

2022-1200

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

AMERANTH, INC.,

Plaintiff-Appellant,

- v -

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

Defendants-Appellees.

*Appeal From the United States District Court for the Southern
District of California in Case No. 12-cv-0733 DMS (WVG),
Honorable Dana Sabraw, Judge*

**AMERANTH'S REPORT TO THE COURT ON HOW THIS APPEAL
SHOULD PROCEED BASED UPON THE DISTRICT COURT'S
GRANTING OF AMERANTH'S MOTION FOR AN EXTENSION OF
TIME TO APPEAL**

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September 6, 2022

TABLE OF CONTENTS

| | Page |
|--|------|
| OVERVIEW | 1 |
| 1. The District Court Has Granted Ameranth’s Motion For an Extension of Time to Appeal the Exceptional Case Finding and Fee Award under FRAP4(a)5(A)..... | 2 |
| 2. This Court Should Deny Domino’s Motion to Dismiss this Appeal, Consolidate the Pending Appeal with the Newly-Filed Appeal Ordered by the District Court, and Set a Briefing Schedule for the Consolidated Appeal..... | 3 |
| 3. Appellate Proceedings in <i>Domino’s</i> should be Coordinated With the Other Appeals Pending From Rulings on the Same Patent by the Same District Court in Cases that were Consolidated with <i>Domino’s</i> for Pretrial Proceedings..... | 4 |
| CONCLUSION..... | 7 |

TABLE OF AUTHORITIES

Page(s)

Statutes

Fed. R. App. P. 4(a)5(A).....1, 3

OVERVIEW

On July 1, 2022, this Court ordered that Appellee Domino's motion to dismiss this appeal continue to be held in abeyance pending the district court's final decision on Ameranth's motion for reconsideration of its motion to extend the time to appeal under FRAP 4(a)5(A) (Doc. No. 20). That order also directed the parties (within 7 days after the district court's final decision) to advise this Court of the district court's ruling and to inform this Court of the parties' views on how this appeal should proceed.

On August 30, 2022, the district court granted Ameranth's motion for reconsideration and granted an extension of 14 days for Ameranth to file a notice of appeal from the district courts' exceptional case and fee award orders. (Doc. No. 208) Consistent with that order, Ameranth filed a notice of appeal.

Ameranth now makes this report to the Court stating its position that:

- Domino's motion to dismiss the appeal should be denied.
- This appeal No. 2022-1200, taken from the district court's November 18, 2021 Amended Judgment, should be consolidated with the appeal filed today and assigned for disposition in accordance with this Court's IOP 3.1 regarding cases remanded for district court proceedings and appeals from awards of attorney's fees in cases previously appealed on the merits.

• Under the order this Court entered in Nos. 2202-1200 and 2022-1655 *et. at.*, on June 3, 2022 (Doc. No. 14), it was determined that these appeals should be considered companion cases and assigned to the same merits panel as the pending appeals in 29 related cases that were consolidated for pretrial proceedings in the district court. Ameranth concurs.

1. The District Court Granted Ameranth’s Motion For an Extension of Time to Appeal the Exceptional Case Finding and Fee Award under FRAP 4(a)5(A)

Following this Court’s remand for consideration of Ameranth’s motion for an extension of time to appeal, the district court has entered two orders that resulted in granting an extension. First, the district court issued an order on June 7, 2022 denying Ameranth’s motion. Doc. No. 199. On June 13, Ameranth reported to this Court that it intended to move for reconsideration in the district court (Doc. No. 13). In response, on July 1, 2022 this Court stayed Domino’s motion to dismiss Ameranth’s appeal pending further decision by the district court (Doc. No. 202). On July 1, 2022, Ameranth filed its timely motion for reconsideration under the local rules of the U.S. District Court for the Southern District of California (Doc. No. 201). On August 30, 2022, the district court issued a new order in which Judge Sabraw granted Ameranth’s reconsideration motion and granted Ameranth’s extension of time to appeal for fourteen days from August 30 (Doc. No. 208).

In compliance with the district court's order, Ameranth filed a timely notice of appeal today, September 6, 2022.

2. This Court Should Deny Domino's Motion to Dismiss this Appeal, Consolidate the Pending Appeal with the Newly-Filed Appeal Ordered by the District Court, and set a Briefing Schedule for the Consolidated Appeal.

Domino's motion to dismiss this appeal as untimely should be denied. The district court's August 30, 2022 order granting Ameranth an extension of time to appeal under FRAP 4(a) 5(A) renders moot all issues raised in Domino's motion.

As directed by the district court's order, Ameranth has filed a timely notice of appeal of the court's exceptional case and fee award rulings within the prescribed fourteen days of the extension.

In both No. 2202-1200 and the appeal filed today, Ameranth challenges the same February 5, 2022 exceptional case and fee award rulings entered in favor of Domino's. Given the total overlap, both docketed appeals should be consolidated and proceed as one appeal, with a single briefing schedule. Consolidation would be in the best interests of both the Court and the parties, as the most efficient way to resolve the issues raised by these identical appeals. That course appears also to conform to this Court's usual practice.

3. Appellate Proceedings in *Domino's* should be Coordinated With the Other Appeals Pending From Rulings on the Same Patent by the Same District Court in Cases that were Consolidated with *Domino's* for Pretrial Proceedings.

The Court should include the newly-filed appeal in the order it entered sua sponte on June 3, 2022 in Nos. 2202-1200 and 2022-1655 *et. al.* The background for that order is as follows:

Domino's was one of multiple cases Ameranth filed for infringement of Patent No. 8,146,077 (“’077 Patent”), all of which were consolidated in the Southern District of California for pretrial proceedings. During the pendency of this appeal in *Domino's* (No. 2022-1200), the district court entered judgments adverse to Ameranth in the related companion cases, ruling on asserted claims of the ‘077 Patent not resolved in *Domino's*. Ameranth’s appeals in those related cases were docketed in this Court as Nos. 2022-1655, 2022-1657, 2022-1660, 2022-1661, 2022-1662, 2022-1663, 2022-1666, 2022-1667, 2022-1668, 2022-1669, 2022-1671, 2022-1672, 2022-1673, 2022-1674, 2022-1675, 2022-1676, 2022-1677, 2022-1678, 2022-1679, 2022-1680, 2022-1681, 2022-1682, 2022-1683, 2022-1684, 2022-1686, 2022-1687, 2022-1689, 2022-1690, and 2022-1692.

On June 3, 2022, this Court sua sponte entered an order in *Domino's*, No. 2022-1200, and all the other Ameranth cases on appeal from the Southern District of California, stating: “Upon consideration of the fact that the cases appear to be related and involve the same patent, IT IS ORDERED THAT: The above-

captioned appeals shall be considered companion cases and assigned to the same merits panel.” (DKT.). The same rationale that warranted this step in Nos. 2022-1200 and 2022-1655 *et. at.*, necessarily applies to the newly-filed appeal in *Domino’s*.¹ One example of how judicial economy is advanced by treating the appeals as companion cases: Although this Court held in 2019 (Doc. No. 183) that the district court lacked jurisdiction over claims 4 and 5 of the ‘077 Patent in *Domino’s*, the district court’s misperception, that it had previously disposed of each and every one of the claims of the “077 patent, clearly and adversely affected the judgments it entered in the remaining cases that had been consolidated for pretrial proceedings. Thus, this error looms very large in the pending appeals in *Domino’s* and appeal Nos. 2022-1655 *et al.* Ameranth’s current appeal and the one filed today in the *Domino’s* case reaffirm the reasons why consolidation was ordered in the district court and why the cases should be considered together as related cases on appeal: the issues raised in all of these appeals are closely intertwined. Ameranth raised and will raise many of the same legal and factual

¹ In its initial report to this Court following the district court’s June 7, 2022 order, Ameranth suggested that the Court consider consolidating the appeal in No. 2022-1200 with the appeals in Nos. 2022-1655 *et al.* This Court’s July 1, 2022 order declined to order consolidation, noting that if Ameranth sought to consolidate the appeals, it should file a motion to consolidate. CITE. On reflection in the current posture of the case (with the opening brief in Nos. 2022-1655 *et. al.* already filed), treating the cases, instead, as companions as set forth in the sua sponte June 3, 2022 order is an efficient way to proceed.

errors related to burden of proof, patent eligibility and presumption of validity as bases for reversal in all appeals.

Under this Court's June 3, 2022 order, only one panel need examine the common record in the related appeals. That is an appropriate way to proceed. And that same reasoning should be applied to this appeal and Ameranth's latest appeal. Consistent with principles of sound judicial administration, this Court should follow its established practice to schedule related district court cases as companion appeals argued at the same time before the same panel. The June 3, 2022 order in Nos. 2022-1200 and 2022-1655 *et. al.*, should apply to the newly-filed appeal. Briefing in these closely related companion and associated appeals should be set to progress on sufficiently contemporaneous schedules that further support the conclusion that the most prudent way for this Court to proceed is to then set the oral arguments for the same day before the same panel.

Conclusion

The motion to dismiss No. 2022-1200 should be denied. The newly-filed appeal should be consolidated with No. 2022-1200 and a briefing schedule entered. And the June 3, 2022 order treating Nos. 2022-1200 and 2022-1655 *et al.* as companion cases should include the appeal Ameranth has filed today, September 6, 2022.

Respectfully submitted.

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September 6, 2022

**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS

Case Number: 22-1200

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