

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
RESPONSIVE *MARKMAN* BRIEF**

REQUEST FOR ORAL ARGUMENT

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I. “BIOS”

A. HTC’s “BIOS is Memory” Argument is Based on Repeated Misrepresentations and Omissions

HTC falsely states that Ancora does not propose adopting the prior construction of “BIOS.” (DN60 at 7.) Ancora proposes the *exact same construction* as that of Judge Gonzalez-Rogers from the Northern District of California for the ‘941 Patent. (DN59-8 at Apx. 705-708.)

HTC also falsely states that the issue of whether BIOS was memory or code was never addressed previously. (DN60 at 7: “page 12 of 29”.) Judge Gonzalez-Rogers in the Northern District of California explained BIOS “is software code. No one disputes that a person of ordinary skill in the art reading the Claim in this context of the specification and prosecution history would understand that ‘BIOS’ is the location in the computer where computer code is stored. The inventive aspect of the ‘941 Patent was to write information onto unused memory in the BIOS area of a computer.” (DN59-8 at Apx. 707.)

HTC also misrepresents the claims, specification and prosecution history to argue that BIOS is memory. Claim 1 recites: “a computer including an erasable, non-volatile **memory area of a BIOS** of the computer.” The claim then references this memory area of the BIOS. If BIOS is memory, the claim would read, a “memory area of a [memory]” – which is total non-sense. And, while HTC on page 13 cites to the portion of the claim that recites “the erasable non-volatile memory of the BIOS,” HTC fails to advise the Court that HTC *agreed* this language is properly construed as “the erasable non-volatile memory *area* of the BIOS.” (Ex. 17, email from HTC regarding constructions.)¹

The specification is also clear *to those skilled in the art* that BIOS is not memory. This is confirmed by *all experts* and the *Federal Circuit*. Apple presented expert testimony that “One of ordinary skill in the art would understand BIOS to mean ‘software routines . . . that handle startup operations . . .’” (Ex. 18, Kelly Decl. at ¶¶ 30-31.) Ancora submitted similar testimony. (Ex. 19, Jestice Decl. at ¶¶ 9-14.) Even HTC’s own expert testified: “BIOS is a set of instructions . . .”

¹ HTC originally proposed changing the words of the claim “of a BIOS” to “within a BIOS” but withdrew that unsupportable proposal. (DN58-1 at 5.)

(DN59-12 at Apx. 747 at 25:20-21.) The Federal Circuit, after review of the intrinsic record, explained the ‘941 patent “discloses using the memory space associated with a computer’s basic input/output system (BIOS)” and there are “‘non-volatile’ areas *associated with* the BIOS.” *Ancora v. Apple, Inc.*, 744 F.3d at 733, 739 (Fed. Cir. 2014) (citing the ‘941 Patent at “col. 1, line 46, through col. 2, line 5; *id.*, col. 4, lines 45-48; *id.*, col. 5, lines 19-24.”) The claim term at issue is “BIOS” which are well-known start-up instructions.

HTC continues its misleading arguments with selective citations to the prosecution history where BIOS may have been used as shorthand for longer claim language, completely ignoring the express definition of BIOS present in the intrinsic record.

The Microsoft Computer Dictionary, 5th Edition, 2002 defines BIOS as “the set of essential software routines that test hardware at startup, starts the operating system, and supports the transfer of data among hardware devices.” ***This definition is 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. This does not preclude such material being also used or modified by programs located outside of the BIOS, such as applications running in an operating system. The fact that a program or table resides in non-volatile memory does not necessarily 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.

(DN59-4 at Apx. 426-427, emphasis added throughout unless otherwise noted.)

Those skilled in the art understand that BIOS is not memory, but instead “the set of essential software routines” for start-up. *Phillips v. AWH Corp.*, 415 F.3d 1303, 1312 (Fed. Cir. 2015) (*en banc*); *Thorner v. Sony Computer Enter. Am. LLC*, 669 F.3d 1362, 1365 (Fed. Cir. 2012) (claim terms are generally given their plain and ordinary meaning.) HTC has presented nothing, let alone compelling evidence, to go against the intrinsic record, all experts, the USPTO, the Northern District of California, *and* the Federal Circuit on this issue.

B. HTC’s Prosecution History Excerpts Do Not Define BIOS

HTC then spends four pages making a convoluted argument from the prosecution history arguing that BIOS must be improperly construed as memory. HTC pursues these arguments

without any recognition that the Federal Circuit cautions the prosecution history often lacks clarity for use in claim construction.

[B]ecause the prosecution history represents an ongoing negotiation between the PTO and the applicant, rather than the final product of that negotiation, it often lacks the clarity of the specification and thus is less useful for claim construction purposes. *See Inverness Med. Switz. GmbH v. Warner Lambert Co.*, 309 F.3d 1373, 1380–82 (Fed.Cir.2002) (the ambiguity of the prosecution history made it less relevant to claim construction); *Athletic Alternatives, Inc. v. Prince Mfg., Inc.*, 73 F.3d 1573, 1580 (Fed.Cir.1996) (the ambiguity of the prosecution history made it “unhelpful as an interpretive resource” for claim construction).

Phillips, 415 F.3d at 1317. Moreover, terms will only be narrowed from their ordinary meaning where “the patentee has made clear its adoption of a different definition.” *Ancora Techs. v. Apple, Inc.*, 744 F.3d 732, 734 (Fed. Cir. 2014). This is far from the case here. *See, e.g., Abbott Labs v. Andrix Pharms.*, 473 F.3d 1196, 1210-11 (Fed. Cir. 2007) (holding language that the “The pharmaceutically acceptable polymer is . . .” does “not signify that the description provided is definitional” for pharmaceutically acceptable polymer.)

HTC takes numerous non-definitional statements out of context. Ancora provided a block quote of this portion of the prosecution history (DN59-10-11), while HTC prefers to rely on misleading quotations.² First, HTC says incorrectly that “the Examiner turned to Ewertz for its teaching of ‘expanding BIOS memory to store identification and/or configuration data such as software licenses’” and that this was the “lone limitation missing from Misra.” (DN60 at 9.) HTC statements are completely out of context and wrong. Ancora explained the information of Ewertz was “stored in a **non-writable, non-erasable area** of the BIOS during manufacture,” *i.e.* ROM memory. (DN59-3 at Apx. 218.) Ancora explained that its invention used E²PROM or the “erasable, non-volatile memory area of a BIOS” recited in the claims. Thus, the combination of Misra and Ewertz was distinguished prior to any additional statements.

² HTC similarly attempted to misrepresent the prosecution history to the Federal Circuit in Ancora’s appeal. The Federal Circuit was quick and strong with their criticism of such a practice by HTC. (Ex. 20, Transcription of Oral Argument at 11:57-17:07.)

1 Second, HTC ignores that Ancora explained that Misra and Ewertz cannot be combined
2 because one included only BIOS routines, the other including only OS programs. (DN59-3 at Apx.
3 219.) The ‘941 Patent teaches a combination; the prior art did not. HTC pulled citations from a
4 portion of the prosecution history, but unfortunately ignores that Federal Circuit examined this
5 *exact portion* of the prosecution and held:

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

10 *Apple*, 744 F.3d at 735. The Federal Circuit did not conclude that BIOS was re-defined as HTC
11 now proposes. In fact, when viewed in the proper context, this portion of the prosecution history
12 is not relevant to the definition of BIOS – the exact reason the Federal Circuit warns against HTC’s
13 use of such prosecution history arguments for claim construction. *Phillips*, 415 F.3d 1317.

14 Here, HTC argues: “BIOS memory (1) is not recognized by an operating system as a
15 storage device, and (2) has no file system.” But, the ‘941 patent recognizes and claims a memory
16 area associated with BIOS that is used with a verification structure as a storage device for licenses.
17 *See, e.g.* Claim 1. HTC is seeking a re-definition of BIOS *exactly opposite* of the claims of the
18 ‘941 Patent – which can never be correct. HTC fails to acknowledge that Ancora was simply
19 arguing why “an ordinary skilled artisan” that works with OS-level programs “would not consider
20 BIOS as a storage medium” for licenses. Ancora never came close to re-defining BIOS.

21 The prosecution history statements are both about prior art operating systems and are
22 irrelevant to the definition of BIOS. These statements explain why “an ordinary person skilled in
23 the art would not consider BIOS as a possible storage medium” for licenses when working through
24 an operating system. (DN59-3 at Apx. 220.) That is because an “ordinary skilled application
25 writer” working in an operating system would not consider use of BIOS memory for license
26 storage. When working with an operating system in 1998 at the time of the invention, BIOS was
27

not readily available for data storage.³ First, common OS prior art systems did not write to BIOS memory. Indeed, that is why the claim recites “using an agent” that the specification discloses as E²PROM manipulation commands – not common OS features – “to set up the verification structure.” (DN59-2, Ex. 1, at 1:65-2:5, 6:64-66.) Second, at the time of the invention, there was no “OS file system” in the prior art “associated with the BIOS.” (DN59-3 at Apx. 220.) But again, the ‘941 Patent changed that by “verifying the program using at the least verification structure” in the memory associated with the BIOS. (DN59-2 at 7:1-3.) Simply, “OS level application programmers would not consider the BIOS as a storage medium for license data.” (DN59-3 at Apx. 220.)

The common meaning of BIOS to those skilled in the art controls. Ancora did not limit or redefine BIOS in the prosecution history. Any attempt to use the prosecution history to redefine 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, let alone a re-definition that is clear, unmistakable and completely unambiguous.

HTC admits as much with its citation to *ViaStat, Inc. v. Apce Sys./Loral, Inc.*, 3:12-cv-00260-H, 2013 WL 3927729, at *20 (S.D. Cal. May 29, 2013). In *ViaStat*, the specification defined “cache” as a “high-speed storage device.” Then, the court evaluated the prosecution history regarding “DRAM” which is not “cache memory” as described in the specification:

As is well-known in the art, a “cache” or “cache memory” is not just any memory but is specialized memory comprising a high-speed storage mechanism. The cache memory may be either a reserved section of main memory or an independent high-speed storage device. ***A cache memory is a portion of memory made of high-speed RAM (SRAM) instead of the slower and cheaper dynamic RAM (DRAM) used for main memory.***

³ “Although critical to performance, the BIOS is usually invisible to computer users” is part of the definition of BIOS in 1998 Microsoft’s Computer Dictionary. (DN58-1 at 9.) The prosecution statements go no further as OS users/programmers did not usually use, see or interact with items in memory associated with the BIOS.

1 *Id.* While the district court used this DRAM statement supported by the specification, the same
 2 district court also refused to limit the definition of “cache” based on other statements. *Id.*
 3 Specifically, the accused infringer sought a construction that “cache” memory “requires no active
 4 system capacity,” but those statements pulled from the prosecution history were not “clear and
 5 unmistakable” because those references were not intended to define “cache.” *Id.*

6 At bottom, Ancora was just explaining how its invention “operated as an application
 7 running through an operating system and used the BIOS level for data storage and retrieval” of
 8 licenses – something that did not exist in the prior art. *Apple*, 744 F.3d at 735. Indeed, the ‘941
 9 Patent has been litigated for over a decade and no party (including Microsoft, Apple, HTC and
 10 others) has ever unearthed such prior art. BIOS should be construed just as in *Ancora v. Apple*
 11 (DN59-8 at Apx. 708):

12 “BIOS” is an acronym for Basic Input/Output System. It is the set of essential
 13 startup operations that run when a computer is turned on, which test hardware, starts
 14 the operating system, and support the transfer of data among hardware devices.

15 II. “USING AN AGENT”

16 HTC spends nine pages arguing the term “agent,” but fails to cite the most recent and most
 17 similar Federal Circuit precedent: *Zeroclick, LLC v. Apple, Inc.*, 891 F.3d 1003 (Fed. Cir. 2018).
 18 In *Zeroclick*, the terms “program” and “code” were not construed under §112, ¶ 6, even though
 19 the claims included functional language. *Id.* at 1008. This case is no different.

20 A. “Agent” is not a Substitute for “Means”

21 HTC, without citation, argues repeatedly: “One way to overcome the presumption is by
 22 establishing that the claim recites a nonce word for software.” (DN60 at 13, *see also* 15, 16 and
 23 17: “‘Agent’ is a Nonce Word for Software.”) Unfortunately, this appears to be a deliberate mis-
 24 statement of the law. *Williamson v. Citrix Online, LLC*, 792 F.3d 1339 (Fed. Cir. 2016) found
 25 §112, ¶ 6 applied because “‘Module’ is a well-known known nonce word that can operate as a
 26 substitute for means.” 792 F.3d at 1350. *Williamson* explained that: “‘module’ is simply a generic
 27 description for software **or hardware** that performs a specified function” making it a substitute for
 means. *Id.* But, when HTC cites this portion of *Williamson* in its brief, HTC states: “Like

‘module,’ ‘agent’ ‘is simply a generic description for software’ that performs a specified function. *Williamson*, 792 F.3d at 1350.” (DN 60 at 14.) HTC intentionally removed “**or hardware**” from the *Williamson* holding via selective quotation. The inquiry is whether the term agent “is used in common parlance as a substitute for means” – not whether “agent” is used as a substitute for software as HTC proposes. *Zeroclick*, 891 F.3d at 1009; *Typemock, Ltd. v. Telerik, Inc.*, No. 17-cv-10274-RGS, 2018 WL 4189692, at *9 (D. Mass. 2018) (“In the computer arts, the term ‘code’ has a definite structure that is understandable to a person of ordinary skill in the art”); *VR Optics, LLC v. Peloton Interactive, Inc.*, 345 F.Supp.3d 394 (S.D. N.Y 2019) (holding “logic” and “logic configured to” did not invoke § 112 ¶ 6 because use of the word logic rather than a nonce word such as “means,” “mechanism,” or “element” supports finding that “logic” conveys some structure.) “Agent” is a term known in the art to mean “software program or routine.” “Agent” is not a substitute for “means” – the only and proper inquiry.

B. The Claim Language Provides All Structure for the Claimed Data Storage

The claim recites data storage. The claim defines **what** is to be stored, *i.e.*, “a verification structure.” The claim defines **where** it is to be stored, *i.e.*, “in the erasable, non-volatile memory of the BIOS.” The claim specifies that the “agent” performs this data storage. The claim also defines what is done with the information after it is stored: “verifying the program using at least the verification structure from the erasable non-volatile memory of the BIOS.” (DN59-2 at 7:1-3.) The claim further defines the verification: “acting on the program according to the verification.” (*Id.* at 7:4-5.) Because the claim provides the only structure needed for a data storage – there is sufficient structure in the claim to avoid consideration of §112, ¶ 6.

The Federal Circuit’s decision in *Liner Tech. Corp. v. Impala Linear Corp.*, 379 F.3d 1311 (Fed. Cir. 2004) is instructive. In *Linear Tech*, “the structure connoting term ‘circuit’ is coupled with a description of the circuit’s operation, sufficient structural meaning generally will be conveyed to persons of ordinary skill in the art, and § 112 ¶ 6 presumptively will not apply.” *Id.* at 1320. HTC cites *Cypress Lake Software, Inc. v. Samsung Elecs. Am. Inc.*, 382 F.Supp.3d 586 (E.D. Tex. 2019) which holds that § 112 ¶ 6 is not invoked for language “instructions to” or “code

1 configured to” because the claim’s recitation of the objectives of this code is sufficiently definite
 2 structure citing *Linear Tech. Id.* at 643. HTC presumably cites *Cypress Lake* for the proposition
 3 that in another claim “code for” was held to be means language, but that was only because “means
 4 for” was used as the only description in the specification but changed in the claim to “code for.”
 5 *Id.* at 615-616. HTC also cites *Genband USA v. Metaswitch Networks*, No. 2:14-cv-33-JRG-RSP,
 6 2015 WL 4722185 (E.D. Tex. Aug. 7, 2015) that holds: “the term ‘agent’ connotes structure to a
 7 person of ordinary skill in the art.” *Id.* at *17. *Genband* also explains that because the claimed
 8 “agent” is a distinct component that interacts with other elements, the claimed “agent” recited
 9 structure. Here, the agent stores specific data in a specific location that interacts with other claim
 10 elements. Finally, and importantly, in *Genband*, the court indicated that “Defendants have not
 11 identified any authority that supports . . . that software limitations are necessarily subject to 35
 12 U.S.C. § 112 ¶ 6 unless coupled with special-purpose hardware.” *Id.* at *18. HTC and its expert
 13 present the exact same position here also *without any legal support.* (DN59-12 at 45:3-11.)

14 Finally, HTC relies on *Synchronoss Techs., Inc. v. Dropbox Inc.*, 16-cv-00119-HSG, 2017
 15 WL 6059302 (N.D. Cal. Dec. 7, 2017) that concerns an apparatus claim. HTC, however, did not
 16 read *Synchronoss* closely. The court credited expert evidence that showed that “synchronization
 17 agent,” like “module” in *Williamson*, was understood as “generic descriptors for software *or*
 18 *hardware.*” *Id.* at *10. Here, HTC does not even attempt to establish that “agent” is a nonce word
 19 for “means.” *Zeroclick*, 891 F.3d at 1009.

20 C. HTC Already Admitted the Agent Performs Conventional Data Storage

21 HTC conveniently fails to address the dispositive issue. Claim 1⁴ simply recites using an
 22 agent to store data in memory. This perhaps is one of the most simplistic steps in computer
 23 implemented methods. As explained previously, *Zeroclick* explained that the presumption against
 24 §112, ¶ 6 holds where one skilled in the art would view the claim language “as specific references
 25 to *conventional [] code, existing in the prior art at the time of the inventions.*” 891 F.3d at 1008.

26
 27 ⁴ HTC spends time discussing non-asserted claims, but it does so under the wrong premise. (DN 60 at 14.) Whether “agent” is known to those skilled in the art as a software routine does not answer the legal inquiry, *i.e.*, whether “agent” is used as a nonce word for “means.”

1 That is exactly true here. (DN59-12 at Apx. 747-748; DN59-3 at Apx. 61; DN59-6 at ¶ 59.) HTC
 2 even told the Federal Circuit:

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

7 (DN59-16 at Apx. 838.) The use of conventional code for a simple storage command prohibits
 8 application of § 112, ¶ 6 – the presumption holds.

9 **D. There Is A Process Disclosed In The ‘941 Patent For Data Storage**

10 The Court should not concern itself with whether an algorithm or process is disclosed in
 11 the specification and claims because the claim language at issue does not invoke 35 U.S.C. § 112,
 12 ¶ 6. Assuming *arguendo* that his claim limitation is construed under 35 U.S.C. § 112 ¶ 6, the first
 13 step is to identify the claimed function.

14 The claimed function is “to set up” or to store data. HTC advised the Federal Circuit that:
 15 “For the setting-up step, the claims recite ‘using an agent’ to *store* license information . . . “
 16 (DN59-16 at Apx. 841.) The specification describes that “[t]he resulting encrypted license record
 17 is *stored* in another (second) non-volatile section of the BIOS, i.e. E2PROM (or the ROM)”
 18 (DN59-2 at 1:66-2:1), and that a license record “*stored* in the E2PROM of the first computer.”
 19 (DN59-2 at 2:35-36.) The Federal Circuit twice explained: “The specification discloses a method
 20 . . . *to store* appropriately encrypted license information” and that “The method calls for *storage*
 21 of a license record.” *Apple*, 744 F.3d at 734; *HTC*, 908 F.3d at 1345. Data *storage* is the function.

22 The ‘941 Patent discloses a conventional process or algorithm to store data. Claim 1
 23 expressly identifies *what* is to be stored (“a verification structure”) and *where* it is to be stored (“in
 24 the erasable, non-volatile memory of the BIOS”). Claim 1 also states that an “agent” performs the
 25 “setting up.” The specification clearly discloses “E2PROM manipulation commands” to store or
 26 add data to the “erasable, non-volatile memory of the BIOS.” (DN59-2 at 1:66-2:5, 5:14-15;
 27 DN59-12 at 27:21-28:4.) The Federal Circuit already explained that this disclosure of “E2PROM
 manipulation commands” is linked to this claim limitation:

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

6 *HTC*, 908 F.3d at 1345. And of course, all parties agree that “E²PROM manipulation commands”
7 are well-known and conventional in the art. (DN59-16 at Apx. 838; DN59-12 at Apx. 748 at
8 29:15-19.) HTC also admits one skilled in the art knows how to store data with these commands
9 *without any further instructions*. (DN59-12 at Apx. 746-747 at 22:11-16; 20:16-22.) Besides
10 “E²PROM manipulation commands,” one skilled in the art only needs to know *what* to store and
11 *where* to store it which is provided in the claim itself. That is the entirety of the software routine
12 that is needed, and it is disclosed in the ‘941 Patent. (DN59-15 at Apx. 823 at 77:7-79:1.)

13 There is no requirement for any additional disclosure for this data storage element. A
14 patent “need not supply every detail about how a structure works . . . Instead, a term need only
15 educate a skilled artisan on the type of structure being described . . . For example, ‘[s]tructure may
16 [] be provided by describing the claim limitation’s operation, such as its input, output or
17 connections.’ The bottom line is that a structure may be described at some level of generality.”
18 *Shure, Inc. v. Clearone, Inc.*, 17-cv-3078, 2019 WL 4014231, at *5 (N.D. Ill. 2019) (the intrinsic
19 record) (internal citations omitted). In fact, there is substantial case law that where data “storing”
20 is claimed in a means-plus-function format, it is “not necessary to disclose more structure than the
21 general purpose computer that performs those functions.” *In re Katz Interactive Call Processing*
22 *Patent Litig.*, 639 F.3d 1303, 1316 (Fed. Cir. 2011); *see also*, *M2M Solutions LLC v. Sierra*
23 *Wireless Am., Inc.*, 12-30/32/33-RGA, 2015 U.S. Dist. LEXIS 134558 (D. Del. 2015) (algorithm
24 identifies two numbers and then compares the numbers); *Copper Innovations Group, LLC v.*
25 *Nintendo Co.*, 07-17252, 2009 U.S. Dist. LEXIS 130960, *87-*92 (W.D. Penn. 2009) (a single
26 step can satisfy the algorithm requirement); *In re Dossel*, 115 F.3d 942, 946 (Fed. Cir. 1997)
27 (“While the written description does not disclose exactly what mathematical algorithm will be
used to compute the end result, it does state that “known algorithms” can be used to solve standard
equations which are known in the art”).

Remarkably, HTC argues that the ‘941 Patent lacks details but admits that this storage step involves conventional hardware and conventional software. The inquiry is whether the process is “disclosed to a degree of detail such that a person of ordinary skill in the art would know how to program the computer to achieve the claimed function.” (DN60 at 19.) HTC’s expert admitted exactly that:

Q. My question is, as of 1998 would one skilled in the art know who to set up a verification structure in the erasable non-volatile memory area of the BIOS?

A. They would likely have sufficient knowledge to do that, yes.

(DN 59-12 at Apx. 747 at 22:11-16.) Here the process is simple, (1) identify what is to be stored which the claim states is a “verification structure” with a “license record,” (2) identify where it is to be stored which the claim states is “the erasable non-volatile memory area of the BIOS,” and (3) use conventional and well-known “E²PROM manipulation commands” to store the data in the claimed memory area. (DN59-15 at Apx. 823 at 77:7-79:1.) This algorithm as disclosed above is all that is required. HTC acknowledges that the question is whether the boundaries of the claims understandable. (DN60 at 19.) They are. HTC cannot argue that there is any ambiguity here.

III. “LICENSE/LICENSE RECORD”

At the threshold, Ancora believes that Judge Gonzalez-Rogers’ ‘construction of “license record” as “a record from a licensed program with information for verifying that licensed program” is appropriate. (DN59-8 at Apx. 715.) Ancora presented its construction only to take issue with HTC’s proposed insertion of “granted by another entity.” HTC seeks to add confusion to argue that the claims do not cover a single actor, such as HTC, that implements every step of the claimed process as the party that grants permission. There is absolutely no requirement in the claims for a “licensor” and a separate third-party “licensee” for infringement.

HTC presents its argument regarding this construction on page 6 of its Brief. HTC cites several portions of the specification, but none reference permission being granted by another entity and certainly none require a separate “licensor” and “licensee” as an actor in the claim. No

reference discusses a first entity and “another entity.” “License record” nor anything else in the claim requires multiple entities for infringement – HTC performs the verification process.⁵

IV. “ACTING ON THE PROGRAM”

“Acting on the program according to the verification” means just that, but HTC seeks to replace the claim language with language from the specification, which is improper.

V. “LICENSE AUTHENTICATION BUREAU”

HTC changed its proposed construction and now argues that the ‘941 Patent at 3:42-44 provides a definition. (DN60 at 22.) It does not. To act as one’s own lexicographer, the patentee must “indicate a clear intent to do so in the patent.” *Hill-Rom Services, Inc. v. Stryker Corp.*, 755 F.3d 1367, 1373 (Fed. Cir. 2014); *see, e.g., TecSec, Inc. v. Adobe Systems, Inc.*, 2016 WL 4394603 at *8 (Fed. Cir. Aug. 18, 2016) (“A [word] for purposes of this invention means . . .”).

HTC then argues that “formatting” and “encrypting” in its construction are not verification functions so Ancora’s proposal is too narrow. HTC is mistaken as both are part of the verification process, and therefore, are “verification functions.” Importantly, the specification describes numerous other functions for the “license authentication bureau.” For example, as explained in DN59 at 23, the specification explains that the bureau assists in placing the license record in the BIOS memory and key verification. (DN59-2, ‘941 patent at 3:33-50.) There is no limitation in the claim or specification that the bureau is limited to only the precise steps of “formatting,” “encrypting,” and “verifying” and this term is properly construed such that it may include other “verification functions.” Ancora’s construction should be adopted.

BROOKS KUSHMAN P.C.

Dated: October 7, 2019

By: /s/ Marc Lorelli
Marc Lorelli (*Pro Hac Vice*)

⁵ The use of “license” in the preamble is not a limitation of the claim. While HTC argues that aspects of the preamble are included in the body of the claim, “license” is not such an aspect that therefore not a claim limitation. *TomTom Inc. v. Adolph*, 790 F.3d 1315, 1323 (Fed. Cir. 2015) (That a preamble term “provides a necessary structure for claim 1 does not necessarily convert the entire preamble into a limitation particularly one that only states the intended use of the invention”).

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CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that on October 7, 2019, I electronically filed the foregoing **ANCORA TECHNOLOGIES, INC.'S RESPONSIVE 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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