

Plaintiff Ameranth, Inc. (“Ameranth”) submits this opposition to the “Motion By Non-Party Seamless North America, LLC [“Seamless”] For Leave To File *Amicus Curiae* Brief” filed on November 11, 2011 (Dkt. No. 334). Seamless’s arguments are either unsubstantiated speculation or misrepresentations to the Court. The actual facts do not justify consideration of Seamless’s proposed brief nor the denial of vacatur as requested by Seamless. Applicable equitable considerations compel grant of vacatur to conserve the resources of this Court, the Federal Circuit and the parties, and Seamless has made no credible showing that its interests are adversely affected or that any other non-party’s interests are adversely affected if the Court enters the order of vacatur as the Court indicated it would do upon remand from the Federal Circuit. Importantly, a denial of vacatur would negate the benefits of the settlement just negotiated by the Federal Circuit Mediation Office by requiring the Federal Circuit to consider Ameranth’s appeal, in contravention of the Mediation Office’s desire to eliminate the appeal by remand and vacatur.

A. Procedural Background

On June 28, 2007, Ameranth filed its Complaint for patent infringement against Menusoft and CRS in this action. On September 4, 2007, Menusoft and CRS filed their Answer and asserted Counterclaims of Invalidity and Unenforceability of the asserted patents. This Court held a jury trial in September 2010, at which the jury reached verdicts of noninfringement and invalidity of the seven asserted claims of the total forty-seven claims of the three asserted patents. (Dkt. No. 263). The Court thereafter entered judgment on the jury verdicts. (Dkt. No. 265). The Court subsequently denied Ameranth’s motions for new trial and judgment as a matter of law on invalidity (Dkt. Nos. 313, 314) and denied the defendants’ motions on inequitable conduct and exceptional case (Dkt. Nos. 315, 316).

Ameranth timely filed a Notice of Appeal with the Federal Circuit on June 23, 2011 (Dkt. No. 317), appealing the Court’s denials of its motions for new trial and judgment as a matter of law.

Ameranth also noticed appeal of the Court’s entry of the jury verdicts based on various issues including,

inter alia, the Court's jury instructions, verdict form and evidentiary rulings. Menusoft and CRS filed a Notice of Cross-Appeal as to the Court's denial of a finding of inequitable conduct. (Dkt. No. 318).

The appeal was selected for the Federal Circuit's mandatory mediation program. On October 13, 2011, a mediation conference presided over by Chief Federal Circuit Mediator James Amend was held. The Federal Circuit Mediator's efforts (including his review and summary of the merits of Ameranth's arguments on appeal) resulted in Ameranth and Menusoft reaching a confidential and comprehensive binding settlement, which included Ameranth also dismissing Menusoft and CRS from a second case currently before this Court¹ involving eight claims of the Ameranth patents (which claims were not asserted or adjudicated in the present case). Under the Settlement Agreement, Ameranth and Menusoft agreed, *inter alia*, to jointly request this Court to vacate the verdicts of invalidity of the seven claims asserted in this case. However, Ameranth did not agree to give up its right to appeal the invalidity verdicts and judgment in the event the invalidity judgment is not vacated.

Under the Settlement Agreement, and at the direction of Chief Federal Circuit Mediator Amend, the parties filed a Stipulated Motion For Indicative Ruling requesting vacatur of the jury verdicts of invalidity and the Court's judgment of invalidity. (Dkt. No. 331). The Court granted the request for indicative ruling and indicated in its Order that it would vacate the verdicts and judgment of invalidity upon remand of the case from the Federal Circuit. (Dkt. No. 332). The parties to the appeal thereafter filed a Joint Motion for Remand with the Federal Circuit on November 7, 2011 and are awaiting the Federal Circuit's action on that motion. Once remanded, a motion for vacatur of the invalidity verdicts and judgment consistent with the Court's Order (Dkt. No. 332) will be filed with the Court.

On November 11, 2011, non-party Seamless filed a motion (Dkt. No. 334) seeking leave to file an *amicus* brief for purposes of preventing the Court's entry of vacatur as to the verdicts and judgment of invalidity of the seven claims asserted at trial in this case. Seamless's request for leave should be denied because Seamless has pointed to no relevant information in its proposed *amicus* filing which is new or

¹ *Ameranth v. Par et al.* Case No. 2:10-cv-294-DE

not known by the Court. Moreover, Seamless's assertion that it has a "unique perspective that can assist the Court beyond what the parties, or the other *amicus* Profitstreams, can provide" (Dkt. No. 334 at 4) is false and misrepresents the relevant facts. Seamless provides only unsupported assertions that common issues of law and fact exist between the California case and this case. *Id.* at 5. Those assertions are fundamentally wrong. The claims asserted in this case are not asserted against Seamless in California, nor against any other party.

B. Seamless's Unsupportable Allegations Of Impact On Other Litigation Are Insufficient To Justify Seamless's Interference In This Case

1. Seamless Misrepresented The Facts

Seamless's argument that Ameranth and Menusoft made a misrepresentation as to the impact that vacatur would have on other pending litigation (Dkt. No. 334 at 2; Dkt. No. 334-2 at 2) is wrong and misleading, especially since the eight claims asserted against Seamless are the exact same claims being asserted in another case before this Court, of which the Court is obviously fully aware as evidenced by the Court's holding that collateral estoppel does not apply to the eight claims asserted in the other case.²

Contrary to Seamless's argument, Ameranth and Menusoft's motion for indicative ruling (Dkt. No. 331) did not state that validity of the particular claims for which they sought vacatur was not alleged to be at issue in any pending litigation (as detailed in Ameranth's response (Dkt. No. 335) to the motion for leave to file *amicus* brief filed by non-party Profitstreams LLC (Dkt. No. 333)) . The motion for indicative ruling stated:

[T]he particular claims for which vacatur is sought ***are not being asserted against any other party***. There will thus be no reduction or elimination of issues or any other form of efficiency in any pending case regarding Ameranth's patents if the Court were to deny the request for vacatur.

Dkt. No. 331. Seamless relied on the baseless allegations of Profitstreams to allege that the foregoing statements from the motion for indicative ruling were untrue. (Dkt. No. 334 at 2). However, as detailed

² See *Ameranth v. Par et al.*, No. 2:10-cv-294-DF, Dkt. No. 107 at 5; see also Dkt. No. 119 (adopting Magistrate Judge Everingham's recommendation)

in Ameranth's opposition to Profitstreams' request to file *amicus* brief (Dkt. No. 335), the undisputable fact is that Ameranth is not asserting any claim for which vacatur is sought against any party, including Seamless. As discussed above, the Court is well aware that Ameranth is only asserting eight of its claims, each of which the Court has recognized are materially different from the claims for which vacatur is sought. And, in the two cases where Ameranth is asserting other patent claims (the California case and the other case in this Court), there would be no reduction or elimination of issues or any other form of efficiency if vacatur of the claims asserted in the present case were to be denied since the claims for which vacatur is sought are not being asserted in those cases (including the California case where Seamless is a defendant) and are entirely different claims.

The claims which the Court agreed to vacate are clearly not being asserted against Seamless and are thus not at issue with respect to Seamless. Therefore, despite Seamless's speculation about potentially being sued on the claims for which vacatur is sought, whether collateral estoppel applies to those claims will not be an issue in the California case because the particular claims are not involved in that case, just as the claims for which vacatur is sought are not involved in another case before this very Court (2:10-cv-294-DF). Seamless is simply trying to interfere with effectuation of the parties settlement agreement when it has not even attempted to demonstrate how the seven claims for which vacatur is sought are even properly involved in the California action, nor are they.

2. *Seamless Grossly Mischaracterized The Patent Prosecution In An Attempt To Mislead The Court*

In its proposed *amicus* brief, Seamless deceptively cited the Examiner's reasons for allowance as applicable to claims of the Ameranth patents other than those for which vacatur is sought. (Dkt. No. 334-2 at 5-6). Seamless stated that "[t]he patent office determined that claims currently asserted against Seamless contain similar limitations to the claims this Court held to be anticipated and obvious." *Id.* at 5. In support of its argument, Seamless pointed to the reasons for allowance as purportedly stating that various limitations involving "menus" were "present in *all* of the independent claims." *Id.* (emphasis in original). However, examination of the claims which are being asserted against Seamless in the

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