

EXHIBIT 10

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11
12 **UNITED STATES DISTRICT COURT**
13 **CENTRAL DISTRICT OF CALIFORNIA**

14 ANCORA TECHNOLOGIES, INC.)

15 Plaintiff,)

16 vs.)

17 TOSHIBA AMERICA)
18 INFORMATION SYSTEMS, INC.)
19 et al.,)

20 Defendants.)

21 TOSHIBA AMERICA)
22 INFORMATION SYSTEMS, INC.)
23 et al.,)

24 Counterclaimants)

25 vs.)

26 ANCORA TECHNOLOGIES, INC.)

27 Counterdefendant.)

28 MICROSOFT CORPORATION,)

Intervenor.)

Case No. SACV08-626 AG (MLGx)

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

Jury Trial Demanded

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1 the standard definition of "non-volatile" memory [is]
2 memory that is maintained even when the power is
3 removed from the storage system
4 (Exhibit 13, 6/21/01 Office Action, p. 108.)

5
6 This definition is the same as the meaning understood by those skilled
7 in the art. (Exhibit 11, p. 94.) The Defendants have not included this limitation in
8 their proposed construction.

9 The parties have also exchanged constructions for "volatile memory
10 area" in which the parties essentially agree is "memory that is not maintained when
11 the power is removed from the storage system."

12
13 **B. "program" / "software program" / "application software program"**

14 Defendants' construction of these terms is entirely motivated by their
15 search for an infringement defense. Every person of skill in the computer field knows
16 exactly what a "program" is: a set of instructions that can be executed by a computer.
17 The '941 patent uses the term "program" broadly to include "software" (Ex. 1, '941
18 patent, col. 1, line 8, col. 1, line 13, col. 4, line 42) or an "application" (Ex. 1, '941
19 patent, col. 1, lines 53-54, col. 2, lines 29-30, col. 2, line 37, col. 2, lines 48-56, col.
20 3, line 40, col. 4, lines 44). The Microsoft Computer Dictionary defines the term
21 "program" as "a sequence of instructions that can be executed by a computer," and
22 that the term "program" is "also called software." (Ex. 11, p. 95.)

23 In this litigation, however, the defendants seeks to *exclude* the "operating
24 system" from the scope of all three of these terms:

25 software that performs a specific task *by interacting with*
26 *the operating system through an API (application*
27 *programming interface).*

28 (Italics added.)

1 in a manner different from the plain import of its terms.") These are all terms that
2 defendants' conjured to avoid infringement, contrary to controlling law.⁵

3 **C. "selecting a program residing in the volatile memory"**

<u>Ancora's Construction</u>	<u>Defendants' Construction</u>
running a program in the volatile memory	choosing from a group of programs that have been loaded into the computer's volatile memory

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8 Briefly, this step is performed when the claimed "program" discussed
9 above is run on the computer. The specification states: "the specified program is run
10 on the specified computer." (Ex. 1, col. 1, lines 60-61.) The defendants, however,
11 propose:

12 choosing from *a group of programs* that have been loaded
13 into the computer's volatile memory.
14 (Italics added.)

15
16 The only dispute is the Defendants' proposed limitation that there must
17 be a "group" of different loaded programs from which one must be "chosen." The
18 terms "group" and "choosing" are not used anywhere in the '941 patent.

19 This construction, like the others, is engineered to avoid infringement
20 by excluding the possibility that only one program (such as Microsoft's accused
21 operating system at computer startup) is loaded into memory for execution. This is
22 another improper exclusionary construction having no basis whatsoever in the
23 intrinsic record.

24
25
26 ⁵ It is unclear at this time how the Defendants' proposed constructions for
27 "program," "software," and "application" differ, if at all. Accordingly, Ancora
28 reserves the right to substantively respond to the Defendants' positions on these terms
in Ancora's Response to Defendants' Opening Claim Construction Brief.

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