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Counterclaimant Ameranth, Inc.

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

IPDEV CO.,

Plaintiff,

v.

AMERANTH, INC.,

Defendant.

Case No. 14-cv-1303 DMS (WVG)

**ANSWER OF AMERANTH, INC.
TO COMPLAINT FOR
DETERMINATION OF PRIORITY;
COUNTERCLAIMS**

ANSWER TO COMPLAINT

Defendant and Counterclaimant Ameranth, Inc. (“Ameranth”) responds to the Complaint of Plaintiff IPDEV Co. (“IPDEV”) as follows:

1. Ameranth admits that IPDEV is an Illinois corporation located at the address stated at the complaint, and is an affiliate of QuikOrder, Inc. (“QuikOrder”) (fka as National Systems Corporation), which in turn indemnifies and is co-represented with Pizza Hut, Inc. and Pizza Hut of America, Inc. (“Pizza Hut”) in the consolidated patent infringement lawsuits brought by Ameranth and pending before this Court. Ameranth admits that IPDEV is the current owner of record of the ‘449 and ‘739 patents (but not the original owner of the ‘739 patent or even the employer of the inventors named thereon), but denies and disputes the validity of the ‘449 patent as further described herein.

2. Admitted.

3. Admitted.

4. Admitted.

5. Admitted.

6. Admitted.

7. Admitted.

8. Admitted. However, Ameranth contends that IPDEV works in concert with QuikOrder and this action is being used by QuikOrder, Pizza Hut, their joint litigation counsel, and other members of the Joint Defense Group in the consolidated patent infringement cases as part of their joint defense strategy.

9. Ameranth admits that Cupps and Glass filed the ‘793 Application on November 24, 1997, and that the ‘793 application issued on November 23, 1999 as the ‘739 patent. Ameranth lacks information and belief to admit or deny the remaining allegations of this paragraph, and on that basis denies them.

10. Admitted.

1 18. Ameranth admits that the Patent Office issued a Notice of Rejection
2 of claims 1-21 of the '199 application on or about June 6, 2013 for the reasons
3 stated therein. Ameranth further admits that, subsequently, on or about December
4 4, 2013, IPDEV submitted an amendment of the '199 application claims to the
5 Patent Office. Except as expressly admitted, denied.

6 19. Admitted.

7 20. Ameranth admits that claims 1-18 of the IPDEV '449 patent
8 (although not the specification) substantially copy the claims and encompass
9 substantially the same subject matter as claims 1-18 of Ameranth's '077 patent.
10 Ameranth denies and disputes the validity of the '449 patent as further described
11 herein. Except as expressly admitted, denied.

12 21. Denied. Ameranth further denies and disputes the validity of the
13 '449 patent as further described herein.

14 22. Ameranth admits that the '077 patent is a continuation in part of the
15 '850 patent. Except as expressly admitted, denied.

16 23. Denied. Ameranth further denies and disputes the validity of the
17 '449 patent as further described herein.

18 24. Ameranth admits that the '350 patent is a continuation of the '850
19 patent, and that the '077 patent is a continuation in part of the '850 patent. Except
20 as expressly admitted, denied.

21 25. Denied. Ameranth further denies and disputes the validity of the
22 '449 patent as further described herein.

23 26. Ameranth admits that IPDEV asserts a priority date of November 24,
24 1997 for the '449 patent by virtue of characterizing it as a continuation of the
25 application which issued as the '739 patent, but denies that the '449 patent claims
26 are actually entitled to such priority date. Ameranth admits that all claims of
27 Ameranth's '325, '850 and '770 patents have an effective priority date of at least
28

1 as early as September 21, 1999, and further notes that Ameranth's patents were
2 reviewed by multiple patent examiners between 2001 and 2012 and were issued
3 and allowed by the Patent Office specifically over the '739 patent, among other
4 references. Ameranth admits that regulations regarding practice before the
5 USPTO as contained in 37 CFR section 41.207(a)(1) and section 41.201 speak for
6 themselves and read as officially published, but denies that they apply to or
7 govern the operation of the Court in which this lawsuit has been filed. Except as
8 expressly admitted, denied.

9 27. Denied. Ameranth further denies and disputes the validity of the
10 '449 patent as further described herein.

11 **AFFIRMATIVE DEFENSES**

12 As additional and affirmative defenses, Ameranth alleges as follows:

13 **First Affirmative Defense**

14 **(Lack of Patentability under 35 USC section 102)**

15 28. As alleged herein, the '449 patent, and the claims thereof, are not
16 based on or supported by the subject matter contained in the '739 patent or
17 application No. 09/282,645, and therefore are not entitled to a priority date senior
18 to Ameranth's '077, '325 or '850 patents (and in fact that the earliest effective
19 filing date to which the '449 patent claims would be entitled is August 22, 2012).
20 Therefore, the '449 patent claims are not new and fail to satisfy the requirement of
21 novelty under 35 USC section 102.

22 **Second Affirmative Defense**

23 **(Lack of Patentability under 35 USC section 103)**

24 29. As alleged herein, the '449 patent, and the claims thereof, are not
25 based on or supported by subject matter contained in the '739 patent or
26 application No. 09/282,645, and therefore are not entitled to a priority date senior
27 to Ameranth's '077, '325 or '850 patents (and in fact that the earliest effective
28

1 filing date to which the ‘449 patent would be entitled is August 22, 2012).

2 Therefore, the claims of the ‘449 patent are not non-obvious and fail to satisfy the
3 requirements of patentability under 35 USC section 103.

4 **Third Affirmative Defense**
5 **(Failure to Disclose True Inventorship)**

6 30. As alleged herein, the claims of the ‘449 patent (copied from
7 Ameranth’s ‘077 patent) are not based on or supported by subject matter
8 contained in the ‘739 patent or application No. 09/282,645, which dealt with a
9 different inventive idea, namely: (a) the use of “geocodes” to determine whether a
10 customer is within a restaurant’s specified geographic delivery area and/or
11 whether a restaurant is within the customer’s specified geographic take-out area;
12 and (b) the facilitation of the placement of an order from a customer’s standard PC
13 type computer (e.g., desktops and laptops) to a restaurant through either
14 conversion of the order into voice data transmitted by telephone to the restaurant
15 or transmission of a facsimile order to the restaurant. The true inventors of the
16 claims set forth in the “copycat” ‘449 patent are not the persons identified on the
17 ‘449 patent, but rather are the inventors named in Ameranth’s ‘077 patent.

18 31. Tellingly, the inventors listed on the ‘449 patent (Bryan Cupps and
19 Tim Glass) did not authorize a statement or declaration in connection with the
20 application for the ‘449 patent (which was filed 15 years after the filing of the
21 application for the Cupps ‘739 patent) contending that they had conceived of
22 Ameranth’s non- PC-standard based invention or invented the subject matter
23 claimed therein, or that the specification for the ‘739 patent supported the claims
24 of the ‘449 patent. To the contrary, independent applications filed with the Patent
25 Office by Cupps and Glass in 2001, after the priority date of Ameranth’s ‘077
26 patent, make it clear that they knew that the specification of the ‘739 patent did
27

1 *not* support or disclose the non-PC-standard based subject matter of the claims in
2 the ‘449 patent copied from the ‘077 patent.

3 32. Furthermore, the original assignee of the ‘739 patent, Food.com (by
4 which Cupps and Glass had been employed) acknowledged that Cupps and Glass
5 had not conceived of or invented Ameranth’s patented inventions. Food.com
6 partnered with Ameranth in July of 1999 in order to obtain and use Ameranth’s
7 inventions and technology, which Food.com needed and admitted it did not
8 possess. Thus, an internal Food.com memo entitled “Ameranth Licensing
9 Contract” dated September 13, 1999 (and which QuikOrder, Pizza Hut and their
10 counsel have seen by virtue of their participation in discovery in the consolidated
11 patent infringement lawsuits pending before this Court) states, in relevant part:

12
13 I have met with Keith McNally to agree on the deal points on a
14 Licensing Agreement. Here are the products and services we would
15 want.

- 16 1. Menu Wizard- this is a tool which digitally constructs and
17 updates restaurant menus ...
- 18 2. Communications Wizard- this tool creates a standard that can
19 be used to integrate with any POS terminal and establishes the
20 online ordering protocol.
- 21 3. Reservations- Food.com would have the exclusive rights to the
22 online reservation system. They would help us create a hybrid
23 system that can connect with the POS ...

24 33. These statements demonstrate that Food.com did not possess any
25 invention or technology duplicating the functionality of Ameranth’s menu
26 generation, online and mobile ordering with point of sale (“POS”) integration or
27 online reservations with POS integration inventions, despite the fact that the
28 Notice of Allowance for their ‘739 patent had been issued by the Patent Office in

1 December of 1998, roughly 9 months earlier. Moreover, the memo explains that
2 Food.com was seeking “exclusive rights” to Ameranth’s Menu Wizard technology
3 because that tool created a “barrier to entry” in the online and mobile food
4 ordering market, and to Ameranth's hybrid reservations system with POS
5 integration, a further acknowledgment (made by persons skilled in the art, at the
6 time of the invention) that neither Cupps, Food.com or anyone else in the industry
7 had conceived of or possessed Ameranth’s inventions.

8 34. Thus, both the named inventors of the ‘739 patent (Cupps and Glass),
9 and their employer and original assignee of the ‘739 patent (Food.com),
10 acknowledged that Cupps and Glass had *not* conceived of or invented Ameranth’s
11 inventions. Despite these facts, IPDEV, 15 years later, covertly copied the claims
12 from Ameranth’s ‘077 patent into Application No. 13,592,199 and falsely
13 represented to the Patent Office that Cupps and Glass had conceived of such
14 inventions earlier in order to improperly obtain the ‘449 patent.

15 35. Additionally, IPDEV’s affiliate, QuikOrder, took the position in and
16 around 2001 in the United States District Court for the Northern District of
17 California, when it was sued by Food.com (the prior owner of the ‘739 patent) for
18 infringement of the ‘739 patent, not only that the ‘739 patent was invalid, but
19 further that the claims of the Cupps ‘739 patent (on which IPDEV’s ‘449 patent
20 supposedly is based) were limited to a single inventive idea (an online ordering
21 system that uses geocodes to match customers with restaurants in the appropriate
22 delivery/take-out geographic area), and therefore could not encompass or disclose
23 the entirely different invention described in the claims of Ameranth’s ‘077 patent,
24 now improperly copied by IPDEV in the claims of the ‘449 patent. As QuikOrder
25 stated in a November 26, 2001 claim construction brief filed with the United
26 States District Court for the Northern District of California: “The purported
27 invention of the ‘739 patent is a single variation on an admittedly ‘prior art’
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1 theme. The '739 patent is characterized as an online ordering system that matches
2 customers with appropriate vendors, such as restaurants providing food delivery
3 services. While admitted prior art ordering systems match customers to
4 appropriate vendors using the customer's address ... or telephone prefix, the
5 system claimed by the '739 patent uses 'geocodes.'" Food.com's claim
6 construction position, and the Northern District of California's claim construction
7 order in that lawsuit, similarly described the "geocode" based invention disclosed
8 in the '739 patent.

9 36. Likewise, in connection with the prosecution of a different patent
10 application before the Patent Office in 2004 (Application No. 09/007,578),
11 IPDEV/QuikOrder and its counsel argued that that the Cupps '739 patent does *not*
12 disclose, and in fact teaches away from, the concepts and inventions contained and
13 described in Ameranth's patents and now duplicated in the claims of the '449
14 patent.

15 37. In an earlier and separate patent application filed by IPDEV with the
16 Patent Office supposedly based on the Cupps '739 patent (Application No.
17 09/282,645), IPDEV previously attempted to duplicate claims of Ameranth's '077
18 patent in or around July of 2012. The patent examiner for that '645 application (a
19 different examiner than the one later assigned to the application for the '449
20 patent), in an August 28, 2012 interview summary, noted the dramatic differences
21 between: (a) the claims IPDEV sought to copy from Ameranth's '077 patent
22 (focusing on "different display sizes of different user devices during
23 mobile/remote ordering," according to the patent examiner); and (b) the "geocode
24 and location information for food ordering" claims that IPDEV sought to derive
25 from the Cupps '739 patent, and pointed out in the office communication that the
26 two sets of claims "*are for a different invention.*" Emphasis added. The '645
27 application patent examiner's comments further reconfirmed what Cupps and
28

1 Glass, Food.com, QuikOrder, and IPDEV itself knew and previously
2 acknowledged—the ‘739 patent is directed to an entirely different inventive
3 concept than that disclosed by and described in the claims of Ameranth’s non-PC-
4 standard based ‘077 patent, and now improperly copied into the ‘449 patent.

5 38. Importantly, none of the evidence described in paragraphs 30 to 34
6 and 36 to 37 above demonstrating that Cupps and Glass did not invent the claims
7 of the ‘449 patent (copied from Ameranth’s ‘077 patent) was provided by IPDEV
8 to the patent examiner for the ‘449 patent. Although the patent examiner did,
9 incorrectly, allow the ‘449 patent to issue, he provided no reasons whatsoever for
10 the notice of allowance, provided no comments as to the substance of any prior art
11 review, and made no indication that he had reviewed any of the extensive
12 prosecution history of Ameranth’s ‘077 patent, further confirming that he relied
13 on and was misled by the misstatements and extensive withholding of material
14 information by IPDEV and its counsel¹.

15 **Fourth Affirmative Defense**

16 **(Lack of Conception and Diligent Reduction to Practice)**

17 39. The claims of the ‘449 patent were not conceived by or diligently
18 reduced to practice by the inventors named in the ‘449 patent or the owners of
19 such patent, rendering the ‘449 patent invalid under (pre-AIA) 35 USC section
20 102. Additionally, the failure to diligently reduce such claims to practice
21 constitutes abandonment of such claims, resulting in such claims being invalid
22 and unenforceable.

23
24 _____
25 ¹ Further demonstrating that the examiner of the ‘449 patent was confused when
26 he approved and issued the ‘449 patent, he cited to only 3 “prior art” references in
27 the ‘449 patent. These references are dated August of 2004, June 2012, and May
28 2013, references which would not be relevant to a patent application seeking a
November 1997 priority date, such as IPDEV sought with the application for the
‘449 patent.

Fifth Affirmative Defense

(Lack of Sufficient Written Description in Specification)

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2
3 40. Neither the specification of the ‘449 patent, nor the content of the
4 ‘739 patent or application No. 09/282,645, contains a sufficient written
5 description to support the invention claimed in the claims of the ‘449 patent, in
6 violation of 35 USC section 112. The ‘739 patent, on which the claims of the
7 ‘449 patent supposedly are based, describes a system that: (a) uses “geocodes” to
8 determine whether a customer is within a restaurant’s specified geographic
9 delivery area and/or whether a restaurant is within the customer’s specified
10 geographic take-out area; and (b) facilitates placement of an order from a
11 customer’s computer to a restaurant through either conversion of the order into
12 voice data transmitted by telephone to the restaurant or transmission of a facsimile
13 order to the restaurant. In contrast, the claims of the ‘449 patent (copied from
14 Ameranth’s ‘077 patent) describe a system for customized configuration and
15 layout of menus to conform with non-PC-standard and different display sizes and
16 characteristics of two or more different wireless handheld computing devices
17 (e.g., “smartphones”), and real time communication and data synchronization
18 between a wireless handheld computing device, a web page and a master database.
19 These claims are not described or disclosed in, or otherwise supported by, the
20 specification of the ‘449 patent, nor the content of the ‘739 patent or application
21 No. 09/282,645, rendering the ‘449 patent and the claims thereof invalid².
22
23
24

25
26 ² IPDEV even deleted an extensive discussion of geocodes from the Abstract of
27 Application No. 13/592,199 (which eventually issued as the ‘449 patent) in an
28 apparent attempt to obscure the primary focus of the application from the
Examiner.

1 **Sixth Affirmative Defense**

2 **(Lack of Enablement in Specification)**

3 41. The '449 patent fails to satisfy the requirement of enablement
4 imposed by 35 USC section 112 because neither the specification of the '449
5 patent, nor the content of the '739 patent or application No. 09/282,645, enables a
6 relevant person of skill in the art to make and use the invention claimed in the
7 claims of the '449 patent.

8 **Seventh Affirmative Defense**

9 **(Inequitable Conduct)**

10 42. IPDEV, its principals, affiliates and counsel, acted with inequitable
11 conduct before the Patent Office in connection with prosecution and procurement
12 of the '449 patent as further alleged herein and with the specific intent to deceive
13 the Patent Office, but for which the '449 patent would not have issued, rendering
14 the '449 patent invalid and unenforceable.

15 **Eighth Affirmative Defense**

16 **(Unclean Hands)**

17 43. IPDEV, its principals, affiliates and counsel, acted with unclean
18 hands before the Patent Office in connection with prosecution and procurement of
19 the '449 patent as further alleged herein, but for which the '449 patent would not
20 have issued, rendering the '449 patent invalid and unenforceable.

21 **Ninth Affirmative Defense**

22 **(Estoppel)**

23 44. IPDEV is estopped from asserting the validity of the claims of the
24 '449 patent or contending that the '449 patent, or any claims thereof, is entitled to
25 priority over any of Ameranth's patents or any of the claims thereof by virtue of
26 contradictory positions that IPDEV, through its attorneys, agents, affiliates, and
27 those in privity or acting in concert with it, have taken:

1 (a) in the consolidated patent infringement lawsuits filed by
2 Ameranth against QuikOrder, Pizza Hut and other members of the Joint Defense
3 Group in this Court (in affirmative defenses, in counterclaims, in discovery
4 responses, in invalidity contentions and in a joint motion in support of the
5 defendants' motion to stay proceedings, among other places);

6 (b) in proceedings before the Patent Trial and Appeal Board with
7 respect to the nearly identical claims of Ameranth's '077 patent and the claims of
8 Ameranth's '850 and '325 patents (including asserting that the claims of
9 Ameranth's patents were invalid under 35 USC sections 101 and 112 and
10 contending that such claims "cover nothing more than an abstract idea");

11 (c) in other filings before the Patent Office regarding a different
12 patent application but involving the '739 patent from which the '449 patent claims
13 priority (among other things, traversing the '739 patent and contending that the
14 '739 patent did *not* disclose or teach elements of the subject matter now claimed
15 in the '449 patent);

16 (d) through a direct and contradictory admission made by
17 IPDEV's President and managing agent, James Kargman, to Ameranth's Chief
18 Executive Officer on December 12, 2007; and

19 (e) in filings made by QuikOrder in the United States District
20 Court for the Northern District of California in and around 2001 asserting that the
21 '739 patent was invalid when QuikOrder was being sued by Food.com (the prior
22 owner of the '739 patent) for infringement of the '739 patent.

23 45. Consequently, IPDEV is estopped from asserting the validity of the
24 claims of the '449 patent or contending that the '449 or any claims thereof is
25 entitled to priority over any of Ameranth's patents or any of the claims thereof.

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1 **Tenth Affirmative Defense**
2 **(Anticipation and Obviousness)**

3 46. Because the '449 patent is not entitled to a priority date senior to
4 Ameranth's '077 patent, the '449 patent, and the claims thereof, is invalid as being
5 anticipated by the '077 patent and rendered obvious by the '077 patent, which
6 describes and discloses every element of the claims of the '449 patent, pursuant to
7 35 USC sections 102 and 103.

8 **Eleventh Affirmative Defense**
9 **(Time Barred Claim)**

10 47. Because IPDEV is attempting to assert its purported interference
11 claims based on the '449 patent claims against Ameranth's '850 patent, which was
12 issued by the Patent Office on May 7, 2002, and Ameranth's '325 patent, which
13 was issued by the Patent Office on March 22, 2005, such an interference challenge
14 is untimely and time barred pursuant to, *inter alia*, (pre-AIA) 35 USC section
15 135(b)(1), which requires any such interference claim to be made, if at all, within
16 one year of the date of issuance of the patent to be challenged.

17 **Twelfth Affirmative Defense**
18 **(Laches)**

19 48. IPDEV's interference claims against Ameranth's patents are barred
20 by the doctrine of laches. IPDEV acquired the '739 patent from the trustee of the
21 bankruptcy estate of Food.com (the prior owner of the '739 patent) on or about
22 February 3, 2004. IPDEV, its affiliate QuikOrder, and their common controlling
23 persons (including but not limited to James Kargman) had knowledge of
24 Ameranth's '850 and '325 patents, and Ameranth's intent to enforce those patents,
25 since at least February of 2006. Nevertheless, and without justification, IPDEV
26 waited until August 22, 2012 to file the application that issued as the '449 patent
27 (copying the claims of Ameranth's '077 patent) supposedly based upon '739
28

1 patent, which IPDEV now asserts supports interference claims against Ameranth's
2 '850, '325 and '077 patents. This delay is unreasonable and results in undue
3 prejudice to Ameranth. Consequently, the doctrine of laches bars IPDEV's
4 interference claims asserted herein.

5 **Thirteenth Affirmative Defense**

6 **(Invalidity of '449 Patent Under (pre-AIA) 35 USC section 135(b)(1))**

7 49. The claims of IPDEV's '449 patent are invalid under (pre-AIA) 35
8 USC section 135(b)(1), which states, in relevant part: "A claim which is the same
9 as, or for the same or substantially the same subject matter as, a claim of an issued
10 patent may not be made in any application unless such a claim is made prior to
11 one year from the date on which the patent was granted."

12 50. IPDEV asserts in its complaint in this matter that the claims of
13 Ameranth's '850 and '325 patents are "obvious variants of the claims of the
14 Ameranth '077 patent," and therefore are for the same or substantially the same
15 subject matter as the claims of the '077 patent (the '325 patent is a continuation of
16 the '850 patent, and the '077 patent is a continuation in part of the '850 patent).
17 IPDEV further asserts in its complaint that claims of the Ameranth patents (the
18 '077, '325 and '850 patents) interfere with claims of the '449 patent. The '850
19 patent issued on May 7, 2002. The '325 patent issued on March 22, 2005.
20 IPDEV did not apply for the '449 patent claims until August 22, 2012, well past
21 the one year time period in which any application for a claim for the same or
22 substantially the same subject matter as the claims of Ameranth's issued '850 and
23 '325 patents would have had to have been filed with the Patent Office. Therefore,
24 the claims of the '449 patent are invalid.

1 **Fourteenth Affirmative Defense**

2 **(Failure to State a Claim)**

3 51. IPDEV fails to state claims upon which relief can be granted with
4 respect to Ameranth's '850 and '325 patents.

5 **PRAYER FOR RELIEF**

6 WHEREFORE, Ameranth prays for relief as follows:

- 7 1. That IPDEV take nothing by way of its claims herein;
- 8 2. For a judicial declaration that the '449 patent, and all claims thereof,
9 is invalid and unenforceable;
- 10 3. For a determination that the '449 patent is not entitled to any priority
11 over Ameranth's '325, '850 and '077 patents;
- 12 4. That the Court deem this to be an exceptional case and award
13 attorneys' fees and costs in favor of Ameranth; and
- 14 5. For such other and further relief as the Court deems just and proper.
- 15

16 **COUNTERCLAIMS**

17 By and for its counterclaims against IPDEV, Ameranth further alleges as
18 follows:

19 **The Parties**

- 20 1. Ameranth is a Delaware corporation registered to do business in
21 California and located in San Diego, California.
- 22 2. On information and belief, IPDEV is an Illinois corporation
23 headquartered in Chicago, Illinois, but doing business within this judicial district.
24 IPDEV is an affiliate of QuikOrder (fka as National Systems Corporation) and
25 under common control with QuikOrder. QuikOrder, in turn, provides the on-line
26 and mobile ordering system used by Pizza Hut, and, on information and belief, is
27 providing a defense and indemnity to Pizza Hut in the consolidated patent
- 28

1 infringement actions pending before this Court, and IPDEV, QuikOrder and Pizza
2 Hut share common legal counsel in the cases pending before this Court. On
3 information and belief, QuikOrder, Pizza Hut and other members of the Joint
4 Defense Group in the consolidated patent infringement cases are utilizing
5 IPDEV's complaint for determination of priority of invention as part of their joint
6 defense strategy against Ameranth's claims for patent infringement.

7 **Jurisdiction and Venue**

8 3. This counterclaim arises under the patent laws of the United States,
9 35 U.S.C. § 101, et seq., and under the declaratory judgments laws of the United
10 States, 28 U.S.C. §§ 2201 and 2202.

11 4. Jurisdiction of this counterclaim arises under 28 U.S.C. §§ 2201 and
12 2202 and under 28 U.S.C. § 1338(a). This is a proper counterclaim under Rule 13
13 of the Federal Rules of Civil Procedure.

14 5. By virtue of IPDEV's complaint for determination of priority of
15 invention against Ameranth filed in this Court, a justiciable controversy exists
16 between Ameranth and IPDEV regarding the validity and scope of IPDEV's rights
17 in and to the '449 patent and the claims thereof.

18 6. Venue is proper in this District pursuant to 28 USC section 1391(b)
19 and (c), and IPDEV has consented to venue in this District by filing suit against
20 Ameranth herein.

21 7. IPDEV is subject to personal jurisdiction in this Court by virtue of
22 doing business in this judicial district and has subjected itself to personal
23 jurisdiction herein by virtue of filing its complaint for determination of priority of
24 invention against Ameranth in this Court.

1 **First Counterclaim**

2 **(Declaration of Invalidity of the ‘449 Patent)**

3 8. Ameranth realleges and incorporates by reference herein the
4 preceding allegations of this answer and counterclaim as though fully set forth
5 herein.

6 9. An actual controversy has arisen and now exists between Ameranth,
7 on one hand, and IPDEV, on the other, with respect to the validity of IPDEV’s
8 ‘449 patent and the claims thereof. Specifically, IPDEV contends that the ‘449
9 patent is valid, whereas, for the reasons described herein, among others, Ameranth
10 contends that the ‘449 patent, and the claims thereof, is invalid.

11 10. The ‘449 patent, and the claims thereof, is invalid for at least the
12 following reasons.

13 11. The ‘449 patent is invalid under (pre-AIA) 35 USC section
14 135(b)(1). (Pre-AIA) 35 USC section 135(b)(1) states, in relevant part: "A claim
15 which is the same as, or for the same or substantially the same subject matter as, a
16 claim of an issued patent may not be made in any application unless such a claim
17 is made prior to one year from the date on which the patent was granted." IPDEV
18 asserts in its complaint in this matter that the claims of Ameranth’s ‘850 and ‘325
19 patents are “obvious variants of the claims of the Ameranth ‘077 patent,” and
20 therefore are for the same or substantially the same subject matter as the claims of
21 the ‘077 patent (the ‘325 patent is a continuation of the ‘850 patent, and the ‘077
22 patent is a continuation in part of the ‘850 patent). IPDEV further asserts in its
23 complaint that claims of the Ameranth patents (the ‘077, ‘325 and ‘850 patents)
24 interfere with claims of the ‘449 patent. The ‘850 patent issued on May 7, 2002.
25 The ‘325 patent issued on March 22, 2005. IPDEV did not apply for the ‘449
26 patent until August 22, 2012, well over one year beyond the issuance dates of
27 Ameranth’s ‘850 and ‘325 patents and therefore long past the one year time period

1 permitted by law for applying to the Patent Office for any claim for the same or
2 substantially the same subject matter as the claims of Ameranth’s previously
3 issued ‘850 and ‘325 patents.

4 12. The claims of the ‘449 patent are not supported or disclosed by the
5 specification and the drawings thereof. For example, there is no support for key
6 claim elements such as: wireless handheld computing devices, real time
7 synchronous communication with wireless handheld computing devices,
8 configuration and formatting of menus for display on two or more different
9 wireless handheld device display sizes, smart phones, reservations, wait-listing,
10 ticketing, and integration with point of sale (“POS”) systems. Thus, the claims of
11 the ‘449 patent are invalid for lack of sufficient written description pursuant to 35
12 USC section 112.

13 13. The claims of the ‘449 are not sufficiently enabled by the
14 specification and drawings thereof to enable a relevant person of skill in the art to
15 make and use the invention claimed therein. Thus, the claims of the ‘449 patent
16 are invalid for lack of enablement pursuant to 35 USC section 112.

17 14. The claims of the ‘449 patent were not conceived by or diligently
18 reduced to practice by the inventors named in the ‘449 patent or the owners of
19 such patent, rendering the ‘449 patent invalid under (pre-AIA) 35 USC section
20 102. Additionally, the failure to diligently reduce such claims to practice
21 constitutes abandonment of such claims.

22 15. As described more fully in Ameranth’s Third Affirmative Defense,
23 incorporated by reference herein, the ‘449 patent fails to name the true inventors
24 of the claims of the patent. The true inventors of such claims are the inventors
25 identified in Ameranth’s ‘077 patent: Keith McNally, William Roof and Richard
26 Bergfeld. In contrast, the persons incorrectly named as inventors in the ‘449
27 patent-- Bryan Cupps and Tim Glass—have acknowledged, in other filings with
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1 the Patent Office, that: (a) they understood that desktop computers (i.e., “PC’s”)
2 and laptops (as referenced in the specification for the ‘739 patent on which the
3 ‘449 patent supposed is based) were *not* the same as or equivalent to non-PC
4 standard “wireless handheld computing devices” (the term used in Ameranth’s
5 ‘077 patent and wrongfully copied in the claims of the ‘449 patent by IPDEV);
6 and (b) they did not believe that the ‘739 patent (from which the ‘449 patent
7 claims priority) disclosed or taught synchronization with wireless handheld
8 computing devices, which is a core aspect of Ameranth’s ‘077 patent and which
9 the claims of the ‘449 patent improperly copy. Moreover, and tellingly, neither
10 Cupps nor Glass (the inventors of the ‘739 patent) asserted that they invented the
11 subject matter of the claims of Ameranth’s ‘077 patent or approved any
12 declaration to the Patent Office in connection with the prosecution of Application
13 No. 13/592,199, which issued as IPDEV’s ‘449 patent, attesting to their supposed
14 invention of the subject matter of the ‘449 patent claims (IPDEV merely
15 resubmitted to the Patent Office the 1997 inventorship declaration filed in
16 connection with the application for the ‘739 patent, which contains entirely
17 different claims). As described in Ameranth’s Third Affirmative Defense, IPDEV
18 withheld from the Patent Office a vast amount of evidence refuting any contention
19 that Cupps and/or Glass invented the invention described in the claims of the ‘449
20 patent copied from Ameranth’s ‘077 patent.

21 16. A judicial determination is necessary and appropriate at this time to
22 resolve the foregoing dispute over the validity of the ‘449 patent and the claims
23 thereof, and there is no other just, efficient and satisfactory method for the
24 resolution of this dispute.

25 17. Consequently, Ameranth requests a judicial declaration that the ‘449
26 patent, and the claims thereof, is invalid.

1 **Second Counterclaim**
2 **(Inequitable Conduct)**

3 18. Ameranth realleges and incorporates by reference herein the
4 preceding allegations of this answer and counterclaim as though fully set forth
5 herein.

6 19. All claims of IPDEV’s ‘449 patent are invalid and unenforceable due
7 to the inequitable conduct during the prosecution of the ‘449 patent by IPDEV, its
8 principals (including James Kargman and David Kargman), its patent prosecution
9 counsel for the ‘449 patent before the Patent Office, its agents, on information and
10 belief litigation counsel for it and its affiliates (including George Yu and Schiff
11 Hardin LLP), its affiliates and those working in concert with it, who intentionally
12 withheld vast amounts of material information from the Patent Office, and/or
13 made material misstatements to the Patent Office, with specific intent to deceive
14 the Patent Office, but for which the ‘449 patent would not have issued.

15 20. As a result of QuikOrder’s and Pizza Hut’s participation in the
16 consolidated patent infringement cases pending before this Court, QuikOrder,
17 IPDEV, their principals (including James and David Kargman) and their counsel
18 knew of the claim constructions that had been given to numerous elements of
19 Ameranth’s patents by the District Court for the Eastern District of Texas that
20 were entirely incompatible with the arguments made by IPDEV to the Patent
21 Office in order to attempt to manufacture support for the claims of the ‘449 patent
22 in the specification thereof. IPDEV and its counsel withheld these claim
23 constructions, including, for example, the construction of the term “wireless
24 handheld computing device” from the examiner of the ‘449 patent, in order to
25 mislead the patent examiner about whether there was any support in the
26 specification of the ‘449 patent for such term.

1 21. As a result of QuikOrder’s and Pizza Hut’s participation in the
2 consolidated patent infringement cases pending before this Court, QuikOrder,
3 IPDEV, their principals (including James and David Kargman) and their counsel
4 knew of the various alleged “prior art” references that the members of the Joint
5 Defense Group had asserted against Ameranth’s ‘077, ‘850 and ‘325 patents,
6 including references that pre-dated the application date of the ‘739 patent from
7 which the ‘449 patent claims priority. Despite the fact that the claims of the ‘449
8 patent substantially duplicate the claims of Ameranth’s ‘077 patent, IPDEV did
9 not apprise the examiner of the ‘449 patent of the alleged prior art references and
10 conflicting claim construction positions that they and the other members of the
11 Joint Defense Group have asserted against Ameranth’s patents.

12 22. As a result of QuikOrder’s participation in the Joint Defense Group
13 in the consolidated patent infringement cases pending before this Court, and Pizza
14 Hut’s participation in the covered business method petition proceedings brought
15 before the Patent Trial and Appeal Board by a number of the defendants in that
16 Joint Defense Group against Ameranth’s ‘077, ‘850 and ‘325 patents, IPDEV and
17 its counsel knew of the claim constructions that had been given to numerous
18 elements of Ameranth’s patents by the Patent Trial and Appeal Board in the
19 covered business method petition proceedings concerning Ameranth’s ‘077, ‘850
20 and ‘325 patents that were incompatible with the arguments made by IPDEV to
21 the Patent Office in order to attempt to manufacture support for the claims of the
22 ‘449 patent in the specification thereof. IPDEV and its counsel withheld these
23 claim constructions from the examiner of the ‘449 patent.

24 23. IPDEV misled the examiner of the 13/592,199 application in order to
25 obtain the ‘449 patent. IPDEV did not use the word “interference” in its patent
26 application, did not propose an interference to the Patent Office, did not propose a
27 “count” for an interference, and importantly did not specifically explain that the
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1 proposed claims were copied from claims of a different inventor. These
2 procedures were required for proper suggestion of an interference. The examiner
3 of the '449 patent was thus not informed and did not understand that declaration
4 of an interference was being suggested. IPDEV intentionally crafted its
5 preliminary statement for its continuation application to the Patent Office in a
6 manner designed to mislead the examiner into believing that the claims were
7 copied from another IPDEV/QuikOrder/Cupps patent so that the examiner would
8 apply minimal scrutiny to the application. IPDEV made no statement that the
9 claims were being copied from the application of a different inventor and patent
10 owner. IPDEV overtly misled the examiner in order to deflect the examiner's
11 attention away from, *inter alia*, the lack of support in the Cupps '739 patent
12 description for the claims IPDEV copied from Ameranth's '077 patent and
13 presented to the Patent Office as its own. Furthermore, IPDEV failed to explain to
14 the examiner that the Cupps '739 patent is cited as a reference in Ameranth's '077
15 patent and that the '077 patent had been issued by the USPTO specifically over
16 the Cupps '739 patent (as, for that matter, have been Ameranth's '850 and '325
17 patents as well).

18 24. Although IPDEV now contends in the present lawsuit that the claims
19 of Ameranth's '850 patent (issued on May 7, 2002) and '325 patent (issued on
20 March 22, 2005) are for the same or substantially the same subject matter as the
21 claims of the '077 patent and are "obvious variants" of the claims of the '077
22 patent, which are substantially copied by IPDEV's '449 patent, IPDEV failed to
23 disclose or explain this to the Patent Office in connection with the prosecution of
24 the '449 patent. Under (pre-AIA) 35 USC section 135(b)(1), "A claim which is
25 the same as, or for the same or substantially the same subject matter as, a claim of
26 an issued patent may not be made in any application unless such a claim is made
27 prior to one year from the date on which the patent was granted." IPDEV did not
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1 submit the application for the ‘449 patent to the Patent Office until August 22,
2 2012, far more than one year after the issuance of Ameranth’s ‘850 and ‘325
3 patents, in violation of (pre-AIA) 35 USC section 135(b)(1). On information and
4 belief, IPDEV and its counsel intentionally failed to disclose this information to
5 the patent examiner for the ‘449 patent in order to improperly obtain the ‘449
6 patent despite the untimely nature of the application.

7 25. IPDEV has previously distinguished and traversed the Cupps ‘739
8 patent in prior filings with the Patent Office in support of other patent
9 applications seeking to replicate elements of Ameranth’s inventions. In these
10 filings, IPDEV has argued to the Patent Office—correctly—that Cupps does *not*
11 disclose, and in fact teaches away from, the concepts contained in Ameranth’s
12 patents and now duplicated in the claims of the ‘449 patent. For example, in its
13 August 10, 2004 Appeal Brief in support of Application No. 09/007,578, IPDEV
14 argued to the Patent Office that its proposed claims were not anticipated by the
15 Cupps ‘739 patent because, among other things: (a) Cupps did not disclose or
16 enable the direct downloading of customer orders into a computer system/ POS
17 system in order to bypass the conventional store order taking process; and (b) the
18 Cupps’ invention was limited to conversion of customer computer orders into
19 voice data transmitted to the restaurant via phone call or transmitted to the
20 restaurant via facsimile transmission. Yet IPDEV withheld this information and
21 these prior filings and inconsistent positions from the examiner of the ‘449 patent
22 during the prosecution of the ‘449 patent.

23 26. In the consolidated District Court patent infringement litigation
24 involving Ameranth’s ‘077, ‘850 and ‘325 patents, QuikOrder, Pizza Hut and
25 other members of the Joint Defense Group have asserted (in affirmative defenses,
26 counterclaims, invalidity contentions, motions, *etc.*) that Ameranth’s patent
27 claims, including all claims of the ‘077 patent, are invalid and fail to meet the
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1 conditions for patentability under 35 U.S.C. sections 101, 102, 103 and 112.
2 Despite these judicial assertions of unpatentability, IPDEV simultaneously has
3 pursued the claims of the '449 patent, which are nearly identical to the claims of
4 Ameranth's '077 patent, through prosecution in the USPTO without revealing
5 these contradictory judicial assertions to the examiner of the '449 patent³.

6 27. In the covered business method petitions that Pizza Hut and other
7 members of the Joint Defense Group have pursued against Ameranth's patents,
8 the petitioners have alleged that the claims of the '077, '325 and '850 patents fail
9 to satisfy the written description and definiteness requirements of section 112, and
10 fail to claim patentable subject matter under section 101. QuikOrder and Pizza
11 Hut joined in the motions to stay the consolidated cases before the District Court
12 pending determination of these covered business method petitions. Yet again,
13 IPDEV failed to disclose the pending covered business method petition challenges
14 to Ameranth's patents, the contradictory positions taken in the covered business
15 method petition proceedings with the Patent Trial and Appeal Board (despite the
16 fact that IPDEV was concurrently pursuing the '449 patent containing nearly
17 exact duplicates of the claims of Ameranth's '077 patent being challenged before
18 the Patent Trial and Appeal Board), the claim constructions issued by the Patent
19 Office in the covered business method petition proceedings, or the rulings issued
20 by the Patent Office in those proceedings, even though these events all occurred
21 and were known to IPDEV, QuikOrder, Pizza Hut and their counsel well prior to
22 the issuance of the '449 patent.

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24 ³ Further, despite asserting in the consolidated patent infringement lawsuits
25 pending before this Court that the claims of Ameranth's '077 patent (from which
26 the claims of IPDEV's '449 are directly copied) are invalid and that QuikOrder
27 and Pizza Hut supposedly do not practice those claims, QuikOrder and Pizza Hut
both now mark their accused products with IPDEV's '449 and '739 patent
numbers, thereby admitting that their products do, in fact, practice such claims
and thus that their non-infringement assertions are untrue.

1 28. In connection with the prosecution of the '449 patent, IPDEV, its
2 principals and agents (including James and David Kargman), and its counsel
3 violated the requirements of section 2001.06(c) of the Patent Office's Manual of
4 Patent Examining Procedures ("M.P.E.P."), which provides, in relevant part:

5 Where the subject matter for which a patent is being sought is or has
6 been involved in litigation, the existence of such litigation and any
7 other material information arising therefrom *must* be brought to the
8 attention of the U.S. Patent and Trademark Office. Examples of such
9 material information include evidence of possible prior public use or
10 sales, questions of inventorship, prior art, allegations of "fraud,"
11 "inequitable conduct," and "violation of duty of disclosure." Another
12 example of such material information is *any assertion that is made*
13 *during litigation which is contradictory to assertions made to the*
14 *examiner. Environ Prods., Inc. v. Total Containment, Inc., 43*
15 *USPQ2d 1288, 1291 (E.D. Pa. 1997). Such information might arise*
16 *during litigation in, for example, pleadings, admissions, discovery*
17 *including interrogatories, depositions, and other documents and*
18 *testimony. (Emphasis added).*

19 29. Despite acknowledging that the claims of the '449 patent are copied
20 directly from the claims of the '077 patent, and despite asserting in this action that
21 the claims of Ameranth's '850 and '325 patents are "obvious variants" of the
22 claims of the '077 patent and therefore directed to the same or substantially same
23 subject matter, IPDEV and its counsel intentionally withheld from the patent
24 examiner of the '449 patent any of the over thirty lawsuits involving the claims of
25 Ameranth's '077, '850, and '325 patents pending before this Court, and the
26 contradictory assertions, contentions and positions taken by QuikOrder, Pizza Hut
27 and other members of the Joint Defense Group about the claims over which
28 IPDEV now asserts an interference.

29 30. Despite acknowledging that the claims of the '449 patent are copied
30 directly from the claims of Ameranth's '077 patent, and despite asserting in this
31 action that the claims of Ameranth's '850 and '325 patents are "obvious variants"
32 of the claims of the '077 patent and therefore directed to the same or substantially
33 of the claims of the '077 patent and therefore directed to the same or substantially

1 same subject matter, IPDEV and its counsel intentionally failed to disclose to the
2 patent examiner for the '449 patent any of the covered business method petition
3 proceedings challenging the patentability of the claims of the '077, '850, and '325
4 patents filed in the Patent Trial and Appeal Board by Pizza Hut and other
5 members of the Joint Defense Group, and the contradictory assertions, contentions
6 and positions taken by the petitioners therein about the claims over which IPDEV
7 now asserts an interference.

8 31. James Kargman, founder and President of IPDEV and founder and
9 Chief Executive Officer of QuikOrder, previously admitted to Keith McNally,
10 Chief Executive Officer of Ameranth, in a December 12, 2007 face to face
11 meeting in San Diego, California, that QuikOrder and its intellectual property
12 counsel had concluded that the Cupps '739 patent (which IPDEV, QuikOrder's
13 affiliate, acquired in 2004) was "trumped" by Ameranth's synchronization patents
14 in that the '739 patent does not describe, disclose, anticipate or render obvious the
15 inventions claimed in Ameranth's patents.

16 32. This direct admission by IPDEV's President to Ameranth's CEO was
17 also entirely consistent with an earlier public statement made by James Kargman
18 on November 6, 2002, two years prior to IPDEV's acquisition of the '739 patent.
19 In a CRN.com article of that date, Kargman claimed that QuikOrder's (then
20 known as National System Corporation) point of sale ("POS") system was: "the
21 only solution on the market I am aware of that has a direct tie into an online
22 ordering facility." At the time Kargman made this statement, he was well aware of
23 the scope of substance of the '739 patent as a result of the infringement lawsuit
24 filed in 2001 by Food.com (the prior owner of the '739 patent) against QuikOrder.
25 Thus, Mr. Kargman's statement, in November of 2002, that no other solution had
26 a direct tie in between an online ordering facility and a POS system (which is an
27 element of claims of the Ameranth's '077 patent now copied by the claims of the
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1 '449 patent) is a recognition that the Food.com system did not provide for direct
2 integration between an online ordering facility and a restaurant POS system.
3 Moreover, because the Food.com system was based upon and practiced the claims
4 of the '739 patent, Mr. Kargman's November 2002 statement is also an admission
5 that the '739 patent did not teach such direct integration between an online
6 ordering facility and a POS system, and therefore did not teach or disclose the
7 claims of Ameranth's '077 patent.

8 33. Nevertheless, despite these multiple contrary admissions by James
9 Kargman, IPDEV later submitted the application for the '449 patent to the Patent
10 Office covertly copying the claims of Ameranth's '077 patent and knowingly
11 misrepresenting to the Patent Office that the specification of the Cupps '739
12 patent contained, described, encompassed and disclosed the elements and
13 functionality of the claims copied from the '077 patent.

14 34. As a result of QuikOrder's and Pizza Hut's participation in the
15 consolidated patent infringement cases pending before this Court, QuikOrder,
16 IPDEV and their counsel knew that Food.com, the prior owner of the Cupps '739
17 patent before the patent was purchased by IPDEV, partnered with Ameranth in
18 1999 in order to use Ameranth's patented inventions and thus publicly
19 acknowledged that the Cupps '739 patent (upon which Food.com's products were
20 built) did not encompass Ameranth's inventions. On information and belief,
21 IPDEV and its counsel intentionally withheld this material information from the
22 patent examiner of the '449 patent, but for which the '449 patent would not have
23 issued.

24 35. On information and belief, IPDEV, its principals and agents
25 (including James Kargman and David Kargman) and its counsel, intentionally
26 withheld the information and material described above from the patent examiner
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1 and made the foregoing misrepresentations during the prosecution of the ‘449
2 patent with the specific intent to deceive the Patent Office.

3 36. The information withheld and/or misrepresented by IPDEV, its
4 principals and agents (including James and David Kargman) and its counsel was
5 material, and the ‘449 patent would not have issued but for such withholdings and
6 misrepresentations.

7 37. Accordingly, the ‘449 patent, and all claims thereof, should be held
8 invalid and unenforceable due to the far reaching inequitable conduct of IPDEV,
9 its principals and agents (including James and David Kargman) and its counsel
10 during the prosecution of the ‘449 patent.

11 **Exceptional Case Determination**

12 38. IPDEV’s conduct, as described herein, constitutes objectively
13 unreasonable and sanctionable conduct, and its interference claims lack
14 evidentiary support and are not warranted by existing law or non-frivolous
15 arguments for modifying existing law. On June 4, 2014, counsel for Ameranth
16 sent a letter to litigation counsel for IPDEV in this matter apprising them of the
17 baseless and frivolous nature of IPDEV’s interference claims, and demanding that
18 IPDEV dismiss the interference lawsuit with prejudice and renounce and repudiate
19 the ‘449 patent. A copy of that letter is attached hereto as **Exhibit 1**. IPDEV and
20 its counsel failed and refused to dismiss the suit and renounce the fraudulently
21 obtained ‘449 patent, and instead have continued to maintain the interference
22 action against Ameranth and its patents. Thus, IPDEV’s assertion and
23 maintenance of its interference claims against Ameranth’s patents violates Rule
24 11, constitutes litigation misconduct, and warrants treatment of this matter as an
25 exceptional case, pursuant to which Ameranth should be awarded the fees and
26 costs it has been required to expend to defend itself from IPDEV’s claims.

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PRAYER FOR RELIEF

WHEREFORE, Ameranth prays for relief on its counterclaims against IPDEV as follows:

1. For a judicial declaration that ‘449 patent, and all claims thereof, is invalid and unenforceable and not entitled to priority over any of Ameranth’s ‘850, ‘325 or ‘770 patents, or the claims thereof;
2. For a judicial declaration that IPDEV, and its principals, agents and counsel, engaged in inequitable conduct before the Patent Office in connection with the prosecution and procurement of the ‘449 patent, rendering the ‘449 patent, and all claims thereof, invalid and unenforceable;
3. That the Court deem this to be an exceptional case and award attorneys’ fees and costs in favor of Ameranth; and
4. For such other and further relief as the Court deems just and proper.

Respectfully submitted,

Dated: June 16, 2014 CALDARELLI HEJMANOWSKI & PAGE LLP

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