

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No.

PROFITSTREAMS LLC,

Plaintiff,

v.

AMERANTH, INC.,

Defendants.

**PROFITSTREAMS, LLC'S COMPLAINT FOR DECLARATORY RELIEF
(JURY TRIAL DEMANDED)**

ProfitStreams LLC ("ProfitStreams") for its Complaint for Declaratory Relief against Ameranth, Inc. ("Ameranth") alleges as follows:

PARTIES

1. ProfitStreams is a Colorado limited liability company. ProfitStreams maintains its offices at 1123 Auraria Parkway, Suite 300, Denver, CO 80204.

2. On information and belief, Ameranth is a Delaware corporation which maintains its offices at 5820 Oberlin Drive, Suite 202, San Diego, CA 92121.

JURISDICTION AND VENUE

3. This action arises under the patent laws of the United States, 35 U.S.C. §§ 1 *et seq.* and the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202.

4. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1338.

5. This Court has personal jurisdiction over Ameranth because Ameranth transacts business and/or offers to transact business within this judicial district (directly or through intermediaries) and because ProfitStreams is being damaged in the State of Colorado.

6. Venue is proper in the United States District Court for the District of Colorado pursuant to 28 U.S.C. § 1391(b)(2).

FACTUAL BACKGROUND

The Licensed Patents

7. On May 7, 2002, the United States Patent and Trademark Office issued United States Patent No. 6,384,850 (the “850 patent”), entitled *Information Management and Synchronous Communications System with Menu Generation* to Keith R. McNally, William H. Roof, and Richard Bergfeld. According to the information on the face of the patent, it was assigned to Ameranth Wireless. A copy of the ‘850 patent is attached hereto as **Exhibit A**.

8. On March 22, 2005, the United States Patent and Trademark Office issued United States Patent No. 6,871,325 (the “325 patent”), entitled *Information Management and Synchronous Communications System with Menu Generation* to Keith R. McNally, William H. Roof, and Richard Bergfeld. According to the information on the face of the patent, it was assigned to Ameranth Wireless, Inc. A copy of the ‘325 patent is attached hereto as **Exhibit B**.

9. On January 17, 2006, the United States Patent and Trademark Office issued United States Patent No. 6,982,733 (the “733 patent”), entitled *Information Management and Synchronous Communications System with Menu Generation, and Handwriting and Voice Modification of Orders* to Keith R. McNally, Ken Rogers, and Paul Rubin. According to the

information on the face of the patent, it was assigned to Ameranth Wireless, Inc. A copy of the '733 patent is attached hereto as **Exhibit C**.

10. On information and belief, Ameranth offered for sale products that are prior art, as defined by 35 U.S.C. §§ 102 and 103, to the '850 patent, the '325 patent, and/or the '733 patent.

11. On information and belief, in 1996, 1997, and 1998, Ameranth attended the Foodservice Technology Exposition ("FS/TEC").

12. On information and belief, in 1996, Ameranth publicly demonstrated, used, and offered for sale products, including "Intrapad™," that are prior art, as defined by 35 U.S.C. §§ 102 and 103, to the '850 patent, the '325 patent, and/or the '733 patent.

13. On information and belief, in 1997, Ameranth publicly demonstrated, used, and offered for sale products, including "TransPad™" and "PadLink™," that are prior art, as defined by 35 U.S.C. §§ 102 and 103, to the '850 patent, the '325 patent, and/or the '733 patent.

14. On information and belief, in 1998, Ameranth publicly demonstrated, used, and offered for sale products, including "21st Century Restaurant," that are prior art, as defined by 35 U.S.C. §§ 102 and 103, to the '850 patent, the '325 patent, and/or the '733 patent.

15. On information and belief, companies other than Ameranth, such as MICROS Systems, Inc., offered for sale products that are prior art, as defined by 35 U.S.C. §§ 102 and 103, to the '850 patent, the '325 patent, and/or the '733 patent.

16. On information and belief, the claims of the '850 patent, the '325 patent, and the '733 patent are invalid as anticipated by, among other things, the foregoing prior art, as defined by 35 U.S.C. §§ 102 and 103, as well as other prior art, and for obviousness.

The Texas Litigation

17. In July 2007, Ameranth sued Menusoft Systems Corporation (“Menusoft”) and Cash Register Sales & Service of Houston, Inc. (d/b/a CRS Texas) (“CRS”) in the United States District Court for the Eastern District of Texas, Marshall Division, Case No. 2:07-CV-271-CE (the “Texas Litigation”) for infringement of the Licensed Patents.

18. On or about September 4, 2007, Menusoft and CRS asserted counterclaims against Ameranth for, among other things, declaratory judgment that the ‘850 patent, the ‘325 patent, and the ‘733 patent are invalid.

19. On or about September 20, 2010, a jury found each claim of the ‘850 patent, the ‘325 patent, and the ‘733 patent asserted by Ameranth in the Texas Litigation to be invalid both as anticipated by prior art and for obviousness.

20. On May 26, 2011, Magistrate Judge Charles Everingham denied Ameranth’s motions in the Texas Litigation for a new trial and for judgment as a matter of law that the ‘850 patent, the ‘325 patent, and/or the ‘733 patent were not anticipated, not obvious and not invalid.

The License Agreement

21. On or about August 27, 2008, ProfitStreams and Ameranth entered into a Second Amended and Restated License Agreement (the “License Agreement”). The License Agreement was the latest in a series of agreements between ProfitStreams, which is headquartered in Colorado, and Ameranth.

22. Under the terms of the License Agreement, ProfitStreams received, among other things, licenses to the ‘850 patent, the ‘325 patent, and the ‘733 patent, and all reissues and

reexaminations of any of the foregoing patents, and all patents claiming priority from any application from which any of the foregoing patents issues.

23. ProfitStreams also received a licensed copy of the software code and related documentation for Ameranth's Magellan System product (the "Licensed Product"). Ameranth delivered a copy of the Licensed Product to ProfitStreams in Colorado. ProfitStreams paid to Ameranth all fees due under the License Agreement related to the Licensed Product.

24. The License Agreement calls for ProfitStreams to pay an annual fee on or before July 1 for its license to the '850 patent, the '325 patent, and/or the '733 patent.

25. To date, ProfitStreams has paid all patent license fees due under the License Agreement.

26. On or about June 7, 2011, Ameranth sent ProfitStreams an invoice for the annual patent license fee called for in the Agreement. A copy of the invoice and accompanying cover email are attached hereto as **Exhibit D**. In the covering email, Ameranth stated that payment was due no later than June 30, 2011.

27. On June 30, 2011, ProfitStreams provided Ameranth with written notice of its intention not to pay the annual patent license fee invoiced by Ameranth on the grounds that the '850 patent, the '325 patent, and the '733 patent are invalid.

28. Ameranth has demonstrated its intention to protect and enforce the '850 patent, the '325 patent, and the '733 patent through litigation, as evidenced by Ameranth's filing of multiple actions in Federal court related to the '850 patent, the '325 patent, and the '733 patent.

29. Upon information and belief, Ameranth believes that one or more products currently being developed by ProfitStreams may infringe the claims of the '850 patent, the '325 patent, and/or the '733 patent.

30. ProfitStreams reasonably believes and apprehends that Ameranth will file suit against ProfitStreams.

31. Based on (1) the existence of prior art, as defined by 35 U.S.C. §§ 102 and 103, to the '850 patent, the '325 patent, and/or the '733 patent., (2) the jury verdict invalidating claims of the '850 patent, the '325 patent, and the '733 patent in the Texas Litigation, (3) Judge Everingham's post-trial orders upholding the jury verdict, (4) Ameranth's demand for payment of the annual patent license fee called for in the Agreement, and (5) Ameranth's demonstrated litigiousness, an actual and justiciable controversy exists between ProfitStreams and Ameranth regarding the validity of the '850 patent, the '325 patent, and the '733 patent.

FIRST CLAIM FOR RELIEF
(Declaratory Judgment of Invalidity of the '850 Patent)

32. ProfitStreams hereby incorporates by reference each and every allegation set forth in paragraphs 1 through 31 of this Complaint.

33. The '850 patent, and each claim thereof, is invalid for failing to comply with the requirements of the patent laws of the United States, particularly with regard to one or more of the requirements specified in Sections 101, 102, 103, and/or 112 of Title 35 of the United States Code.

34. There exists an actual controversy between Ameranth and ProfitStreams regarding the validity of the '850 patent, and a judicial declaration of invalidity is necessary and appropriate at this time.

SECOND CLAIM FOR RELIEF
(Declaratory Judgment of Invalidity of the '325 Patent)

35. ProfitStreams hereby incorporates by reference each and every allegation set forth in paragraphs 1 through 34 of this Complaint.

36. The '325 patent, and each claim thereof, is invalid for failing to comply with the requirements of the patent laws of the United States, particularly with regard to one or more of the requirements specified in Sections 101, 102, 103, and/or 112 of Title 35 of the United States Code.

37. There exists an actual controversy between Ameranth and ProfitStreams regarding the validity of the '325 patent, and a judicial declaration of invalidity is necessary and appropriate at this time.

THIRD CLAIM FOR RELIEF
(Declaratory Judgment of Invalidity of the '733 Patent)

38. ProfitStreams hereby incorporates by reference each and every allegation set forth in paragraphs 1 through 37 of this Complaint.

39. The '733 patent, and each claim thereof, is invalid for failing to comply with the requirements of the patent laws of the United States, particularly with regard to one or more of the requirements specified in Sections 101, 102, 103, and/or 112 of Title 35 of the United States Code.

40. There exists an actual controversy between Ameranth and ProfitStreams regarding the validity of the '733 patent, and a judicial declaration of invalidity is necessary and appropriate at this time.

DEMAND FOR JURY TRIAL

ProfitStreams demands a trial by jury of any and all issues triable as of right by a jury in this action.

PRAYER FOR RELIEF

WHEREFORE, ProfitStreams asks the Court to enter judgment in its favor and grant the following relief:

1. Declare every claim of the '850, '325, and '733 patents invalid;
2. Find this an exceptional case and award ProfitStreams its costs, attorneys' fees, and expenses pursuant to 35 U.S.C. § 285; and
3. Grant such other and further relief as the Court may deem just and proper.

Respectfully submitted this 30th day of June, 2011.

KUTAK ROCK LLP

s/ Chad T. Nitta

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