UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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Agilysys, Inc. *et al.*

Petitioner

v.

Ameranth, Inc.

Patent Owner

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Petition No. CBM2014-00016
Patent No. 6,871,325

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PETITIONER'S REPLY TO AMERANTH'S OPPOSITION TO PETITIONER'S MOTION TO RECONSTITUTE PETITIONER TO EXCLUDE APPLE INC. UNDER 37 C.F.R. § 42.20

I.   INTRODUCTION

In its Opposition to Petitioner's Motion to Reconstitute (Paper 16), Ameranth, Inc. ("Ameranth") neither disputes that Petitioner was unaware of the Board's requirement of proceeding with a single lead counsel nor identifies any reason why Petitioner should have been aware of this requirement. Additionally, Ameranth's claimed procedural barriers to granting the relief requested in the Motion to Reconsitute (Paper 15) are illusory. In arguing such alleged barriers, Ameranth ignores provisions in the rules that both allow the Board to determine a proper course of conduct for situations not specifically covered in the rules and also give the Board discretion to waive or suspend any rule when appropriate. Moreover, Ameranth's claims of prejudice as a result of being "required" to file two sets of reponses to identical petitions filed by Apple are likewise illustory because Ameranth does not explain why its preliminary responses could not also be identical. To the contrary, the Board can put procedures in place to prevent any undue prejudice to the patent owner in joined proceedings. Meanwhile, Ameranth's proposal only seeks to impose unnecessary estoppel on Apple Inc. ("Apple") and preclude Apple from proceeding with a counsel of its own choosing. Therefore, Petitioner respectfully requests the Board grant its Motion and permit Apple to file identical petitions and requests to join these proceedings.

II. ARGUMENT

A. There Is No Procedural Barrier to Granting Petitioner's Motion.

Ameranth's Opposition relies on a perceived lack of a provision in the rules

governing this Covered Business Method ("CBM") review that would allow the

Board to grant the relief requested in the Motion to Reconstitute Petitioner.

However, this argument ignores 37 C.F.R. § 42.5(a), which provides that the

"Board may determine a proper course of conduct in a proceeding for any situation

not specifically covered by this part," and 37 C.F.R. § 42.5(b), which provides that

the "Board may waive or suspend a requirement of parts 1, 41, and 42 and may

place conditions on the waiver or suspension." Thus, this clear language in the

rules provides a sound basis for the relief requested in Petitioner's Motion.

B. Ameranth Does Not Dispute That Petitioner Did Not Know of the Single-Counsel Requirement.

Importantly, Ameranth does not dispute that Petitioner, including Apple, did

not know of the requirement for a single lead counsel to represent all parties to the

original Petitions. Additionally, Ameranth does not argue or cite to any authority

for the proposition that Petitioner should have known of such requirement prior to

filing the original Petitions. Therefore, particularly in light of the prior precedent

in IPR2013-00026, in which multiple lead counsel for multiple petitioners were

permitted, the single-counsel requirement was contrary to Petitioner's good-faith

expectations. Under these circumstances, Petitioner respectfully submits that

permitting Apple to proceed with its own counsel as Apple would have proceeded

had it known of the single counsel requirement is reasonable.

C.   Permitting Petitioner to Reconstitute to Exclude Apple With Later Joinder Will Not Prejudice Ameranth.

In its Opposition, instead of pointing to actual injury that would allegedly

result from Petitioner's request, Ameranth merely hypothesizes potential harm

should the Board proceed in a manner other than that requested by Petitioner.

However, the potential harms identified by Ameranth are illusory.

First, Ameranth's arguments on page 2 of its Opposition as to the potential

effect that granting Petitioner's Motion may have on future parties ignores the fact

that such future parties will be on notice of the single counsel requirement in view

of the Board's prior order and its decision on this Motion. Ameranth's arguments

also ignore the fact that the relief being sought by Petitioner is to allow Apple to

file identical petitions and motions to join this proceeding—not to walk away from

it.

Second, Ameranth's argument on page 3 of its Opposition regarding the

need for it to "respond to two separate sets" of papers is likewise illusory. No

obligation exists requiring Ameranth to file any preliminary responses, and in view

of the fact that the requested relief seeks to allow Apple to file identical petitions,

the burden of filing identical responses if Ameranth so chooses is negligible.

Finally, the potential for prejudice with respect to proceedings after Ameranth's preliminary responses is also negligible. In similar cases where the Board has granted joinder motions, it has instituted procedural safeguards to prevent such joined proceedings from becoming overly cumbersome or prejudicial. For example, the Board has mandated that joined petitioners work together to allocate between them the time in depositions and the oral hearings usually allotted to a single petitioner. *See Dell Inc. v. Network-1 Security Solns., Inc.*, IPR2013-00385 (Paper 17); *Motorola Mobility LLC v. Softview LLC*, IPR2013-00256 (Paper 10). The Board has further required the joined petitioners to file consolidated papers with the second petitioner (which in this case would be Apple) only being allowed to file seven additional pages of briefing in such limited situations where it disagreed with the first petitioner. *See id.* Petitioner seeks nothing more here. Therefore, as the Board has previously held, Ameranth's claim of prejudice is without merit.

D.   Ameranth's Proposal Will Unduly Prejudice Apple.

As discussed in Petitioner's Motion, entering an adverse judgment against Apple would result in substantial prejudice to Apple. On the other hand, granting Petitioner's Motion will result in no real prejudice to Ameranth. In reality, such a scenario will leave Ameranth in no worse position that it is now. Coupled with the fact that Petitioner's Motion was the result of unexpected developments in this

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