

Hon. Richard A. Jones

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

**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

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

- I. “BIOS” 1
 - A. HTC’s “BIOS is Memory” Argument is Based on Repeated Misrepresentations and Omissions 1
 - B. HTC’s Prosecution History Excerpts Do Not Define BIOS 2
- II. “USING AN AGENT” 6
 - A. “Agent” is not a Substitute for “Means” 6
 - B. The Claim Language Provides All Structure for the Claimed Data Storage 7
 - C. HTC Already Admitted the Agent Performs Conventional Data Storage 8
 - D. There Is A Process Disclosed In The ‘941 Patent For Data Storage 9
- III. “LICENSE/LICENSE RECORD” 11
- IV. “ACTING ON THE PROGRAM” 12
- V. “LICENSE AUTHENTICATION BUREAU” 12

TABLE OF AUTHORITIES**Cases**

1		
2		
3		
4	<i>Abbott Labs v. Andrix Pharms.</i> ,	
	473 F.3d 1196 (Fed. Cir. 2007).....	3
5	<i>Ancora Techs. v. Apple, Inc.</i> ,	
	744 F.3d 732 (Fed. Cir. 2014).....	2, 3, 4, 6, 9
6		
7	<i>Copper Innovations Group, LLC v. Nintendo Co.</i> ,	
	2009 U.S. Dist. LEXIS 130960, *87-*92 (W.D. Penn. 2009).....	10
8	<i>Cypress Lake Software, Inc. v. Samsung Elecs. Am. Inc.</i> ,	
	382 F.Supp.3d 586 (E.D. Tex. 2019).....	7, 8
9		
10	<i>Genband USA v. Metaswitch Networks</i> ,	
	2015 WL 4722185 (E.D. Tex. Aug. 7, 2015).....	8
11	<i>Hill-Rom Services, Inc. v. Stryker Corp.</i> ,	
	755 F.3d 1367 (Fed. Cir. 2014).....	12
12		
13	<i>In re Dossel</i> ,	
	115 F.3d 942 (Fed. Cir. 1997).....	10
14	<i>In re Katz Interactive Call Processing Patent Litig.</i> ,	
	639 F.3d 1303 (Fed. Cir. 2011).....	10
15		
16	<i>Liner Tech. Corp. v. Impala Linear Corp.</i> ,	
	379 F.3d 1311 (Fed. Cir. 2004).....	7, 8
17	<i>M2M Solutions LLC v. Sierra Wireless Am., Inc.</i> ,	
	2015 U.S. Dist. LEXIS 134558 (D. Del. 2015).....	10
18		
19	<i>Omega Eng'g, Inc. v. Raytek Corp.</i> ,	
	334 F.3d 1314 (Fed. Cir. 2003).....	5
20	<i>Phillips v. AWH Corp.</i> ,	
	415 F.3d 1303 (Fed. Cir. 2015).....	2, 3, 4
21		
22	<i>Purdue Pharma L.P. v. Endo Pharmaceuticals Inc.</i> ,	
	438 F.3d 1123 (Fed. Cir. 2006).....	5
23	<i>Shure, Inc. v. Clearone, Inc.</i> ,	
	2019 WL 4014231, *5 (N.D. Ill. 2019).....	10
24		
25	<i>Synchronoss Techs., Inc. v. Dropbox Inc.</i> ,	
	2017 WL 6059302 (N.D. Cal. Dec. 7, 2017).....	8
26	<i>TecSec, Inc. v. Adobe Systems, Inc.</i> ,	
	2016 WL 4394603 at *8 (Fed. Cir. Aug. 18, 2016).....	12
27		

1 *Thorner v. Sony Computer Enter. Am. LLC*,
669 F.3d 1362 (Fed. Cir. 2012)..... 2

2

3 *TomTom Inc. v. Adolph*,
790 F.3d 1315 (Fed. Cir. 2015)..... 12

4 *Typemock, Ltd. v. Telerik, Inc.*,
2018 WL 4189692, at *9 (D. Mass. 2018) 7

5

6 *ViaStat, Inc. v. Apce Sys./Loral, Inc.*,
2013 WL 3927729, at *20 (S.D. Cal. May 29, 2013)..... 5

7 *VR Optics, LLC v. Peloton Interactive, Inc.*,
345 F.Supp.3d 394 (S.D. N.Y 2019)..... 7

8

9 *Williamson v. Citrix Online, LLC.*,
792 F.3d 1339 (Fed. Cir. 2016)..... 6, 7

10 *Zeroclick, LLC v. Apple, Inc.*,
891 F.3d 1003 (Fed. Cir. 2018)..... 6, 7, 8

11

12 **Statutes**

13 35 U.S.C. § 112..... 6, 7, 8, 9

14

15

16

17

18

19

20

21

22

23

24

25

26

27

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.)

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