. 2008) (finding “computer code” did not invoke ¶ 6.)

36 Simply, the term “agent” has a defined and well-understood meaning in the art as a
37 “software program or routine.” HTC cannot overcome the presumption that § 112, ¶ 6 is *not*
invoked.

a. “Agent” Is Not A Nonce Word Substituting For “Means”

Like the accused infringer Apple did in *Zeroclick*, HTC effectively asks the court to treat “agent” as a nonce word that operates as a substitute for “means.” HTC cites two cases, each explain that a nonce word is a substitute for any means. *Williamson v. Citrix Online, LLC*, 792 F.3d 1339, 1350 (defining nonce words as “[g]eneric terms such as ‘mechanism,’ ‘element,’ ‘device,’ and other nonce words that reflect nothing more than verbal constructs may be used in a claim in a manner that is tantamount to using the word ‘means’ because they ‘typically do not connote sufficiently definite structure’ and therefore may invoke § 112 para. 6”).

In *Williamson*, the patentee admitted that the “distributed learning control module” did not have a meaning in the art and the patentee admitted it “could be in software or it could be in hardware.” *Id.* at 1351. In *Media Rights Tech. Inc. v. Capital One Financial Corporation*, 800 F.3d 1366 (Fed. Cir. 2015), it was not disputed that “compliance mechanism” did not have a commonly understood meaning in the art and does not have a particular structure so it would cover all means to perform a function. To fit this case within those, HTC presented testimony that the term “agent” is not understood and could refer to “software, hardware, or a combination of both.” (Ex. 5, Weissman Decl. at ¶ 71.) But, HTC’s expert *retracted* this testimony. HTC now admits that “agent” has a well-understood meaning to those skilled in the art as a software program or routine. (Ex. 13, Weissman Decl. at ¶ 12; Ex. 11, Weissman Dep. at 36:17-38:25.) *Williamson* and *Media Rights* do not apply.

b. A Simple Conventional Algorithm Is Clearly Disclosed In the ‘941 Patent For This Limitation

After HTC argues that this limitation should be treated under § 112, ¶ 6, HTC contends “there is no corresponding structure disclosed in the patent’s specification other than a general-purpose computer generically programmed to perform the function” and that renders the claim invalid. Not only has HTC not overcome the presumption that § 112, ¶ 6 does not apply, HTC also fails to consider the claim and specification when identifying the corresponding structure for the “agent” of claim 1.

1 The '941 Patent discloses a simple conventional algorithm for the agent. As HTC admits,
 2 an "algorithm [only] has to describe how to do something." (Ex. 11, Weissman Dep. at 17:17-21.)
 3 Here, the claim and specification describe the "setting up" step. Claim 1 recites: "using an agent
 4 to set up a verification structure in the erasable, non-volatile memory of the BIOS." Claim 1 of
 5 the '941 Patent then expressly identifies *what* is to be stored ("a verification structure") and *where*
 6 it is to be stored ("in the erasable, non-volatile memory of the BIOS.") It also states that an "agent"
 7 performs the "setting up." The specification clearly discloses "E²PROM manipulation commands"
 8 to store add data to the "E²PROM section of the BIOS." (Ex. 1 at 1:66-2:5, 5:14-15; Ex. 11
 9 Weissman Dep. at 27:21-28:4.) The Federal Circuit already explained that this disclosure is linked
 10 to this limitation.

11 More specifically: The method calls for storage of a license record in a "verification
 12 structure" created in a portion of BIOS memory that, unlike the ROM of the BIOS,
 13 may be erased or modified" – for example, an Electrically Erasable Programmable
 14 Read Only Memory (E²PROM), which may be altered by "using E²PROM
 manipulation commands." Id., col. 1, line 65 through col. 2, line 5.

15 *Ancora v. HTC*, 908 F.3d at 1345. And of course, all parties agree that "E²PROM manipulation
 16 commands" are well-known and conventional in the art. (Ex. 15 at p. 4; Ex. 11, Weissman Dep.
 17 at 29:15-19) HTC also admits one skilled in the art knows how to store data with these commands
 18 *without any further instructions*. (Ex. 11, Weissman Dep. at 22:11-16; 20:16-22.)

19 Besides "E²PROM manipulation commands," one skilled in the art only needs to know
 20 *what* to store and *where* to store it. This information is provided in the claim itself. That is the
 21 entirety of the software routine that is needed, and it is disclosed in the '941 Patent. (Ex. 14, Jestice
 22 Dep. at 77:7-79:1.) A simple storage command, with what is stored, and where it is stored,
 23 describes *how* to perform this claim limitation – an algorithm is undeniably disclosed in the
 24 specification specifically for this claim limitation.

D. “license record”

Claim Term/Phrase	Ancora Construction	HTC Construction
“license record”	Data indicating permission to use a program	Data indicating that another entity granted permission to use a program

This parties dispute whether a “license record” indicates permission (per Ancora) or requires permission be granted by another entity (per HTC). There is nothing in the claim or the specification that limits the term “license record” to permission from another entity, whatever undefined entity that may be, and nothing should be added under the guise of claim construction. For similar reasons asserted above with respect to the “license” limitation, the Court should reject the “another entity” aspect of HTC’s proposed construction.

E. “acting on the program according to the verification”

Claim Term/Phrase	Ancora Construction	HTC Construction
“acting on the program according to the verification”	Plain and ordinary meaning	(i) allowing the use of the program if licensed or (ii) restricting the program’s operation with predetermined limitations if not licensed

HTC seeks to completely re-draft this limitation. There is no basis for the re-write of this claim language. “In some cases, the ordinary meaning of claim language as understood by a person of skill in the art may be readily apparent even to lay judges, and claim construction in such cases involves little more than the application of the widely accepted meaning of commonly understood words.” *Phillips*, 415 F.3d at 1314. No further construction is needed for this phrase. *Phillips v. AWH Corp.*, 415 F.3d 1303, 1312 (Fed. Cir. 2005) (“it is ‘unjust to the public, as well as an evasion of the law, to construe it in a manner different from the plain imports of its terms’) (citing *White v. Dunbar*, 119 U.S. 47, 51-52 (1886) (“The context may, undoubtedly, be resorted to, and often

is resorted to, for the purpose of better understanding the meaning of the claim; but not for the purpose of changing it, and making it different from what it is.”))

Claim differentiation also prevents HTC’s proposed construction. Claim 10 of the ‘941 patent further defines this limitation as “restricting the program’s operating with predetermined limitations if the comparing yields non-unity or insufficiency.” Thus, HTC request to bring these limitations from claim 10 into claim 1 through claim construction is presumptively improper. *Curtiss-Wright Flow Control Corp. v. Velan, Inc.*, 438 F.3d 1374 (Fed. Cir. 2006) (“In the most specific sense, ‘claim differentiation’ refers to the presumption that an independent claim should not be construed as requiring a limitation added by a dependent claim.”)

F. “license authentication bureau”

Claim Term/Phrase	Ancora Construction	HTC Construction
“license authentication bureau”	A telecommunications accessible processor that can be used for verification functions	Telecommunications accessible processor where authentication of a license is performed

HTC seeks to completely re-draft this limitation. There is no basis for the re-write of this claim language. Both parties agree that this term refers to a “telecommunications accessible processor” but then the parties diverge. HTC seeks to add the limitation that this processor is “where” authentication is performed. There is no basis for this limitation in claim 2 of the ‘941 patent.

First, the claim language does not limit where authentication is performed. In fact, claim 4 provides the added limitation that the authentication comparison is at the bureau. (*Id.* at 7:28-29: “enabling the comparing at the bureau; and transferring, from the bureau to the computer, the result of the comparing.”) Thus, HTC’s construction is presumptively improper. *Nazomi Communs., Inc. v. Arm Holdings, PLC.*, 403 F.3d 1364, 1370 (Fed. Cir. 20005) (“Claim differentiation ‘normally means that limitations stated in the dependent claims are not to be read

1 into the independent claim from which they depend.”) quoting *Karlin Tech., Inc. v. Surgical*
 2 *Dynamics, Inc.*, 177 F.3d 968, 971-72 (Fed. Cir. 2005).

3 Importantly, the specification describes that the license bureau may participate in setting
 4 up the verification structure OR the verification process.

5 According to the preferred embodiment of the present invention, there is further
 6 provided a license authentication bureau which can participate in either or both of:

7 (i) establishing the license record in the second nonvolatile memory; and
 8 (ii) verifying if the key and license record in the nonvolatile memory(s) is
 9 compatible with the license record information as extracted from the application
 10 under question.

11 The bureau is a telecommunications accessible processor where functions such
 12 as formatting, encrypting, and verifying may be performed. Performing these or
 13 other functions at the bureau helps to limit the understanding of potential software
 14 hackers; since they can not observe how these functions are constructed. Additional
 15 security may also be achieved by forcing users of the bureau to register, collecting
 16 costs for connection to the bureau, logging transactions at the bureau, etc.

17 (Ex. 1, ‘941 patent at 3:33-50.) There is no limitation in the claim that the bureau is where the
 18 verification process occurs, as this would be blatantly incorporating one (but not the other)
 19 example from the specification into the claim. This is legally improper. *Vitronics Corp. v.*
 20 *Conceptronic, Inc.*, 90 F.3d 1576, 1583 (Fed. Cir. 1996)(A claim construction that excludes an
 21 embodiment is “rarely, if ever, correct.”) The license authentication bureau may assist in
 22 verifications functions such as placing a license record in the non-volatile memory of the BIOS,
 23 verifying the key, formatting issues, registering users, etc. Thus, Ancora’s proposed construction
 24 that the bureau is where several functions may be performed is most appropriate.

25 IV. CONCLUSION

26 For the reasons set forth above, Ancora requests that if the Court determines that claim
 27 construction is necessary, the Court adopt Ancora’s proposed constructions. Ancora’s proposed
 constructions are reproduced below for the Court’s convenience:

Claim Term	Ancora's Construction
"license"	Plain and ordinary meaning/ Preamble non-limiting
"BIOS"	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
"using an agent to set up a verification structure in the erasable, non-volatile memory of the BIOS"	Plain and ordinary meaning
"acting on the program according to the verification"	Plain and ordinary meaning
"license record"	Data indicating permission to use a program
"license authentication bureau"	A telecommunications accessible processor that can be used for verification functions

In addition, the parties agreed to the following construction after the parties submitted the Joint Claim Construction Statement:

Claim Term	Agreed Construction
"erasable non-volatile memory of a BIOS"	Erasable memory area of a BIOS whose data is maintained when the power is removed
"the verification structure from the erasable non-volatile memory of the BIOS"	Plain and ordinary meaning

BROOKS KUSHMAN P.C.

Dated: September 23, 2019

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CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that on September 23, 2019, I electronically filed the foregoing ANCORA TECHNOLOGIES, INC.'S OPENING *MARKMAN* BRIEF with the Clerk of the Court using the ECF System which will send notification to the following registered participants of the ECF System as listed on the Court's Notice of Electronic Filing:

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