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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 IPDEV'S OPENING**
 16 **CLAIM CONSTRUCTION BRIEF**

17 Date: December 11, 2017
 18 Time: 9:00 a.m.
 19 Location: Courtroom 13A

Judge: Hon. Dana M. Sabraw
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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 IPDEV’s Opening Claim
4 Construction Brief (Doc. 868).

5 IPDEV’s Opening Brief and the Declaration of Dr. Stevenson (and his
6 deposition) confirm the absurdity of IPDEV’s proposed constructions of the
7 dispositive terms in dispute and the baselessness of IPDEV’s priority claim. The
8 proper construction of the dispositive terms will eviscerate the priority action on
9 multiple grounds.

10 IPDEV and its expert Stevenson ignored Judge Payne’s crystal clear ruling
11 that IPDEV’s ‘449 patent does not teach or even suggest the claimed
12 “synchronization,” ignored Judge Everingham’s construction of “wireless
13 handheld computing device” and ignored the clear prosecution disclaimer of
14 “Web pages” as regards ‘077 claims 1-12.¹ Confirmation of the disclaimer by
15 this Court will render Dr. Stevenson’s opinions and the entirety of IPDEV’s
16 position as to ‘077 claims 1-12 and ‘449 claims 19 and 20 fatally defective due to
17 the fact that the ‘449 patent discloses nothing but “Web pages.”

18 IPDEV and its expert’s dogged pursuit of their ridiculous construction
19 regarding “wireless handheld computing device” is shocking. To Dr. Stevenson,
20 a “handheld” is actually “suitcase” sized or larger, **size/weight** do not matter, and
21 a “wired” connection meets the “wireless capable” limitation. IPDEV makes the
22 fundamental mistake of conflating “**handheld**” with “**portable.**” However, the
23 ‘077 specification/claims, common sense, the canons of patent law and the rules
24 of grammar compel a rejection of their proposal, which in turn will compel a

25 ¹ All “Web page” based embodiments were clearly and unmistakably disclaimed
26 from claims 1-12. (Doc. 865 at 2). However, Dr. Stevenson admitted that his
27 opinion assumed that the disclaimer of “Web pages” did not apply. See Stevenson
28 Rough Tr. 319 (“Since I don’t believe there’s any disclaimer, I do not factor in a
disclaimer into my analysis.”) (Exh. 25).

1 rejection of the entire IPDEV priority dispute. This clear claim construction
2 dispute must therefore be resolved by the Court to resolve the priority dispute.²

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

4 Incredibly, Dr. Stevenson and IPDEV ignore the specification³ and believe
5 that “**size/weight**” are inapplicable to the determination of whether a “handheld”
6 device is “handheld” or not.⁴ Their argument that a *suitcase* is “sized” such that it
7 can be held “in one hand” is non-sensical. A suitcase is not held “in” one hand—it
8 is held “with” one hand (via a handle). Such holding of a “suitcase sized”
9 computer via a handle would not be understood by a POSA or anyone else as a
10 “**handheld** computer.” Further still, Dr. Stevenson asserted that a computer
11 “tower, a monitor, a UPS, keyboard and mouse” together constitute a wireless
12 handheld computing device because they could somehow be carried by two hands.
13 Stevenson Rough Tr. 209 (Exh. 25). He said that the aforementioned
14 amalgamation is “sized to be held in one’s hand” because “[i]t’s the same size as a
15 suitcase.” *Id.* at 199. Thus, the “suitcase” analogy and the IPDEV “**two** handed
16 carry” proposal are demonstrably ridiculous.

17 However, IPDEV’s and Dr. Stevenson’s “deck of cards” analogy is indeed
18 instructive. A POSA would know that a handheld device as described and claimed
19 is held in one hand precisely the way a deck of cards would be held in one hand.
20 Further, while asserting that “sized to be held in one’s hand” is allegedly indefinite,
21 Dr. Stevenson admitted that being “pocket sized” was something that would be

22 _____
23 ² Note: because claims 19-21 of the copycat IPDEV ‘449 patent substituted
24 “portable” for “handheld,” unless this distinction is resolved in the Markman order,
25 those claims will be undefined in the priority action. *See CAE Screenplates Inc. v.*
26 *Heinrich Fiedler GmbH & Co. KG*, 224 F.3d 1308, 1317 (Fed. Cir. 2000) (holding
27 there is a presumption that when different words are used to describe different
28 elements they have different meanings).

³ *E.g.*, Doc. 865-7 at 1:54-55 (“shortcomings of PDA type devices ... **small size,**
low weight”) (emphasis added).

⁴ *See* Stevenson Rough Tr. 278 (“It has nothing to do with size or weight.”).

1 understood⁵ and which Defendant Apple has itself confirmed was a handheld
 2 design factor. Ameranth asserts that a POSA would know that something that is
 3 “sized to be held in one’s hand” is similar to being sized to “fit in one’s pocket.”⁶

4 IPDEV’s attempt to contort “laptop” into “handheld” defies common
 5 understanding. As shown, *e.g.*, by the Apple ‘431 patent discussed in Ameranth’s
 6 Response to Defendants’ Opening Briefs and the Microsoft Computer Dictionary
 7 definition discussed in Ameranth’s Opening Brief, a handheld device is portable,
 8 but “portable” also encompasses many larger size devices including laptop. But
 9 neither “portable” nor “laptop” equate to “handheld” as argued by IPDEV. A
 10 laptop computer is sized to be held in one’s *lap*, not in one’s *hand*. Moreover, the
 11 ‘077 specification discloses that a user holds the wireless handheld in one hand and
 12 operates it with the other in the process of entering manual modifications onto the
 13 “touch sensitive screen.” A POSA would know that the “touch sensitive screen”
 14 must be “touched” by the fingers of the other hand. Doc. 865-7 at 3:51-52, 60-64;
 15 4:9-12, 17-21; Figure 8.

16 “Wireless” does not mean “wired.” Nonetheless, Dr. Stevenson testified that
 17 he does not believe that “wireless” actually means what it says. Stevenson Rough
 18 Tr. 286-87, 290 (Exh. 25). Rather, he believes that a “wired/cabled” connection to
 19 an “external wireless transceiver” box meets the agreed construction “capable of
 20 wireless communications.” However, “wireless” must be interpreted pursuant to
 21 the rules of grammar⁷—the term “less” clearly means “without.”⁸ Further, the
 22

23 ⁵ See Stevenson Rough Tr. at 249-50 (Exh. 25).

24 ⁶ IPDEV’s argument that a definition including “sized” would require proving the
 25 intent of a manufacturer is misplaced. Ameranth’s proposal merely reflects the
 26 clear meaning to the entire world that a handheld device fits into a hand. See, *e.g.*,
 Exh 19 at 1:24-25, 2:26-27, 5:9-11, 5:59-61, 9:47-48.

27 ⁷ “A claim must be read in accordance with the precepts of English grammar.” *In*
re Hyatt, 708 F.2d 712, 714 (Fed. Cir. 1983).

28 ⁸ <http://www.dictionary.com/browse/-less>: “adjective suffix meaning ‘without.’”

1 “wireless” limitation cannot be read out of the claims.⁹ Moreover, adding a “cable”
 2 and “external box” to what is to be “sized to fit in one’s hand” and/or “fits in one’s
 3 pocket” demonstrates the absurdity of the entire IPDEV proposal.¹⁰ As Dr. Shamos
 4 explained, at the time of the Cupps ‘449 application, most handheld, PDA-sized,
 5 computers did not include internal wireless transceivers as required to meet this
 6 jointly agreed-to requirement. Bi-directional, internally-enabled, wireless
 7 communications were required from within the handhelds themselves in order to
 8 meet the claimed “synchronous” aspects of the invention due to the fact that a
 9 POSA would have known that, by their very nature, wireless handhelds were not
 10 physically connected to stationary computers/servers by cables or wires. The
 11 specification is clear that the “wireless handheld computing devices” must include
 12 “radio transceivers.” (’077 13:3-4 (Doc. 865-7)). Wireless functionality is essential
 13 to the operation of the claimed invention. Shamos Dec. ¶ 31 (Doc. 865-19).

14 IPDEV’s argument that Ameranth initially took positions in the *Menusoft*
 15 case contrary to the construction of the term actually given by the Court in that
 16 case is hardly worth mentioning. A judicial determination clearly supersedes
 17 arguments made by the parties. There is no authority for requiring a party to cling
 18 to an argument which was not adopted by a court. Moreover, Ameranth’s
 19 argument in the *Menusoft* case was consistent with its current proposal. “In-hand”
 20 means the same as “sized to fit into a hand.”

21 **2. “synchronized”/”synchronous”**

22 Ameranth agrees with IPDEV’s proposed construction (“made, or
 23 configured to make, consistent”). However, Ameranth does not agree with

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 25 ⁹ *Texas Instr. Inc. v USITC*, 988 F.2d 1165, 1171 (Fed. Cir. 1993) (Claim language
 cannot be mere surplusage. An express limitation cannot be read out of the claim).

26 ¹⁰ This is highly relevant to the priority action due to the fact that none of the
 27 computers disclosed in the IPDEV Cupps ‘449 specification included an internal
 28 “wireless transceiver” capability which would have been necessary to provide a
 handheld that was itself “capable of wireless communication.”

1 IPDEV’s characterizations of the ‘077 invention or the internet. IPDEV offered no
2 support for its characterization that “the internet is an *asynchronous* system.” Doc.
3 868 at 17. Nor is it clear what IPDEV was trying to allege.

4 IPDEV’s attempt to draw distinctions between “Ameranth’s understanding”
5 and “IPDEV’s understanding” (Doc. 868 at 17, fn. 3) of this term, without saying
6 what they supposedly are, should be ignored. IPDEV is trying to reserve the right
7 to later argue against a construction which it agrees with in the current claim
8 construction proceeding. That is not how claim construction works.

9 **3. “Web page”**

10 Ameranth agrees with IPDEV’s position in regard to this term.

11 **4. “graphical user interface”**

12 IPDEV’s assertion that the recited GUI is “provided by an ‘application
13 program”” (Doc. 868 at 4) is without merit. IPDEV confuses the use of a GUI by
14 an application program with the actual GUI itself. The GUI is provided by an
15 operating system as explicitly stated in the specification, as explained in
16 Ameranth’s Opening Brief. IPDEV ignores what the specification says.

17 IPDEV’s attempt to rely on extrinsic evidence to replace the explicit
18 “provided by an OS” requirement of the patent likewise fails. The Microsoft
19 Computer Dictionary definition of GUI is “a visual computer environment that
20 *represents* programs ...” (Doc. 868 at 5). The GUI “represents” programs per that
21 definition, it is not “provided by” a program.

22 Still further, in agreement with the JDG, IPDEV admitted that the pertinent
23 claims “already require[] ‘an operating system including a first graphical [user]
24 interface,’ rendering Ameranth’s proposed construction redundant.” Doc. 868 at 6.
25 Thus, IPDEV admits that a “GUI” recited in the claims is provided by an OS.
26 Ameranth submits that making this admitted requirement (which Ameranth agrees
27 with and all other parties admit) explicit with regard to all of the recited GUIs,
28 including the handheld device GUIs, is necessary for clarity and consistency across

1 all of the elements in all of the claims.

2 IPDEV's objection to "display" in the construction is not well founded. The
3 claims include "display screen" recitations. There is no reason to be less precise in
4 the construction than the claims themselves require.

5 **5. "communications control software enabled to"**

6 Ameranth agrees with IPDEV that construction is unnecessary. Ameranth
7 does not agree with IPDEV's alternative proposal for the reasons detailed in
8 Ameranth's Opening Brief. IPDEV attempts to import unclaimed limitations.
9 However, as IPDEV admits, the remainder of the claim defines the functions
10 performed by the CCS. Specifically with regard to CCS as compared to the
11 disclosed "communications control program" and "communications control
12 module," Ameranth's expert Dr. Shamos testified that the claimed CCS is related
13 but different from the disclosed "program" and "module." Shamos Tr.160-64
14 (Exh. 20). In fact, IPDEV admits that the "'synchronous communications control
15 module' ... aspect of the invention is not claimed." Doc. 868 at 21.

16 Ameranth agrees with IPDEV that this element is not governed by §112(6)
17 and Ameranth agrees with IPDEV's analysis, argument and supporting authorities
18 on the § 112(6) issue. (Doc. 868 at 23-25).¹¹ Dr. Stevenson testified that the
19 claimed "communications control software" would be understood to be consistent
20 with the "communications control program" disclosed in the '077 patent (Doc.
21 865-7 at 10:41-60), thus confirming it to be well understood and defined by its
22 associated structure, and refuting the JDG contention that the term has no meaning,
23 structure or supporting disclosure. Stevenson Rough Tr. at 158-59 (Exh. 25).

24 ¹¹ In particular, Ameranth agrees (a) that a POSA would understand the CCS claim
25 term as connoting structure sufficient to remove it from the purview of § 112(6)
26 and (b) that the claims interpreted as a whole more than adequately specify the
27 structure for performing the recited functions such that a POSA "would neither
28 need nor expect specific algorithms to be disclosed in the specification of the '077
patent to carry out these functions." (Doc. 868 at 24). Either one of the
aforementioned conditions removes the term from § 112(6) consideration.

1 The lack of any need for disclosure of specific algorithms to perform the
 2 functionality described in the '077 patent was admitted by Defendant Apple and its
 3 expert Dr. Turnbull in the CBM proceedings:

4 [A]n application would be architected and developed to perform the
 5 functionality described in the '850 patent [which is included in the
 6 disclosure of the '077 patent], but would use many existing functions
 7 and programming language libraries available for the chosen
 8 operating system and would require (in the case of the '850 patent)
very little or no original invention of algorithms or functions to
 perform the methods described.

9 Shamos Dec. ¶ 49, fn. 13 (Doc. 865-19 at 18, fn. 13) (*quoting* Turnbull Dec. in
 10 CBM2015-00081) (emphasis added). Dr. Shamos agreed that specific
 11 identification of algorithms was unnecessary:

12 (1) the CCS code must generate a PHC structure from the recited
 13 master database file structure parameters. The software code structure
 14 for doing so would have been apparent to a POSA upon reviewing all
 15 of the limitations of the claims, (2) the CCS code is configured to
 16 make the PHC structure consistent (“synchronized”) with the master
 17 database file structure. It would thus have been clear to a POSA that
 18 specific master database and PHC structures were to be synchronized
 19 via the code requirement of (1), (3) a POSA would understand the
 20 software code structure required to make the specific PHC structure fit
 21 onto a particular WHCD screen size, (4) a POSA would have
 22 understood the software code structure required to configure the PHC
 23 for display as cascaded sets of GUI screens appropriate for a
 24 particular wireless handheld computing device and (5) a POSA would
 25 have understood the software code structure required to configure the
 26 PHC as cascaded sets of linked GUI screens for at least two different
 27 WHCDs. Thus, it is my opinion that the claim elements themselves
 28 define a structure that includes the CCS, which a POSA would have
 understood as definite structure.

Shamos Dec. ¶ 52 (Doc. 865-19).

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

IPDEV’s proposal is redundant of limitations already in the claims, and does
 not comport with what is recited in claim 13. Ameranth agrees with IPDEV’s

1 arguments against Defendants’ attempt to define “real time” as “instantaneous.”
2 The only potential necessity with respect to these terms is a construction of “real
3 time” (as proposed by Ameranth) due to the fact that Defendants have
4 impermissibly attempted to import one disclosed, but not claimed, embodiment
5 into the claims to the exclusion of all other disclosed embodiments.

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

7 Ameranth disagrees with IPDEV’s proposed construction. IPDEV attempts
8 to add limitations to these phrases which are not required by the actual claim
9 language and/or are recited in other claim elements. This phrase says nothing about
10 what happens to the PHMC *after* it is generated, and thus any addition of any
11 further limitation is unwarranted and incorrect.

12 Ameranth agrees with IPDEV that there is nothing in the claims or
13 prosecution history which limits the claims to generating/formatting handheld
14 configurations “solely at a central server” with no functionality allowed at/on the
15 handhelds themselves. Dr. Stevenson testified that the handheld device can
16 certainly “manipulate that data and do something with it” (Stevenson Rough Tr. at
17 36 (Exh. 25), thus concurring with Dr. Shamos that Defendants’ attempt to import
18 this negative/restrictive limitation into these “comprising” claims is unfounded.
19 Doc. 866-12 at 52 ¶114; Shamos Tr. 99-102 (Exh. 20)

20 Ameranth agrees with IPDEV’s argument against importation of an
21 “optimized” requirement.

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

23 Ameranth agrees with IPDEV that construction is unnecessary. Ameranth
24 does not agree with IPDEV’s alternative proposal for the reasons detailed in
25 Ameranth’s Opening Brief. IPDEV attempts to import unclaimed limitations from
26 the specification. However, as IPDEV admits, the remainder of the claim defines
27 the functions performed by the MCS. Specifically, the inclusion of “downloading”
28 in IPDEV’s proposal is a superficial attempt to import an embodiment from the

1 specification into the claims to the exclusion of other disclosed embodiments.
2 Likewise, “based on a user’s request” is a transparent attempt to import a particular
3 embodiment to the exclusion of other disclosed embodiments.

4 Ameranth agrees with IPDEV that this element is not governed by §
5 112(6) and Ameranth agrees with IPDEV’s analysis, argument and supporting
6 authorities on the § 112(6) issue. (Doc. 868 at 23-25).¹² As discussed above in
7 the context of the CCS term, the lack of any need for specific algorithms was
8 admitted by Apple and its expert in the CBMs. Dr. Shamos agreed that specific
9 identification of algorithms was unnecessary:

10 (1) the MCS code must generate a PHMC structure from specifically
11 recited master menu file structure parameters. The software code
12 structure for doing so would be apparent to a POSA upon reviewing
13 all of the limitations of the claims; (2) The MCS code is configured to
14 make the PHMC structure consistent with the master menu file
15 structure. It would thus have been clear to a POSA that specific
16 master menu and PHMC structures are synchronized via the code
17 requirement of (1); (3) a POSA would have understood the software
18 code structure required to make the specific PHMC structure fit onto a
19 particular WHCD screen size; (4) A POSA would have understood the
20 software code structure required to configure the PHMC for display as
21 cascaded sets of GUI screens appropriate for the particular wireless
22 handheld computing device; (5) A POSA would have understood the
23 software code structure required to configure the PHMC as cascaded
24 sets of linked GUI screens differently from the master menu GUI
25 screens; and (6) A POSA would have understood the CCS and system
26 software code structure required to configure the PHMC cascaded sets
27 of linked GUI screens differently for at least two different WHCDs.
28 Thus the claim elements themselves define a structural system

12 In particular, Ameranth agrees (a) that a POSA would understand the MCS claim
term as connoting structure sufficient to remove it from the purview of § 112(6)
and (b) that the claims interpreted as a whole more than adequately specify the
structure for performing the recited functions such that a POSA “would neither
need nor expect specific algorithms to be disclosed in the specification of the ‘077
patent to carry out these functions.” Doc. 868 at 24. Either one of the
aforementioned conditions removes the term from § 112(6) consideration.

1 including menu configuration software which a POSA would have
2 understood as definite structure.

3 Shamos Dec. ¶ 77 (Doc. 865-19).

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

5 Ameranth disagrees with IPDEV’s “hierarchical” proposal. “Hierarchical”
6 appears in the specification but not the claims. Moreover, “hierarchical” was
7 recited in other claims of the patent family, *e.g.*, U.S. Pat. No. 6,384,850. Thus
8 claim differentiation alone precludes importation of “hierarchical.” Further, there is
9 no authority for importing a disclosed embodiment which has clearly *not* been
10 recited in the claims. IPDEV admits as much when it says “the idea of ‘linked’ is
11 commonly used and indicates that *the GUI screens are organized or connected in*
12 *some fashion, e.g., a user can easily move between screens.*” Doc. 868 at 7
13 (emphasis added). Organizing screens such that they are connected so that a user
14 can move between them does not require that the screens be organized
15 hierarchically. It means only that they are arranged in succession, *i.e.*, one after the
16 other pursuant to the “link” structure. IPDEV further states that “[t]he phrase
17 ‘cascaded set of linked’ is descriptive of how the GUI screens are interconnected
18 logically, *e.g.*, how one moves between the group of GUI screens.” *Id.* at 8. This
19 is further inconsistent with IPDEV’s “hierarchical” proposal. It is an admission
20 that “cascaded” has to do with a logical succession of screens, not a hierarchy.¹³

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

22 Ameranth believes that no construction is necessary, but does not disagree
23 with IPDEV’s proposal with the qualifier that any construction must be consistent
24 with the claims as a whole and specifically with regard to each of the four usage
25 instances in claims 1-12 and three instances in claims 13-18. Ameranth agrees
26 with IPDEV’s analysis and argument against Hyatt’s proposal.

27 ¹³ Ameranth agrees with IPDEV’s argument against the JDG proposal.
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