UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

AYLO FREESITES LTD and fuboTV MEDIA INC.,
Petitioners,

v.

DISH TECHNOLOGIES L.L.C.,
Patent Owner.

IPR2024-00043[1]

U.S. PATENT NO. 11,677,798

PATENT OWNER'S RESPONSE TO PETITIONER AYLO FREESITES LTD'S MOTION TO EXCLUDE

[1] fuboTV Media Inc., which filed a petition in IPR2024-00901, has been joined as a petitioner in this proceeding.

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PATENT OWNER'S EXHIBIT LIST

Ex. No.	Description of Documents
2001	Declaration of Dr. Kevin Jeffay in Support of Patent Owner's Preliminary Responses under 35 U.S.C. § 313 and 37 C.F.R. § 42.107
2002	File History of U.S. Patent No. 11,470,138
2003	Terminal Disclaimers of Patent Family
2004	U.S. Patent No. 6,389,473 ("Carmel")
2005	337-TA-1265 Investigation Commission Opinion
2006	Declaration of Dr. Kevin Jeffay in Support of Patent Owner's Response
2007	Trowt-Bayard *et al.*, *Videoconferencing & Interactive Multimedia: The Whole Picture* (Flatiron Publishing, 1997)
2008	Nigel Chapman *et al.*, *Digital Multimedia* (John Wiley & Sons, LTD, 2000)
2009	Transcript of Deposition of Dr. Henry Houh (July 9, 2024)
2010	Declaration of Inventor Robert Drew Major
2011	MOVE Networks Streaming Media Technology
2012	MOVE Networks Technology Overview
2013	Sling TV Emmy Award (CX-1084)
2014	MOVE Awarded Fundamental Patent (CX-1122)
2015	MOVE Networks Article (CX-0013)
2016	OnHollywood 100 (CX-1078)
2017	OnHollywood 100 Winner (CX-1079)

2018	OnMedia 100 Winner (CX-1080)
2019	Red Herring Global 100 (CX-1081)
2020	MOVE Networks TechCrunchies Finalist (CX-1082)
2021	MOVE Networks Makes Web TV Watchable (CX-0046)
2022	ABC.com Makes Watching TV at Work Better (CX-1106)
2023	MOVE Networks, a next-gen content distribution platform (CX-1134)
2024	Better than YouTube (CX-0045)
2025	Long-Form Video Gaining Viewers (CX-1115)
2026	Move Over Joost (CX-1125)
2027	Coming Faster Than You Think (CX-1110)
2028	WSJ Pushing to Bring TV to the Internet (CX-1128)
2029	CNN Level 3 Collaborates with MOVE (CX-1113)
2030	The Sport Page ESPN 360 (CX-1132)
2031	E-Mail 5/15/2007 (CX-1047C)
2032	E-Mail 6/16/2007 (CX-1049C)
2033	E-Mail 11/26/2007 (CX-1050C)
2034	ABC Big Move Away from Flash (CX-1116)
2035	Disney ABC Throws Down (CX-1130)
2036	The Lowdown on Apple (CX-1131)
2037	AOL and CBS Put Online HD (CX-1109)
2038	MOVE Quality Solution (CX-1121)
2039	ABC Becomes First Network HD Streamer (CX-1112)

2040	ABC.com to Stream HD Video (CX-1108)
2041	ABC Adds Full Screen Mode to Online Shows (CX-1104)
2042	MOVE Networks Releases Live Streaming (CX-1123)
2043	ABC Offering Full Screen Streaming HD (CX-1105)
2044	Level 3 Streams and Other News from SMW (CX-1114)
2045	Microsoft Unlocks Power of the Web (CX-1092)
2046	[Reserved]
2047	Disney Backs Video Start-Up (CX-1111)
2048	Here Comes More HD Video (CX-1077)
2049	E-Mail 1/20/2009 (CX-1146C)
2050	MOVE and Microsoft Term Sheet (CX-1051C)
2051	To the Ends of the Earth (CX-1074)
2052	MOVE Gets Streaming Patent; Are Adobe & Apple Hosed? (CX-1120)
2053	DISH's Motion for Preliminary Injunction, *DISH Techs. v. MG Premium Ltd et al.*, No. 2:23-cv-552-HCN-DAO, D.I. 19.
2054	[Reserved]
2055	Apple and MOVE NDA Agreement 11/15/2006 (CX-1137C)
2056	Apple and MOVE NDA Agreement (CX-1085C)
2057	E-Mail on 2/23/2009 (CX-1219C)
2058	Microsoft Invests in Net Video (CX-1087)
2059	MOVE Networks Publishing System (CX-1247C)
2060	Silverlight Shines (CX-1090)

2061	[Reserved]
2062	Exemplary Claim Chart Illustrating MOVE Networks' Use of Invention
2063	Excerpt of Deposition of David Ericson in *In re Certain Fitness Devices, Streaming Components Thereof, and Systems Containing Same*, Inv. No. 337-TA-1265 (taken Jan. 6, 2022)
2064	MOVE Crosses the Hour Threshold
2065	Readies Online HD Shows as Streamlettes (CX-1107)
2066	Delivering a Better Viewing Experience
2067	MOVE Adaptive Stream
2068	Utah Valley Entrepreneurial Forum Hall of Fame 2013
2069	Utah Technology Hall of Fame 2005
2070	ABC TV New Player Rocks
2071	E-Mail 1/23/2008 (CX-1052C)
2072	ABC.com Streamlettes (CX-1133)
2073	MOVE Networks Newsroom (CX-1124)
2074	ABC.com Readies Online HD (CX-1135)
2075	Metrics Point to Maturation of Online (CX-1117)
2076	More Money Pouring Into Rich Media (CX-1118)
2077	MOVE Put Mass Back Into Mass Media (CX-1126)
2078	E-mail 2/25/2008 (CX-1053C)
2079	E-mail 5/14/2008 (CX-1055C)
2080	2010 EchoStar 10-K (CX-0052)
2081	E-Mail 8/26/2008 (CX-1059C)

2082	Microsoft Extends Vision (CX-1148)
2083	DISH's Motion to Terminate Against Peloton
2084	Joint Motion to Partially Terminate Against Mirror
2085	DISH Petition to Rescind Limited Exclusion Order Against iFit
2086	MOVE Networks Awarded Fundamental Patent (CX-1091)
2087	Synchronized Multimedia Integration Language (SMIL 2.0)
2088	Default Protective Order
2089	Reserved
2090	Ericson Declaration
2091	Transcript of Deposition of Dr. Henry Houh (November 12, 2024)
2092	09-19-24 Aylo v. Dish – Deposition transcript David Ericson - Condensed

I. INTRODUCTION

Petitioner Aylo Freesites Ltd ("Aylo") seeks to exclude evidence of secondary considerations of non-obviousness. This evidence demonstrates the state of the art as it existed in the mid-2000s and the industry's concurrent surprise and praise of the cutting-edge commercial embodiment of the ABR Patents as it was demonstrated and commercialized by MOVE Networks, Inc. ("MOVE")—the ABR Patents' previous owner. These highly-probative internal communications between MOVE executives and senior Microsoft and Level 3 engineers demonstrate the surprise by industry leaders and unexpected results achieved in the state of streaming by the ABR Patents as demonstrated with the MOVE player.

Aylo objects to these documents largely on hearsay grounds. But these materials are not hearsay because they "are offered for the fact that they were made (that is, industry praise existed)—not for the underlying truth" of the matters asserted. *Geotab USA, Inc., v. Omega Patents, LLC*, IPR2023-00504, Paper 45 at 63 (PTAB 2024). For example, one disputed exhibit contains communications between senior officials expressing surprise and curiosity, questioning "[w]hy … current streaming protocols [were] broken? There is enough bandwidth but they cannot get the results you [MOVE] do." EX2031. DISH offers this evidence not to establish that then-current streaming protocols were, in fact, "broken," but rather to demonstrate that industry players recognized the superior "results" of the MOVE player (*e.g.*, industry praise). EX2031 and the other similar exhibits are therefore

admissible for that purpose. Along the same lines, the 2006 Emmy Award exemplifies how the MOVE-powered player used by ABC.com won an engineering Emmy for its technology, directly demonstrating the inventiveness of the ABR Patents. Awards like this are also admissible over hearsay objections. *Fox Factory, Inc. v. SRAM, LLC*, IPR2017-00472, Paper 64 at 59 (PTAB Apr. 18, 2018).

Aylo's other objections pertaining to DISH's reliance on the cross-examination testimony of Dr. Houh are also flawed. Dr. Houh's supplemental declaration opines, for the first time, on both "M.Show" and his belief that industry awards recognizing DISH's technology are not objective indicia of non-obviousness. DISH was entitled to cross-examine Dr. Houh with evidence to the contrary and to rely upon that testimony in its Sur-Reply. *See* PTAB Consolidated Trial Practice Guide, 73 (Nov. 2009)

As explained in detail below, Aylo ignores the well-settled bases for the admission of this objective indicia evidence of non-obviousness. As such, the Board should deny the Motion to Exclude the Challenged Exhibits.[2] Not only is each Challenged Exhibit admissible, but Aylo's arguments are conclusory and fail to show why exclusion of probative evidence is warranted.

[2] "The Challenged Exhibits" as used herein refers to EX2031, EX2032, EX2033, EX2049, EX2057, EX2071, EX2078, EX2079, and EX2081, and the following excerpts from the transcript of the second deposition of Dr. Houh (EX2091): 21:16-24:4; 91:9-94:21; and 104:23-106:14.

II. LEGAL STANDARDS

The Federal Rules of Evidence ("FRE") apply in proceedings before the Board. *See, e.g.*, 37 C.F.R. §42.62. As movant, Aylo bears the burden of proving that exclusion is justified and to articulate the grounds for its position. 37 C.F.R. §42.20(c). Aylo has not met its burden.

A. Relevance

Generally, all evidence that is relevant is admissible, unless the FRE provide an exclusion to admissibility. FRE 402. "Evidence is relevant if it has *any tendency* to make a fact more or less probable than it would be without the evidence and the fact is of consequence in determining the action." *Fox Factory, Inc. v. SRAM, LLC*, IPR2017-00472, Paper 64 at 59 (P.T.A.B. Apr. 18, 2018) (citing FRE 401).

B. Hearsay

Statements that are not offered to prove the truth of the matters asserted therein are not hearsay, and are, therefore, admissible. FRE 801. Recognizing this distinction, the Board has repeatedly found that statements of accolades or awards received are not hearsay because the probative value of such statements lies not in the statements' truth but in the fact that the statements were made. *Cf. Fox Factory, Inc. v. SRAM, Inc.*, IPR2017-00472, Paper 59, at 60 (P.T.A.B. Apr. 18, 2018) (citing *Asetek Danmark A/S v. CMI USA, Inc.*, No. 13-cv-00457-JST, 2014 WL 12644295, at *2 (N.D. Cal. Nov. 19, 2014)). Other exceptions also exist, such as FRE 803(1) (present sense impression), 803(5) (recorded recollection), 803(6) (business record).

C. Foundation/Authentication

To properly authenticate or identify evidence, "the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." FRE 901(a); FRE 602. Testimony from a witness with knowledge "that an item is what it is claimed to be" is sufficient to authenticate evidence. FRE 901(b)(1).

III. EXHIBITS 2031-2033, 2049, 2057, 2071, 2078, 2079, 2081, AND 2091 ARE ADMISSIBLE.

Aylo seeks to exclude from the Board's consideration four tranches of information demonstrating secondary considerations of non-obviousness of the ABR Patents: (1) confidential business records evidencing communication between executives from MOVE (predecessor-owner of the ABR Patents that DISH acquired) and industry leaders Microsoft or Level 3 soon after the patent application was filed that reveal Microsoft/Level 3 executives' perception of the state of the art and memorialize meetings between the executives; (2) similar confidential records relied upon in Dr. Jeffay's analysis; (3) the commercial implementation of Ogdon[3] (otherwise known as "M.Show") that directly contradicts Dr. Houh's statements and demonstrates a POSITA's understanding that Ogdon's presentation segments refer to PowerPoint slides; and (4) the 2006 Emmy Award given to the MOVE-powered ABC.com player for its "Outstanding Achievement In Enhanced Or Interactive

[3] "Ogdon" refers to U.S. Patent No. 6,161,137 and serves as the primary reference for Aylo's obviousness arguments.

Television (New Delivery Platforms)" that came out of testimony that *Aylo itself elicited* from fact witness David Ericson, who served as MOVE's VP of Operations and Business Development. For the reasons set forth below, all are admissible.

A. Exhibits 2031, 2032, 2033, 2049 and 2057 Are Admissible.

Exhibits 2031, 2032, 2033, 2049 and 2057 are confidential business records that consist of e-mails between executives from MOVE and Microsoft or Level 3 Communications. Each of these exhibits was submitted in and relied upon in DISH's ITC Action finding secondary considerations of nonobviousness to support validity of the ABR Patents. *See, e.g.*, EX2031 (labeled CX-1047C, where "CX" represents "Complainant's Exhibit"); EX2032 (labeled CX-1049C); EX2033 (labeled CX-1050C); EX2049 (labeled as CX-1146C); EX2057 (labeled CX-1051C).

1. Hearsay

Exhibits 2031–2033, 2049, and 2057 are not hearsay, and therefore should not be excluded. If the significance of evidence "lies solely in the fact that it was made . . . the statement is not hearsay." FRE 801(c), 1997 Adv. Comm. Note.; *see also Fox Factory*, Paper 59 at 59–60 (finding that "'courts have properly found that articles showing the receipt of "awards and accolades" are admissible over a hearsay objection'"). Contrary to Aylo's allegations, the Board need not accept the truth of the matters asserted in Exhibits 2031–2033, 2049, and 2057 to reach the well-reasoned and evident conclusion that MOVE's innovative product (which practices the claimed invention) stunned industry players and solved a long felt, unmet need

in the market. Instead, DISH offers these exhibits as evidence of the state of mind of other industry participants to show the fact that statements of praise were made, and not to prove that "competing technologies allegedly could not achieve the same results as the MOVE player." IPR2024-00045, Paper 48 at 3 (Mot. to Exclude). The existence of these statements, coming from engineers and executives from video-streaming giants, corroborates DISH's argument that the claimed technology was innovative and filled a long felt, but unmet need in the "broken" video-streaming marketplace. Therefore, these exhibits are admissible because they are not hearsay.

Even assuming *arguendo* that Exhibits 2031–2033, 2049, and 2057 are hearsay, they are separately admissible under FRE 803(1)—the present sense impression exception to hearsay. Under FRE 803(1), hearsay evidence is admissible as a present sense impression if "the declarant [has] personally perceived the event described, (2) the declaration [is] a factual description, and (3) the declaration and the event described [is] be contemporaneous." *Tracinda Corp. v. DaimlerChrysler AG*, 362 F.Supp.2d 487, 602 (D. Del. 2005). Exhibits 2031–2033, 2049, and 2057 all contain statements that relate to media executives' then-present sense impressions of the streaming industry during 2007–2009, soon after the filing of the ABR Patents. These Challenged Exhibits document business meetings between the executives shortly after they occurred and include statements about the industry executive's perceptions of the current streaming/video sharing marketplace as they were experiencing it. The emails include statements, such as, "why are the current

streaming protocols broken," and "[t]hese are show stoppers for our customers." EX2031; EX2033. This demonstrates that between 2007-2009, industry executives believed that there needed to be an alternative to traditional streaming technology and that ABR technology powered by MOVE's invention was quickly becoming the solution. As such, Exhibits 2031–2033, 2049 and 2057 are admissible.

The documents are also business records under FRE 803(6) because they are e-mail communications between MOVE Networks, the predecessor owner of the patents, and executives at Microsoft and Level 3. Specifically, as confirmed by Mr. Major, EchoStar (now merged with DISH), purchased MOVE Networks and its assets for $45 Million. Ex. 2010 at ¶ 18. With the purchase, DISH received the company corporate records, including e-mails. These company e-mails were obtained through subpoenas of records of former MOVE employees and they describe regularly conducted business activity as well as development and commercialization of MOVE's player with parties such as Microsoft and Level 3. There is no dispute that these e-mails were drafted at the time of the events occurring at the business between 2006 and 2009, and Mr. Major confirmed that these activities were ongoing at or around this time. Ex. 2010 at ¶ 25-29. As business records (e-mails) of regularly conducted business activity occurring at or around the time of the activities, these documents are admissible.

2. Authenticity/Foundation

The sum and substance of Aylo's authentication and foundation arguments fare no better. According to Aylo, DISH allegedly failed to carry its burden of proving authenticity or foundation because it failed to, for example, "proffer any witness, via declaration or deposition, to authenticate these exhibits." Paper 48, at 4 (emphasis added). But ***Aylo deposed two MOVE executives, including MOVE's founder/CEO, Drew Major, and VP of Business Development/Operations, David Ericson***.[4] Mr. Major also submitted a declaration, EX2010, referencing the e-mail chains in Exhibits 2031–2033 as evidence of MOVE's overwhelmingly successful demonstration and collaboration with Microsoft and Level 3. *See, e.g.,* EX2010 ¶ 25. *Cf.* FRE 901(b)(1) (authentication requirement satisfied where testimony by knowledgeable witness is offered). Further undercutting its own arguments, Aylo asked Mr. Major about those exhibits during his deposition and ***knew*** that Mr. Major had personal experience with demonstrating MOVE's technology to others, which is the underlying subject matter of the e-mail communications. *See* EX1021 at

[4] Aylo deposed Mr. Ericson after DISH served Aylo with supplemental evidence to overcome Aylo's initial objections to DISH's POR evidence. DISH's supplemental evidence included a declaration from Mr. Ericson (EX2090) that, among other things, confirms the ample indicia of non-obviousness for the ABR Patents. Evidently discontent with the testimony Mr. Ericson provided Aylo's counsel, Aylo now seeks to suppress the deposition testimony (EX2092) and supplemental evidence.

128:15-129:5; 134:20-137:6. In other words, Aylo asked for and got the foundational information from Mr. Major's deposition that it now claims is lacking.

B. Exhibits 2071, 2078, 2079, and 2081 Are Admissible.

Exhibits 2071, 2078, 2079, and 2081 are confidential business e-mails between executives from MOVE and Microsoft or Level 3 Communications. These confidential emails form the basis of part of Dr. Jeffay's expert opinion that MOVE's ABR technology achieved extraordinary success, which reinforces the objective indicia of non-obviousness here.

1. Hearsay

As with Exhibits 2031–2033, 2049, and 2057, the above-listed e-mail chains between MOVE and Microsoft or Level 3 executives are admissible. The Board need not accept the truth of the matters asserted in Exhibits 2071, 2078, 2079, and 2081 to reach the conclusion that MOVE's ABR technology was receiving wide-spread industry praise and commercial success. The mere fact that statements exist indicating the excitement of industry giants, such as Microsoft, to showcase MOVE's technology and incorporate it as a critical component of others' streaming operations is sufficient evidence to demonstrate ABR's technology is non-obvious and innovative. Therefore, these exhibits are not hearsay.

Exhibits 2071, 2078, 2079, and 2081 are also admissible because an expert is permitted to base their opinion on underlying documents that are hearsay. Aylo themselves admitted as much. *See* Paper 48 at 6. FRE 703 permits experts to offer

opinion testimony that relies on facts or data that would otherwise be inadmissible if (1) experts in the field would reasonably rely on the facts or data and (2) the probative value of facts or data outweighs any prejudicial effect. When reading paragraphs 219 and 221 in the context of Dr. Jeffay's ***entire*** declaration, it is clear that Dr. Jeffay is opining on the extraordinary commercial success of MOVE's ABR technology. Dr. Jeffay bases this opinion by examining (1) internal discussions between Microsoft executives on whether they should purchase/acquire MOVE and (2) discussions between Microsoft and MOVE requesting MOVE to "support a demonstration of the 'full featured player' for the 2008 National Association of Broadcasters (NAB) conference." EX2006, ¶¶ 218-21. Dr. Jeffay, as an expert reasonably viewed such communications in determining whether the technology was successful and received industry praise, especially because such communications are coming from Microsoft, an industry giant. Therefore, the portion of Dr. Jeffay's declaration relying on these exhibits is admissible.

C. Exhibit 2091.

1. M.Show

DISH has shown that the teachings of Ogdon, alone or in combination with other references, fails to render obvious any challenged claim. Ogdon's specification does not refer to M.Show, and thus M.Show is not part of Ogdon's disclosures. Seeking to show how a POSITA would have understood Ogdon, however, Aylo's expert, Dr. Houh, first raised M.Show in his second declaration

submitted after DISH's Patent Owner Response. *See* EX1028 ¶ 44. DISH is entitled to challenge Dr. Houh's opinions by confronting him with contradictory evidence during his deposition. Accordingly, the cross-examination of Dr. Houh at 21:16-24:4 should not be excluded without excluding the entirety of Dr. Houh's discussion of M.Show in his supplemental declaration.[5] *See* EX1028 ¶ 44. Even if M.Show is hearsay, the relevant disclosure of M.Show in this proceeding is entirely covered as a public record under Rule 803. This is because, although not part of the Ogdon reference, M.Show is discussed in Ogdon's provisional patent application. *See* EX1014 at 13-23.[6]

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[5] Even if the discussion of M.Show constitutes hearsay, DISH notes that Aylo has not moved to exclude other out of court statements about M.Show, including in its own exhibits (*e.g.*, EX1028 ¶ 44; EX1014 at 13-23).

[6] DISH notes that the Ogdon provisional application is not a prior art reference in any of Aylo's IPR grounds nor part of Ogdon via incorporation-by-reference. *See Apple Inc. v. Int'l Trade Comm'n*, 725 F.3d 1356, 1362 (2013) (holding prior art reference (Perski '808) failed to incorporate-by-reference provisional application (Morag) and explaining, "[t]o incorporate material by reference, the host document must identify with detailed particularity what specific material it incorporates") (internal quotations omitted); *Apple Inc. v. DoDots Licensing Sols. LLC*, IPR2023-00939, Paper 12 at 9-10 (P.T.A.B. Jan. 3, 2024) (similar); *Radware Inc. v. F5 Networks, Inc.*, IPR2017-00653, Paper 10 at 13-14 (P.T.A.B. Jul. 31, 2017) (similar).

2. ABC.com's 2006 Emmy Award Is Admissible.

Aylo's efforts to exclude the 2006 Emmy Award received by ABC.com for its "Outstanding Achievement in Enhanced or Interactive Television (New Delivery Platforms)" (the "2006 Emmy") should be denied.

Aylo incorrectly states that "this record was never identified previously" and asserts that evidence of this second Emmy Award was submitted in violation of the Board's rules. DISH's Patent Owner Response, however, points out that Sling TV, a service of DISH, which implemented the patented ABR technology after DISH acquired MOVE and the ABR Patents, was recognized as a "pioneer in adaptive bitrate streaming" and received an Emmy Award for the technology in 2020 (the "2020 Emmy"). Paper 18 at 64 (quoting EX2013). In reply, Aylo and Dr. Houh attempted to undercut the 2020 Emmy by suggesting that the award is attributable to other features such as "increased Internet bandwidth and advances in computing technology." Paper 36, at 29. The 2006 Emmy debunks this notion because it was awarded shortly after the relevant filing date here. DISH therefore raised the 2006 Emmy at Dr. Houh's deposition in direct response to Aylo's mischaracterizations of the technology driving MOVE's and Sling TV's industry praise.

Further, the details surrounding the 2006 Emmy were identified ***during cross-examination testimony elicited by Aylo***. Specifically, Aylo questioned fact witness David Ericson about the 2020 Emmy Award and the reason for the time difference. Mr. Ericson responded that the MOVE player also received another Emmy Award

in 2006 for being one of the first to be able to offer a full-screen high resolution player that could stream one-hour long episodes without freezing or buffering, as shown below.

> Q. And Move was not awarded an Emmy when it began providing services for companies like ABC and Fox; is that correct?
>
> A. Move, no, we didn't – again, I don't recall Move ever [submitting for an Emmy]. ***However, I do believe—I recall that ABC won an Emmy—I can't remember what it was for, but it was related to their product. I think it was the ABC.com that was obviousoly using Move's technology—underlying technology at the time they won the Emmy. But I don't remember what the actual award was. I did see the Emmy when I was in Burbank***.

EX2092 (Tr. of Dep. of D. Ericson) at 131:20-132:11 (emphasis added).[7]

After confirming on re-direct that ABC.com's Emmy-award winning Full Streaming Player "[a]bsolutely unequivocally" relied on MOVE's technology, Mr.

[7] As DISH notes in its Patent Owner Sur-Reply (Paper 41), Aylo cross-examined Mr. Ericson on the testimony he provided in the ITC Action (represented in EX2063, which Aylo misidentifies as EX2036) and in the declaration he provided as supplemental evidence following Aylo's objection to EX2063. *See* EX2090. Now, Aylo elects to forego its objection to EX2063 and argues that DISH should be precluded from filing EX2090 in support of DISH's Opposition to Aylo's Motion to Exclude on relevance grounds. *See* Paper 48, at 2 n.2. Absent admission of EX2090 or Mr. Ericson's deposition testimony in this case, the Board should infer that Mr. Ericson's testimony is unfavorable to Aylo. *See Ring Plus, Inc. v. Cingular Wireless Corp.*, 614 F.3d 1354, 1362-63 (Fed. Cir. 2010).

Ericson testified that the reason he did not disclose the Emmy in his declaration was because he "wasn't asked about it until [Aylo's counsel asked him]" in his deposition. EX2092, at 173:10-13. DISH's counsel made clear on the record that Aylo, and not DISH, opened the door to this award. EX2092 at 173:22-174:5.

Dr. Houh's confirmation that he did not consider the 2006 Emmy Award undercuts his analysis of secondary considerations. EX2091 at 91:5-8, 97:18-20. Aylo's arguments are merely an attempt to deprive this Board from considering what Aylo's own inquiry revealed—the overwhelming success and industry response to MOVE's innovative and patented ABR technology.

a. **Relevance**

Evidence of ABC.com's 2006 Emmy Award that "[a]bsolutely unequivocally" relied on MOVE's technology is relevant objective indicia. At a minimum, the award is highly probative of the industry's praise of ABC.com's (and MOVE's) state-of-the-art technology in the 2000s. Thus, the award is not prejudicial to Aylo and cannot "substantially outweigh" the high probative value it offers.

Aylo's assertion that ABC.com might not have used MOVE's technology lacks any factual support and undercuts the 2006 Emmy's relevance. Although ABC.com announced a new broadband player in early 2007 using MOVE's technology, Mr. Ericson's testimony establishes that ABC.com unequivocally used MOVE's technology for its 2006 delivery of content that received an Emmy. Indeed, Mr. Major's declaration states "our product release in Fall of 2006," nearly 35

million people downloaded the MOVE Networks client with "[m]ost of the downloads were for viewing ABC." EX2010 at ¶ 22. The Emmy Award was for technology from 2006, lining up exactly as Mr. Major and Mr. Ericson testified. To the extent Aylo had any doubt, it had full opportunity to ask Mr. Ericson about these issues on re-direct and instead elected to not do so.

b. **Hearsay**

Evidence that a company received an Emmy Award for its use of MOVE technology is not hearsay. As explained throughout, the Board need not accept the truth of the matters asserted on the website; rather, the mere existence of the award suffices as evidence that the industry lauded MOVE's ground-breaking technology. *See* Paper 41, 22–23 ("The overwhelming and unavoidable evidence here—which includes . . . Emmy Awards to ABC.com in 2006 . . . proves that MOVE and PO's successes are attributable to more than the mere optional use of multiple TCP connections and HTTP web servers."). And "articles showing the receipt of 'awards and accolades' are admissible over a hearsay objection." *Fox Factory*, Paper 59 at 59; *see Hynix Semiconductor, Inc. v. Rambus, Inc.,* 2009 112834, at *15 (N.D. Cal. Jan. 16, 2009) (admitting awards and laudatory praise offered for the fact that they were made and not any underlying truth). Thus, the 2006 Emmy is admissible.

IV. CONCLUSION

For the foregoing reasons, DISH respectfully requests the Board deny Aylo's motion to exclude the Challenged Exhibits.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

Pursuant to 37 C.F.R. §§ 42.6(e), we certify that an electronic copy of the foregoing Opposition to Petitioner's Motion to Exclude pursuant to 37 C.F.R. § 42.107(a) along with any accompanying exhibits was served on Petitioner's counsel of record at the following address:

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CERTIFICATION UNDER 37 C.F.R. § 42.24(d)

Pursuant to 37 C.F.R. § 42.24(d), the undersigned hereby certifies that the word count under §42.24(b)(3) for the foregoing Opposition to Petitioner's Motion to Exclude totals 15 pages, within the fifteen (15) page limit allowed under § 42.24(a)(1)(v) and § 42.24(b)(3).

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