

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION**

AMERANTH, INC.,	§	
	§	
	§	
Plaintiff,	§	
	§	
v.	§	Civil Action No. 2:07-cv-271-DF
	§	
MENUSOFT SYSTEMS CORPORATION	§	
and CASH REGISTER SALES & SERVICE	§	
OF HOUSTON, INC. (dba CRS TEXAS)	§	
	§	
Defendants.	§	
	§	

**PLAINTIFF AMERANTH'S OPPOSITION TO
NON-PARTY SEAMLESS NORTH AMERICA, LLC'S
MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF**

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-DF.

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

California litigation clearly shows that the “menu” limitations are not recited in those claims. In fact, the claims are entirely different, as recognized by Judge Everingham (as discussed below). The independent claims asserted against Seamless in the California case are claim 12 of the ‘850 patent and claim 11 of the ‘325 patent. Neither of these claims, nor any other claim asserted in the California case, includes the recitations relied on by the Examiner to allow the “menu” claims (*e.g.*, claim 1 of the ‘850 patent and claim 1 of the ‘325 patent). The Examiner, in his summary of reasons for allowing claims over the cited prior art, clearly made a simple mistake in referring to “all” claims as including the menu recitations. They do not. Surely, Seamless’s attorneys, having had at least several months to analyze the claims asserted in the present case versus the claims asserted in California, must be aware of that obvious typo by the Examiner, yet Seamless chose to nonetheless make such a transparently false argument. Seamless’s willingness to do so is a reflection of its complete inability to explain to this Court how the claims asserted in California could in any way be affected by the status of the claims asserted at trial in this case.

Based on its mischaracterization of the prosecution history, Seamless alleged that Ameranth’s and Menusoft’s request for vacatur is an “egregious circumstance.” *Id.* at 6. Seamless’s mischaracterization is in reality itself an egregious circumstance which should equitably preclude entry of Seamless’s proposed *amicus* brief as well as the relief requested by Seamless.

C. Seamless Mis-Stated The Holding Of *Bancorp*

Notwithstanding Seamless’s assertion that the standard for district court vacatur motions is “exceptional circumstances,” controlling authority of the Supreme Court in fact does not require such a finding. Seamless’s error on this point lies in misconstruing what *Bancorp* said with regard to the standard which “appellate” courts must apply when considering a motion to vacate a lower court judgment. In *Bancorp*, the Supreme Court held that, absent exceptional circumstances, an *appellate* court may not order a district court to vacate a judgment rendered moot by settlement. However, the Supreme Court expressly recognized in *Bancorp* the power of the *district* court to vacate

a judgment after settlement on appeal. *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 29 (1994).³ Clearly, the “exceptional circumstances” standard of the Supreme Court’s *Bancorp* decision is not applicable to district court vacatur determinations. *Bancorp*, “by its terms, does not apply to district courts but rather only to the Supreme Court and to courts of appeals.” *Lycos v. Blockbuster, Inc.*, No. 07-11469, 2010 U.S. Dist. LEXIS 136252, *8-9 (D. Mass. Dec. 23, 2010) (quoting *Dana v. E.S. Originals, Inc.*, 342 F.3d 1320, 1328 (Fed. Cir. 2003) (Dyk, J., concurring)). In fact, the Supreme Court held in *Bancorp* that an appellate court considering a request to vacate a district court decision as part of a settlement may remand to the district court to consider the request “***even in the absence of***, or before considering the existence of, ***extraordinary circumstances***.” 513 U.S. at 29. This holding plainly indicates that the Supreme Court did not hold nor suggest that the extraordinary circumstances standard should apply to Rule 60(b) motions. It clearly would be pointless to remand to a district court “in the absence of extraordinary circumstances,” if a motion to vacate an order to facilitate a settlement could only be granted under such circumstances. Moreover, a district court should have wider discretion to vacate its own decision than should an appellate court to vacate another court’s decision without even considering the merits. *American Games, Inc. v. Trade Prods., Inc.*, 142 F.3d 1164, 1170 (9th Cir. 1998) (“a district court should enjoy greater equitable discretion when reviewing its own judgments than do appellate courts operating at a distance”).

Moreover, it is widely acknowledged that “a Rule 60(b) motion is addressed to the sound discretion of the [district] court [and] gives the court a grand reservoir of ***equitable power to do justice***

³ Numerous courts have recognized that *Bancorp* does not constrain a district court to the exceptional circumstances test when considering a request for vacatur of a judgment or verdict on remand from an appellate court. See *Marseilles Hydro Power LLC v. Marseilles Land & Water Co.*, 481 F.3d 1002, 1003-04 (7th Cir. 2007); *American Games, Inc. v. Trade Products, Inc.*, 142 F.3d 1164, 1168-69 (9th Cir. 1998); *Mayes v. City of Hammond*, 631 F. Supp. 2d 1082, (N.D. Ind. 2008) (“[T]his court is not cabined by the ‘exceptional circumstances for a request for vacatur made to an appellate court.’”). To the extent any of the cases cited by Seamless state or imply that the exceptional circumstances test is mandatory in such circumstances, those cases are wrong as inconsistent with the Supreme Court’s controlling authority in *Bancorp*. Moreover, *Bancorp* is distinguishable from the present case because the present settlement agreement did not result in mootness of Ameranth’s appeal of invalidity.

in a particular case.”⁴ The Court may vacate a judgment where “it is no longer equitable that the judgment should have prospective application.” Fed. R. Civ. P. 60(b)(5). Under Rule 60(b)(6), a court has “ample power to vacate judgments whenever that action is appropriate to accomplish justice.”⁵ There is no requirement in such an equitable inquiry for “exceptional circumstances.”

In the present case, grant of vacatur would do justice and additionally, although not required under *Bancorp*, exceptional circumstances are present which militate heavily in favor of vacatur. Here, all parties desired settlement, the settlement is in the best interests of all parties, the benefits of vacatur outweigh any harm the public or the judicial system might lose from a loss of legal precedent and vacatur would produce significant judicial efficiencies both for this Court and for the Federal Circuit, while respecting and recognizing the objectives of the Federal Circuit Mediation process as well.

D. The Cases Cited By Seamless Do Not Support Its Arguments Against Vacatur

Under the logic of *Willow Wood*, Seamless is precluded from intervening or otherwise interfering in this Court's vacatur determination because Ameranth is not asserting the claims for which vacatur is sought against Seamless or anyone else. In *Willow Wood*, the plaintiff was *asserting the very same claims for which vacatur was sought* against other parties in different litigations.⁶ But for that very salient fact, which Seamless attempts to sweep under the rug, *Willow Wood* would have been decided differently. Seamless should not be allowed to file an irrelevant and unnecessary paper to burden the Court and the parties without submitting actual proof that the pertinent claims are actually being asserted against it. Such proof cannot be provided because the claims are simply not being asserted against

⁴ *Pierce v. Cook & Co., Inc.*, 518 F.2d 720, 722 (10th Cir. 1975); *accord Reid v. Angelone*, 369 F.3d 363, 374 (4th Cir. 2004).

⁵ See 11 Charles A. Miller, *et al.*, *Federal Practice and Procedure* § 2864 (2nd ed. 1995).

⁶ In *Willow Wood*, the claims for which vacatur was sought were being litigated in other cases, and essentially all claims of the asserted patents stood invalidated. *Ohio Willow Wood Co. v. Thermo-Ply, Inc.*, C.A. No. 9:07-cv-274, Dkt. No. 142 at 2 (E.D. Tex. Feb. 2, 2011) (“Here, this court's ruling, which found that most claims of the '182 patent are invalid, will, unless reversed on appeal, dispose of significant litigation in other forums.”). Conversely, in the present case, the invalidity verdicts will not affect other cases irrespective of vacatur or reversal on appeal because those cases involve claims other than those adjudicated at the trial in this case.

Seamless or anyone else.

In fact, Seamless's request for *amicus* status, instead of intervention, speaks volumes about its tactics. Seamless is well aware that it has no argument for intervention in this case because, *inter alia*, Ameranth is not asserting the claims for which vacatur is sought against Seamless. The present situation is clearly the opposite of *Ohio Willow Wood*, where intervention was allowed because ***the very same claims*** were being asserted against the party which sought to intervene. There are no such facts here, and Seamless has not attempted to allege any such facts. Seamless simply tried to create an illusion that Ameranth will assert the claims in the future, without pointing to any basis whatever for such belief.

Unlike in *Medtronic v. Boston Scientific* (cited by Seamless at Dkt. No. 334-2 at 6), Ameranth has not abandoned its appeal rights as part of the settlement with Menusoft. In *Medtronic*, Judge Ward applied the *Bancorp* "mootness result[ing] from settlement" standard to deny vacatur. *Medtronic Vascular Inc. v. Boston Scientific Corp.*, No. 2:06-cv-78, 2009 WL 383237, at *1. Here, mootness has not resulted from settlement, and thus Seamless's principal argument against vacatur (Dkt. No. 334-2 at 4) is based on an erroneous factual assumption. Ameranth retained its right to appeal if the invalidity judgment is not vacated and, if the Court were to reverse its order stating that it would vacate on remand, the appeal would go forward as to the validity of the claims for which vacatur is sought. Further, one of Seamless's own cited cases stands for the proposition that the appeal can proceed even if the infringement issues have been settled. *Ohio Willow Wood Co. v. Thermo-Ply, Inc.*, 629 F.3d 1374, 1376 (Fed. Cir. 2010) (Moore, J. concurring) ("the Federal Circuit must consider a validity determination on appeal, even if the court concludes that the defendant does not infringe the patent at issue.") (citing *Cardinal Chemical Co. v. Morton Int'l, Inc.*, 508 U.S. 83, 100 (1993)).

Further, the cases cited by Seamless involved requests to vacate detailed decisions of district courts. Conversely, the judgment in this case contains no analysis of validity by the Court (Dkt. No. 265), and the post-trial order denying Ameranth's validity JMOLs similarly contains no analysis by the

Court (Dkt No. 314).⁷ There is thus no presumptively correct decision of a district court which the parties seek to vacate.

E. Seamless's Allegation Regarding Potential Collateral Estoppel As To Claims Not Asserted In This Case Has Already Been Rejected By This Court

Seamless pontificates that claims other than those for which vacatur is sought “may not be different at all” from the claims involved in the request for vacatur and thus that it should be able to rely on the judgment of invalidity of the seven claims asserted at trial in this case. (Dkt. No. 334 at 3). Seamless further implores that it “should be allowed to point to the wisdom of this Court’s prior rulings in its defense.” *Id.* However, Seamless entirely ignores the wisdom of this Court’s prior rulings. Judge Everingham explicitly ruled that collateral estoppel does not apply to the claims which were not adjudicated in this case:

Here, many of the claims asserted in this case contain limitations not found in the “representative” claims Ameranth asserted in the first case. In sum, there could have been no final decision on the validity of claims that were withdrawn, not asserted, or never litigated in first case – that is, there could have been no final decision on “the identical question” of the validity of claims that were not presented to the jury in the first case.

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). Seamless admitted that, in the pending California case, Ameranth “only alleged infringement of claims that were not previously-held invalid.” (Dkt. No. 334 at 4). Thus, Seamless’s self-serving theory that collateral estoppel might potentially apply to non-adjudicated claims is thus demonstrably incorrect in light of the wisdom already expressed by this Court. There is no legal authority for applying collateral estoppel to unadjudicated claims, Seamless cited none, and Judge Everingham already denied such an attempt. Similarly, Seamless’s theorizing that the court in the California action, where the pertinent claims are not being asserted, will find some preclusive effect from the judgment as to entirely *different* claims (Dkt. No. 334-2 at 5-6), is extremely

⁷ The Court merely entered the jury verdicts without comment, and likewise denied Ameranth’s motions for JMOL without providing a memorandum opinion identifying substantial evidence to support the verdicts. The jury verdicts of invalidity in this case should not be given the presumption of correctness in light of the serious evidentiary and proof issues raised in Ameranth’s post-trial motions which were not addressed by Judge Everingham’s dispositions of the post-trial motions, and which Ameranth will brief even more fully for the Federal Circuit if vacatur were to be denied.

speculative and has no sound basis. Judge Everingham ruled that collateral estoppel does not apply to the non-litigated claims of the asserted patents—and only those claims are being asserted in the California case. Seamless’s conjecture that the California court will conclude the opposite of Judge Everingham, who tried the case and managed it for four years, is not realistic.

F. Resources Will Be Conserved By Granting A Motion For Vacatur

As recognized in *Ohio Willow Wood*, a grant of a motion to vacate may conserve resources if vacatur allows the parties to avoid the substantial cost of an appeal and a remanded trial. *Ohio Willow Wood. Co. v. Thermo-Ply, Inc.*, 769 F. Supp. 2d 1065 (E.D. Tex. 2011). Seamless’s assertion that there are no “exceptional circumstances”⁸ warranting vacatur in the present case runs afoul of the recognition in *Willow Wood* and other cases that conservation of resources justifies vacatur. In this case, without vacatur of the invalidity judgment, the full appeal to the Federal Circuit will proceed as to validity, and the substantial cost of an appeal will thus not be avoided, negating the success of the Federal Circuit mediation program in settling the case. Nor will the Federal Circuit’s time be conserved. Likewise, this Court will not see efficiency in the dismissal of the case and elimination of the possibility of a remanded trial. Although *Willow Wood* also involved a situation where the appeal would proceed in the absence of vacatur, as is the case here, *Willow Wood* also involved assertion of the **very same claims** in a separate litigation as the claims for which vacatur was sought (unlike the present situation). The policy goals as stated in *Willow Wood* thus actually compel vacatur to conserve the aforesaid resources.

The public interest in resources expended by this Court and by the Federal Circuit would be respected by vacatur of the invalidity verdicts and judgment as to only the seven particular claims which were litigated in this case.⁹ When the potential effect on other parties or the public is limited or

⁸ As discussed above, exceptional circumstances is not the applicable standard, but such circumstances exist in this case in any event.

⁹ Those claims are 1 and 4 of U.S. Pat. No. 6,384, 850; 6, 9, and 10 of U.S. Pat. No. 6,871,325 and 1 and 3 of U.S. Pat. No. 6,982,733. In addition to the seven claims asserted at trial, the Court ruled in Case No. 2:10-cv-294-DF (Dkt. No. 119) that collateral estoppel applies to claim 3 of U.S. Pat. No.

nonexistent and when judicial resources are not squandered, vacatur is appropriate. *See Gould v. Bowyer*, 11 F.3d 82, 84 (7th Cir. 1993). Despite Seamless's allegations of potential harm to it, Seamless has not pointed to any actual facts supporting its contention that it would be affected by a grant of vacatur. Effecting the terms of the settlement between Ameranth and Menusoft, on terms amenable to both, would conserve the Federal Circuit's resources, and potentially this Court's resources in the event the case is remanded for further proceedings after the appeal is litigated. The Federal Circuit's objectives would also be respected since the settlement would not have been reached without the efforts of the Chief Federal Circuit Mediator and his suggestion of the motion for vacatur to facilitate the settlement. A circuit mediator's assistance in reducing the appeals court's case load by helping the parties reach a settlement weighs in favor of vacatur. *See, e.g., Auto. Club v. Mellon Bank*, 224 F.R.D. 657, 658 (C.D. Cal. 2004); *Motta v. INS*, 61 F.3d 117, 118 (1st Cir. 1995).

The private interests also weigh in favor of vacatur. Settlement of the current litigation will advance each of Ameranth's and Menusoft's interests by eliminating the expense and risks associated with a lengthy appeal process and, potentially, a new trial. Still further, the settlement will also result in the dismissal of a second case against Menusoft and CRS currently before this Court (2:10-cv-294-DF).

Moreover, the settlement on appeal reflected the Federal Circuit Mediator's consideration of Ameranth's strong arguments supportive of invalidity reversal or remand, which were discussed between all parties at the mediation, and directly led to the settlement and licensing of Ameranth's patents. The fact that a settlement was reached confirms that there were reasonable grounds for Ameranth's challenge to the invalidity verdicts and judgment and that such was recognized by Chief Federal Circuit Mediator Amend.¹⁰ The parties have agreed to this procedure as a term of the

6,384,850 and claim 1 of U.S. Pat. No. 6,871,325. As discussed above, this Court has already ruled that the verdicts and judgment of invalidity do not collaterally estop Ameranth as to claims not asserted at trial or which contain significantly different elements/terms than the previously asserted claims.

¹⁰ If the appeal proceeds, it will involve, *inter alia*, challenges to the Court's decisions on prior art status, evidence, jury instructions and verdict form, all of which facts, and relevant standard of review, were considered by Chief Mediator Amend in urging settlement to avoid an appeal of invalidity by Ameranth.

Settlement Agreement, and thus neither party will be prejudiced by vacating the invalidity verdicts and judgment. Strangers to this litigation certainly have no right to complain if a verdict in a litigation in which they played no part is vacated and which has not been shown to affect them.¹¹

CONCLUSION

Based on the foregoing analysis and objections, and in view of the Court's equitable powers, Ameranth requests that the Court deny Seamless's request to file an *amicus* brief regarding vacatur of the invalidity verdicts and judgment. A proposed order is submitted herewith.

Respectfully submitted,

This 15th day of November, 2011.

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¹¹ In fact, vacating a verdict or judgment to facilitate a settlement is simply a recognition of a party's legitimate challenge to a decision and that the issue should be left to another day in the event that there are proceedings involving other parties. The Federal Circuit's review of this Court's decision would have been plenary. *Rite-Hite Corp. v. Kelley Corp.*, 56 F.3d 1538, 1551 (Fed. Cir. 1995) (en banc) ("The question of standing to sue is a jurisdictional one which we review de novo.").

CERTIFICATE OF SERVICE

The undersigned hereby certifies that all counsel of record who are deemed to have to consented electronic service are being served with a copy of this document via the Court's CM/ECF system per Local Rule CV-5(a)(3) this 15th day of November, 2011. Any other counsel of record will be served by facsimile transmission and/or first class mail.

/s/ Michael C. Smith

Michael C. Smith

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION**

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Plaintiff,	§	
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v.	§	Civil Action No. 2:07-cv-271-DF
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MENUSOFT SYSTEMS CORP. and	§	
CASH REGISTER SALES & SERVICE OF	§	
HOUSTON, INC. (dba CRS TEXAS),	§	
	§	
Defendants.	§	
	§	

ORDER

The Court, having considered the Motion by Non-Party Seamless North America, LLC for Leave to File *Amicus Curiae* Brief filed November 11, 2011 (Dkt. No. 334), is of the opinion that the Motion should be, in all things,

DENIED.

IT IS THEREFORE ORDERED that the Motion by Non-Party Seamless North America, LLC for Leave to File *Amicus Curiae* Brief filed November 11, 2011 (Dkt. No. 334) is hereby DENIED.