

2019-1141, 2019-1144

**United States Court of Appeals
for the Federal Circuit**

AMERANTH, INC.,

Plaintiff – Appellant,

v.

DOMINO'S PIZZA, LLC, DOMINO'S PIZZA, INC.,

Defendants – Appellees,

PAPA JOHN'S USA, INC., OPENTABLE, INC., GRUBHUB, INC., SEAMLESS NORTH AMERICA, LLC, O-WEB TECHNOLOGIES LTD., HOTELS.COM, L.P., STUBHUB, INC., TICKETMASTER, LLC, LIVE NATION ENTERTAINMENT, INC., TRAVELOCITY.COM LP, HOTEL TONIGHT, INC., ORBITZ, LLC, EXPEDIA, INC., FANDANGO, INC., HOTWIRE, INC., KAYAK SOFTWARE CORPORATION, EMN8, INC., HILTON INTERNATIONAL CO., HILTON RESORTS CORPORATION, HILTON WORLDWIDE, INC., USABLENET, INC., STARWOOD HOTELS & RESORTS WORLDWIDE INC., MOBO SYSTEMS, INC., AGILYSYS, INC., ATX INNOVATION, INC., BEST WESTERN INTERNATIONAL, INC., HYATT CORPORATION, ORDR.IN, INC., NAAMA NETWORKS, INC., MARRIOTT HOTEL SERVICES, INC., MARRIOTT INTERNATIONAL, INC., RITZ CARLTON HOTEL COMPANY, LLC, RENAISSANCE HOTEL OPERATING COMPANY, APPLE, INC., TICKETBISCUIT, LLC, EVENTBRITE, INC., TICKETFLY, INC., STARBUCKS CORPORATION, IPDEV CO., ORACLE CORPORATION,

Defendants.

*Appeal from the United States District Court for the Southern District of California in Case Nos. 3:11-cv-1810-DMS-WVG, 3:12-cv-00733-DMS-WVG,
Judge Dana M. Sabraw*

APPELLANT'S REPLY BRIEF

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March 21, 2019

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Ameranth, Inc. v. Domino's Pizza, LLC and
Domino's Pizza, Inc.

Case No. 2019-1141, 2019-1144

CERTIFICATE OF INTEREST

Counsel for the:

(petitioner) (appellant) (respondent) (appellee) (amicus) (name of party)

Ameranth, Inc.

certifies the following (use "None" if applicable; use extra sheets if necessary):

1. Full Name of Party Represented by me	2. Name of Real Party in interest (Please only include any real party in interest NOT identified in Question 3) represented by me is:	3. Parent corporations and publicly held Companies that own 10 % or more of stock in the party
Ameranth, Inc.	N/A	None

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court (**and who have not or will not enter an appearance in this case**) are:

Caldarelli, Hejmanowski, Page & Leer, LLP: William J. Caldarelli
 Fabiano Law Firm, P.C: Michael D. Fabiano
 Osborne Law LLC: John W. Osborne
 Watts Law Offices: Ethan M. Watts

5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. See Fed. Cir. R. 47.4(a)(5) and 47.5(b). (The parties should attach continuation pages as necessary).

Ameranth, Inc. v. Live Nation Ent., Inc., Case No. 3:12-cv-1648-DMS (WVG) (S.D. Cal., filed June 29, 2012); *Ameranth, Inc. v. Papa John's USA, Inc.*, Case No. 3:12-cv-729 DMS (WVG) (S.D. Cal., filed Mar. 27, 2012); *Ameranth, Inc. v. Open Table, Inc.*, Case No. 3:12-cv-731 DMS (WVG) (S.D. Cal., filed Mar. 27, 2012); *Ameranth, Inc. v. O-Web Techs. Ltd.*, Case No. 3:12-cv-732 DMS (WVG) (S.D. Cal., filed Mar. 27, 2012); *Ameranth, Inc. v. GrubHub, Inc.*, Case No. 3:12-cv-739 DMS (WVG) (S.D. Cal., filed Mar. 27, 2012); *Ameranth, Inc. v. Agilysys, Inc.*, Case No. 3:12-cv-858 H (MDD) (S.D. Cal., filed Apr. 6, 2012); *Ameranth, Inc. v. Hyatt Hotels Corp.*, Case No. 3:12-cv-1627 DMS (WVG) (S.D. Cal., filed June 29, 2012); *Ameranth, Inc. v. Starwood Hotels and Resorts Worldwide, Inc.*, Case No. 3:12-cv-1629 DMS (WVG) (S.D. Cal., filed June 29, 2012); *Ameranth, Inc. v. Best Western International, Inc.*, Case No. 3:12-cv-1630 DMS (WVG) (S.D. Cal., filed June 29, 2012); *Ameranth, Inc. v. Marriott Internat'l, Inc.*, Case No. 3:12-cv-1631 DMS (WVG) (S.D. Cal., filed June 29, 2012); *Ameranth, Inc. v. Hotel Tonight, Inc.*, Case No. 3:12-cv-1633 DMS (WVG) (S.D. Cal., filed June 29, 2012); *Ameranth, Inc. v. Hotels.com, LP*, Case No. 3:12-cv-1634 DMS (WVG) (S.D. Cal., filed June 29, 2012); *Ameranth, Inc. v. Hilton Resorts Corp.*, Case No. 3:12-cv-1636 DMS (WVG) (S.D. Cal., filed July 2, 2012); *Ameranth, Inc. v. Kayak Software Corp.*, Case No. 3:12-cv-1640 DMS (WVG) (S.D. Cal., filed June 29, 2012); *Ameranth, Inc. v. Mobo Systems, Inc.*, Case No. 3:12-cv-1642 DMS (WVG) (S.D. Cal., filed June 29, 2012); *Ameranth, Inc. v. Orbitz, LLC*, Case No. 3:12-cv-1644 DMS (WVG) (S.D. Cal., filed June 29, 2012); *Ameranth, Inc. v. Stubhub, Inc.*, Case No. 3:12-cv-1646 DMS (WVG) (S.D. Cal., filed June 29, 2012); *Ameranth, Inc. v. Ticketmaster, LLC*, Case No. 3:12-cv-1648 DMS (WVG) (S.D. Cal., filed June 29, 2012); *Ameranth, Inc. v. Travelocity.com, LP*, Case No. 3:12-cv-1649 DMS (WVG) (S.D. Cal., filed June 29, 2012); *Ameranth, Inc. v. Usablenet, Inc.*, Case No. 3:12-cv-1650 DMS (WVG) (S.D. Cal., filed June 29, 2012); *Ameranth, Inc. v. Fandango, Inc.*, Case No. 3:12-cv-1651 DMS (WVG) (S.D. Cal., filed June 29, 2012); *Ameranth, Inc. v. Hotwire, Inc.*, Case No. 3:12-cv-1653 MMA (BGS) (S.D. Cal., filed July 2, 2012); *Ameranth, Inc. v. Expedia, Inc.*, Case No. 3:12-cv-1654 CAB (RBB) (S.D. Cal., filed June 29, 2012); *Ameranth, Inc. v. Oracle Corp.*, Case No. 3:12-cv-1655 DMS (WVG) (S.D. Cal., filed June 29, 2012); *Ameranth, Inc. v. ATX Innovation, Inc.*, Case No. 3:12-cv-1656 DMS (NLS) (S.D. Cal., filed June 29, 2012); *Ameranth, Inc. v. Ticketbisquit, LLC*, Case No. 3:13-cv-352- AJB (KSC) (S.D. Cal., filed Feb. 13, 2013); *Ameranth, Inc. v. Starbucks Corp.*, Case No. 3:13-cv-1072 MMA (BGS) (S.D. Cal., filed May 6, 2013); *Ameranth Inc. v. Spluck-It, Inc.*, Case No. 3:17-cv-1093-DMS (WVG) (S.D. Cal., filed May 26, 2017); *In re: Ameranth Litig.*, Case No. 3:11-

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March 21, 2019

Date

/s/ Richard C. Weinblatt

Signature of counsel

Please Note: All questions must be answered

Richard C. Weinblatt

Printed name of counsel

cc:

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I. INTRODUCTION

As Ameranth, Inc. ("Ameranth") explained in its Opening, U.S. Patent No. 8,146,077 (the "'077 patent") and its prosecution history demonstrate that the appealed claims claim technological solutions to technological problems. Domino's Pizza, LLC and Domino's Pizza, Inc. (collectively, "Domino's") do not contest that (i) achieving full integration/synchronization with different handheld device types was impractical due to, among other reasons, the size, weight, cost, battery power, memory, wireless data transmission and rate constraints of the wireless devices known at the time, *see* Appx1588-1589; and (ii) due to the differences in screen sizes of mobile devices and the non-PC standard sizes and formats of their displays, there was no "user-friendly information management and communication capability not requiring extensive computer expertise . . . for use in everyday life such as for restaurant ordering, reservations, and wait-list management." '077 patent at 1:44-48. As the handheld screen size decreases, the number of screens necessary to display the same information typically increases, and if it did not increase, usability decreased due to shrinking the same information displayed. *Id.* at 1:58-62. Ameranth's inventive solution provides both flexibility and adaptability to accommodate the vast number of new and disparate handheld devices, such as smart phones, with varying screen sizes.

The claimed solutions solve systemic integration and synchronization

problems, including in part its advanced database and file structure design while concurrently creating user-friendly, customized graphical user interfaces ("GUIs") that can be optimally displayed with the appropriate number of linked, cascading screens on the small displays of multiple handheld devices having different physical sizes and types. The multiple devices are wirelessly synchronized for consistency across nodes in real time through use of the master menu/database and their file structures and "communications control software" (claim 13) or "menu configuration software" (claims 1 and 9), which obviate (i) having separate, individualized programming for each device due to varying small screen sizes of wireless handheld computing devices with different display sizes and (ii) having to scroll through information in its entirety due to the prior art's inability to customize the format/layout and create the appropriate number of screens for the size of the handheld devices' small screens.

The District Court erred by holding the appealed claims are invalid under 35 U.S.C. § 101, and Domino's opposition fails. Instead of addressing the appealed claims as a whole and the technological problems solved by them, Domino's asks the Court to disregard the '077 patent itself and its prosecution history, which establish the claims describe concrete, technological solutions to problems rooted in computer technology through the unconventional use of programming which impact the performance of the devices in which they are installed. Domino's fails to

demonstrate that the appealed claims are directed towards abstract ideas, or that they lack the necessary "something more" under the second part of the *Alice* test. See *Alice Corp. Pty. Ltd. v. CLS Bank Int'l*, 134 S. Ct. 2347 (2014). Like the District Court, at both steps of *Alice*, Domino's improperly summarizes the claims and ignores multiple claim elements in an attempt to analogize this case to *Apple, Inc. v. Ameranth, Inc.*, 842 F.3d 1229 (Fed. Cir. 2016). However, the scopes of the claims in *Apple* and this case are drastically different and *Apple* is not controlling. For example, in *Apple*, the claims did not include the "communications control software" found in appealed claim 13 or the "menu configuration software" found in appealed claims 1 and 9. The *Apple* claims also made no mention of the "customized display layout" and the ability to format and display information for multiple handheld displays having different display sizes and with a different number of screens or any automatic functionality.

Domino's does not dispute that prior to deciding the summary judgment motion, the District Court had actual notice that the only claims asserted against Domino's were claims 1, 6, 9, 13 and 17. The court did not have subject matter jurisdiction over non-asserted claims it invalidated, and for that reason alone, its decision on unasserted claims should be vacated.

A proper examination of the '077 patent and the undisputed record evidence reveals the appealed claims are not directed towards patent-ineligible subject matter.

Additionally, there are disputed facts, such as competing expert reports, that independently compel reversal.

II. ARGUMENT

A. The District Court Had No Subject Matter Jurisdiction Over Claims Not Asserted Against Domino's.

Domino's does not contest (a) the District Court had actual notice before it granted Domino's summary judgment motion that the only claims asserted against Domino's were claims 1, 6, 9, 13 and 17, and (b) Ameranth explicitly informed the court that claims 2-5, 7, 10-12, 14-16 and 18 were not challenged in the summary judgment motion. Appx10258-10259.

Domino's mistakenly argues the facts of *Prism Technologies, LLC v. Sprint Spectrum L.P.*, No. 2018-1108, 2019 WL 413765 (Fed. Cir. Feb. 1, 2019), are similar to the facts here. Prism Technologies was involved in a prior appeal involving T-Mobile, T-Mobile sought to invalidate claims beyond the six claims Prism asserted, and Prism never disputed that that appeal should be limited to only the six asserted claims. *Id.* at *4-*5. Thus, when Prism Technologies argued in its subsequent appeal involving Sprint that the scope of the *T-Mobile* decision should not apply to its case against Sprint because claims not asserted against T-Mobile were invalidated, the Court disagreed. *Id.* at *5.

Here, the record establishes (1) Pizza Hut's motion for summary judgment

sought to invalidate the "asserted claims," defined as claims 1, 6, 8, 13 and 17,¹ Appx6398; Appx6421; (2) when Domino's sought to join Pizza Hut's (mooted) motion on August 28, 2018, Appx10204-10207, it informed the District Court that "Pizza Hut's motion does not address claim 9" and claim 9 was asserted against Domino's, Appx10212 n.1; (3) prior to Domino's seeking joinder, Ameranth served Domino's its Amended Disclosure of Asserted Claims and Infringement Contentions, asserting claims 1, 6, 9, 13 and 17 of the '077 patent, Appx2196; (4) the five claims asserted against Domino's were brought to the District Court's attention in the parties' pretrial order filed July 27, 2018, Appx10198; (5) Ameranth informed the District Court that claims 2-5, 7, 10-12, 14-16 and 18 were not challenged in the summary judgment motion, Appx10258-10259; and (6) in this appeal, Ameranth has challenged the court's invalidating claims not asserted against Domino's, stating "[a]lthough only claims 1, 6, 9, 13, and 17 were asserted against Domino's, Appx10198, because the District Court invalidated nine unasserted claims, this brief addresses all claims invalidated by the District Court without conceding it was proper for the Court to rule on those claims." Ameranth's Opening at 14 n.2. Unlike *Prism Technologies*, Ameranth has challenged the scope of the

¹ Although Pizza Hut wrote "Pizza Hut respectfully requests that the Court enter summary judgment of unpatentability of all *asserted claims* of the '077 patent," Appx6421 (emphasis added), Domino's contends Pizza Hut challenged "*all* claims of the '077 patent." Domino's Br. at 12.

District Court's ruling and it specified which claims were *not* subject to the summary judgment motion.

Domino's argues its "counterclaim and motion placed all claims decided by the district court at issue,"² Domino's Br. at 61, and it cited zero cases in support of its implication that its counterclaim and motion create subject matter jurisdiction over unasserted claims. Instead, it cited Fed. R. Civ. P. 56(f) regarding notice, but that rule does not create subject matter jurisdiction where there is no case or controversy.

Fox Group, Inc. v. Cree, Inc., 700 F.3d 1300 (Fed. Cir. 2002), is directly on point. In that case, "the district court granted Cree's summary judgment motion on its counterclaim seeking a declaration that the entire '130 patent is invalid," *id.* at 1307, and the Court vacated the ruling with respect to unasserted claims, holding "[t]here was no case or controversy with respect to the unasserted claims at the time of the summary judgment motions; therefore the district court did not have jurisdiction over the unasserted claims." *Id.* at 1308; *accord Allergan, Inc. v.*

² Domino's contends its "summary judgment motion sought ineligibility of *all* the '077 patent claims," Domino's Br. at 18 (emphasis added), but the District Court ruled "the issue of patent eligibility of all *asserted* claims of U.S. Patent No. 8,146,077 (the "'077 Patent") under 35 U.S.C. §101 (hereinafter 'Section 101') was brought before his Court on summary judgment by Domino's Pizza, LLC and Domino's Pizza, Inc. (collectively hereinafter 'Domino's')" Appx1 (emphasis added). Thus, the District Court recognized all claims were not subject to Domino's motion.

Sandoz, Inc., 681 Fed. Appx. 955, 963-64 (Fed. Cir. 2017) (reversing district court's invalidating unasserted claims because the court had no jurisdiction over them); *Plantronics, Inc. v. Aliph, Inc.*, 724 F.3d 1343, 1357 n.3 (Fed. Cir. 2013) ("The district court also erred to the extent it invalidated the unasserted claims of the '453 patent or to the extent the district court invalidated claims not at issue in the motion before it. Accordingly, to the extent the district court's final judgment invalidates patent claims not at issue, that determination is vacated.").

Here, the District Court invalidated claims 1, 4-9, 11, 13-18 of the '077 patent, Appx1-2, even though the parties and the Court were on actual notice that only claims 1, 6, 9, 13 and 17 were asserted against Domino's. This is error, and the order invalidating the claims beyond claims 1, 6, 9, 13 and 17 should be vacated.

Counter to Domino's assertions, the District Court did not provide any notice to Ameranth that claims beyond those asserted against Domino's were at issue. Domino's contends without citing to any order or transcript that "the district court put Ameranth on explicit notice that all claims were being considered." Domino's Br. at 62. It argues the court's permitting Ameranth to file a supplemental brief provided Ameranth notice. *See* Appx10228-10229. But the District Court did not specify in its Order why it permitted Ameranth to file a supplemental brief, *id.*, and nowhere does the Order identify or put claims not asserted against Domino's at issue. *Id.* Accordingly, Ameranth was not put on notice that claims beyond those asserted

against Domino's were subject to the summary judgment motion. That Ameranth argued validity of all the claims is irrelevant since "subject matter jurisdiction cannot be conferred by waiver, estoppel, or consent." *Diggs v. Department of Housing and Urban Development*, 670 F.3d 1353, 1355 (Fed. Cir. 2011).

Last, one or more of the five claims asserted against Domino's also were asserted in Ameranth's other cases pending before the District Court. Thus, the court's statement regarding the "importance of the § 101 issue" to the cases, Appx10229, makes sense given the overlap with the other cases, but that does not mean claims beyond those asserted against Domino's were before the court when deciding Domino's summary judgment motion. Domino's argument to the contrary fails.

B. The Undisputed Record Evidence Confirms Patent-Eligibility.

The '077 patent and its prosecution history are undisputed record evidence. They confirm that prior to Ameranth's inventions, it was not possible to automatically generate, configure, and synchronize menus for multiple disparate handheld devices with different display sizes, a backoffice server, master database and Web pages in real time. *See* Appx1588-1589 ("Systems known at the time involved different sets of GUI-based information or data on different platforms (e.g., wired, wireless, internet) and the different platforms had very different user display characteristics. The inability of one platform to readily use and display the

information originated from another platform was a huge impediment to a fully-integrated hospitality system involving many different fixed, web and wireless system components."); Appx927-928 ("Prior to applicants' invention, the various hospitality software applications (e.g. point of sale, reservations, frequency/affinity, ticketing etc [*sic*]) were largely 'stand alone' and not integrated and synchronized with/between each other, not in 'real time' and certainly not across the vast array of devices, communications media and non standard display outputs"); *see also* Appx1277 ("This breakthrough Ameranth innovation solved a previously major hurdle as to how the hospitality 'point of sale' and property management system' (PMS) system user interfaces could easily be ported and transferred to wireless devices."). Thus, there was no "user-friendly information management and communication capability not requiring extensive computer expertise . . . for use in everyday life such as for restaurant ordering, reservations, and wait-list management." '077 patent at 1:44-48. Likewise, because of the handheld device's small screens, before the '077 patent's claimed inventions, users typically had to scroll through *all* of the information to view it, and "[s]crolling is a very poor technique for displaying information on devices having limited display attributes such as small screen size because such an approach is painstakingly slow for operators and largely ineffective in a time critical hospitality application." Appx1092.

Domino's does not challenge the technological problems identified in the specification and prosecution history. Instead, Domino's asserts the claimed inventions "are not improvements; the claims merely use generic computing technology and software as tools to achieve the claimed results," Domino's Br. at 32, and Domino's believes that Ameranth's admitting it did not invent the hardware or operating systems used to implement the claims dooms the claims. *Id.* However, there is no requirement that a patentee must invent new hardware or an operating system for the software to be patent-eligible subject matter. If that were the test, then claims found eligible in the following cases would have been found ineligible because the claimed inventions used existing hardware and operating systems: *Data Engine Technologies LLC v. Google LLC*, 2017-1135, 2018 WL 4868029 (Fed. Cir. Oct. 9, 2018); *Finjan, Inc. v. Blue Coat Systems, Inc.*, 879 F.3d 1299 (Fed. Cir. 2018); *Core Wireless Licensing S.A.R.L. v. LG Electronics, Inc.*, 880 F.3d 1356 (Fed. Cir. 2018); *Berkheimer v. HP Inc.*, 881 F.3d 1360 (Fed. Cir. 2018); *Trading Technologies Int'l Inc. v. CQG, Inc.*, 675 Fed. Appx. 1001 (Fed. Cir. 2017); *Amdocs (Israel) Limited v. Openet Telecom, Inc.*, 841 F.3d 1288 (Fed. Cir. 2016); *Bascom Global Internet Svs., Inc. v. AT&T Mobility LLC*, 827 F.3d 1341 (Fed. Cir. 2016); *McRO, Inc. v. Bandai Namco Games America Inc.*, 837 F.3d 1299 (Fed. Cir. 2016); *DDR Holdings, LLC v. Hotels.com, L.P.*, 773 F.3d 1245 (Fed. Cir. 2014).

When considering Ameranth's appealed claims as an ordered combination and

as a whole, as confirmed by the PTAB decision in CBM2014-00014, one of ordinary skill in the art can review the patent and intrinsic record and then write the code and design the claimed inventions. *See* Appx2312-2321. The best mode requirement was satisfied and including source code was not necessary. *See Liquid Dynamics Corp. v. Vaughan Co., Inc.*, 449 F.3d 1209, 1223 (Fed. Cir. 2006). The specification's statement that the "discrete programming steps are commonly known," '077 at 12:59-61; *see also id.* at 6:37-7:30, does not mean that the unique *combination* of steps as claimed were commonly known or that the advanced database or design of the architecture of the overall software system was commonly known. Notably, neither hardware was created nor source code provided in the claims (or their respective specifications) held patent-eligible in *Finjan*, 879 F.3d 1299, *Core Wireless*, 880 F.3d 1356, and *Bascom*, 827 F.3d 1341; that source code is not provided in the '077 patent does not mean the appealed claims are routine and conventional.

Domino's fails to consider the claims as a whole, and it ignores the unrebutted evidence that proves the claims solve a technological problem, improve the functioning of computers, and are neither conventional nor routine.

C. The District Court And Domino's Improperly Relied on the *Apple* Case.

In *Apple*, the claims only included a single handheld device type/size and were about a menu wherein categories can be selected and an undefined second menu

generated based on the selection(s). The physical size of multiple small, non-PC standard, handheld displays was not a factor, and the claims included no display configuration, formatting, and layouts, and did not address the combination of features claimed in the '077 patent appealed claims. Additionally, the claimed "communications control software" found in claim 13 of the '077 patent is nowhere in the *Apple* claims. The *Apple* claims also did not require a system with at least two differently sized handheld devices with simultaneous synchronization with the devices.

Here, the appealed claims recite a *particular way* of programming and designing the database and the software to permit a menu or hospitality application information to be formatted for and displayed with a customized display layout for multiple handheld devices having different small display screen sizes, with different GUI screen counts, and to wirelessly configure the menu or hospitality application information throughout the connected system. *See, e.g.*, Appx2315 (PTAB ruling "[w]e are persuaded that the specification describes customizing display layouts for particular versions of handheld computing devices."); Appx2316 (PTAB ruling "[w]e are persuaded that the specification discloses customizing the display layout of each of two or more devices having different screen display sizes.").

Unlike the *Apple* claims, the appealed '077 patent claims recite the programming/design details. As explained in Ameranth's Opening at pages 26-29, 33-38, and 49-50, the appealed '077 patent claims include an advanced master

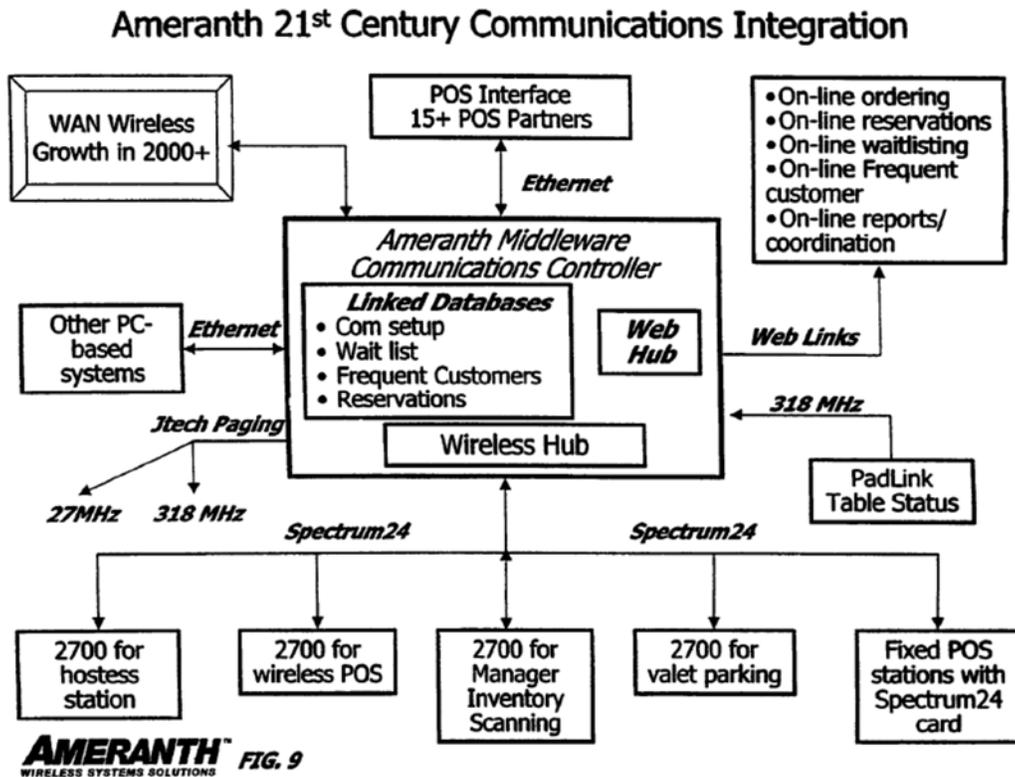
menu/database and its file structures with parameters, and they teach a particular way of programming and designing software to create menus for different, non-standard PC device types with different display sizes. These claims detail how to synchronize in real-time information from the programmed handheld menu configuration ("PHMC") with analogous information in the master database, '077 patent at 16:5-19; 17:52-18:1; 19:15-26, and they include details in Figures 5 and 7 regarding configuration software that is further enabled to generate the PHMC in conformity with a customized display layout for the wireless handheld computing device and compatible with the displayable size of the handheld graphical user interface device. *Id.* at 16:20-29; 17:2-13; 19:30-38.

Just as the District Court ignored the multiple "wherein" clauses of the independent claims – the *exact* place where the "how" occurs – so too did Domino's. As explained in Ameranth's Opening at pages 33-36, claim 13, for example, includes "communications control software" that is required and enabled to perform the requisite integration and synchronization steps.

As the specification details, '077 patent at 12:39-51, the communications control software and its functionality to act as a real time interface between any applicable communications protocol as a layer that sits on top of the communications protocol improves the computer system, through its ability to allow the claimed hospitality system to work with new and varying communications protocols without

modifying the hospitality application, which solved the problem that existed in prior systems; the appealed claims' inventions provided flexibility and adaptability. *See Visual Memory, LLC v. NVIDIA Corp.*, 867 F.3d 1253, 1259-60 (Fed. Cir. 2017) (claims for an improved computer memory system that accommodated different types of processors without compromising performance, which was a problem of the prior art, were directed to a technological improvement and not abstract.).

As shown in Figure 9, the communications control software is the single point of entry and serves to enable both the ability to work with varying communications protocols and perform simultaneous synchronization with both handhelds and web pages, an Ameranth first:



The omission of these elements – which were not present in the claims examined in *Apple* and which are critical to achieve a synchronized system – results in ignoring (a) how the claims improve computer functionality and (b) a technological process of an information management and real time synchronous communications system for use with wireless handheld computing devices having varying display characteristics, such as screen sizes, and the internet with communications control software, to among other things, synchronize the hospitality application information in real time between the master database, at least one wireless handheld computing device, at least one web server and at least one web page, to automatically and simultaneously configure the hospitality application information for display on both the wireless handheld computing device and the web page in conformity with a customized display layout for the wireless handheld computing device or the web page, wherein the customized display layout is compatible with the displayable size of the handheld computing device display screen or the web page, and to automatically format a programmed handheld configuration for display as cascaded sets of linked GUI screens appropriate for a customized display layout of at least two different wireless handheld computing device display sizes in the same connected system.

Domino's – like the District Court – made the same errors with respect to claims 1 and 9. As detailed in Ameranth's Opening at pages 36-38, claims 1 and 9,

for example, include "menu configuration software" that is required and enabled to generate the "programmed handheld menu configuration." Claims 1 and 9 recite details of a "programmed handheld menu configuration" that "is configured by the menu configuration software for display" and that is used for "real time synchronous communications to and from the wireless handheld computing device." '077 patent at 16:30-49, 18:13-34. Claims 1, 9 and 13 recite the additional limitation of "a cascaded set of linked graphical user interface screens for a wireless handheld computing device in the system includes a different number of user interface screens from at least one other wireless handheld computing device in the system." *Id.* at 16:57-61, 18:43-47, 20:5-9.

Disregarding all of these terms and their integration as an ordered combination ignores details about how the claims improve computer functionality and a technological process. The *Apple* claims did *not* contain the specifics recited in the appealed '077 patent claims. Yet, the District Court ruled the claims' additional steps "does not change the nature of the underlying invention," Appx12, which "are not directed to improving the capabilities of any particular computing device." *Id.* This confirms the court over-generalized the claim language, ignoring critical claim terms, like the "master menu" / "master database," "communications control software" and the "customized display layout," which had no prior analog outside a system with computers and wireless handheld computing devices.

Domino's incorrectly asserts "Ameranth points only to the 'real time synchronous' *menu features* and the 'PHMC' *menu features*." Domino's Br. at 23. Domino's did not address any of the substance set forth above and in Ameranth's Opening. Domino's – like the District Court – hand-waved to assert the *Apple* case is analogous. Had the appealed claims been considered in their entirety and without the presupposition that *Apple* was controlling, it is clear that they pass *Alice* and are patent-eligible.

D. The Appealed Claims of the '077 Patent Are Not Abstract.

"Abstract idea" is a term without a definition, and a legal determination without a test. *See, e.g., Bascom*, 827 F.3d at 1354 (Newman, J., concurring) ("I have come upon no guide to when a claim crosses the boundary between unacceptable abstractness and acceptable specificity. Experience with this aspect demonstrates its imprecision."). "Instead of a definition, then, the decisional mechanism courts now apply is to examine earlier cases in which a similar or parallel descriptive nature can be seen—what prior cases were about, and which way they were decided." *Amdocs (Israel) Limited v. Openet Telecom, Inc.*, 841 F.3d 1288, 1294 (Fed. Cir. 2016).

Ameranth's Opening compared the appealed '077 patent claims to the claims in prior cases cited by the District Court to show the court's error. Ameranth's Opening at 41-46. Comparing the cases cited by Domino's to the appealed claims also evidences error.

The claims in cases relied on by Domino's simply use generic computers as tools to carry out a process like sorting images (*In re TLI Communications LLC Patent Litig.*, 823 F.3d 607 (Fed. Cir. 2016)); filtering communications (*Intellectual Ventures I LLC v. Symantec Corp.*, 838 F.3d 1307 (Fed. Cir. 2016)); scanning documents (*Content Extraction & Transmission LLC v. Wells Fargo Bank, N.A.*, 776 F.3d 1343 (Fed. Cir. 2014)); streaming content to portable devices (*Affinity Labs of Tex., LLC v. Amazon.com Inc.*, 838 F.3d 1266 (Fed. Cir. 2016)); collecting information, analyzing it and then displaying results (*Electric Power Group, LLC v. Alstom S.A.*, 830 F.3d 1350 (Fed. Cir. 2016)); displaying an advertisement in exchange for access to copyrighted media (*Ultramercial, Inc. v. Hulu, LLC*, 772 F.3d 709 (Fed. Cir. 2014)); automating offer-based price optimization techniques (*OIP Techs., Inc. v. Amazon.com, Inc.*, 788 F.3d 1359 (Fed. Cir. 2015)); paying for mass transit rides with a credit card (*Smart Systems Innovations, LLC v. Chicago Transit Auth.*, 873 F.3d 1364 (Fed. Cir. 2017)); and presenting information in a non-overlapping way on a display without limiting how to produce that result (*Interval Licensing LLC v. AOL, Inc.*, 896 F.3d 1335 (Fed. Cir. 2018)).³

Domino's extensively cited to *University of Fla. Research Found., Inc. v. General Elec. Co.*, 2018-1284, 2019 WL 921859 (Fed. Cir. Feb. 26, 2019), wherein the patent at issue "proposes replacing the 'pen and paper methodologies' with 'data

³ Domino's also relies on *Apple*, and *Apple* is discussed *supra*.

synthesis technology' in the form of 'device drivers written for the various bedside machines' that allow the bedside device to present data from the various bedside machines 'in a configurable fashion within a single interface.'" *Id.* at *4. The Court found "[t]his is a quintessential 'do it on a computer' patent: it acknowledges that data from bedside machines was previously collected, analyzed, manipulated, and displayed manually, and it simply proposes doing so with a computer." *Id.* The patent owner argued the drivers used in the claimed "converting" step improved the functioning of computers, but neither the patent nor its claims detailed how the drivers perform the function upon which the patent owner relied. *Id.* at *5. The Court held "[t]he mere function of converting is not a 'specific improvement to the way computers operate.'" *Id.*

Unlike the claims in the cases upon which Domino's relies, Ameranth's appealed claims claim improvements to computer functionality and a technological process as discussed herein, and are thus not directed to an abstract idea. They are unlike the ineligible process claims that use generic computers to sort images, store data from scanned documents or filter messages, etc. because they are limited to improving the usability of devices with small screens and set forth explicitly how to do so, and they do not automate a fundamental economic practice.

The independent claims' "wherein" clauses reflect the "how" of the claims and should not be ignored. Domino's assertion that the claims are written in "purely

functional" terms is incorrect. *See* Domino's Br. at 38. Given the descriptions found in the "wherein" clauses in the independent claims, such as the requirements for the "communications control software" in claim 13, '077 patent at 19:15-20:4, the requirements for the "menu configuration software" and "programmed handheld menu configuration" in claims 1 and 9, *id.* at 16:5-49, 17:53-18:34, and the limitation of "a cascaded set of linked graphical user interface screens for a wireless handheld computing device in the system includes a different number of user interface screens from at least one other wireless handheld computing device in the system" in claims 1, 9 and 13, *id.* at 16:57-61, 18:43-47, 20:5-9, it is incorrect to conclude that "no details regarding how to perform the functions" are provided. Domino's Br. at 38. It also is incorrect to contend that claim 1 is representative. *See* Ameranth's Opening at 55-57.

The problems solved by the appealed claims only exist in the handheld computer environment, *see, e.g.*, Appx4790 (construing "graphical user interface"), and the appealed claims improve computer operation and "efficiency with respect to computational speed and equipment, e.g., storage and processor, usage." '077 patent at 15:38-46. The appealed claims are limited to a specific manner of producing a GUI from an existing master menu/database to create user-friendly, customized GUIs, with an appropriate set of cascading screens that can be displayed on various small screen sizes of handheld devices and that are wirelessly synchronized across

nodes in real time through use of "communications control software" (claim 13) or "menu configuration software" (claims 1 and 9). These claims solved the problem of having to individually program each handheld device running, for example, Palm, Windows CE, iOS, or Android, not only because of the different operating systems, but also because of the different non-standard PC display characteristics, such as display size and layout/orientation, of each handheld device type. Consequently, the claims obviated the need to have separate, individualized programming for each device due to varying small screen sizes of wireless handheld computing devices with various display sizes (which are small) and varying operating systems. They also reduced the need to scroll through information in its entirety due to the prior art's inability to customize the format/layout for the size of the handheld devices' small screens.

Like the claims in *Core Wireless*, Ameranth's appealed claims are not abstract because they are directed to an improved user interface for computing devices with small screens; they permitted users "to more quickly access desired data stored in, and functions of applications included in, the electronic devices" and thus were an "improvement in the functioning of computers, particularly those with small screens." 880 F.3d at 1359, 1363. Although Domino's argues that "the purported no scrolling improvement is not claimed [in the '077 patent]," Domino's Br. at 33, the reduction of needing to scroll through the entirety of information –

which is what Ameranth argued in its Opening, Ameranth's Opening at 13 – is the natural effect of the claimed inventions just as it was in *Core Wireless*, and the claims examined in *Core Wireless* also made no mention of scrolling. 880 F.3d at 1359-60.

Domino's incorrectly argues that "Ameranth's current positions *contradict* its infringement positions." Domino's Br. at 35. Domino's cites to Ameranth's expert's deposition testimony that a JSON file itself would not "mandate" that it should be displayed as cascaded sets of linked GUI screens. *Id.* (citing Appx5779-5781). But the claim language does not require a PHMC itself "mandate" that it be displayed as cascaded sets of linked GUI screens. Rather, the claim language states that the PHMC is configured or formatted by the system "for display as" cascaded sets of linked GUI screens. '077 patent at 16:30-33, 18:15-17; *see also id.* at 19:41-20:1 ("programmed handheld configuration"). Ameranth's expert's testimony was not inconsistent with the claim language or the District Court's claim constructions, and the portion of page 17 of Ameranth's Opening cited by Domino's discusses what the system claims collectively cover as an integrated system, *not* what a PHMC must be enabled to do by itself in isolation and independent of the handheld GUI. As such, there is no contradiction as asserted by Domino's, and Domino's assertion should be rejected.

E. The Appealed Claims Are Directed to Multiple Improvements in Computer Functionality and Specify How to Solve Technological Problems Arising in Computers.

Domino's does not contest that, as set forth in the prosecution history, (1) prior to the inventions claimed in the '077 patent, it was not possible to automatically generate, configure, and synchronize the menus for multiple disparate handheld devices with different display sizes, a backoffice server and Web pages in real time, *see* Appx1588-1589; Appx927-928; *see also* Appx1277; (2) there was no "user-friendly information management and communication capability not requiring extensive computer expertise . . . for use in everyday life such as for restaurant ordering, reservations, and wait-list management", '077 patent at 1:44-48; and (3) before the '077 patent's claimed inventions, users typically had to scroll through all of the information to view it due to the handheld device's small screens, and "[s]crolling is a very poor technique for displaying information on devices having limited display attributes such as small screen size because such an approach is painstakingly slow for operators and largely ineffective in a time critical hospitality application." Appx1092. These are technological problems and Domino's does not argue otherwise.

The '077 patent discloses and the appealed claims claim specific information management and real time synchronous communications systems for use with wireless handheld computing devices having various display characteristics, such as

display size and format, that are configured and programmed in a way to make the computing system it is installed in perform better. The specification confirms the system including the advanced master menu/database file structures of the claimed inventions improves computer efficiency and operation, '077 patent at 15:38-46 ("Efficiencies with respect to computational speed and equipment, e.g., storage and processor, usage can thus be achieved along with the facilitation of display of the generated menu."), and the appealed claims are patent-eligible. *See SRI Int'l, Inc. v. Cisco Sys., Inc.*, 2017-2223, 2019 WL 1271160, at *5 (Fed. Cir. Mar. 20, 2019) ("[T]he claims here are not directed to using a computer as a tool—that is, automating a conventional idea on a computer. Rather, the representative claim improves the technical functioning of the computer and computer networks by reciting a specific technique for improving computer network security.").

The appealed claims include configuration software ("communications control software" (claim 13) or "menu configuration software" (claims 1 and 9)) that is enabled to design and generate PHMC's for the wireless devices by utilizing parameters from the master database file structure that synchronizes in real-time information from the PHMC with analogous information in the master database. *Id.* at 16:5-19, 17:52-18:1, 19:15-26; *see also id.* at 7:31-10:41, 11:15-31, 11:52-12:4, 15:4-25. They state how to enable configuration software to generate the different PHMC's in conformity with a customized display layout for the different wireless

handheld computing devices and be compatible with the sizes of their displays. *Id.* at 16:20-29; 17:2-13; 19:30-38. This solved the technological problems presented by the varying small screen sizes of wireless handheld computing devices while also being user-friendly, which obviated the need to have separate, individualized programming for each device. The claims also solved the problem of having to scroll through information in its entirety due to the prior art's inability to customize the format/layout for the size of the handheld devices' small screens.

The claims detail how to synchronize in real-time information from the PHMC with analogous information in the master database. *Id.* at 16:5-19, 17:52-18:1, 19:15-26. The claimed wireless synchronization technology ensured data was consistent across multiple system nodes with different types and sizes of handhelds was not found in Windows CE®. The minimal, built-in basic, synchronization of Windows CE® identified in the specification, *id.* at 12:14-19, did not permit *wireless* synchronization among *all* nodes of a network nor in "real time" as claimed. *See* Appx11109-11114 at ¶¶ 4-6, 8, 10, 12; *see also* Appx10237-10238; Appx10252-10254. Windows CE® – an operating system that required Windows CE® on the mobile device and Windows on a computer – could not synchronize with a non-Windows-based device, and it could not synchronize wirelessly or across multiple mobile devices at the same time. *See* Appx11113-11114 at ¶ 12; Appx11110-11111 at ¶ 7. Indeed, the claimed inventions enhance the basic operation and limitations

of Windows CE®, which is confirmed by the specification, and the claimed systemic synchronization is vastly different from the one device at a time synchronization performed by Windows CE®.

Windows CE® provides a **basic** set of database and communication tools for developer use. However, interfacing with these tools to provide application specific results can be a complex task. In addition to the menu generation described above, a set of software libraries described herein in conformance with the present invention not only **enhances** the **basic** Windows CE® functionality *by adding new features* but also maximizes the full potential of wireless handheld computing devices. Such features include fast synchronization between a central database and multiple handheld devices, *synchronization and communication between a Web server and multiple handheld devices*, a well-defined API that enables third parties such as POS companies, affinity program companies and internet content providers to fully integrate with computerized hospitality applications, real-time communication over the internet with direct connections or regular modem dialup connections and support for batch processing that can be done periodically throughout the day to keep multiple sites in synch with the central database.

'077 patent at 12:20-38 (emphasis added); *accord* Appx11112 at ¶ 10 (Microsoft, the creator of Windows CE®, "considered Ameranth's new systemic synchronization and integration technology to be innovative and ground-breaking in 1999-2000. As I myself [Dedo] stated at the time: 'Ameranth provides a total turnkey solution integrating Pocket PC's with wireless networks, and linking them to PC servers, and the internet.'").

As explained in Mr. Dedo's declaration:

Ameranth's technology was new, pioneering, unconventional and provided functionality and features beyond what was otherwise

available in Windows CE. This was one of the reasons driving Microsoft's decision to make a strategic multi-million investment into Ameranth in June 2000 in order to support and foster Ameranth's 21st Century Restaurant system technology and its integration with and use of Microsoft's Windows CE platform. . . . Such an investment was quite a rare step for Microsoft's mobile devices division to take. That Microsoft chose to make the investment into Ameranth was an indisputable affirmation of Microsoft's belief that Ameranth had developed something new, special and valuable.

Appx11113 at ¶ 12.

This record evidence establishes that the claims entail a concrete way to design and employ the inventive information management and real time synchronous communications systems improved on existing systems, i.e. Windows CE.

Domino's arguments that the claims and patent do not specify the "programming steps/details," Domino's Br. at 45, or "how", *see id.* at 53, 57, contradicts the evidence before the Court and is an enablement argument. *See Visual Memory*, 867 F.3d at 1261. Lack of enablement must be proved by clear and convincing evidence, and several factors are examined to determine if undue experimentation is necessary. *Vasudevan Software, Inc. v. MicroStrategy, Inc.*, 782 F.3d 671, 684 (Fed. Cir. 2015). Domino's has not met this burden of proof.

The appealed claims do not perform some fundamental practice long prevalent in our system, as confirmed by the intrinsic record's criticism of prior art and explanation as to how the claimed inventions solve the prior art's inadequacies,

and all factual inferences from the intrinsic record must be weighed in favor of Ameranth. *See Visual Memory*, 867 F.3d at 1262. They are patent-eligible under step 2 of *Alice*. *See Bascom*, 827 F.3d at 1352. Also, the claims satisfy step 1 of *Alice* because "the plain focus of the claims is on an improvement to computer functionality itself, not on economic or other tasks for which a computer is used in its ordinary capacity." *Enfish, LLC v. Microsoft Corp.*, 822 F.3d 1327, 1336 (Fed. Cir. 2016).

Last, Domino's filed a motion for summary judgment but Ameranth submitted extensive factual evidence in opposition, including Mr. Dedo's unrebutted declaration, App11109-11114 at ¶¶ 4, 6-13; Dr. Shamos' expert declarations, one of which declared "Mr. Dedo was referring in his Declaration . . . to the claimed invention as a whole and as an ordered combination," Appx10266-10272 at ¶¶ 22-27; Appx10480-10612; Mr. Harker's Memorandum for Record confirming the claimed technology reflected a "breakthrough" in that "user interfaces could be easily ported and transferred to wireless devices," Appx10398-10399; and Mr. McNally's declaration, which remains unrebutted and which confirmed the claimed inventions solved computerized problems and improved the functioning of computers. Appx10339-10359 at ¶¶ 9-37. Even though Pizza Hut filed its own expert declaration, Appx6514-6593, which Domino's cited on page 34 of its Brief, to try to contest some of Ameranth's positions, Ameranth's expert, Dr. Shamos,

refuted Pizza Hut's and Domino's positions and the facts – including what was routine and conventional – should have been viewed in the light most favorable to Ameranth.

"[W]hether a claim element or combination of elements is well-understood, routine and conventional to a skilled artisan in the relevant field is a question of fact. Any fact, such as this one, that is pertinent to the invalidity conclusion must be proven by clear and convincing evidence." *Berkheimer*, 881 F.3d at 1368; *see also Aatrix Software, Inc. v. Green Shades Software, Inc.*, 882 F.3d 1121, 1128 (Fed. Cir. 2018) ("Whether the claim elements or the claimed combination are well-understood, routine, conventional is a question of fact."). Here, the District Court was confronted with competing declarations regarding patent-eligibility. Where evidence, such as conflicting testimony, is genuinely disputed on a particular issue, such as whether the claims cover routine and conventional activity, that "issue is inappropriate for resolution on summary judgment." *Direct Techs., LLC v. Electronic Arts, Inc.*, 836 F.3d 1059, 1067 (9th Cir. 2016); *Pan Pac. Retail Props., Inc. v. Gulf Ins. Co.*, 471 F.3d 961, 970 (9th Cir. 2006) ("[T]he district court erred in granting summary judgment to the defendants, resolving [an] issue in light of the disputed and conflicting evidence before it."); *see also Vaporstream, Inc. v. Snap Inc.*, Case No.: 2:17-cv-00220-MLH (KSx), 2018 WL 1116530, at *6 (C.D. Cal. Feb. 27, 2018) (ruling where "there is competing expert testimony as to that specific

question of fact [whether a claim element or combination of elements is well-understood, routine and conventional to one of ordinary skill in the art,] . . . summary judgment on this issue is inappropriate.").

VIII. CONCLUSION AND PRAYER

For the reasons stated herein and in Ameranth's Opening, this Court should reverse. The Court should hold that the '077 patent's claims at issue are eligible under § 101 and that the District Court did not have jurisdiction over any unasserted claims.

Dated: March 21, 2019

Respectfully submitted,

/s/ Richard C. Weinblatt _____

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**United States Court of Appeals
for the Federal Circuit**

*Ameranth, Inc. v. and Domino's Pizza, LLC and Domino's Pizza, Inc.,
2019-1141, 2019-1144*

CERTIFICATE OF SERVICE

I, Robyn Cocho, being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

Counsel Press was retained by STAMOULIS & WEINBLATT LLC, Attorneys for Appellant to print this document. I am an employee of Counsel Press.

On **March 21, 2019**, Counsel for Appellant has authorized me to electronically file the foregoing Appellant's Reply Brief with the Clerk of Court using the CM/ECF System, which will serve via e-mail notice upon all counsel registered as CM/ECF users, including the following principal counsel:

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Six paper copies will be filed with the Court within the time provided in the Court's rules.

March 21, 2019

/s/ Robyn Cocho
Counsel Press

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPE-FACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 28.1(e)(2)(A), because it contains 6,972 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Federal Circuit Rule 32(b).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). This brief has been prepared in a proportionally spaced typeface using Microsoft Word, in 14 Point Times New Roman.

Dated: March 21, 2019

/s/ Richard C. Weinblatt
Richard C. Weinblatt

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