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18 **UNITED STATES DISTRICT COURT**
19 **SOUTHERN DISTRICT OF CALIFORNIA**
20 **SAN DIEGO DIVISION**

21 AMERANTH, INC.

22 v.

23 DOMINO'S PIZZA, INC. and
24 DOMINO'S PIZZA, LLC

Lead Case No.: 3:12-cv-0733-DMS-WVG

**DOMINO'S PIZZA, LLC AND
DOMINO'S PIZZA, INC.'S
OPPOSITION TO MOTION FOR
RECONSIDERATION OF ORDER
GRANTING IN PART MOTION TO
DECLARE CASE EXCEPTIONAL
AND AWARD ATTORNEY FEES AND
COSTS OR, IN THE ALTERNATIVE,
REQUEST FOR CERTIFICATION OF
INTERLOCUTORY APPEAL**

Judge: Hon. Dana M. Sabraw
Date: April 16, 2021
Time: 1:30 PM
Location: Courtroom 13A

CONFIDENTIAL --

FILED UNDER SEAL

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1 **I. INTRODUCTION**

2 On February 5, 2021, this Court issued a twenty-one (21) page opinion finding
3 this case “exceptional” based on the “totality of the circumstances.” (ECF 134 at
4 21.) The totality of the circumstances included:

- 5 1) the “substantive strength” of Ameranth’s case was “weak”/“especially
6 weak” on both of the major liability issues – infringement and validity
7 (ECF 134 at 7-12);
8 2) Ameranth took “inconsistent positions” on both of the key claim terms–
9 “synchronous” and “PHMC/PHC”—in the case (ECF 134 at 9-10, 12-
10 13); and
11 3) the “manner in which this case was litigated” was problematic on
12 several grounds (ECF 134 at 18-21).

13 Ameranth Inc. (“Ameranth”) now moves for reconsideration and an interlocutory
14 appeal of this Court’s exceptional case finding.

15 Because reconsideration is an “extraordinary remedy,” Ameranth must show
16 this Court’s decision finding this case exceptional was “clear error” or “manifestly
17 unjust.” Ameranth does not come close to meeting that standard. On the contrary,
18 Ameranth’s arguments misstate this Court’s Opinion and repeat arguments this
19 Court has already considered and rejected.

20 Unfortunately, Ameranth’s motion appears to be another attempt to delay
21 judgment requiring it to pay Domino’s Pizza, Inc. and Domino’s Pizza LLC
22 (collectively Domino’s) their attorneys’ fees and costs. Domino’s filed its motion
23 for exceptional case three times. Ameranth delayed the first by filing an appeal that
24 the Federal Circuit summarily denied as to the claims asserted against Domino’s and
25 delayed the second filing through a Supreme Court petition that did not even address
26 the invalidated claims asserted against Domino’s. Ameranth’s current motion and
27 request for interlocutory appeal would result in another 18-month delay.
28

1 This Court properly considered the totality of the circumstances and found
2 this case exceptional in a measured and well-reasoned opinion. Ameranth’s motion
3 for reconsideration and request for interlocutory appeal should be denied.

4 II. ARGUMENT

5 A. Ameranth Seeks an “Extraordinary Remedy” and Must Therefore 6 Show This Court’s “Exceptional Case” Decision Was “Clear Error” 7 and “Manifestly Unjust”

8 Reconsideration is an “extraordinary remedy, to be used sparingly in the
9 interests of finality and conservation of judicial resources.” *Kona Enters., Inc. v.*
10 *Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000); see also *Killian v. Panetta*, No.
11 12-CV-828 (JLS), 2013 WL 4118399 at *2 (S.D. Cal. Aug. 13, 2013). Generally
12 speaking, reconsideration of a prior order is appropriate only “if the district court (1)
13 is presented with newly discovered evidence, (2) committed clear error or the initial
14 decision was manifestly unjust, or (3) if there is an intervening change in controlling
15 law.” *Sch. Dist. No. 1J, Multnomah Cnty. v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th
16 Cir. 1993). Ultimately, whether to grant or deny a motion for reconsideration is in
17 the “sound discretion” of the district court. *Navajo Nation v. Norris*, 331 F.3d 1041,
18 1046 (9th Cir. 2003) (citing *Kona Enters.*, 229 F.3d at 883).

19 “Reconsideration ‘may *not* be used to raise arguments or present evidence for
20 the first time when they could reasonably have been raised earlier in the litigation.’”
21 *Killian*, 2013 WL 4118399, at *2 (emphasis in original) (quoting *Kona Enters.*, 229
22 F.3d at 890, and citing *389 Orange St. Partners v. Arnold*, 179 F.3d 656, 665 (9th
23 Cir. 1999)); see also *Shaw v. Experian Info. Sols., Inc.*, No. 13-CV-1295 JLS (BLM),
24 2016 WL 7634441, at *1 (S.D. Cal. Apr. 4, 2016) (“A party may not raise new
25 arguments or present new evidence if it could have reasonably raised them earlier.”).
26 “Nor should it be used ‘to argue new facts or issues that inexcusably were not
27 presented to the court in the matter previously decided.’” *Killian*, 2013 WL 4118399,

1 at *2 (quoting *Brambles USA, Inc. v. Blocker*, 735 F.Supp. 1239, 1240 (D. Del.
2 1990)).

3 Here, Ameranth argues neither “newly discovered evidence” nor “an
4 intervening change in controlling law.” Thus, the standard for this motion is
5 “whether the Court committed clear error or the initial decision was manifestly
6 unjust.” *See Shaw*, 2016 WL 7634441, at *1. Importantly, clear error does not exist
7 where the issue is merely “a debatable one.” *McDowell v. Calderon*, 197 F.3d 1253,
8 1256 (9th Cir. 1999). Instead, a finding of clear error is appropriate only where, in
9 consideration of the entire evidence, the Court is left with the “definite and firm
10 conviction” that a mistake has been committed. *U.S. Ethernet Innovations, LLC v.*
11 *Acer, Inc.*, No. C 10-3724 (CW), 2015 WL 1478636, at *2 (N.D. Cal. Mar. 31, 2015)
12 (citing *United States v. Ruiz-Gaxiola*, 623 F.3d 684, 693 (9th Cir. 2010)).

13 As discussed more fully below, Ameranth recasts and distills this Court’s
14 twenty-one (21) page opinion analyzing the totality of the circumstances to an
15 alleged “core basis,” and then proceeds to attack that alleged “core basis.” (ECF
16 142-1 at 2-6). This “straw man” approach fails, as the Court’s thorough and multi-
17 factor analysis cannot be reduced to a “core basis,” and the Ameranth-created alleged
18 “core basis” in fact mischaracterizes the Court’s opinion. (See Section C.1, below).

19 When Ameranth turns to specifics, it purports to identify no less than four
20 alleged “manifest errors.” (ECF 142-1 at 10 (and following 14 pages)). The first
21 two misstate the Court’s opinion. (See Sections C.2-C.3, below). The last two
22 merely repeat arguments the Court has already considered and rejected. (See
23 Sections 4-5, below).

24 In short, Ameranth does not come close to showing this Court’s exceptional
25 case decision was “clear error” or “manifestly unjust.”

1 **B. The Court’s Decision Relies on Numerous Factors in the “Totality of**
2 **Circumstances” to Find This Case Exceptional**

3 Based on the “totality of the circumstances” addressed in detail in a twenty-
4 one (21) page opinion, this Court found “this is an exceptional case under §285.”
5 (See, e.g. ECF 134 at 21.) The “totality of circumstances” included the following
6 points.

7 1) The “Substantive Strength” of Ameranth’s case was
8 “weak”/“especially weak” on both of the major liability issues –
9 infringement and validity. (ECF 134 at 7-12).

10 a. “Ameranth’s position on infringement of the ‘077 Patent was
11 weak.” (ECF 134 at 10).

12 b. “Ameranth’s litigation position on the validity of the ‘077 Patent
13 was especially weak after *Alice* and *Apple*.” (ECF 134 at 11-12).

14 2) Ameranth took “inconsistent positions” on both of the key claim terms–
15 “synchronous” and “PHMC/PHC”—in the case. (ECF 134 at 9-10, 12-
16 13).

17 a. “Ameranth took inconsistent positions on the meaning of
18 ‘synchronous.’” (ECF 134 at 9).

19 b. On “whether the ‘PHMC/PHC’ had to contain information about
20 the size of the handheld device, . . . Ameranth again took
21 inconsistent positions depending on whether the issue was
22 infringement or validity.” (ECF 134 at 13).

23 3) The “manner in which this case was litigated” was problematic on
24 several grounds. (ECF 134 at 18-21).

25 a. Ameranth’s “scattershot approach made for unwieldy litigation,”
26 “created procedural and logistical challenges well beyond the
27 ordinary patent case” and “resulted in repetitive, duplicative, and
28

1 unnecessary motion work on behalf of all parties and the Court.”
2 (ECF 134 at 19).

3 b. “Ameranth’s attempt[ed] to avoid a prompt ruling on the § 101
4 issue” (objecting to Domino’s request to join Pizza Hut’s § 101
5 motion after Pizza Hut settled), which followed an Ameranth-
6 Menusoft settlement that avoided (via vacatur) earlier invalidity
7 findings. (ECF 134 at 5, 20).

8 c. Ameranth had a “pattern of continued bullishness in the face of
9 numerous defeats.” (ECF 134 at 20-21).

10 **C. Ameranth Has Not Shown This Court’s Decision Finding This Case**
11 **Exceptional Was “Clear Error” Nor “Manifestly Unjust”**

12 Each of the above three grounds—weak merits, position shifting on key
13 issues, and improper litigation tactics—could alone support a finding of exceptional
14 case, yet here all three are present. Ameranth thus faces an exceptionally high
15 burden to prove the Court’s exceptional case decision was “clear error” or
16 “manifestly unjust.” Ameranth falls woefully short.

17 **1. Ameranth’s Assertion of the “Core Basis of the Exceptional Case**
18 **Determination” is Factually and Legally Wrong**

19 Ameranth asserts without citation that a “core basis” of the Court’s
20 exceptional case finding was the “mistaken[] belief that Ameranth is merely a non-
21 practicing patent assertion entity that tried but failed to commercialize its products
22 and instead simply adopted a strategy of pursuing nuisance value settlements.” (ECF
23 142-1 at 2). Ameranth is wrong on two counts.

24 First, this Court’s opinion was based on the “totality of the circumstances”
25 and thus cannot be reduced to a “core basis.” Ameranth’s attempt to water down this
26 Court’s thorough, multi-factor analysis in an effort to make it easier to attack is
27 improper. The Court instead properly considered the “totality of the circumstances,”
28

1 using its discretion and applying a preponderance of the evidence burden, to
2 conclude the case was exceptional. (See, e.g. ECF 134 at 21). Ameranth has not
3 shown otherwise.

4 Second, Ameranth’s characterization of the Court’s opinion is inaccurate at
5 best. What the Court actually stated is as follows:

6 Clearly, Ameranth is not shy about enforcing its patent rights. Indeed,
7 although Ameranth at one point attempted to commercialize the
8 inventions disclosed in the Patents-in-Suit, its current business model
9 appears to be focused on patent licensing rather than commercializing
10 its own products. This business strategy is evident in the number of
11 cases Ameranth has filed in courts across the country, including appeals
12 to the Federal Circuit and writs to the United States Supreme Court.

13 (ECF 134 at 16).

14 Everything the Court stated was factually accurate. Ameranth admits it
15 attempted to commercialize its patented invention. (ECF 142-1 at 2). The Court
16 never stated, as Ameranth asserts, that Ameranth failed to commercialize its
17 products. Ameranth admits that its focus since 2008 has been patent licensing as
18 opposed to commercializing new products. (Ex. A, Yates 3/1/18 Tr. at 314:05-
19 315:05). Ameranth has unquestionably filed a substantial number of cases in courts
20 around the country, including appeals to the Federal Circuit and Supreme Court.

21 Ameranth’s attempt to create and attack an alleged “core basis” to the Court’s
22 opinion fails. The Court’s thorough analysis and opinion cannot be reduced to a
23 “core basis,” and indeed Ameranth mischaracterizes the Court’s opinion in pursuing
24 this “straw man” argument.

25 **2. Ameranth’s Arguments About the Pizza Hut Settlement Ignore
26 the Court’s Focus on “Ameranth’s attempt thereafter to avoid a
27 prompt ruling on the § 101 issue”**

28 When Ameranth turns to specifics, it contends the Court made four “manifest
errors.” (ECF 142-1 at 10). In its lead argument, Ameranth contends that the Court
relied on a “mistaken belief that Ameranth entered into a nuisance-value settlement

1 with Pizza Hut shortly before trial in order to avoid a hearing on the eligibility of the
2 '077 patent.” (ECF 142-1 at 10). Ameranth continues: “The Order states that the
3 timing of the confidential settlement (two weeks before trial was to begin) was
4 ‘troubling.’ Order, p. 20, ll. 11-14.” (*Id.*)

5 Ameranth does not fairly characterize this Court’s opinion. First, the opinion
6 nowhere states that the Pizza Hut settlement was “nuisance-value”—neither word
7 appears in the opinion. So Ameranth’s pleas that it “obtained a very significant
8 settlement with Pizza Hut” (ECF 142-1 at 10, 11) are irrelevant.

9 Second, the suggestion that the Court focused only on the “timing” of the
10 settlement is plainly incorrect. Ameranth cherry-picks one part of the Court’s
11 opinion, while ignoring another, which Domino’s here emphasizes: “Although there
12 may have been many reasons for the parties’ decision to settle, the timing of the
13 settlement, and *Ameranth’s attempt thereafter to avoid a prompt ruling on the*
14 *§ 101 issue*, is ‘troubling.’” (ECF 134 at 20, ll. 11-14 (emphasis added).) While
15 Ameranth argues that “the Court ordered Ameranth and Pizza Hut to participate in
16 a mandatory settlement conference” (ECF 142-1 at 11), Ameranth fails to address
17 the fact that, after the Pizza Hut settlement, Ameranth opposed Domino’s motion for
18 “joinder in Pizza Hut’s § 101 motion, which the Court granted *over Ameranth’s*
19 *objection.*” (ECF 134 at 5) (emphasis added).

20 In sum, Ameranth’s lead argument for alleged “manifest error” relies an issue
21 (alleged “nuisance-value” settlement) the Court did not raise and fails to address an
22 issue (“Ameranth’s attempt thereafter to avoid a prompt ruling on the § 101 issue”)
23 the Court did raise. Ameranth’s lead argument is baseless.

24 **3. The Court Properly Considered the *Menusoft* Verdict in the**
25 **Context of Ameranth’s Overall Litigation Conduct**

26 For its second alleged “manifest error,” Ameranth again erroneously reframes
27 the Court’s ruling when it asserts the Court found “that *vacatur* of prior invalidity
28

1 verdicts . . . cast doubt upon the validity” of Ameranth’s patents. (ECF 142-1 at 12)
2 (emphasis added). Actually, the Court’s Opinion states that “here, the *Menusoft*
3 *verdicts* cast a cloud on the Patents, and indicated a weakness in Ameranth’s
4 position.” (ECF 134 at 8, 17) (emphasis added). The Court further found that
5 “Ameranth’s request to vacate those verdicts could be construed as an
6 acknowledgement of that weakness, and an effort to remove that cloud from this
7 litigation and other litigation on those Patents.” (ECF 134 at 8; see also 17).
8 Ameranth’s recast is significant because Ameranth focuses its argument on
9 defending the process of vacatur, rather than refuting the fact that “the *Menusoft*
10 *verdicts* [themselves] cast a cloud on the Patents.” Since Ameranth makes no
11 attempt to address the Court’s *actual* reasoning, it necessarily demonstrates no error.

12 Further, just as Ameranth improperly tried to point to the Court for ordering
13 a settlement conference with Pizza Hut (ECF 142-1 at 11, addressed above in Section
14 2), Ameranth again improperly points to the Court here, saying that the Court
15 somehow endorsed Ameranth’s patents when it held that the vacated *Menusoft*
16 verdicts had no preclusive effect. (ECF 142-1 at 14-15). That is false. The Court’s
17 decision said nothing about the strength of Ameranth’s patents nor its litigation
18 position going forward. The vacatur and collateral estoppel decisions did *not* negate
19 the fact of the invalidity verdicts, nor the fact that Ameranth acquired vacatur with
20 a cheap settlement,¹ nor Ameranth’s obligation to bring a case with merit.

21 ¹ Ameranth asserts that the settlement in which the *Menusoft* parties agreed to
22 vacatur “resulted in a significant economic recovery to Ameranth through a patent
23 license with *Menusoft*.” (ECF 142-1 at 5). That is false. Ameranth sought over **\$12**
24 **million** (over \$4 million trebled) from *Menusoft* at trial. It had also filed a second
25 patent infringement lawsuit on the eve of the *Menusoft* trial – ***which it fails to inform***
26 ***the Court was dismissed as part of the settlement.*** (Ex. B, *Menusoft* Settlement
27 Agreement at 1). This purported “significant economic” license required no
28 *Menusoft* payment up-front and had resulted in only \$121,000 in royalties between
the 2011 settlement and 2018. (Ex. C, Ameranth Royalty Sheet at 2). Thus,
Menusoft achieved dismissal of both the Federal Circuit appeal and the second suit
for a nuisance payment of substantially less than it would have cost to litigate the
appeal and the second lawsuit.

1 Ameranth also improperly relies on *Munchkin, Inc. v. Luv n' Care, Ltd.*, 960
2 F.3d 1373, 1381 (Fed. Cir. 2020) and *Thomas v. Bible*, 983 F.2d 152, 154-55 (9th
3 Cir. 1993) for the proposition that this Court's finding of no preclusion mandates a
4 finding of no exceptional case. (ECF 142-1 at 14). These cases do not support
5 Ameranth, because the facts of those cases are different -- both address a situation
6 where a court addressed an issue on the merits early in the case, and then addressed
7 the same issue on the merits later in the case. In *Munchkin*, the Federal Circuit
8 reversed an exceptional case finding that was based on the plaintiff allegedly
9 amending its complaint in "bad faith," because the district court had found *no* bad
10 faith at the time of the amendment, and there were "no new facts" at the time of the
11 "bad faith" finding "that were not considered at that time" of the *no* bad faith finding.
12 960 F.3d at 1375, 1377, 1381. Similarly, in *Thomas*, the Ninth Circuit reversed a
13 district court's "frivolous" finding because the Ninth Circuit had "previously
14 determined that Thomas' action was not frivolous." 983 F.2d at 155.

15 Here, unlike *Munchkin* and *Thomas*, this Court's ruling on vacatur in no way
16 addressed the substantive merits of the validity of Ameranth's patents; it simply
17 ruled that preclusion did not bar Ameranth's claims. Thus, the order on preclusion
18 does not prevent this Court from finding this case exceptional. Indeed, if Ameranth
19 relied on the no-preclusion ruling as support for the substantive validity of its
20 patents, it did so on its own peril.

21 Ameranth also attributes the following to this Court:

- 22 • "this cloud eviscerated the presumption of validity for all claims
23 of those patents and even of the later-issued '077 patent."
- 24 • "The Order expresses the belief that the *Menusoft* invalidity
25 verdicts ... nullified the statutory presumption of validity as to
26 all its patent claims."

27 (ECF 142-1 at 1, 3).
28

1 Again, Dominos’ disagrees with Ameranth’s representation of the Court’s
2 Order. Domino’s understands that, in context, the Court was clearly stating that
3 because nearly identical claims of the same patents had already been invalidated in
4 *Menusoft* over a presumption of invalidity, the validity of the patents was
5 questionable. Further, Ameranth should have known that by asserting substantially
6 similar claims again, the presumption on invalidity would likely be overcome again.²
7 (ECF 134 at 8).

8 Ameranth lastly criticizes this Court for a typographical error in a case cite —
9 “*Wang Labs. v. Toshiba Corp.*, 793 F.Supp. 676, 678 (E.D. Ca. 1992)” (ECF 142-1
10 at 12-13) — which expresses the public policy against vacatur of judgments. That
11 *Wang Labs* was never cited by the Ninth Circuit (Ameranth’s criticism) is irrelevant
12 because numerous Ninth Circuit cases have similarly expressed the public policy
13 against the vacatur of judgments and courts have even refused to vacate judgments
14 of patent invalidity.³ *Protegrity USA, Inc. v. Netskope, Inc.*, No. 15-cv-02515-YGR,
15 2016 U.S. Dist. LEXIS 124324 at *4 (C.D. Cal. Sept. 13, 2016) (Denying vacatur of
16 invalidity judgment, for among other reasons, “[b]y their own admission, plaintiffs
17 seek vacatur so that they may assert the ’707 Patent again against others, which
18 would result in unnecessary relitigation of issues already determined by this
19 Court.”); *Am. Games, Inc. v. Trade Prods., Inc.*, 142 F.3d 1164, 1167-69 (9th Cir.
20 1998) (There is a “public policy against allowing a losing party to buy an eraser for
21 the public record.”). Thus, the Court’s “typo” was not a manifest error.

22
23
24
25
26 ² Indeed, all of these claims were eventually invalidated a second time,
without ever going to trial.

27 ³ It is not surprising that the patent plaintiff-friendly Eastern District of Texas
28 was willing to vacate an invalidity judgment of one of its own juries.
<https://www.eff.org/deeplinks/2014/07/why-do-patent-trolls-go-texas-its-not-bbq>

1 **4. The Court Properly Found that Ameranth Failed to Reassess Its**
2 **Case After the *Apple* decision**

3 For its third alleged “manifest error,” Ameranth argues that the Court erred
4 by not finding Ameranth had a reasonable basis to litigate the ’077 Patent after the
5 *Apple* decision. (ECF 142-1 at 15-18). But Ameranth relies on the same arguments
6 it made in the original briefing, which is not a proper basis for reconsideration.
7 *Thermolife Int’l, LLC v. Myogenix Corp.*, No.: 13-CV-651 JLS, 2017 U.S. Dist.
8 LEXIS 176276 at *25 (S.D. Cal. Oct. 24, 2017) (“Plaintiffs cannot attempt to re-
9 argue this point now; a motion for reconsideration does not give parties a ‘second
10 bite at the apple.’”) (quoting *Weeks v. Bayer*, 246 F.3d 1231, 1236 (9th Cir. 2001)).

11 Moreover, Ameranth continues to assert falsely that in the Starbucks ’077
12 CBM, the PTAB substantively considered the petition, in light of the *Apple* decision,
13 and ruled that the ’077 patent was patent-eligible. To the contrary, the PTAB made
14 clear that its decision was not a substantive decision, instead denying the petition
15 because Starbucks had filed a previous petition. The *Apple* case is never mentioned.⁴

16 We do not take lightly *denying a petition on grounds unrelated to its*
17 *substantive patentability challenges*. Nor do we hold that multiple
18 petitions against the same claims of the same patent are never
19 permitted. Here, however, weighing the relevant factors under the
20 circumstances of this case, ...[w]e, therefore, exercise our discretion
21 and decline to institute covered business method patent review under
22 35 U.S.C. § 324(a).

23 (12-cv-0733, ECF No. 125-5 at 22) (emphasis added).

24 Ameranth next argues that the following two statements regarding this issue
25 were “erroneous statements” in the Court’s assessment of the issue:

26 ⁴ Indeed, with regard to the § 101 issue, the Patent Office specifically denied
27 institution because “the substance of its argument is substantially the same and **we**
28 **are not persuaded that *Alice* modified the law**, such that the interest of justice
would require us to reconsider Petitioner’s § 101 challenge. (ECF No. 142-3 at
PageID.9448). Thus, the PTAB never substantively reconsidered patent-eligibility
in light of *Apple*.

- 1 • “The ‘077 Patent was part of the same family as the ‘850, ‘325 and ‘733
2 Patents, all of which were declared invalid by the Federal Circuit in *Apple*.”
3 Order p. 12, ll. 1-2.
- 4 • “Here, Ameranth was presented with two decisions, one from the PTAB and
5 the other from the Federal Circuit, finding the ‘850, ‘325 and ‘733 Patents
6 ineligible.” Order p. 12, ll. 9-10.

7 (ECF 142-1 at 16).

8 Ameranth asserts that the Court was “mistaken” and did not understand that,
9 “neither the PTAB nor the Federal Circuit found that *all* of the claims of the ‘850,
10 ‘325, and ‘733 patents were ineligible.”⁵ (*Id.*) (emphasis in original). This argument
11 is simply false given the clear text of the Court’s order and constitutes nothing but
12 another thinly veiled attempt to create and knock down a “straw man” entirely
13 irrelevant to this Court’s analysis and conclusion. Ameranth ignores that this Court
14 clearly stated in its Order that the PTAB “found *certain* claims of the [’850, ’325
15 and ’733] Patents unpatentable and “the Federal Circuit found *all instituted claims*
16 of the ... Patents unpatentable.” (ECF 134 at 4-5) (emphasis added).

17 Ameranth’s assertion that aspects of the law of § 101 patent eligibility are
18 “unsettled” is irrelevant here. (ECF 142-1 at 2). What is not unsettled are the
19 bedrock principals, in place long prior to *Alice*, that: (1) abstract ideas are not
20 patentable, and (2) claims written in purely functional language that merely claim
21 the result, and not a particular means of achieving the result – merely claim an
22 unpatentable abstract idea. *Le Roy v. Tatham*, 55 U.S. (14 How.) 156, 175 (1853)
23 (“A patent is not good for an effect, or the result of a certain process” because such
24 patents “would prohibit all other persons from making the same thing by any means
25 whatsoever”); *Diamond v. Diehr*, 450 U.S. 175, 182 n.7, 101 S. Ct. 1048 (1981) (A

26 ⁵ Significantly, *nearly all* the claims of these patents were found patent
27 ineligible. All claims of the ’733 patent, 10 of 15 claims of the ’850 patent and 12
28 of 16 claims of the ’325 patent were declared patent ineligible in *Apple*. Significantly, claims 12-16 of the ’850 patent and claims 11 and 13-15 of the ’325 patent were also found invalid by the PTAB under §103.

1 patent may issue “for the means or method of producing a certain result, or effect,
2 and not for the result or effect produced.”)

3 The Federal Circuit in *Apple* made clear that Ameranth’s ’850, ’325 and ’733
4 patents all have: (1) claims directed to computer systems with particular features that
5 are written in functional language only claiming the resulting system, rather than any
6 particular way of programming the software to create these features, and (2) largely
7 identical specifications indicating the idea is implemented on “typical” hardware
8 using “commonly known” programming. *Apple, Inc. v. Ameranth*, 842 F.3d 1229,
9 1242 (Fed. Cir. 2016). That decision should have been a strong signal to Ameranth
10 that the remaining claims of all its patents, including the ’077 patent – which has the
11 same functional claims directed to a resulting system, and the same specification –
12 were also likely patent-ineligible. Indeed, it was abundantly clear to this Court, to
13 the Federal Circuit, and to the District of Delaware (in declaring the ’961 patent
14 ineligible). See, ECF 1395 at 13 (“As with the related patents, there is nothing ...
15 that “transform[s] the claimed abstract idea into a patent-eligible application of the
16 abstract idea.’ *Apple*, 842 F.3d at 1242.”); *Ameranth v. Domino’s Pizza, LLC*, 792
17 F. Appx. 780, 786 (Fed. Cir. 2019) (the “claims of the ’077 patent suffered from the
18 same ineligibility defects” of those in *Apple*); ECF 112-1 at 13 (“the claims are
19 similar to those ... that have already been found abstract by the Federal Circuit in
20 two other cases ...”).

21 Ameranth’s assertion that this Court erred in finding that Ameranth failed to
22 reassess⁶ the strength of its case after the Federal Circuit’s *Apple* decision also fails.

23 _____
24 ⁶ Ameranth asserts it did reassess its case, and because of the *Apple* decision,
25 dropped its Federal Circuit appeal of the PTAB’s finding that the remaining claims
26 of the ’850 and ’325 Patents were unpatentable under § 103. (ECF 142-1 at 6).
27 However, it was not unreasonable for the Court to find that Ameranth dropped the
28 appeal not because of *Apple*, but because Ameranth faced another two-year stay
while the PTAB decision was on appeal. Indeed, right after the *Apple* decision,
Ameranth moved to lift the stay of the district court case (after two failed attempts
to lift stay while an appeal was pending in the Federal Circuit) and told the Court it

1 This Court found that “the record reflects that Ameranth pushed ahead without any
2 apparent concern that the ‘077 Patent might be found unpatentable.” (ECF 134 at
3 18). The Court’s finding was not erroneous given that after the Federal Circuit’s
4 *Apple* and *Domino’s Pizza* decisions, Ameranth continued its serial baseless
5 litigation by: (1) asserting a fourth patent in the family (the ‘961 Patent) - which the
6 district court found patent ineligible under § 101 and (2) informing the Court it
7 intends to assert the dependent claims of the ‘077 Patent – including claims this
8 Court already found invalid – and a fifth patent in the family (the ‘060 Patent) against
9 Domino’s and the other consolidated defendants.⁷ (See 11-cv-1810; ECF 1486,
10 Ameranth Notice of Supreme Court Order at 2-6).

11 **5. The Court Properly Found That Ameranth Took Inconsistent**
12 **Positions on Synchronization**

13 Finally, Ameranth fails in its effort to show a fourth alleged “manifest error”
14 in the Court’s analysis of Ameranth’s inconsistent positions on significant case
15 issues. Ameranth instead merely rehashes the same arguments from the underlying
16 motion, disagrees with the Court’s analysis of the facts, or improperly offers faulty,
17 never before raised arguments.

18 Ameranth principal argument is as follows:

19 Ameranth’s statements about synchronization were completely
20 consistent with the Court’s claim construction order, which defined
21 synchronize to mean “made, or configured to make, consistent.” Dkt.

22 *was appealing the PTAB decision.* (11-cv-1810; ECF 608-1 at 3). Ameranth only
23 later dropped the Federal Circuit appeal of the PTAB decision after defendants
24 opposed lifting the stay pending the Federal Circuit review of the PTAB decision –
25 Ameranth telling the Court it wanted to avoid more delay. (11-cv-1810; ECF 610 at
26 102).

27 ⁷ In addition to the ‘077 patent claims originally asserted against Domino’s
28 (claims 1, 6-9, 11 and 13-18) that this Court found patent-ineligible after a thorough
substantive analysis – a finding which the Federal Circuit affirmed – this Court also
found claims 4 and 5 to be patent ineligible. However, the Federal Circuit reversed
this finding – not on substantive grounds – but on the grounds that the Court did not
have jurisdiction over these claims because they were not asserted against Domino’s.

1 No. 908, p. 5. Importantly, the Court expressly rejected the defendants'
2 requests that the invention “instantaneously” push out all changes in the
3 master menu to “an entire network of connected devices without a
4 request for an update” so that they are “made to be the same.” *Id.* at pp.
5 5-7. Thus, neither this Court, nor the claims themselves, impose the
6 master menu “all connected devices” and “made to be the same”
7 limitations argued for by the defendants.

8 (ECF 142-1 at 19).

9 First, Ameranth again fails to describe the Court’s findings accurately. With
10 regard to what needs to be synchronized, this Court did not “expressly reject” in its
11 claim construction order the notion that “all connected devices” had to be “made to
12 be the same”. (11-cv-1810; ECF 908 at 5-7.) The Court was instead discussing
13 whether the term “real time” required that the synchronization be made
14 “instantaneously.” (*Id.*) The Court expressly stated that “[t]he claims themselves
15 identify what is to be synchronized or synchronous such that further explanation is
16 not necessary.” (*Id.* at 5).

17 Ameranth next attempts to reconcile the clearly inconsistent statements it
18 made about the scope of the claims depending on whether the issue was infringement
19 or invalidity. (ECF 142-1 at 20-23). However, as discussed at length in the
20 exceptional case briefing, when Ameranth discussed *the '077 claims'* scope in the
21 invalidity context, it asserted that the claims required that “everybody” (i.e., “all
22 connected users”) gets the same substantive menu.

23 ***So the synchronization aspect of these claims and as taught by the***
24 ***'077 means that everybody gets the same substantive menu.*** That is
25 not -- that is not -- what Cupps provides. Every user gets a different
26 menu based on the user's request and geolocation.

27 * * *

28 As I mentioned in my earlier remarks, the '449 [Cupps] Patent is a -- or
specification, rather, is a web-page-only invention that teaches away
from consistency. It actually ensures inconsistency across the different
devices because each user gets a different web page served up

1 depending upon their particular request and their particular geolocation.
2 **So instead of all connected users getting the same substantive menu**
3 **they each get a unique different menu based on their request and**
4 **their location.**

5 (11-cv-1810; ECF No. 1109-10 at 39-40) (emphasis added)⁸. In other words, in the
6 IPDEV proceeding, Ameranth asserted that Cupps did *not* disclose the
7 synchronization claimed in the '077 patent claims because all connected users did
8 *not* get the same menu, but instead got different menus depending on their particular
9 geolocation. Yet when infringement was the issue, Ameranth asserted that
10 Domino's ordering system infringed, even though, *just like Cupps*, all connected
11 users do not get the same menus, but instead get different menus depending on their
12 particular geolocation.⁹

13 Ameranth falsely asserts that it has never argued that the claims "require in
14 the context of multiple different restaurant locations with thousands of different
15 customers that the exact same master menu items be pushed out to every user's
16 handheld device in order for a system to be 'synchronous.'" (ECF 142-1 at 21). The
17 record is clear however, that Ameranth made that argument with regard to Cupps —
18 a system for multiple different restaurant locations. Regardless, Ameranth's
19 revisionist history about whether its comments concerned a "single" or a "multi-
20 location" restaurant system is irrelevant because the claims do not distinguish
21 between the two. This Court correctly found Ameranth's arguments to be red
22 herrings and its findings were properly based on Ameranth's inconsistent arguments

23 ⁸ See also 11-cv-1810; ECF No. 1109-10 at 15)(Synchronization is required
24 "not only between a particular individual user device and the master menu, but also
25 any other user device connected into the system; whether that is a front desk point
26 of sale system, the back office kitchen, or individual users."); (*Id.* at 13) ("[I]f you
27 make a change, if you update a menu item, if you remove one, if you add one, it gets
28 promulgated throughout *the entire system.*") (emphasis added).

⁹ This Court correctly stated that "Ameranth identified the accused system as
"Domino's Ordering System," not the system for any individual Domino's store.
(ECF 134 at 10). Indeed, in Domino's Ordering System, Ameranth pointed to a
single master database and single master menu for all Domino's store locations.

1 on the scope of the claims for the invalidity issue, when trying to save its patent, and
2 on the infringement issue, when trying to prove Dominos system fell within the
3 scope of the claims. (ECF 134 at 10).

4 Ameranth also argues, improperly for the first time on reconsideration, that
5 the Court improperly mashed different elements of the claims together when
6 concluding Ameranth took inconsistent positions. (ECF 142-1 at 22). Not only is
7 this new assertion false, but it is irrelevant because Ameranth argued — to save the
8 validity of the patent — that “*the synchronization aspect of these claims and as*
9 *taught by the ’077 means that everybody gets the same substantive menu.*” (11-
10 cv-1810; ECF No. 1109-10 at 39-40) (emphasis added). Moreover, Ameranth’s
11 assertion that claim 1 “requires only two different display-sized handheld devices
12 reflecting the same substantive data from the same restaurant master menu” is
13 incorrect. (ECF 142-1 at 22). The claim is directed to a “synchronous system.” The
14 claim requires synchronization both between the master menu and the PHMC and
15 between the PHMC and the handheld devices. Ameranth similarly misrepresents
16 claim 13, asserting it does not contain the master menu elements of claim 1. (*Id.*)
17 However, Ameranth told the PTAB the exact opposite — that although claim 13
18 does not contain the term “menu,” claim 13 clearly refers to a menu.

19 The term [PHC] excluded “menu” as to claim 13, but clearly has the
20 same meaning as in claims 1 and 9, as is clear from claim 13 as a whole,
21 including recitation of a master database including a “master database
22 file structure” from which the handheld configuration is built, as well
23 as the recitation of “for display as cascaded sets of linked graphical user
interface screens,” which is clearly a multi-level menu configuration.

24 (11-cv-1810; ECF 1109-7, CBM 2015-00081 PO Resp. at 23, fn. 34.)

25 Because Ameranth fails to identify any “manifest error,” but simply disagrees
26 with the Court’s finding, Ameranth’s motion for reconsideration should be denied.

1 **D. Ameranth’s Request for Interlocutory Appeal Highlights Its Intent to**
2 **Delay**

3 Ameranth’s alternative request for an interlocutory appeal of this Court’s
4 exceptional case finding is baseless. An interlocutory appeal would not “materially
5 advance the ultimate termination of the litigation.” 28 U.S.C. § 1292(b). Indeed, all
6 that remains is a ruling on the amount of fees/costs/interest. Thus, such as appeal
7 will serve to further delay the award of attorneys’ fees, which is clearly Ameranth’s
8 intent.

9 Because “Section 1292(b) is a departure from the normal rule that only final
10 judgments are appealable, ... [it] therefore must be construed narrowly.” *James v.*
11 *Price Stern Sloan, Inc.*, 283 F.3d 1064, 1067 n.6 (9th Cir. 2002). The Ninth Circuit
12 has cautioned that section 1292(b) “is to be applied sparingly and only in exceptional
13 cases.” *United States v. Woodbury*, 263 F.2d 784, 799 n.11 (9th Cir. 1959); see
14 *James*, 283 F.3d at 1067 n.6 (interlocutory appeals are limited to “rare
15 circumstances”); *In re Cement Antitrust Litig.*, 673 F.2d 1020, 1026 (9th Cir. 1982)
16 (exceptional situations are those where an interlocutory appeal would avoid
17 protracted and expensive litigation).

18 A district court may certify an order for interlocutory appeal only if all of the
19 following three statutory requirements are satisfied: (1) the issue to be certified must
20 involve a “controlling question of law”; (2) there must be “substantial ground for
21 difference of opinion” on the issue; and (3) it must be likely that an interlocutory
22 appeal will “materially advance the ultimate termination of the litigation.” 28 U.S.C.
23 § 1292(b); see *Sullivan v. Kelly Servs., Inc.*, No. C 08-3893 CW, 2010 WL 1445683,
24 at *1 (N.D. Cal. Apr. 7, 2010); *Matsunoki Grp., Inc. v. Timberwork Or., Inc.*, No. C
25 08-04078 CW, 2011 WL 940218, at *2 (N.D. Cal. Feb. 18, 2011). The party seeking
26 the interlocutory appeal bears the burden of meeting these statutory requirements.
27 See *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 475 (1978) (superseded on other
28 grounds, *Microsoft Corp. v. Baker*, 137 S. Ct. 1702 (2017)).

1 Ameranth ignores the standard for granting an interlocutory appeal because it
2 cannot possibly meet it. Ameranth identifies no controlling question of law
3 (requirement 1), so there necessarily is no “substantial ground for difference of
4 opinion” on the issue (requirement 2). On the contrary, Ameranth repeatedly attacks
5 the Court’s *fact* findings, delves into the record – e.g., whether the settlements were
6 “favorable” and “substantial,” whether any purported reliance by Ameranth was
7 reasonable, among others.

8 Nor can Ameranth demonstrate an interlocutory appeal will “materially
9 advance the ultimate termination of the litigation” (requirement 3). 28 U.S.C.
10 § 1292(b). A district court should not permit an interlocutory appeal where doing
11 so would prolong litigation rather than advance its resolution. See *Fenters v.*
12 *Yosemite Chevron*, 761 F.Supp.2d 957, 1005 (E.D. Cal. 2010). Indeed, the case is
13 over. Domino’s counsel could not find a single case in which an interlocutory appeal
14 was granted after judgment was entered and all that remained was a fee award
15 determination.

16 Ameranth’s request for interlocutory appeal is troubling. Ameranth is clearly
17 attempting to delay a judgment requiring it to pay Domino’s its attorneys’ fees and
18 costs. It has already delayed the exceptional case briefing twice during appeals and
19 it seeks to do it a third time. Domino’s is concerned that Ameranth is using the delay
20 to squander funds it could use to satisfy the judgment against Domino’s. Indeed,
21 Domino’s has no doubt that if Ameranth were allowed to appeal prior to an award
22 of fees, that when fees were ultimately awarded after yet another Federal Circuit
23 affirmance, Ameranth would appeal the amounts of the fees award again to the
24 Federal Circuit.

25 III. CONCLUSION

26 For the foregoing reasons, this Court should deny Ameranth’s motion for
27 reconsideration.
28

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2 Dated: March 26, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

1
2 The undersigned certifies that counsel of record who are deemed to have
3 consented to electronic service are being served on March 26, 2021, with a copy of
4 this document via the Court’s CM/ECF system per Local Rules. Any other counsel
5 will be served by electronic mail, facsimile, overnight delivery and/or first class mail
6 on this date.

7
8 By: /s/ Thomas W. Cunningham
9 Thomas W. Cunningham

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