



VIA CM/ECF

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September 18, 2020

The Honorable Leonard P. Stark
U.S. District Court for the District of Delaware
844 N. King Street
Wilmington, DE 19801

Re: *Ameranth, Inc. v. Olo Inc.*, C.A. 1:20-cv-518-LPS

Dear Judge Stark:

Plaintiff Ameranth, Inc. ("Ameranth") submits this letter opposing Defendant Olo Inc.'s request for leave to file a supplemental letter. (D.I. 20.) Ameranth's Complaint only asserts claims 1, 3, 6, and 11 of U.S. Patent No. 9,747,651 (the "Asserted Claims"). (D.I. 1 at ¶ 25.) The Complaint *does not* assert "at least" these claims, and Defendant did not file a counterclaim seeking declaratory judgment of any claims of the '651 patent.

The Federal Circuit's opinion in *Ameranth, Inc. v. Domino's Pizza, LLC*, 792 Fed. Appx. 780 (Fed. Cir. 2019) – which currently is the subject of a petition for writ of certiorari set for Conference on September 29, 2020 before the U.S. Supreme Court and anticipated ruling on October 5, 2020 – demonstrates that for the court to have jurisdiction over a patent claim in a patent asserted by a plaintiff, (1) a complaint must actually assert the patent claims or (2) if a plaintiff asserts but does not formally withdraw any of the asserted patent claims and the defendant filed a counterclaim seeking a declaratory judgment that all of the patent's claims are invalid, only then would the court maintain subject matter jurisdiction over all of the asserted claims. *Id.* at 783-84. Here, Ameranth's September 16, 2020 letter merely identifying an alternative reason for the Court to deny Defendant's Motion to Dismiss is to "*permit* Ameranth to amend its Complaint and to assert additional claims 4, 9, and 10, based on two new products and integrations Defendant announced on September 3 and 10, 2020, after the Court scheduled oral argument, and thus to assert indirect infringement and willfulness, before deciding a motion to dismiss." (D.I. 19 at 3 (emphasis added).) This statement seeking *permission* is not the same as Ameranth's having filed an amended complaint and in so doing having its due process right to fully defend the validity of the new claims. There was insufficient time prior to the September 16, 2020 date for Ameranth to have filed its amended complaint.

While Ameranth intends to amend its Complaint by September 25, 2020, until such time as either the parties stipulate to an amended complaint and the Court grants the stipulation or Ameranth files an opposed motion seeking leave to amend and the Court grants it, the only claims presently before the Court are the Asserted Claims – claims 1, 3, 6, and 11 of the '651 patent. After the Complaint is amended, claims 4, 9, and 10, would require further additional briefing. Ameranth raised this issue with Defendant and while Defendant does not wish to move the hearing on its Motion to Dismiss, continuing the hearing may be the more prudent option so that the Court

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has before it a complaint that puts into controversy all claims that may be at issue in this case and full briefing on all of those claims before deciding a motion to dismiss. In the event the Court grants Defendant's request for leave filed today, Ameranth hereby requests leave to file a response to Defendant's letter, pending the filing of Ameranth's amended complaint.

Respectfully,

/s/ Richard C. Weinblatt

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Counsel for Plaintiff
Ameranth, Inc.

cc: All Registered Counsel (via CM/ECF)