IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SYMANTEC CORPORATION,

Plaintiff,

v.

VEEAM SOFTWARE CORPORATION,

Defendant.
_____/

No. C 12-0700 SI

CLAIM CONSTRUCTION ORDER

On January 23, 2013, the Court held a *Markman* hearing regarding the construction of disputed terms in four patents owned by plaintiff. Having considered the arguments of counsel and the papers submitted, the Court construes the disputed terms as follows.

BACKGROUND

This is a patent infringement action initiated by plaintiff Symantec Corporation against defendant Veeam Corporation, pertaining to U.S. Patents No. 7,191,299 ('299), No. 7,254,682 ('682), No. 6,931,558 ('558) and No. 7,093,086 ('086).[1] The parties agree that none of the terms to be construed is case dispositive. Joint Claim Construction Statement (Dkt. 73) at 7. Symantec is a software provider which has developed and owns patents in backup and recovery software. The '299 patent ("Method and System of Providing Periodic Replication") provides "solutions for storage life cycle management," and the '682 patent ("Selective File and Folder Snapshot Image Creation") teaches a "snapshot" method to

[1] The '299 and '682 patents are asserted in Case No. C 12-700. The '558 and '086 patents are asserted in Case No. 12-1035, which has been consolidated with Case No. C 12-700. All citations are to 12-700 unless otherwise indicated.

selectively back-up desired files. Compl. ¶¶ 25, 26. The '086 patent ("Disaster Recovery and Backup Using Virtual Machines") teaches a method for a "distinct, remote backup" on a separate storage device, and the '558 patent ("Computer Restoration Systems and Methods") provides for backup and restoration of an entire machine on a network in the event that the client device should become incapable of booting up on its own. Compl. ¶¶ 25, 26 (No. C 12-01035, Dkt. 1). Defendant Veeam produces the Backup & Replication software suite, which "provides image-based backup tools," and competes with Symantec's products in the market. *Id.* ¶ 28.

LEGAL STANDARD

Claim construction is a matter of law. *Markman v. Westview Instr., Inc.*, 517 U.S. 370, 372 (1996). Terms contained in claims are "generally given their ordinary and customary meaning. *Phillips v. AWH Corp.*, 415 F.3d 1303, 1312 (Fed. Cir. 2005). "[T]he ordinary and customary meaning of a claim term is the meaning that the term would have to a person of ordinary skill in the art in question at the time of the invention." *Id.* at 1312. In determining the proper construction of a claim, a court begins with the intrinsic evidence of record, consisting of the claim language, the patent specification, and, if in evidence, the prosecution history. *Id.* at 1313; *see also Vitronics Corp. v. Conceptronic, Inc.*, 90 F.3d 1576, 1582 (Fed. Cir. 1996). "The appropriate starting point . . . is always with the language of the asserted claim itself." *Comark Communications, Inc. v. Harris Corp.*, 156 F.3d 1182, 1186 (Fed. Cir. 1998); *see also Abtox, Inc. v. Exitron Corp.*, 122 F.3d 1019, 1023 (Fed. Cir. 1997).

Accordingly, although claims speak to those skilled in the art, claim terms are construed in light of their ordinary and accustomed meaning, unless examination of the specification, prosecution history, and other claims indicates that the inventor intended otherwise. *See Electro Medical Systems, S.A. v. Cooper Life Sciences, Inc.*, 34 F.3d 1048, 1053 (Fed. Cir. 1994). While claims are interpreted in light of the specification, this "does not mean that everything expressed in the specification must be read into all the claims." *Raytheon Co. v. Roper Corp.*, 724 F.2d 951, 957 (Fed. Cir. 1983). For instance, limitations from a preferred embodiment described in the specification generally should not be read into the claim language. *See Comark*, 156 F.3d at 1187; *see also Decisioning.com, Inc. v. Federated Dep't Stores, Inc.*, 527 F.3d 1300, 1314 (Fed. Cir. 2008) ("[The] description of a preferred embodiment, in the

absence of a clear intention to limit claim scope, is an insufficient basis on which to narrow the claims."); *Howmedica Osteonics Corp. v. Wright Med. Tech., Inc.*, 540 F.3d 1337, 1345-46 (Fed. Cir. 2008) (refusing to limit claim language to the disclosed embodiment in the absence on indication that the inventor meant to limit the claim language). However, it is a fundamental rule that "claims must be construed so as to be consistent with the specification." *Phillips*, 415 F.3d at 1316.

Finally, the Court may consider the prosecution history of the patent, if in evidence. *Markman*, 52 F.3d at 980. In most situations, analysis of this intrinsic evidence alone will resolve claim construction disputes. *See Vitronics*, 90 F.3d at 1583. Courts should not rely on extrinsic evidence in claim construction to contradict the meaning of claims discernable from examination of the claims, the written description, and the prosecution history. *See Pitney Bowes, Inc. v. Hewlett-Packard Co.*, 182 F.3d 1298, 1308 (Fed. Cir. 1999) (citing *Vitronics*, 90 F.3d at 1583). However, it is entirely appropriate "for a court to consult trustworthy extrinsic evidence to ensure that the claim construction it is tending to from the patent file is not inconsistent with clearly expressed, plainly apposite, and widely held understandings in the pertinent technical field." *Id.* Extrinsic evidence "consists of all evidence external to the patent and prosecution history, including expert and inventor testimony, dictionaries, and learned treatises." *Phillips*, 415 F.3d at 1317. All extrinsic evidence should be evaluated in light of the intrinsic evidence. *Id.* at 1319.

DISCUSSION

I. Terms on Which the Parties Agree

Patent	Term	Construction
'682	item	file or folder
'086	a destination separate from a storage device to which the first virtual machine is suspendable	a destination separate from a storage device on which the state of the first virtual machine is stored when the first virtual machine is suspended
'086	memory of the virtual machine	volatile storage of the virtual machine
'086	virtual disk	non-volatile storage of the virtual machine

II. Terms for Construction

A. '558 Patent

The '558 patent ("Computer Restoration Systems and Methods") is drawn to a method of restoring a client device on a network when the device has failed and is unable to boot on its own:

> The method includes booting the client device over the network in the restoration operation, [and] configuring the client device according to the boot program. . . . The client device is booted over the network, rather than locally to the client device by boot disk or otherwise . . . . Alternatively, the client device is reset and booted via a control device either locally or otherwise connected to the client device, and substantially according to the method of the network boot.

'558 (Abstract). The problem addressed by the '558 patent is computer system "crash" events that have conventionally required "system administrators to completely reconfigure the crashed computer, including, without limitation, by reconfiguring machine non-volatile random access memory (NVRAM) settings, loading the computer operating system, replacing applications and files, retrieving backed up data, and thoroughly re-configuring the operating system, application programs, drivers, and other operational settings." '558, 1:21-28. The invention addresses this problem through the use of a storage manager application that is able to automatically record the configuration of a client device, and a boot program that is used to re-boot the client device after a crash; these applications function on a server device connected to the client device via a network. A representative claim states (terms to be construed are in bold):

> **1.** A device restoration system, for restoring a **client device** to a state prior to a major failure, comprising:
> a server device;
> a network communicatively interconnecting the client device and the server device;
> a storage manager accessible to the server device for saving the state, wherein the state includes client disk configuration information; and
> a **network boot** in which the server device causes the client device to boot.

'558, 9:60-10:2.

1. *client device*

Symantec	**Veeam**
"any processing or communications device capable of communicating with the server device over the network"	"the physical computer that is to be restored" amended construction: "the computer (i.e. non-virtual machine) that is to be restored"

Veeam contends that "client device" applies only to (1) computers, and excludes other devices, and (2) physical, not virtual, machines; Symantec disputes this contention. *See* Defendant Veeam's Responsive Claim-Construction Brief (Dkt. 88, "Def. Br.") at 3-4. As to the first issue, the Court finds that while in many of the embodiments the "client device" is depicted as a computer (*see e.g.*, Figure 3, component **106** [depicting "client device" as a standard computer tower]), the specification teaches that "client device" includes but is expressly not limited to computers.[2] Moreover, the Federal Circuit has consistently advised against limiting claims to the preferred embodiments in figures. *See Playtex, Inc. v. Proctor & Gamble Co.*, 400 F.3d 901, 907 (Fed. Cir. 2005) ("By its reliance on the figures, the district court improperly limited claim 1 to a preferred embodiment."). Additionally, the *Authoritative Dictionary of IEEE Standards Terms* defines "device" as either a hardware component "that is capable of performing a specific function" or a software "mechanism or piece of equipment designed to serve a purpose or serve a function." *IEEE 100: The Authoritative Dictionary of IEEE Standard Terms* (7th ed. 2000).[3] Veeam's point that the patent uses "client device" and "client computer" interchangeably, does not alter this conclusion because the specification clearly contemplates "devices" including devices *other* than "computers."

As to the second issue, the Court finds no reason to limit "client device" to physical devices and exclude virtual machines.[4] Veeam argues that, in the context of the patent and as used in the figures (*e.g.*, Figure 3, component **106**), a computer is a physical machine rather than a virtual machine. Veeam

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[2] '558 Patent at 9:15-22 teaches "combinations of client devices, such as the client computer **106** and others, as well as server devices, such as the server computer **104**, its various server components **300**, and others, including, for example, those elements, and even additional or alternative elements, and other combinations, are all possible in keeping with the scope of the embodiments herein." Even component 106 - which shows a standard computer tower – is itself broadly defined as "*any* processing or communications device." '558 Patent at 4:5-8 (emphasis added).

[3] "Dictionaries and technical treatises, which are extrinsic evidence, hold a special place and may sometimes be considered along with the intrinsic evidence when determining the ordinary meaning of claim terms." *Bell Atl. Network Services, Inc. v. Covad Communications Group, Inc.*, 262 F.3d 1258, 1267 (Fed. Cir. 2001)

[4] The *Authoritative Dictionary of IEEE Standards Terms* defines "virtual machine" as "a functional simulation of a computer and its associated devices." Symantec defines virtual machine, without citation, as "a collection of resources running on a physical machine that appears as an independent physical machine to executing top level operating systems and applications." Symantec's Opening Claim Construction Brief (Dkt. 81, "Pl. Br.") at 3 (FN 1).

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