

Time To Stop 'Post-Alice Bedlam,' Ameranth Urges Justices

By [Craig Clough](#) · [Listen to article](#)

Law360 (May 23, 2022, 9:49 PM EDT) -- [Ameranth Inc.](#), whose online menu patents were found invalid under Alice, told the [U.S. Supreme Court](#) on Friday that restaurant software company Olo Inc. is "oblivious" to the reality of the "post-Alice bedlam" by opposing its bid for certiorari or coordination with [American Axle & Manufacturing Inc.](#)'s widely watched high court bid over patent eligibility.

In a reply brief to the high court, Ameranth said opposition by Olo to coordinating the case [with American Axle's](#) ignores the extreme similarities between the two and the chaos the Alice decision has created.

"Respondent's opposition brief is oblivious to this reality," Ameranth said. "So long as the existing doctrinal paralysis in the lower courts produced a result favorable to it, respondent is content to prolong the chaotic status quo."

The company added that Olo's brief "offers no meaningful response to the overwhelming calls for this court to address the post-Alice bedlam. Respondent instead offers an amalgam of brief-in-opposition platitudes that have no application to this case."

The decisions in both American Axle and Ameranth turned on readings of the Alice decision, which found the patents involved covered inventions ineligible for patent protection under Section 101 of the Patent Act. The Alice decision created a two-part legal test for judges to use when making rulings on patent eligibility.

U.S. District Judge Leonard Stark of the District of Delaware in 2020 dismissed Ameranth's case against Olo, a New York startup that made its debut on the New York Stock Exchange last year. Ameranth alleged Olo infringed U.S. Patent No. [9,747,651](#) for online menu technology, one of at least 40 infringement lawsuits the company filed in recent years against companies including [Domino's Pizza](#), [Pizza Hut Inc.](#), [Papa John's](#)

[USA](#) and [GrubHub Inc.](#)

After Judge Stark found the patent invalid, the Federal Circuit affirmed the decision the following year.

In March, Ameranth [asked the high court](#) to review the case or at least coordinate it with American Axle's, which is an appeal from a sharply split ruling from the full Federal Circuit over the eligibility of a driveshaft patent.

The high court is notably still waiting for the federal government to offer its take on the American Axle case after the justices requested it [almost a year ago](#). It's the only case from that session that the solicitor general's office has yet to deliver a requested opinion on, and, in that time, [numerous companies](#) have pegged their appeals on the case.

Ameranth is the project of a man named Keith McNally, who had left his job as a designer for the defense contractor Litton Industries in the 1990s in order to sell technology related to an idea his petition called a "new and useful intelligent automated assistant."

In its reply brief, Ameranth tried to convince the high court to take another look at the Alice decision.

"After rejecting all prior pleas to clarify the Alice test, this court should perceive why the situation is now materially different," Ameranth said. "The bridge to the technological future is crumbling under the Federal Circuit's chaotic deadlock. Quibbling over which vehicle will traverse the abyss forestalls the cure that only this court can provide."

Ameranth also said the Federal Circuit's 6-6 split on the American Axle case shows the importance of clarification from the high court, quoting the ruling as saying its judges "are at a loss as to how to uniformly apply [Section] 101 ... There is very little about which all twelve of us are unanimous, especially when it comes to [Section] 101. We are unanimous in our unprecedented plea for guidance."

Ameranth also said that Olo is off base to argue that Ameranth did not identify any issue worth a review in the case.

"The same district court judge granted judgment against Ameranth and American Axle in

their respective cases," Ameranth said. "In both cases, the district judge misunderstood the Alice standard of an 'inventive concept' in the same way. Under Alice, a claim is eligible if it involves more than the performance of 'well-understood, routine, [and] conventional activities previously known to the industry.'"

In an email to Law360, McNally said: "Surely, the [solicitor general] has to file their brief soon, and well, one way of looking at this situation is that the irresistible force of five years of continual pleadings for the [Supreme Court] to clarify Alice — are up against the immovable object [of] the Supreme Court, having turned down 60+ cert petitions over the last five years."

Counsel for Olo did not immediately respond to a request for comment.

The patent-in-suit is U.S. Patent No. 9,747,651.

Ameranth is represented by Jerrold J. Ganzfried of Ganzfried Law and Robert F. Ruyak of [RuyakCherian LLP](#).

Olo is represented by Heidi Keefe at [Cooley LLP](#).

The case is Ameranth Inc. v. Olo Inc., case number [21-1228](#), at the U.S. Supreme Court.

--Additional reporting by Andrew Karpan, Elise Hansen and Ryan Davis.