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11 *Attorneys for Plaintiff*
Ancora Technologies, Inc.

12
13 **UNITED STATES DISTRICT COURT**
14 **CENTRAL DISTRICT OF CALIFORNIA**

15 ANCORA TECHNOLOGIES,
16 INC.

17 Plaintiff,

18 v.

19 TCT MOBILE (US) INC.,
HUIZHOU TCL MOBILE
COMMUNICATION CO.,
20 LTD., and SHENZHEN TCL
CREATIVE CLOUD
21 TECHNOLOGY CO., LTD.,

22 Defendants.

Case No. 8:19-cv-02192-GW-ASx
(LEAD CASE)

Consolidated Case
No. 2:20-cv-01252-GW-ASx

JOINT STATUS REPORT
REGARDING MARKMAN
RULING

Hearing Date: November 19, 2020
Time: 8:30 am
Before Hon. George H. Wu
United States Courthouse
Courtroom: 9D, 9th Floor

1 **Plaintiff's Position:**

2 Plaintiff believes the present construction for “memory of the BIOS” identified
3 by the Court in its November 12 Markman Order (“Markman Order”) is incorrect for
4 several reasons. *First*, the Parties agreed to the construction of **BIOS** which is “the
5 set of essential startup *operations* . . .” (*Id.* at 4, emphasis added.) Operations may
6 occur at a location, but operations themselves are not stored. Defendants are
7 attempting to change the agreed term BIOS to “BIOS software or code.” For this
8 reason, incorporation of the term “store” in the claim is improper. *Second*, the claim
9 phrase “memory of the BIOS” is part of a larger phrase that reads “the erasable, non-
10 volatile memory of the BIOS.” The term “the” is used to indicate an antecedent basis
11 in the claim, which is “an erasable, non-volatile memory area of a BIOS of the
12 computer.” The Parties agreed that “non-volatile memory area of a BIOS” should be
13 construed as “memory area of BIOS...” (11/12/2020 Markman Paper at 4.) Thus,
14 this is an admission that there is no ambiguity in this phrase and it need not be further
15 construed.

16 *Third*, during the Re-Examination of the ‘941 Patent filed by Microsoft, the
17 Examiner explained that only those items used by the BIOS are part of the BIOS. (Ex.
18 12 at ANCA2569: “one skilled in the art would consider any non-functional
19 descriptive material, such as tables, to be part of the BIOS only if it is made and used
20 by the functions of the BIOS itself.”) *Fourth*, even the Federal Circuit has described
21 the “memory of [a/the] BIOS” as “memory space associated with the computer’s basic
22 input/output system (BIOS), rather than other memory space.” *Ancora Techs., Inc. v.*

1 *Apple, Inc.*, 744 F.3d 732, 733 (Fed. Cir. 2014) (pointing to various disclosures in the
2 '941 Patent.)

3 *Lastly*, the specification never states that BIOS is “stored” in memory. Instead,
4 the specification refers to memory of the BIOS as memory that the BIOS operations
5 use. For example, specification teaches that the verification structure may be
6 established in a different BIOS memory area than the BIOS software. '941 Patent at
7 1:39-2:12 (teaching how, in one “non-limiting example” embodiment, the BIOS
8 software is stored in a first BIOS memory area while the verification structure is stored
9 in a second BIOS memory area); *id.* at 6:18-21; *see also id.* at 1:45-47; 1:65-2:1.

10 Plaintiff further submit that there is no obligation of the Court to change the
11 language of the claims. *E.g. Finjan, Inc. v. Secure Computing Corp.*, 626 F.3d 1197,
12 1207 (Fed. Cir. 2011) (holding that the district court did not err by rejecting
13 defendants’ construction and instructing the jury to give the claim term its “ordinary
14 meaning”); *U.S. Surgical Corp. v. Ethicon, Inc.*, 103 F.3d 1554, 1568 (Fed. Cir. 1997)
15 (claim construction “is not an obligatory exercise in redundancy”). However, if it is
16 so inclined, Plaintiff’s respectfully suggest that a more appropriate plain and ordinary
17 meaning of the term “memory of the BIOS” is “a memory area that the BIOS uses”
18 which is at least consistent with the claim language and specification.

19 **Defendant’s Position:**

20 TCL believes that the plain and ordinary meaning for “memory of the BIOS”
21 identified by the Court in its November 12 Markman Order (“Markman Order”) does
22 not need revision. The Court found the plain and ordinary meaning to be “a memory
23 that stores the BIOS.” Markman Order at 14. Ancora criticizes that construction at
24

1 length, and then submits a brand new construction for the first time in the last sentence
2 of its comments. The Court received briefing and extensive arguments on this term,
3 *see* Markman Hearing Transcript at 24:9–29:5, and TCL submits that it is past time
4 for Ancora to be submitting new proposed constructions.

5 Ancora’s first criticism presents for the first time a sort of meta-construction of
6 “operations” as necessarily different from “software” or “code.” Ancora provides no
7 basis for that distinction. There is no conflict between BIOS being “operations” and
8 BIOS being stored in memory. Ancora’s fifth criticism (discussed below) cites the
9 specification as disclosing BIOS being *stored* in a memory. Ancora’s infringement
10 contentions identify the alleged “BIOS” as UEFI instructions that are *stored* in TCL’s
11 accused smartphones.

12 Ancora’s second criticism tries to read more meaning into an agreed
13 construction of “non-volatile memory area of the BIOS” than exists. The agree
14 construction only modified “non-volatile,” which was construed as “whose data is
15 maintained when power is removed.” Markman Order at 4. That agreed construction
16 provides meaning to *non-volatile* not “memory area of the BIOS.” To the extent that
17 Ancora is again raising the distinction between “memory” and “memory area,” the
18 Court should again reject that distinction. Markman Order at 14 n.6.

19 As to Ancora’s third criticism, Ancora does not explain why the Examiner’s
20 description of “non-functional descriptive material, such as tables” somehow bears on
21 “memory of the BIOS.” Is “memory of the BIOS” a “non-functional descriptive
22 material, such as tables” that is “made and used by the functions of the BIOS”? It is
23 not, and that citation is irrelevant.

1 As to Ancora’s fourth criticism, Ancora again relies a single passing phrase
2 from the background section of a Federal Circuit decision. The Court should again
3 reject that approach. Markman Order at 14. The other Federal Circuit decision
4 regarding the asserted patent supports the plain and ordinary meaning determined by
5 the Court. Markman Hearing Transcript at 26:2–27:11.

6 As to Ancora’s fifth criticism, the cited portions of the specification do not
7 provide the disclosure for which Ancora cites them. None of the cited passages of the
8 specification state that BIOS software is stored in a first BIOS memory and not in a
9 second BIOS memory. Ancora is belatedly presenting a new, and incorrect, factual
10 interpretation of the asserted patent.

11 As to Ancora’s newly presented construction of “a memory area that the BIOS
12 uses,” Ancora does not cite to any portion of the asserted patent that actually uses this
13 language. Moreover, memory that the BIOS “uses” is needlessly vague and overly
14 broad. Part of the BIOS operations are hardware tests, Markman Order at 4, so is
15 every memory that the BIOS operations test a “memory of the BIOS”? If so, then
16 Ancora’s construction appears to convert *every memory in the computer* into a
17 “memory of the BIOS.” The Court should reject this belatedly-raised and incorrect
18 construction.

19
20 Date: November 17, 2020

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