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

22 IPDEV CO.,
23 Plaintiff, and
24 Counterclaim-
25 Defendant
26 v.
27 AMERANTH, INC.,
28 Defendant, and
 Counterclaimant.

LEAD CASE NO. 3:11-cv-01810-
DMS-WVG

CASE NO. 3:14-cv-01303-DMS-
WVG

**IPDEV’S RESPONSIVE CLAIM
CONSTRUCTION BRIEF**
[Patent Local Rule 4.4]

Date: December 11, 2017
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Location: Courtroom 13A
Judge: Hon. Dana M. Sabraw

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1 **I. INTRODUCTION**

2 Ameranth, Inc. (“Ameranth”) and the Joint Defense Group (“JDG”) offer
3 claim constructions that contradict the plain claim language and the specification of
4 U.S. Patent No. 8,146,077 (“the ’077 patent”). Conversely, the claim constructions
5 proposed by IPDEV Co. (“IPDEV”) are most closely aligned with the disclosure in
6 the ’077 patent, as well as its prosecution history and the extrinsic evidence, and
7 should be adopted by the Court.

8 **II. THE ALLEGED “SOFTWARE” ELEMENTS**

9 The JDG contends that “menu configuration software” and “communications
10 control software” are means-plus-function claim elements that must be construed
11 pursuant to 35 U.S.C. § 112, ¶ 6. Dkt. 866 at 4-10.¹ As IPDEV explained in its
12 Opening Brief, the term “software” connotes structure sufficient to remove these
13 claim elements from the purview of 35 U.S.C. § 112, ¶ 6. Dkt. 868 at 10.
14 Moreover, the claims recite acts the software must perform, the hardware required
15 to perform these functions, and the type of data stored for generation of menus,
16 counseling against applying 35 U.S.C. § 112, ¶ 6. The specification of the ’077
17 patent further assists in defining structure for one skilled in the art and expert
18 testimony likewise favors a finding that 35 U.S.C. § 112, ¶ 6 does not apply. *Id.* at
19 10-13; *see also* Dkt. 868-5 at 9-14, 24-27; Ex. 1 at 81:13-82:9, 92:16-22, 94:9-13;
20 Dkt. 865-19 at ¶¶ 47-55, 73-78; Ex. 2 at 136:14-138:20, 140:6-22, 154:15-23,
21 156:9-19.

22 In its Opening Brief, the JDG implies that the Federal Circuit’s decision in
23 *Williamson v. Citrix Online, LLC*, 792 F.3d 1339 (Fed. Cir. 2015) significantly
24 changed the landscape for determining whether 35 U.S.C. § 112, ¶ 6 applies. *See*
25

26 ¹ Congress amended 35 U.S.C. § 112, ¶ 6 in 2011, restructuring its subsections; the
27 section now numbered as 112(f) was previously numbered as 112(6). However,
28 this had no substantive effect on the applicable law. *See, e.g., Media Rights Techs, Inc. v. Capital One Fin. Corp.*, 800 F.3d 1366, 1371, n1 (Fed. Cir. 2015).

1 Dkt. 866 at 4-7. Although *Williamson* retreated from the “heavy” presumption that
2 claims lacking the term “means” do not invoke 35 U.S.C. § 112, ¶ 6, it did not
3 otherwise alter the underlying inquiry. *See Williamson*, 792 F.3d at 1348-49.
4 Indeed, courts “should still use *pre-Williamson* Federal Circuit caselaw in
5 analyzing whether disputed terms convey sufficiently definite structure to a skilled
6 artisan.” *Triplay, Inc. v. Whatsapp, Inc.*, 13-1703, 2016 WL 3574012, at n7 (D.
7 Del. June 30, 2016); *see also, e.g., In re Neurografix*, 201 F.Supp.3d 206, 215 (D.
8 Mass. 2016) (while the presumption changed, “the ‘sufficient structure’ standard
9 for means-plus-function terms is nothing new”). Courts are still instructed to
10 presume that claim terms that do not recite the word “means” are not drafted in
11 means-plus-function format. It is not until after a limitation has already been found
12 to be drafted in means-plus-function format that the Court is to consider if “the
13 specification discloses sufficient structure that corresponds to the claimed
14 function.” *See Williamson*, 792 F.3d at 1351. Indeed, while the Federal Circuit has
15 required patentees who draft software claims in mean-plus-function format to
16 disclose the particular algorithms that implement those claims, non-means-plus-
17 function claims are not subject to those constraints. *See, e.g., WhitServe, LLC v.*
18 *GoDaddy.com, Inc.*, 65 F.Supp.3d 317, 320 (D. Conn. 2014). Moreover,
19 “[f]unctional language may also be employed to limit the claims without using the
20 means-plus-function format.” *Microprocessor Enhancement Corp. v. Texas*
21 *Instruments, Inc.*, 520 F.3d 1367, 1375 (Fed. Cir. 2008).

22 The JDG relies primarily on *Finisar Corp. v. DirectTV Group, Inc.*, 523 F.3d
23 1323 (Fed. Cir. 2008) and *Advanced Ground Info. Sys., Inc. v. Life360, Inc.*, 9:14-
24 cv-806510DMM, 2014 WL 12652322 (S.D. Fla. Nov. 21, 2014) in support of its
25 argument that “software” is a nonce word that operates as a substitute for “means.”
26 *See* Dkt. 866 at 6. These cases, however, are readily distinguishable. Particularly,
27 the claim term at issue in *Finisar* expressly recited the term “means,” thus falling
28 within the purview of 35 U.S.C. § 112, ¶ 6, and apparently the parties did not

1 dispute this categorization. *Finisar Corp.*, 523 F.3d at 1340. As a result, the
2 Federal Circuit merely addressed the second step of the mean-plus-function
3 analysis—whether the specification disclosed sufficient structure corresponding to
4 the “means” limitation. *See id* at 1340-41. In this case, however, the claims do not
5 recite the term “means,” and the JDG cannot overcome the presumption that 35
6 U.S.C. § 112, ¶ 6 does not apply. *See* Dkt. 868 at 8-13, 23-25. Likewise, the
7 JDG’s reliance on *Advanced Ground* is misplaced. In *Advanced Ground*, the court
8 determined that neither the patent claims nor the specification provided guidance as
9 to the meaning of the term “CPU software for.” *See Advanced Ground*, 2014 WL
10 12652322 at *7. Specifically, the claim term at issue was not further defined
11 anywhere in the remainder of the claim; the claim merely recited “CPU software for
12 selectively polling other participants with a cellular telephone”—and nothing more.
13 *Id.* In stark contrast, the claims of the ’077 patent recite numerous acts the “menu
14 configuration” and “communications control” software must perform, rendering the
15 *Advanced Ground* case readily distinguishable. *See* Dkt. 868 at 11-12, 24.

16 As explained in IPDEV’s Opening Brief, and in direct contrast to the cases
17 cited by the JDG, several courts specifically addressing whether the term
18 “software” connotes sufficient structure in the context of 35 U.S.C. § 112, ¶ 6 have
19 determined that “software” is *not* a nonce word, but rather “a noun with a specific
20 structural meaning, defining the set of coded instructions and programs governing
21 the operation of computer hardware.” *WhitServe*, 65 F.Supp.3d at 321; *see also*
22 *Affinity Labs of Texas, LLC v. Samsung Elecs. Co.*, 1:12-cv-557, 2014 WL
23 12605382, at *5 (E.D. Tex. June 4, 2014) (“software is a structure-connoting term
24 to one of skill in the art”); *RLIS, Inc. v. Allscripts Healthcare Solutions, Inc.*,
25 3:12-cv-209, 2013 WL 3772472, at *14-16 (S.D. Tex. July 16, 2013) (“Viewed in
26 the context of the claim language, the [software] terms at issue are more than just
27 nonce words”). Unlike *Finisar* and *Advanced Ground*, these cases thoroughly
28 analyzed the issue and in some instances relied upon extrinsic evidence, such as

1 dictionaries, to reach the correct conclusion. *See, e.g., WhitServe*, 65 F.Supp.2d at
2 321-22 (*citing American Heritage Dictionary 1652* (4th ed. 2000) (“The programs,
3 routines, and symbolic languages that control the function of the hardware and
4 directs its operation.”); *The New Merriam–Webster Dictionary* 685 (1989) (“[T]he
5 entire set of programs, procedures, and related document associated with a system;
6 especially computer program.”)).

7 Notwithstanding the JDG’s locus, IPDEV does not solely rely on its position
8 that the prefixes “menu configuration” and “communications control” alone provide
9 sufficient structure to remove the term “software” from the ambit of 35 U.S.C. §
10 112, ¶ 6. *See* Dkt. 866 at 6. Specifically, this is not a circumstance where the
11 inventors simply recited the term “software” without additional claim language
12 delineating the acts this software performs to accomplish its function. Rather,
13 claims 1, 9 and 13 of the ’077 patent expressly recite the numerous acts that the
14 “software” must perform, providing sufficiently definite structure to the terms
15 “menu configuration software” and “communications control software.” *See* Dkt.
16 868 at 11-12, 24; *see also, e.g., Apple, Inc. v. Motorola, Inc.*, 757 F.3d 1286, 1296-
17 1301 (Fed. Cir. 2014) (claim language disclosing claim term’s operation within the
18 context of the invention precludes application of §112, ¶6). Specifically, as
19 articulated in IPDEV’s Opening Brief, the claims describe how the “menu
20 configuration software” and “communications control software” elements interact
21 with the other claimed components in a manner that informs the structural character
22 of these limitations. Dkt. 868 at 11-12, 24; *see also Inventio AG v. ThyssenKrupp*
23 *Elevator Americas Corp.*, 649 F.3d 1350, 1358-60 (Fed. Cir. 2011) (contextual
24 language in the claims describing operation of claim element provides limiting
25 structure removing claim term from the ambit of §112, ¶6). Moreover, both the
26 specification and extrinsic evidence expand on these structural connections,
27 reinforcing the fact that one skilled in the art would understand that the terms
28 “menu configuration software” and “communications control software” denote

1 sufficient structure. *See* Dkt. 868 at 12-13, 24-25; Dkt. 868-5 at 9-14, 24-27; Ex. 1
2 at 81:13-82:9, 92:16-22, 94:9-13; Dkt. 865-19 at ¶¶ 48-55, 74-78; Ex. 2 at 136:14-
3 138:20, 140:6-22, 154:15-23, 156:9-19.

4 **III. “REAL TIME SYNCHRONIZATION” TERMS**

5 The specification of the '077 patent instructs one skilled in the art that “real
6 time synchronization” need not be “instantaneous” and that “periodic updates” are
7 contemplated, and contrary to the JDG’s understanding, the prosecution history of
8 the '077 patent does not compel a different result. *See* Dkt. 868 at 21-22. While
9 IPDEV does not dispute that Ameranth disavowed claim scope during prosecution,
10 this disavowal was not unequivocally attributable to the “real time synchronous”
11 term. *See, e.g., 3M Innovative Properties Co. v. Tredegar Corp.*, 725 F.3d 1315,
12 1326 (Fed. Cir. 2013) (“Where an applicant’s statements are amenable to multiple
13 reasonable interpretations, they cannot be deemed clear and unmistakable.”).
14 Unsurprisingly, while the prosecution history can inform whether the inventor
15 limited the claim scope in the course of prosecution, it often produces ambiguities
16 created by ongoing negotiations between the inventor and the PTO. *See Abbott*
17 *Labs v. Sandoz, Inc.*, 566 F.3d 1282, 1289 (Fed. Cir. 2009). Accordingly, the
18 doctrine of prosecution disclaimer only applies to unambiguous disavowals. *Id.*
19 The JDG mischaracterizes what occurred during the prosecution of the '077 patent,
20 cropping portions of arguments made by the inventors and taking them out of
21 context. *See* Dkt. 866 at 11. As articulated below, ambiguities abound and there
22 was no unmistakable disavowal surrounding the scope of “real time synchronous
23 communications” during the prosecution of the '077 patent.

24 Specifically, in the May 28, 2008 Reply and Amendment, the applicants of
25 the '077 patent (“Applicants”) amended the claims, adding numerous limitations,
26 including adding “master menu,” “master menu file structure,” and “in real time” to
27 various claims. *See* Dkt. 866-3 at 2, 6, 8. Prior to particularizing its arguments,
28 Applicants cautioned that “Applicants do not acquiesce to the characterizations of

1 the references made in the Office Action.” *Id.* at 11. Applicants then prefaced their
2 arguments, explaining that they “conceived a system which ensured that all of the
3 disparate components of the system could process, display and/or interact with the
4 same information or data, while synchronously maintaining data consistency across
5 the entire system.” *Id.* at 12. As articulated below, the focus of the arguments
6 proffered during the prosecution of the ’077 patent surrounded generating the
7 display from the “master menu” to conform with the display characteristics of the
8 handheld computing device, and assuring consistency of data transmission
9 throughout the system. Not once did Applicants argue that “real time synchronous”
10 requires “instantaneous” changes or that data could not be “pulled.”

11 For example, in distinguishing the Kinebuchi reference, applicants stressed
12 the “different display/size characteristics” of the claimed invention, arguing that
13 “Kinebuchi merely deals with point-to-point non-synchronous communications of
14 the same menu to additional components of the system [and] [t]here is no
15 appreciation in Kinebuchi of synchronous generation and transmission of a second
16 menu from a master menu, by leveraging parameters in the database as presently
17 claimed.” *Id.* at 20. (*emphasis in original*). Applicants elaborated on their
18 position, arguing that “‘point-to-point’ communications [] do not equate to
19 synchronization, and most certainly do not equate to nor suggest the
20 synchronization of hospitality information in real-time on disparate nodes and
21 device types having very different display and user interface characteristics.” *Id.* at
22 19-20. Applicants concluded by noting that “[s]imply updating a database once at
23 the start of each day as disclosed by Kinebuchi is not a description nor suggestion
24 of the claimed connected and synchronized system.” *Id.* (*emphasis in original*).
25 Hence, the applicants distinguished Kinebuchi based on the fact that it did not
26 “address the unique challenges of formatting non-standard user interfaces for the
27 small display screens of mobile handheld devices nor the internet/web” and because
28 it merely disclosed synching data when the system was not in use, and thus was not

1 “synchronous.” *Id.* at 19-20. There is nothing in this portion of the prosecution
2 history supporting the JDG’s position that “Ameranth argued that Kinebuchi failed
3 to disclose ‘real time’ synchronization because it did not disclose *instantaneously*
4 updating multiple system components.” Dkt. 866 at 12. *See, e.g., Grober v. Mako*
5 *Prods, Inc.*, 686 F.3d 1335, 1341-42 (Fed. Cir. 2012) (statements that do not
6 unambiguously focus on the particular characteristic at issue do not constitute a
7 disavowal). In fact, the word “instantaneously” does not appear anywhere in this
8 Response and Amendment. *See* Dkt. 866-3.

9 Similarly, in a subsequent Response to an Office Action dated December 15,
10 2008, Applicants argued that “Olewicz does not teach or suggest a real time,
11 synchronous menu/ordering system.” Dkt. 866-4 at 17. According to Applicants,
12 Olewicz “admitted that the ordering devices do not ‘know’ whether the items
13 sought to be ordered from the menu are available [and] the waiter will know
14 immediately after sending the order if the food ordered is still available.” *Id.*
15 Applicants explained that “[t]he salient word is ‘after’ (which means that the menu
16 presented to the waiter is not generated synchronously in real time *from a master*
17 *menu file structure* on a central database).” *Id.* at 17-18 (*emphasis added*).
18 Applicants subsequently provided context to this argument, noting that
19 “[c]ompiling real time data’ as described by Olewicz merely refers to the storing of
20 data as it is created, which is entirely different from generating and transmitting
21 custom, ‘second menu’ displays throughout a synchronized system in real time.”
22 *Id.* at 20. One skilled in the art reading this portion of the prosecution history
23 would understand that the distinction made by Applicants was the failure of
24 Olewicz to account for the generation of the “second menu” from a “master menu
25 file structure” for transmission and display on devices having disparate display
26 sizes, and that “real time synchronization” does not encompass connected devices
27 that do not reflect the current status of the menu items. Again, Applicants did not
28 use the word “instantaneously” anywhere when distinguishing the Olewicz

1 reference, and one skilled in the art would not interpret Applicants’ arguments to
2 require “instantaneous” transmission of data, understanding that periodic updates to
3 the remote devices was contemplated. *See, e.g., i4i Ltd. P’ship v. Microsoft Corp.*,
4 598 F.3d 831, 843 (Fed. Cir. 2010) (“In evaluating whether a patentee has
5 disavowed claim scope, context matters.”).

6 Finally, in this same Response, Applicants addressed the Angwin reference,
7 which the Examiner cited “as teaching aspects of the recitations in [the then-
8 pending claims] directed to the formatting of the ‘second menu’ for display on the
9 GUI of a wireless handheld computing device.” Dkt. 866-4 at 22. Applicants
10 argued that “the menus referred to by Angwin are not hospitality ‘second menus’
11 for use on a handheld device which are synchronously generated from a master
12 menu file structure,” and explained that “[t]he menu screens of the ‘second menu’
13 as presently claimed are generated specifically to satisfy the specialized display
14 constraints of the handheld display screen.” *Id.* at 23-24. After a lengthy
15 discussion of why the Angwin reference fails to disclose the claimed “second
16 menu,” Applicants further distinguished it by noting in passing that in “the
17 presently-claimed synchronous real time system, no such ‘request services menu’
18 message ever needs to be sent, since all linked devices are always synchronized
19 with each other.” *Id.* at 26. Applicants characterized Angwin as disclosing “a cell
20 phone network services type system” that had a “menu of services [that] may
21 change from session to session,” thus “teach[ing] away from the presently-claimed
22 invention directed to a master database driven system in which a change in any
23 element of the system is synchronously reflected in all system elements.” *Id.* One
24 skilled in the art would interpret this disclosure to be limiting the scope of the
25 “second menu for display on the GUI” and not for the proposition that “real time
26 synchronous” communication excludes the concept of “pulling” data. *See, e.g.,*
27 ’077 Patent, Col. 2:27-31; 5:11-15 (“batch processing [] can be done periodically
28 throughout the day to keep multiple sites in synch with the central database”). The

1 passages relied on by the JDG do not approach the level of “clear and unequivocal”
2 needed before prosecution history can operate to extinguish subject matter
3 otherwise within the claims. *See, e.g., Aria Diagnostics, Inc. v. Sequenom, Inc.*,
4 726 F.3d 1296, 1302 (Fed. Cir. 2013).

5 The claim language and specification generally carry greater weight than the
6 prosecution history “because the prosecution history represents an ongoing
7 negotiation between the PTO and the applicant, rather than the final product of that
8 negotiation.” *Philips v. AWH Corp.*, 415 F.3d 1303, 1317 (Fed. Cir. 2005).
9 Accordingly, “it often lacks the clarity of the specification and thus is less useful for
10 claim construction purposes.” *Id.* This is the case here, as there was no clear and
11 unmistakable disavowal of claim scope surrounding the term “real time
12 synchronous” during the prosecution of the ’077 patent.

13 **IV. “CASCADED SETS OF LINKED GUI SCREENS”**

14 The JDG contends that the term “cascading sets of linked graphical user
15 interface screens” must include “overlapping and offset” portions. Dkt. 866 at 20-
16 23. The JDG’s position, however, is based entirely on extrinsic evidence and
17 conspicuously fails to substantively address the disclosure in the ’077 patent for
18 support of its proposed construction. *Metabolite Labs., Inc. v. Lab. Corp. of Am.*
19 *Holdings*, 370 F.3d 1354, 1360 (Fed.Cir.2004) (“In most cases, the best source for
20 discerning the proper context of claim terms is the patent specification wherein the
21 patent applicant describes the invention.”); *see also Philips*, 415 F.3d at 1315.
22 Conversely, IPDEV’s construction is primarily based on, and is strongly supported
23 by, the disclosure in the ’077 patent. *See* Dkt. 868 at 6-7.

24 Specifically, the JDG relies on “cascading windows” from the Windows[®]
25 Operating System in use in 1999. Dkt. 866 at 21. “Cascading *windows*,” however,
26 are not analogous to the “cascading *screens*” described in the specification of the
27 ’077 patent. *See, e.g.,* Dkt. 868 at 6-7. For example, the inventors explained that a
28 “PDA or Web page format could appear like FIG. 7” which is “a page menu

1 displayed in a catalogue-like point-and-click format.” ’077 Patent, Col. 11:33-38.
 2 Figure 7 illustrates an exemplary embodiment of the “cascaded sets” of linked GUI
 3 screens and plainly does not incorporate the “overlapping” requirement proposed
 4 by the JDG. Ex. 2 at 212:16-213-8, 213:23-214:20. Indeed, to move from one
 5 linked GUI to another, the user clicks on “MAIN” or “PREV” under the
 6 “Direction” section of the GUI, s/he does not click on an “overlapping” screen. *Id.*
 7 *See also* Dkt. 865-19 at ¶¶ 81-84.

8 Moreover, adopting the JDG’s proposed construction would lead to an
 9 incomprehensible construction of the claimed invention. Specifically, claim 1 of
 10 the ’077 patent recites that “said master menu is capable of being configured for
 11 display to facilitate user operations in *at least one window* of said first graphical
 12 user interface *as cascaded sets* of linked graphical user interface screens.” ’077
 13 Patent, Col. 15:67-Col. 16:4 (*emphasis added*). Accordingly, adopting the JDG’s
 14 proposed construction would in essence require claim 1 to incorporate “at least one
 15 window containing a series of overlapping windows.” Such a construction is not
 16 rational and does not comport with how one skilled in the art would interpret this
 17 claim term.

18 V. CONCLUSION

19 For the foregoing reasons, IPDEV respectfully requests the Court to adopt its
 20 proposed claim constructions, as they comport with the specification, the
 21 prosecution history, and with how one skilled in the art at the time of the invention
 22 would construe them.

23
 24 Dated: November 3, 2017

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