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

10
 11 **IN RE: AMERANTH PATENT**
 12 **LITIGATION**

Lead Case No. 11-cv-1810 DMS (WVG)

13 **AMERANTH'S CLAIM**
 14 **CONSTRUCTION BRIEF IN**
 15 **RESPONSE TO DEFENDANTS'**
 16 **OPENING CLAIM CONSTRUCTION**
 17 **BRIEFS**

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1 Pursuant to Patent L.R. 4.2 and the Court’s Orders of Feb. 14, 2017 (Doc.
2 623), July 6, 2017 (Doc. 775) and Aug. 16, 2017 (Doc. 782), Ameranth hereby
3 presents its Claim Construction Brief in Response to Defendants’ Opening Claim
4 Construction Briefs (Docs. 866, 867, 870).

5 **1. “wireless handheld computing device”**

6 Defendants argue that "handheld" is met by any device that can be held with
7 **two** “hands,” as opposed to the clearly correct construction that requires the device
8 to be sized to *fit in one hand* and be used with the other hand.

9 Tellingly, Defendant Apple “does not join” the Joint Defendant Groups’
10 (“JDG”) position (Doc. 866 at 23, fn.21). It is clear why Apple, producer of the
11 iPhone and which has extensive knowledge and experience with “handheld
12 computing devices,” would not join Defendants’ proposal. Apple has numerous
13 issued patents in which it defines “handheld computing device” as follows:

14 The present invention relates generally to *portable* computing devices.
15 ... The invention relates, in *one embodiment*, to a *handheld*
16 computing device. ... *sized for one-handed operations* and placement
17 into small areas *such as a pocket* ... For hand held devices, it is
18 typically preferred to use a shape that better *fits the hand* (e.g., form
19 fits). ... dimensioned to fit comfortably *within a user[']s hand*.

20 U.S. Pat. No. 7,515,431 at 1:24-25, 2:26-27, 5:9-11, 5:59-61, 9:47-48 (Exh. 19)
21 (emphasis added). Apple itself has thus defined handheld as a device that is sized
22 to fit into a hand.¹

23 The ‘077 patent describes “one handed” computing device use, contrary to
24 the JDG’s assertion (Doc. 866 at 23-24). *See, e.g.*, ‘077 Figure 8 and accompany-
25 ing text (Doc. 865-7 at 3:51-52, 60-64; 4:9-12, 17-21), which discloses that a
26 waiter may enter manual handwriting modifications on the handheld device display

26 ¹ Apple also distinguished “handheld” from “portable.” Handheld is a subset of
27 “portable” as Ameranth explained. Even the JDG’s own expert, Dr. Franz,
28 understood that laptops are “portable” but are not “PDAs.” *See* Franz U.S. Pat. No.
7,117,488 at 3:30-33 (Exh. 22).

1 screen. Unless the waiter has three hands, the waiter will hold the handheld device
2 in *one* hand while entering the manual modification with the other hand.

3 **2. “synchronized”/”synchronous”**

4 The JDG’s attempt to equate “synchronize” with “real time” and
5 “automatic” are unsupported and inconsistent with the claims and intrinsic
6 evidence. For example, claim 9 element “e” recites “automatically” generating a
7 menu configuration. Claim 1 does not. If “automatic” functionality was not
8 different from “synchronize” and/or “real time,” the claims would not have been
9 structured differently in this regard. Moreover, the specification discloses many
10 different types of timing of the “synchronization,” only one of which is real time
11 (as discussed in greater detail below with regard to Term/Phrase 6).

12 **3. “Web page”**

13 The JDG’s position that the jury should be left to decide the technical
14 meaning of Web page in 1999 is wrong. The World Wide Web Consortium (Doc.
15 865-17) defined it in 1999. The jury should not be left floundering for an
16 understanding of something that has been defined clearly and is not disputable.

17 **4. “graphical user interface”**

18 The JDG stated that “‘provided by an operating system’ adds no meaning to
19 the term ‘GUI’ because the claimed operating system includes the GUI.” Doc 866
20 at 25. Thus, the JDG admits that a “GUI” recited in the claims is provided by an
21 OS. Ameranth submits that making this admitted requirement explicit with regard
22 to all of the recited GUIs, including the handheld device GUIs, is necessary for
23 clarity and consistency across all of the elements in all of the claims.

24 **5. “communications control software enabled to”**

25 The JDG attempt to reduce this element to generic “software.” It is not
26 simply “software,” and “communications control” are not nonce words as IPDEV’s
27 expert confirmed. Stevenson 8-25-17 Dec. at 24-25 (Exh. 23). A POSA would
28 recognize the CCS as structure. Shamos Tr. 146-48, 155-56, 161-63 (Exh. 20).

1 The JDG’s reliance on cases finding no structure in generic terms such as
 2 “compliance,” “distributed learning control” and “colorant selection” is of no
 3 moment. The recited CCS would have been understood by a POSA to have a
 4 sufficiently definite meaning as the name for structure. *Id.*; *see also* Exh. 23 at 24-
 5 25. Further, the JDG’s expert Franz admitted that a “communication controller”
 6 connotes definite structure to a POSA. Franz Dec. ¶ 38, fn. 1 (Doc. 866-1). Franz
 7 further admitted that a communication controller provides functions of “sending,
 8 receiving, deciphering and checking transmissions for errors.” Franz Tr. 206-208
 9 (Exh. 21). He further admitted that the specification “might provide structure” for
 10 such functionality, but, stunningly, he had “not spent the time and the detail” to
 11 even analyze whether it did or not. *Id* at 210.² A communication controller is
 12 configured by communications control software. There is thus no discernable
 13 basis for deeming one structural but the other non-structural. If a POSA would
 14 recognize the controller as structure, the same POSA would recognize that the
 15 software which provides the controller’s capabilities also has a specific structure.
 16 Dr. Franz’s admission thus refutes his ultimate conclusion.

17 The JDG and their expert Franz assert that a “step-by-step” algorithm is
 18 required to support all software limitations,³ but neither offered authority for such
 19 an overly restrictive requirement. Rather, with respect to software limitations, “the
 20 patent need only disclose sufficient structure for a person of skill in the field to
 21 provide an operative software program for the specified function.” *Typhoon Touch*

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 23 ² Dr. Franz did not consider the ‘077 disclosure of “communications controller”
 24 (Doc. 865-7 at 10:41-60) nor Figure 9, which indisputably shows the
 25 “communications controller” dead center in the Figure. Dr. Franz ignored these
 26 disclosures because he did not believe they were “directly related” to the CCS or
 27 he believed that they were outside the scope of his Section 112(6) analysis. Franz
 28 Tr. 203-04, 209-10 (Exh. 21).

³ Franz also said that all claimed “software [] requires [] an algorithm that does
 these steps.” Exh. 21 at 57. Franz thus skipped over a determination of whether
 112(6) was applicable, and thus did not perform a correct analysis.

1 *Techs., Inc. v. Dell, Inc.*, 659 F.3d 1376, 1385 (Fed. Cir. 2011). Moreover, as
 2 detailed in Ameranth’s Opening Brief, recitation of a claim limitation’s
 3 connections, functions and operation in the remainder of the claim removes the
 4 limitation from Section 112(6).⁴ Ameranth demonstrated in its Opening Brief and
 5 supporting Declaration of Dr. Shamos that a POSA would recognize from the
 6 interconnections and requirements between all of the recited software and
 7 hardware elements that definite structure is conveyed by the claims. This is in
 8 addition to Dr. Shamos’s explanation that CCS is not a nonce word, but rather
 9 conveys a specific structure in and of itself, and the proper understanding of the
 10 structure for CCS is informed by the remainder of the claim. Shamos Tr. 146-48,
 11 155-56, 161-63 (Exh. 20). In contrast, Dr. Franz’s opinions did not consider any
 12 claim terms other than CCS and MCS. Franz Tr. 30-32 (Exh. 21). Regarding other
 13 terms, including the critical “master database” and its “file structure,” he simply
 14 “had no opinion on whether they provide structure.” *Id.* at 38-39. He thus did not
 15 consider the claims as a whole, nor was he even aware of such a requirement. *Id.*
 16 Thus all of his opinions are legally flawed and must be disregarded.

17 The CCS element is not governed by Section 112(6). However, even if it
 18 were, the element and its claim-defined structure and function are supported by
 19 corresponding structure in the specification.⁵ The “synchronous” invention of the
 20 ’077 patent as claimed produces a “consistent” (synchronized) user interface across

21 ⁴ *Apple, Inc. v. Motorola, Inc.*, 757 F. 3d 1286, 1299 (Fed. Cir. 2014); *see also*
 22 *Collaborative Agreements v. Adobe*, Case 3:15-cv-03853, Doc. 128 at 10 (N.D.
 23 Cal. Dec. 2, 2015) (post *Williamson*, rejecting alleged 112(6) applicability to “code
 24 segment” because it connotes structure and is thus not a nonce word, and that the
 25 claimed functions describe the operation with specificity) (Exh. 24). “[R]equiring
 26 the patent to describe precisely how the claimed functions are achieved or how a
 person of ordinary skill in the art could make and use the invention goes beyond
 the threshold trigger for the application of § 112 ¶ 6.” *Id.* at 10.

27 ⁵ “Disclosure of corresponding structure applies only if a court holds that § 112 ¶ 6
 28 applies.” *Collaborative v. Adobe*, Exh. 24 at 11. Thus, the corresponding structure
 issue only arises after a determination of § 112(6) applicability has been made.

1 disparate elements of the system which is provided by the claimed MCS and CCS
2 and their integrated interactions with the other elements/functions of their
3 respective claims. Disclosure providing structure corresponding to these terms is
4 found, *e.g.*, throughout the entirety of the specification and Figures.

5 **6. “real time synchronous communications to and from ...” / “synchronize**
6 **the hospitality application information in real time between ...”**

7 The JDG argues that the specification and prosecution history require “real
8 time” to be “instantaneous.” They point to “instant” in the Summary of the
9 Invention. But they fail to point out that the same Summary also refers to “fast,”
10 “real time,” “dial up modem” and “batch processing” as “timing” embodiments.
11 Further, there is no equation of “real time” to “instant/instantaneously” because
12 each of the occurrences of these terms is separate and apart from “real time.”

13 As to the prosecution statements regarding the Olewicz reference, the
14 distinction made was that the Olewicz menu was static whereas the claimed system
15 sent out whatever was in the master database/master menu. Being real time
16 synchronous does not mandate “knowing” that an item is available. It only
17 mandates that whatever is in the master database/menu is synchronized on the
18 handheld. If the master database/menu has been updated to reflect what is then
19 available in the kitchen, the handheld will have that information. But if there is a
20 no real time updating of the master database/menu reflecting an item as
21 unavailable, then the handheld device will have incorrect information. But even if
22 the master database/menu is not “current,” the system is still real time synchronous
23 per the claims if it sends out what is in the master database/menu in real time to
24 make the master and handheld consistent. The prosecution statement was not an
25 assertion that the claimed system would “know” if an item is available in “the real
26 world” when an order is entered. It was a statement that by admitting its system
27 did not (and could not) know, Olewicz admitted that it taugth away from a real
28 time synchronous system, *i.e.*, it admitted that there was no real time

1 synchronization of a master menu/database with a handheld device. Olewicz did
2 not synchronize anything under a “real time” synchronous regime.⁶

3 The JDG also mischaracterized Ameranth’s arguments regarding the
4 Angwin reference. In Angwin, a mobile device constantly broadcast a request for
5 cell phone services because the available services/locations were always
6 changing. In contrast, in the ‘077 claims, a handheld device connected in the
7 system to the master menu/database does not have to constantly broadcast requests
8 for updates because it is “linked” as stated by Ameranth in the January 2009
9 Amendment (Doc. 866-4 at 26). Ameranth’s distinction was that the claimed
10 system did not have to keep requesting services because (1) it never had to send a
11 request for services in the first place (because the claims (then-pending and issued)
12 did not relate to finding services) and (2) because components/devices that are
13 “linked” in the claimed system do not have to continuously look for each other.

14 Still further, the only real time requirement in the claims pending at the time
15 (claims 103 and 118) which Angwin was asserted against was to synchronize (in
16 real time) the master menu and second (generated) menu. (Doc. 866-4 at 2-3, 4-6).
17 There was no requirement to transmit to a handheld in real time or otherwise. Thus
18 there was nothing in the relevant then-pending claims about either “pushing” or
19 “pulling” anything to a handheld device. The terms the JDG proposed for
20 construction were the synchronous communications to and from the handheld
21 device (claims 1 and 9) and the “synchronization between” limitations of claim
22 13. Neither was in the then-pending claims which Angwin was applied against.
23 Thus, Ameranth’s prosecution statement does not relate to the actual elements
24 before the Court in this proceeding.

25 Still further as to the Jan. 23, 2009 Amendment (Doc. 866-4), there was no

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27 ⁶ Still further, Ameranth distinguished Olewicz as not receiving an update. This
28 was the opposite of the JDG’s assertion that Ameranth distinguished on the basis
that mobile devices in Olewicz “receive an update.” Doc. 866 at 12.

1 “automatic” recitation in the then-pending independent claims. Several dependent
 2 claims (*e.g.*, claims 104, 105) added “automatic,” thus mandating that “automatic”
 3 was not “real time.” Further, the “automatic” recitations in the dependent claims at
 4 the time compel that “a request for update” was not precluded by the independent
 5 claims (even assuming “automatic” means “without a request for update” as
 6 asserted by the JDG, which is wrong). Since “automatic” functionality was added
 7 by the dependent claims, the independent claims were not necessarily limited to
 8 automatic functionality. Thus Ameranth did not distinguish the independent claims
 9 from either Olewicz or Angwin based on “automatic.”⁷

10 GrubHub’s attempt to import an unclaimed “know” requirement fails for the
 11 reasons discussed above regarding the prosecution statements respecting Olewicz
 12 and Angwin. GrubHub completely mischaracterized the references and the
 13 statements relating to the references, just as the JDG did.⁸

14 **7. “[generate/format] a programmed handheld [menu] configuration”**

15 There is nothing in the claims or prosecution history which limits the claims
 16 to generating/formatting handheld configurations “solely at a central server.”
 17 Ameranth’s expert did not agree with Defendants on this point nor that no
 18 “configuration/formatting” can occur on/at the handheld. A POSA would know
 19 that the PHMC and PHC must be designed for and **integrated/integral** with the
 20 mobile OS/GUI of the handhelds. Ameranth’s expert merely opined that the

21 ⁷ The JDG also referred to the Kinebuchi reference in support of their argument
 22 that real time means “instantaneous. They point to Kinebuchi’s off line/batch
 23 processing as supposedly meaning that real time has to be instantaneous. That is a
 24 gross mischaracterization. The ‘077 disclosure includes batch processing, but it is
 25 not claimed in the ‘077 patent. The specification’s use of “instantaneous” and
 26 “instant” embodiments cannot be read into these claims because the specification
 27 discloses a myriad of different “synchronization speed” embodiments, including
 28 “fast,” “real time,” “regular modem dial up” and “batch processing.”

⁸ The claims do not require “knowing” what is available in the “real world” as
 GrubHub asserts, only synchronizing what is in the master menu/database with a
 handheld device and, with regard to claims 13, with a Web server and Web page.

1 claimed “programmed” functions which must be determined prior to transmission
2 of the PHMC must be programmed prior to transmission of the PHMC. Doc. 866-
3 12 at 52 ¶114 (“The **claimed** PHMC/PHC is generated prior to transmission to a
4 handheld device”) (bold emphasis added). Dr. Shamos reiterated his opinions at
5 deposition. Shamos Tr. 99-102 (Exh. 20). His focus was clearly on the **claimed**
6 functions “programmed” prior to transmission, not a preclusion of all other
7 functions and especially not preclusion of PHMC/PHC OS/GUI integration on/at
8 the handhelds. Dr. Stevenson concurred. Stevenson Rough Tr. 34-38 (Exh. 25).
9 Defendants’ attempt to avoid infringement by adding unclaimed functionality is
10 contrary to the law. If the claimed functionality to generate the PHMC is
11 configured to occur prior to transmission of the PHMC, the pertinent limitations of
12 the MCS are satisfied, irrespective of any other functionality in the system.

13 The JDG’s reliance on arguments made against the Micros/HHT prior art is
14 a mischaracterization. Ameranth’s prosecution and CBM arguments on Micros was
15 that it required a “manual” and “dual” configuration effort, *i.e.*, entirely separate
16 programming of a menu structure on a handheld device versus a standard menu
17 displayed on a standard PC screen.⁹ Again, while recited MCS “programmed”
18 functions must be “programmed” prior to transmission, that does not preclude the
19 PHMC from integrating its “programming” with the handheld device OS/GUI to
20 enable that configuration to be integrated with the known functionality of the
21 handheld device, and does not preclude **any** configuration or formatting
22 whatsoever on the handheld device after transmission. The JDG generalize from
23 the requirement that “programmed” functionality must occur prior to transmission

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25 ⁹ Doc. 865-19 at 29 ¶ 67 (“Ameranth’s argument against the Micros HHT during
26 prosecution was directed only against ‘manual’ programming/generation by a
27 human ‘programmer/operator’ on the Micros HHT itself. Ameranth’s inventions
28 eliminated the ‘dual menu programming’ requirement of Micros and other such
prior art systems. This did not preclude some PHMC/PHC ‘integration’ with the
GUI and other features of the mobile OS on the handhelds”).

1 of the PHMC to the conclusion that nothing happens to the PHMC when it is
2 received on the handheld device. That is incorrect. The PHMC is “*programmed*
3 for display on” the handheld device, and that “programming,” including its
4 intended integration with the handheld OS/GUI, cannot be read out of the claims.

5 The JDG argument on “optimization” is not readily fathomable, but there is
6 no “optimization” requirement in the claims. Moreover, optimization of a
7 configuration would not mean producing the “perfect” or “final” configuration. It
8 would merely mean performing the claim functions. “Optimized and suitable for”
9 did not mean “perfect” or “final,” it simply meant that the PHMC was generated
10 for display on a handheld device. The only reasonable inference to be drawn from
11 Ameranth’s use of “unique to,” “appropriate for” and “distinctive to,” as
12 referenced by the JDG (Doc. 866 at 20), was that the PHMC was generated for
13 particular handheld device characteristics—not that nothing else could be done to it.

14 **8. “menu configuration software”**

15 The JDG attempt to reduce this element to generic “software.” It is not
16 simply “software,” and “menu configuration” are not nonce words. Stevenson 8-
17 25-17 Dec. at 12-14 (Exh. 23). A POSA would recognize the MCS as a specific
18 kind of menu generation software structure. Shamos Tr. 136-38, 141-42 (Exh. 20).
19 As discussed above with regard to the CCS, the JDG’s cases are off the mark.
20 Their citation to generic “modifiers” is irrelevant to this element. Nor is a “step-
21 by-step” algorithm required. The recited MCS would have been understood by a
22 POSA to have a sufficiently definite meaning as the name for structure. Shamos
23 Tr. 136-40; *see also* Exh. 23 at 13-14. Further, Dr. Franz admitted that the MCS is
24 “well described” in the patent and “I would call that menu configuration” (Franz
25 Tr. 139 (Exh. 21)), thus eviscerating the JDG’s entire argument.¹⁰

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27 ¹⁰ Dr. Franz applied an incorrect analysis based on his belief that the claims must
28 provide a specific software “mapping.” Exh. 21 at 143. He thus believes
incorrectly that every software recitation must define precise line by line code.

1 Ameranth’s Opening Brief and supporting Declaration of Dr. Shamos
 2 demonstrate that a POSA would recognize from the interconnections and
 3 requirements between the recited software and hardware elements that definite
 4 structure is conveyed by the claims. This is in addition to Dr. Shamos’s
 5 explanation that MCS is not a nonce word, but rather conveys a specific structure
 6 in and of itself. Shamos Tr. 136-38, 141-42 (Exh. 20).

7 The MCS element is not governed by Section 112(6). However, even if it
 8 were, the element and its claim-defined structure and function, as explained
 9 above in regard to the CCS element, are clearly supported by corresponding
 10 structure found throughout the specification.

11 **9. “cascaded sets of linked graphical user interface screens”**

12 The JDG’s argument that “cascaded screens” must be “overlapping” and
 13 “offset” is based on their citations to definitions of “cascading *windows*,” not
 14 *screens*. They are not the same as explained by Dr. Shamos. Doc. 865-19 at ¶¶
 15 81-85. The specification is filled with description of handheld device display
 16 “screens”—which are not “windows” on a screen. Doc. 865-7 at 1:58-62; 3:51-52,
 17 60-64; 4:44; 5:48-49 (“a window displayed on a computer display screen”); 7:51-
 18 52 (“windows on the screen”). Further, the specification discloses linked screens
 19 without a requirement for “overlapping.” *E.g., id.* at 11:33-44. The “offset”
 20 argument likewise relies on the same attempt to equate “screens” to
 21 “windows.” The JDG has provided nothing to warrant importation of an incorrect,
 22 inapplicable, extrinsic definition contrary to the express teaching of the patent.

23 **10. “customized display layout”**

24 Ameranth agrees with the JDG that construction is unnecessary. Hyatt’s
 25 assertion that Ameranth defined the claim scope to “not require scrolling” (Doc.
 26 870 at 5) is incorrect. Ameranth said only that the claims “eliminate the need to
 27 *rely entirely* on scrolling.” *Id.* at 4. Nothing Ameranth said during prosecution or
 28 the CBMs is inconsistent with scrolling if the other claim recitations are met.

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