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

AMERANTH, INC.  
  
Plaintiff,  
  
v.  
  
APPLE, INC.  
  
Defendant.

Civil Action No.: 3:12-cv-2350-IEG-BGS

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
PLAINTIFF AMERANTH, INC.’S  
MOTION FOR LEAVE TO FILE A  
SECOND AMENDED COMPLAINT**

**HEARING**

**Date: July 1, 2013**  
**Time: 10:30 a.m.**  
**Place: Courtroom 4-D**

**No Oral Argument Unless Requested By  
The Court**

**Hon. Irma E. Gonzalez**

Complaint Filed: September 26, 2012

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**INTRODUCTION**

1  
2 Plaintiff Ameranth, Inc. (“Ameranth”) hereby applies to the Court for  
3 leave to file its Second Amended Complaint (“SAC”) against defendant Apple,  
4 Inc. (“Apple”) in the form submitted herewith as **Exhibit 1**.

5 Ameranth’s current complaint, its First Amended Complaint (“FAC”)  
6 filed January 24, 2013, alleges that Defendant Apple directly infringes  
7 Ameranth’s U.S. Patent Nos. 6,384,850 (the “’850 patent”), 6,871,325 (the  
8 “’325 patent”), 6,982,733 (the “’733 patent”) and 8,146,077 (the “’077 patent”)  
9 under 35 U.S.C. 271(a) via its Passbook product. Ameranth’s FAC also alleged  
10 inducement of infringement of the ‘850, ‘325, ‘733 and ‘077 patents under 35  
11 U.S.C. 271(b) and contributory infringement of the ‘850, ‘325 and ‘733 patents  
12 under 35 U.S.C. 271(c). All of the indirect infringement allegations of the FAC  
13 are based on the Apple Passbook and/or Siri products.

14 In the SAC, Ameranth seeks to add allegations of inducement of  
15 infringement of all four asserted patents by the Apple iOS Simulator product,  
16 expand the existing factual allegations of indirect infringement and willful  
17 infringement and add a contributory infringement claim against the Apple  
18 Passbook product as regards the ‘077 patent.

19 The Ninth Circuit directs that Fed. R. Civ. P. 15 should be applied with  
20 “extreme liberality” towards allowing amendments. *See, e.g., Eminence*  
21 *Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9<sup>th</sup> Cir. 2003). The relevant  
22 factors addressed below all unequivocally establish that Ameranth should be  
23 granted leave to file the SAC consistent with this permissive standard.

24 For example, this is not a case where Ameranth is seeking leave to amend  
25 its Complaint simultaneous with a ruling by the Court granting summary  
26 judgment, after the deadline for full discovery has passed or will soon pass, after  
27 a claim construction hearing, or shortly before trial. In fact, discovery has only  
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1 commenced very recently, and to date has only involved written discovery  
2 requests. No depositions have occurred, claim construction and disclosures  
3 under the Local Patent Rules have not yet commenced, there is no fact discovery  
4 deadline in place, and no pretrial or trial date has been set. The reality is that  
5 this case just started. Under the Court's CMC Order [Doc. No. 24], motions to  
6 amend the pleading may be filed up through May 17, 2013.

7 Ameranth first learned of the new proposed claims regarding the iOS  
8 Simulator product and the contributory infringement claim as regards the '077  
9 patent after further analysis of Apple's products, after filing the FAC. In  
10 addition, Ameranth seeks leave to amend the existing indirect and willful  
11 infringement allegations, as regards Apple's knowledge of the asserted patents,  
12 in response to Apple's stated position that Ameranth's proposed SAC was  
13 insufficient as regards its pleading of indirect infringement.

14 Ameranth diligently provided Apple with a copy of a proposed SAC on  
15 May 3, 2013 which added inducement of infringement allegations as to the '850  
16 and '077 patents by the iOS Simulator product. Ameranth provided this  
17 proposed SAC to Apple only 16 days after the Court's CMC Order which  
18 directed that any request to amend a pleading be brought before the Court by  
19 May 17, 2013, as discussed below. On May 7, 2013, Apple declined to stipulate  
20 to the filing of the proposed SAC and reserved the right to oppose the request  
21 for leave to file the SAC until after it saw Ameranth's motion for leave to  
22 amend. Apple also indicated that it believed the proposed pleading of indirect  
23 infringement by the iOS product was insufficient. Apple's refusal to stipulate,  
24 and reservation of right to oppose, prompts this motion. For these reasons and  
25 the reasons stated below, Ameranth respectfully requests that this Court,  
26 applying the permissive standards under Fed. R. Civ. P. 15(a)(2), grant  
27 Ameranth's Motion for Leave to allow Ameranth to file the SAC, *instanter*.





1 amend is applied with "extreme liberality." Eminence Capital v. Aspeon, 316  
2 F.3d at 1051; Morongo Band of Mission Indians v. Rose, 893 F.2d 1074, 1079  
3 (9th Cir. 1990) ("extraordinary liberality"). That is because "[t]he purpose of  
4 pleadings is to facilitate a proper disposition on the merits." Hurn v. Retirement  
5 Fund Trust of Plumbing, Heating & Piping Indus. Of S. Cal., 648 F.2d 1252,  
6 1254 (9<sup>th</sup> Cir. 1981) (*quoting* Conley v. Gibson, 355 U.S. 41, 48 (1957) (internal  
7 quotation marks omitted)). The trial court's discretion in deciding to allow  
8 amendment of a complaint must be guided by the strong federal policy favoring  
9 the disposition of cases on the merits and permitting amendments with "extreme  
10 liberality." Isis Pharm, Inc. v. Sanaris Pharma A/S Corp., 3:11-cv-2214-GPC-  
11 KSC, 2013 U.S. Dist. LEXIS 58916, at \*8 (S.D. Cal. April 23, 2013) (*citing*  
12 DCD Programs Ltd. v. Leighton, 833 F.2d 183, 186 (9th Cir. 1987)).

13 In Foman v. Davis, 371 U.S. 178 (1962), the Supreme Court identified  
14 five factors that are to be taken into consideration before granting a party leave  
15 to amend pleadings: (1) undue delay; (2) bad faith or dilatory motive; (3) futility  
16 of amendment; (4) failure to cure deficiencies by amendments previously  
17 allowed and (5) prejudice to the opposing party. Foman, 371 U.S. at 182; *see*  
18 *also* Ascon Properties, Inc. v. Mobil Oil Co., 866 F.2d 1149, 1160 (9th Cir.  
19 1989); United States v. Webb, 655 F.2d 977, 980 (9th Cir. 1981). "[T]here  
20 exists a *presumption* under Rule 15(a) in favor of granting leave to amend"  
21 absent prejudice or a strong showing of any of the above-mentioned factors.  
22 Eminence Capital, 316 F.3d at 1052 (emphasis in original). The strong policies  
23 in favor of granting leave to amend are reflected in the assignment of the burden  
24 of showing prejudice to the party opposing amendment. *Id.*; DCD Programs,  
25 Ltd. V. Leighton, 833 F.2d 183, 187 (9<sup>th</sup> Cir. 1987); *accord* Genentech, Inc. v.  
26 Abbott Labs., 127 F.R.D. 529, 530-31 (N.D. Cal. 1989) (nonmoving party bears  
27 burden of demonstrating why leave to amend should not be granted).

1 "Amendments seeking to add claims are to be granted more freely than  
2 amendments adding parties." Isis v. Santaris, 2013 U.S. Dist. LEXIS 58916, at  
3 \*9 (quoting Union Pacific R.R. Co. v. Nevada Power Co., 950 F.2d 1429, 1432  
4 (9th Cir. 1991)).

5 **DISCUSSION**

6 Ameranth respectfully requests the Court to grant leave to file a SAC to  
7 add the following allegations:

- 8 (1) To allege that an additional Apple product, the iOS Simulator,  
9 indirectly infringes the '850 and '077 patents under 35 U.S.C.  
10 271(b) (*see* SAC at ¶¶ 3, 32, 33, 80, 81 (Exh. A));
- 11 (2) To expand the factual allegations of indirect and willful  
12 infringement in the existing complaint as regards the knowledge  
13 element of each (*see* SAC at ¶¶ 31, 37, 48, 51, 52, 64, 67, 68, 79,  
14 85 (Exh. A)) in response to Apple's stated position that Ameranth's  
15 proposed allegations of indirect infringement by the iOS simulator  
16 were not adequately pleaded; and
- 17 (3) To add an allegation of indirect infringement of the '077 patent  
18 under 35 U.S.C. 271(c) (*see* SAC at ¶¶ 82, 83, 84 (Exh. A)).

18 Good cause exists to allow such amendment, for the reasons given below.

19 Ameranth learned of the basis for the new infringement allegations  
20 against the iOS Simulator after filing its FAC, and proposes to add the claims  
21 based thereon at this time because they are supported by the factual record and  
22 the asserted patent claims. Ameranth was aware of the iOS Simulator prior to  
23 filing its FAC, but had not concluded its analysis to the point of being able to  
24 make an allegation of infringement of the iOS Simulator consistent with its  
25 obligation to this Court to interpose only claims that have evidentiary support or  
26 have a reasonable opportunity for having evidentiary support after a reasonable  
27 opportunity for investigation or further discovery. Thus, Ameranth's request to  
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1 add the allegations regarding inducement with regard to the iOS Simulator is the  
2 result of following the dictates of the Federal Rules, and which Rule 15 was  
3 designed to accommodate in order to avoid penalizing a party for conducting a  
4 litigation in a straightforward manner by reserving assertion of claims until their  
5 factual basis is sufficiently confirmed.

6 The additions respecting the knowledge element of indirect and willful  
7 infringement were included in the SAC in response to Apple's stated position of  
8 alleged pleading insufficiency respecting indirect infringement by the iOS  
9 Simulator, and thus Apple should not be heard to complain of factual allegations  
10 added in response to positions Apple itself has taken. Apple did not specify the  
11 alleged insufficiency of Ameranth's proposed pleading of inducement, and  
12 Ameranth does not believe its existing complaint is insufficient under applicable  
13 caselaw, but Ameranth chose to provide additional factual allegations to remove  
14 any potential doubt as to the sufficiency of its pleading.

15 The new contributory infringement allegations regarding infringement of  
16 the '077 patent by the Passbook product was added to the SAC after Ameranth  
17 completed further analysis, after the filing of the FAC, of the scope of the '077  
18 claims and the function of the Passbook product. Again, as was the case with  
19 the iOS Simulator, Ameranth refrained from asserting this claim for contributory  
20 infringement until it established a clear factual basis for doing so. Ameranth  
21 should not be penalized for substantiating its claim before seeking to add it to its  
22 pleading. Such a penalty would be contrary to the purpose of Rule 15.

23 A recent decision of this Court, in the Isis v. Santaris case, is highly  
24 instructive on the question of leave to amend complaints in patent infringement  
25 cases. In Isis, leave to amend was granted even though the plaintiff sought to  
26 add an entirely new patent to the case. In contrast, Ameranth does not seek to  
27 add an additional patent. Ameranth seeks only to include additional allegations  
28

1 of infringement of patents which were alleged infringed in Ameranth's  
2 previously filed complaint (Ameranth's FAC). In Isis, the plaintiff sought to  
3 amend its complaint by:

4 (1) adding an allegation of direct [sic: indirect] infringement under  
5 35 U.S.C. § 271(b); (2) expand the factual allegation of direct  
6 infringement to include new information on Defendants' previously  
7 undisclosed relationship with a third party; and (3) add a third cause  
8 of action for Defendants' infringement of *U.S. Patent No. 6,440,739*  
9 ("*739 Patent*").

10 Isis v. Santaris, 2013 U.S. Dist. LEXIS 58916, at \*9.

11 Ameranth's request for leave to amend asks for leave to do far less than  
12 the plaintiff in the Isis case was permitted to do in its amended complaint, and  
13 none of the Foman factors militate against Ameranth.

14 ***1. There Was No Undue Delay***

15 Ameranth has not unduly delayed its request to amend the complaint.  
16 Ameranth promptly sought to amend the complaint to add allegations of indirect  
17 infringement under 35 U.S.C. § 271(b) respecting the iOS Simulator as soon as  
18 Ameranth's investigation revealed that the proposed new claim of infringement  
19 based on the iOS Simulator could be added to the present action.<sup>1</sup> See Isis v.  
20 Santaris, 2013 U.S. Dist. LEXIS 58916, at \*11 ("[T]he Court finds Plaintiff did  
21 not unduly delay in seeking leave to file a first amended complaint. Given the

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22  
23 <sup>1</sup> Ameranth also proposes to add further allegations respecting indirect  
24 infringement and willful infringement in response to Apple's refusal to join an  
25 unopposed joint motion to amend the complaint. Ameranth does not believe its  
26 previous complaints were deficient in this regard, but is seeking to address  
27 Apple's stated concerns to avoid having to involve the Court in resolving any  
28 challenge to pleading sufficiency. Ameranth also seeks to add a claim for  
contributory infringement of the '077 patent by Apple Passbook as discussed  
above. Ameranth did not complete its analysis of this mode of infringement by  
the Passbook product until very recently, and after the FAC was filed.

1 complexity of this case and the number of documents produced in the limited  
2 discovery that has occurred thus far, the Court finds any delay by Plaintiff was  
3 reasonable.”). The absence of undue delay strongly favors granting leave to  
4 amend. Owens v. Kaiser Found. Health Plan, Inc., 244 F.3d 708, 712 (9<sup>th</sup> Cir.  
5 2001) (affirming grant of leave to amend where answer was amended as soon  
6 amending party became aware of the applicability of a defense). To prevail  
7 under Rule 15, Apple must therefore make a strong showing that other factors  
8 sufficiently counter the presumption that leave to amend should be granted.  
9 Eminence Capital, 316 F.3d at 1052. Apple cannot make such a showing for the  
10 reasons noted below.

11 **2. *Ameranth’s Request For Leave To Amend Is In Good Faith***

12 Ameranth does not have a bad faith or dilatory motive for seeking to  
13 amend its complaint. Ameranth learned of the basis for the new infringement  
14 allegations against the iOS Simulator after filing its FAC, and proposes to add  
15 the claims based thereon at this time because they are supported by the factual  
16 record and the asserted patent claims. The other additions respecting  
17 Ameranth’s previously-pled claims for indirect and willful infringement,  
18 regarding the knowledge elements of indirect and willful infringement, were  
19 included in response to Apple’s stated position of alleged pleading inadequacy  
20 respecting indirect infringement, and thus Apple should not be heard to  
21 complain of factual allegations added in response to positions Apple itself has  
22 taken. Ameranth’s new allegation of contributory infringement of the ‘077  
23 patent by the Apple PBS product was not known to Ameranth at the time of  
24 filing of the Original Complaint or FAC, and only became apparent to Ameranth  
25 after completing analysis and investigation regarding the scope of the ‘077  
26 claims and the function of the PBS product. Indeed, Ameranth refrained from  
27 alleging various modes of infringement in its previous complaints until it made  
28

1 sure that it could not only sufficiently plead these modes of infringement but  
2 could prove them substantively. Ameranth should not be penalized for  
3 judiciously pleading its claims; Rule 15(a) is designed to allow and encourage  
4 just that.

5 As explained above, Ameranth acted promptly—and within the time set  
6 by the Court to bring motions to amend the pleadings-- to bring the proposed  
7 amendments to Apple’s attention and the proposed new claims themselves state  
8 viable claims. This fact weighs in favor of granting Ameranth leave to file the  
9 SAC under Rule 15.

### 10 **3. *The Ameranth Pleading Amendments Are Not Futile***

11 A proposed amendment is not futile unless it fails to state a valid claim  
12 under Fed. R. Civ. P. 12(b)(6). M.H. v. County of Alameda, 2012 U.S. Dist.  
13 LEXIS 168412, at \*8 (*citing to* Miller v. Rykoff-Seton, 845 F.2d 209, 214 (9<sup>th</sup>  
14 Cir. 1988)). A validly stated claim pleads “enough factual matter” so that, when  
15 taken as true, it “state[s] a claim to relief that is plausible on its face.” Bell  
16 Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007). This plausibility  
17 standard is met when “the plaintiff pleads factual content that allows the court to  
18 draw the reasonable inference that the defendant is liable for the misconduct  
19 alleged.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (*citing* Twombly, 550  
20 U.S. at 556).

21 Ameranth’s amendments are not futile. As evidenced by Ameranth’s  
22 proposed SAC, Ameranth’s allegations clearly allege that Apple intentionally  
23 induced a third party to infringe the ‘850 and ‘077 patents via the Apple iOS  
24 Simulator and that Apple had the requisite knowledge level required to support a  
25 claim for inducement. Plausibility of the inducement claim is thus established.

26 With regard to the additional factual allegations regarding indirect and  
27 willful infringement, as regards Apple’s knowledge of the patents, Ameranth  
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1 likewise has provided allegations in the SAC that, in concert with the existing  
2 allegations, clearly allege the elements of inducement, contributory and willful  
3 infringement.

4 Similarly, Ameranth's SAC provides allegations regarding contributory  
5 infringement of the '077 claims by the Passbook product which are plausible on  
6 their face, *i.e.*, the allegations allege all of the required elements for proof of a  
7 contributory infringement claim.

8 **4. Ameranth Has Not Failed To Cure Any Deficiencies By Any**  
9 **Previously Allowed Amendment**

10 No amendment has been previously requested, and hence none allowed,  
11 and thus Ameranth has not failed to cure any deficiencies by any previously  
12 allowed amendment.

13 **5. Apple Will Not Be Prejudiced By These Amendments**

14 Apple carries the burden of showing undue prejudice stemming from the  
15 Ameranth amendments. Eminence Capital, 316 F.3d at 1052; DCD Programs,  
16 833 F.2d at 187. Apple has not indicated that it believes it would be prejudiced.  
17 Apple objected to the proposed stipulation based only on alleged pleading  
18 insufficiency.

19 The reality is that entry of Ameranth's proposed SAC would not prejudice  
20 Apple, and certainly will not prejudice Apple in any substantial way. Morongo  
21 Band of Mission Indians, 893 F.2d at 1079 (the prejudice to the opposing party  
22 must be *substantial*). Ameranth's amendments will not prejudice Apple because  
23 of the relatively early stage of these proceedings: *i.e.*, discovery has only  
24 proceeded on a limited basis, no pre-trial conference date has even been set, and  
25 the parties have not yet begun complying with the many requirements found in  
26 the Patent Local Rules. *See Isis v. Santaris*, 2013 U.S. Dist. LEXIS 58916, at  
27 \*10 ("The Court further finds Defendants have not demonstrated they would be  
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1 significantly prejudiced by Plaintiff's proposed amendments given the relatively  
2 early stage of these proceedings.”).

3 Under these circumstances, *i.e.*, the fact that this case has just started,  
4 there is no prejudice to Apple in allowing Ameranth to file the SAC. *See DCD*  
5 *Programs*, 833 F.2d at 187-88 (no prejudice where case was in discovery stage  
6 with no trial date set and no pretrial conference scheduled).

7 Apple thus cannot make “a showing sufficient to overcome the  
8 ‘presumption under *Rule 15(a)* in favor of granting leave to amend.” *Isis v.*  
9 *Santaris*, 2013 U.S. Dist. LEXIS 58916, at \*11-12 (*quoting Eminence Capital*,  
10 316 F.3d at 1052). Ameranth’s request to file a Second Amended Complaint  
11 should therefore be granted.

12 **CONCLUSION**

13 For all of the above reasons, which constitute good cause shown,  
14 Ameranth respectfully requests that it be granted leave to file a Second  
15 Amended Complaint in the form lodged herewith.

16 Dated: May 14, 2013

CALDARELLI HEJMANOWSKI & PAGE LLP

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