UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

AYLO FREESITES LTD,
Petitioner
v.

DISH TECHNOLOGIES L.L.C.,
Patent Owner

U.S. Patent 11,470,138
Issue Date: October 11, 2022
Title: APPARATUS, SYSTEM, AND METHOD FOR MULTI-BITRATE CONTENT STREAMING

Inter Partes Review No. IPR2024-00044

PETITIONER'S OPPOSITION TO PATENT OWNER'S MOTION TO SEAL

Mail Stop PATENT BOARD
Patent Trial and Appeal Board
United States Patent and Trademark Office
PO Box 1450
Alexandria, Virginia 22313-1450
Submitted Electronically via PTAB P-TACTS

Pursuant to 37 C.F.R. § 42.25(a)(1), Petitioner Aylo Freesites Ltd ("Aylo") opposes Patent Owner DISH Technologies LLC's ("DISH") Motion to Seal (Paper 20). DISH moved to seal exhibits 2006, 2031, 2032, 2033, 2049, 2050, 2055, 2056, 2057, 2059, 2071, 2078, and 2079 in their entirety. Paper 20 at 2.

DISH's Patent Owner Response ("POR") was due on Monday, July 22, 2024. On the Friday afternoon before the due date, DISH emailed Aylo asking whether Aylo would oppose entry of the Board's Default Protective Order without providing or describing the exhibits it wished to be sealed. Accordingly, Aylo was not able to provide its position before DISH filed its POR.

Having now reviewed the exhibits DISH wishes to be sealed, Aylo does not believe a protective order is necessary and opposes DISH's motion.[1] The Board has established a four-factor test for determining whether a moving party has met its burden of showing "good cause" under 37 C.F.R. § 42.54 to support granting a motion to seal: (1) the information sought to be sealed is truly confidential; (2) a concrete harm would result upon public disclosure; (3) there exists a genuine need to rely in the trial on the specific information to be sealed; and (4) on balance, an

[1] To the extent the Board determines that a protective order is necessary, Aylo would be agreeable to entry of the Board's Default Protective Order (Exhibit 2088). Out of an abundance of caution, Aylo's expert and counsel have each signed the Default Protective Order and will file the signed acknowledgements if the Default Protective Order is entered by the Board.

interest in maintaining confidentiality outweighs the strong public interest in having an open record. *See Argentum Pharm. LLC v. Alcon Research, Ltd.*, IPR2017-01053, Paper 27 at 4 (PTAB Jan. 19. 2018). DISH has not shown that any of these factors are met. Moreover, DISH's proposal to seal entire documents is overbroad.

I. DISH's Exhibits Do Not Contain "Truly Confidential" Information

DISH has not met its burden of showing that the information sought to be sealed is truly confidential. DISH merely alleges that "Exhibits 2006, 2031, 2032, 2033, 2050, 2055, 2056, 2057, 2071, 2078, and 2079 contain confidential communications related to business dealings, financial information, valuation and/or investment information between DISH's predecessor and third parties" and that "other confidential technical information related to MOVE Networks, Inc.'s products and how they are integrated into third parties' streaming systems is contained in Exhibits 2006, 2049 and 2059." Paper 20 at 3-4.

But DISH does not point to any particular information in these documents that is truly confidential to DISH. For example, Exhibit 2059 is cited on the face of the patent as publicly available at "http://www.movenetworks.com/wp-content/uploads/move-networks-publishing-system.pdf." EX1001, Cover; *see also Microsoft Corp. v. Daedalus Blue, LLC*, IPR2021-00831, Paper 21 at 3 (PTAB Nov. 17, 2021) (denying motion to seal where information was publicly available). Other exhibits purport to be term sheets, NDAs, or internal emails, but they merely contain high

level discussions about DISH's patents or the long-defunct MOVE player and defunct MOVE entity. *E.g.*, Ex. 2031-2033, 2049, 2057, 2071, 2078, 2079 (emails between MOVE and Microsoft), Ex. 2050 (MOVE and Microsoft term sheet); Ex. 1055-2056 (MOVE and Apple NDAs).

The exhibits do not reflect any "trade secret or other confidential research, development, or commercial information" that the Board typically considers "truly" confidential, but rather contain only high level, stale information. *See* PTAB Consolidated Trial Practice Guide ("PTAB Guide") at 19; *Google LLC v. Personalized Media Communications, LLC*, IPR2020-00719, Paper 10 at 3 (PTAB July 17, 2020) (denying motion to seal and noting "Patent Owner's Motions to Seal do not even allege, let alone demonstrate, that any information in the identified exhibits is confidential information under this definition"). Thus, DISH's motion to seal should be denied under this factor.

II. DISH Cannot Show Concrete Harm Upon Public Disclosure

DISH does not allege any concrete harm would result upon public disclosure. *See* Paper 20. Instead, it simply alleges that "public interest will not be harmed by sealing these agreements and related documents" and cites only to a district court case from the Middle District of Florida. *See* Paper 20 at 4. DISH must show that it would suffer a concrete harm upon public disclosure of each of the exhibits it wishes to seal. It does not even attempt to do so here, nor could it given that the exhibits do

not contain information that is truly confidential as described above. *Supra* Section I. Thus, DISH's motion to seal should be denied under this factor as well. *See Slayback Pharma LLC v. Eye Therapies, LLC*, IPR2022-00142, Paper 56 at 4 (PTAB Feb. 1, 2023) (denying motion to seal for lacking explanation of concrete harm); *Google*, IPR2020-00719, Paper 10 at 4 (denying motion to seal for failing "to aver, let alone demonstrate, that a concrete harm would befall").

III. DISH Has Not Shown a "Genuine Need" to Rely on the Exhibits

DISH fails to explain why it has a "genuine need" to rely on the exhibits at trial. There does not appear to be any. In its POR, DISH cites the majority of the exhibits no more than once, usually just in a string cite and without any explanation as to why the cited exhibit is relevant to the point DISH tries to make. DISH's failure to explain why it has a genuine need to rely on each exhibit at trial weighs against granting its motion. *See Shure Inc. v. Clearone, Inc.*, IPR2017-01785, Paper 47 at 4, 6, 7 (PTAB July 31, 2018) (denying motions to seal for failing to identify any genuine need for the information).

IV. DISH Has Not Shown that an Interest in Maintaining Confidentiality Outweighs the Strong Public Interest in having an Open Record

As explained above, DISH has not shown that the exhibits contain truly confidential information or that DISH would suffer concrete harm by their disclosure. DISH has also failed to explain why there is a genuine need to rely on them at trial, as opposed to other exhibits that could serve the same purpose. The

strong public interest in having an open record outweighs DISH's conclusory allegation that these exhibits contain confidential information. *See Axonics, Inc. v. Medtronic, Inc.*, IPR2020-00680, Paper 71 at 2 (PTAB Nov. 28, 2023) ("A strong public policy favors making information filed in an *inter partes review* open to the public, e.g., because the proceeding determines the patentability of claims in an issued patent and, therefore, affects the rights of the public). Accordingly, this factor does not support DISH's motion to seal, and the motion should be denied.

V. DISH's Proposal to Seal Documents in their Entirety is Overbroad

If the Board finds that sealing is appropriate, DISH's proposal to seal exhibits in their entirety is overbroad. DISH has moved to seal Exhibits 2006, 2031, 2032, 2033, 2049, 2050, 2055, 2056, 2057, 2059, 2071, 2078, and 2079, but these exhibits on their face all contain at least some information that DISH cannot plausibly claim is confidential. Though DISH stated that it "will file redated versions of these exhibits where appropriate" (*id.*), DISH did not provide redacted public versions of these exhibits along with its motion to seal per the PTAB Guide and the Default Protective Order. *See* PTAB Guide at 22 ("The rule encourages parties to redact sensitive information, where possible, rather than seeking to seal entire documents."), Default Protective Order (EX2088) at 5 (explaining that where "not all" information is confidential, the submitting party "shall file confidential and non-confidential" versions). Indeed, DISH seeks to seal in its entirety the declaration of

its expert Dr. Jeffay (Exhibit 2006), which would undoubtedly be overbroad because numerous paragraphs clearly do not contain confidential information. *See Analog Devices, Inc. v. Xilinx, Inc.*, IPR2020-01599, Paper 56 at 5-6 (PTAB Dec. 23, 2021) (denying motion to seal portions of documents that were "well beyond the minimum needed to protect confidential information").

Therefore, at a minimum, DISH should be required to file redacted versions of its exhibits where redactions are "limited to the minimum amount necessary to protect confidential information" such that "the thrust of the underlying argument or evidence [is] clearly discernable from the redacted versions." Paper 10 (Scheduling Order) at 3.

VI. Conclusion

For the foregoing reasons, the Board should deny Patent Owner's motion to seal.

DATED: August 21, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 21, 2024 I caused a true and correct copy of the foregoing Opposition to Patent Owner's Motion to Seal to be served via email to counsel of record:

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