EXHIBIT 11

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13 **UNITED STATES DISTRICT COURT**

14 **NORTHERN DISTRICT OF CALIFORNIA**

15 **OAKLAND DIVISION**

16

17 ANCORA TECHNOLOGIES, INC.   Case No. 4:11-cv-06357-YGR

18   Plaintiff,

19 v.

20 APPLE, INC.,   **ANCORA TECHNOLOGIES, INC.'S**
                                                OPENING *MARKMAN* BRIEF
21   Defendant.

22 APPLE, INC.   Hearing Date:

23   Counterclaimant,   June 15, 2012   10:00 AM

24 v.   Hon. Yvonne Gonzalez Rogers

25 ANCORA TECHNOLOGIES, INC.

26   Counterdefendant.

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1   Defendant's construction of these terms is entirely motivated by its search for an

2   infringement defense. Every person of skill in the computer field knows that a "program" is: "a

3   set of instructions that can be executed by a computer."   The '941 Patent uses the term

4   "program" broadly to include "software" (Rondini Decl. ¶2, Ex. 1, '941 patent, col. 1, line 8,

5   col. 1, line 13, col. 4, line 42) or an "application" (*Id.,* Ex. 1, '941 patent, col. 1, lines 53-54,

6   col. 2, lines 29-30, col. 2, line 37, col. 2, lines 48-56, col. 3, line 40, col. 4, lines 44). The

7   Microsoft Computer Dictionary defines the term "program" as "a sequence of instructions that

8   can be executed by a computer," and that the term "program" is "also called software." (Rondini

9   Decl. ¶8, Ex. 7, ANCA 2872.) Even Apple documents define "program" similarly to Ancora's

10   proposal. (Rondini Decl. ¶14, Ex. 13, ANCA 1386, Apple II Reference Manual: "Program: A

11   sequence of instructions which describes a process.")

12   In this litigation, however, Apple seeks to significantly narrow the scope of the claims.

13   By requiring that the claimed "program" "interact" with the "operating system," Apple seeks to

14   *exclude* the "operating system" itself from the scope of the term "program." Nothing in the '941

15   Patent supports this exclusion.

16   An operating system, is undeniably a "program," *i.e.*, a "set of instructions that can be

17   executed by a computer." The primary prior art reference over which the Patent Office allowed

18   '941 Patent expressly described an "operating system" as a type of "program." (Rondini Decl.

19   ¶15, Ex. 14, U.S. Patent No. 6,189,146, 5:63 – 6:5: "programs include a server operating

20   system.") *Acumed LLC v. Stryker Corp.*, 483 F.3d 800, 809 (Fed. Cir. 2007) (cited references

21   are part of the intrinsic record).

22   Apple attempts to dramatically narrow the claimed terms to a particular *type* of program –

23   another negative limitation that the claims, the intrinsic record and the law simply do not permit.

24   The specification does not clearly set forth Apple's far narrower definition. *Thorner,* F.3d at

25   1365. Similarly, there was no clear disavowal of claim scope in the prosecution history. *Id*. at

26   1366. Again, outside of this litigation, Apple agrees with Ancora. In its own patents, Apple

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1   explains: "An operating system 180 is a program that controls processing by CPU 110."

2   (Rondini Decl. ¶16, Ex. 15, U.S. Patent 6,178,464 at 3:34-35).

3

4   **D.   "Volatile Memory"**

5

Claim Term/Phrase	Ancora Construction	Apple Construction
"volatile memory"	memory that is not maintained when the power is removed	This phrase is indefinite under 35 U.S.C. § 112, ¶ 2.

8   This term first appears in the following phrase of claim 1 of the '941 patent: "selecting a

9   program residing in the volatile memory." Apple contends that this term is indefinite. Apple,

10 therefore, must prove by clear and convincing evidence that the term cannot be construed.

11 *Datamize,* 417 F.3d at 1348; *Source Search Techs., LLC v. LendingTree, LLC,* 588 F.3d at 1076

12 ("If the meaning of the claim is discernible, even though the task may be formidable and the

13 conclusion may be one over which reasonable persons will disagree, we have held the claim

14 sufficiently clear to avoid invalidity on indefiniteness grounds. Only claims not amenable to

15 construction or insolubly ambiguous are indefinite."). Because the term "volatile memory" is

16 very well-known and readily amendable to construction, it is not indefinite.

17 The term is universally understood by those of skill in the art as memory that is not

18 available for use by a program after the computer's power turned off. Both Ancora's and

19 Apple's experts agree.

20

Ancora Expert (Ex. 5, Jestice Decl., ¶ 5)	Apple Expert (Ex. 6, Kelly Decl. ¶ 23.)
"[I]nformation stored in 'volatile' memory is not preserved for use after the power is removed."	"The ordinary meaning of volatile memory' is memory that loses its data when power is removed"

23 Volatile memory is a fundamental building block of all computers. Virtually every

24 computer dictionary and textbook defines the term "volatile memory." For example, the

25 Microsoft Computer Dictionary defines the term as "[m]emory, such as RAM, that loses its data

26 when the power is shut off. *Compare* nonvolatile memory.") (Rondini Decl. ¶8, Ex. 7, <u>The</u>

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