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

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 AYLO FREESITES LTD'S MOTION TO EXCLUDE EVIDENCE

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United States Patent and Trademark Office
PO Box 1450
Alexandria, Virginia 22313-1450
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I. STATEMENT OF THE PRECISE RELIEF REQUESTED

Pursuant to 37 C.F.R. § 42.64(c), Petitioner Aylo Freesites Ltd ("Aylo") moves to exclude improper evidence cited and relied upon by Patent Owner DISH Technologies LLC ("DISH"). Specifically, Aylo moves to exclude:

1. Exhibits 2031-2033, 2049, 2057, 2071, 2078, 2079, and 2081, which are a collection of email chains from non-declarants and third parties. Aylo timely objected to these exhibits on July 29, 2024. *See* Paper 21.

2. Portions of Exhibit 2091, which is the cross-examination deposition transcript of Aylo's expert, Dr. Henry Houh, that merely reflect DISH's counsel reading from documents introduced by DISH for the first time during Dr. Houh's deposition. EX2091 at 21:16-24:4, 104:23-106:14, 91:9-94:21. Aylo timely objected during Dr. Houh's Deposition (EX2091 at 22:8-11, 92:17-25, 96:8-16) and on December 4, 2024 (Paper 45).

3. The website "https://www.emmys.com/shows/abccom-full-episode-streaming-player" (the "Emmy Website"), which DISH identified and cited for the first time in its Sur-Reply. Paper 47 ("Sur-Reply") at 24 n.7. Aylo timely objected to DISH's citation of the Emmy Website on December 4, 2024. *See* Paper 45.

4. Any portions of DISH's Patent Owner Response ("POR"), Sur-Reply, and Dr. Jeffay's declaration (EX2006) that cite, quote, or otherwise rely upon the aforementioned improper evidence. *E.g.*, Paper 19 ("POR") at 56-57 (citing

EX2031-EX2033), 61 (citing EX2049), 63 (citing EX2057), EX2006 at ¶¶ 184, 196, 197, 203, 213, 218, 219, 221-224, 234 (citing EX2031-2033, EX2057, EX2071, EX2078, EX2079), Sur-Reply at 8-9 (citing EX2091 at 21:16-24:4), 22-23 (citing EX2091 at 105:16-106:14, 94:8-21), 24 n.7 (citing EX2091 at 104:23-106:10 and the Emmy Website), 26-27 (citing EX2031).[1]

II. STATEMENT OF REASONS FOR THE RELIEF REQUESTED

The Federal Rules of Evidence apply to this proceeding. 37 C.F.R. § 42.62. A party may move to exclude improper evidence when timely objections are filed. 37 C.F.R. §§ 42.64(b)-(c). Aylo timely objected to DISH's improper evidence. *Supra* Section I.

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[1] Aylo also provisionally moves to exclude DISH's supplemental evidence to the extent DISH attempts to file or rely on it. Specifically, DISH served, but did not file, its supplemental evidence in response to Aylo's objections to DISH's Exhibit 2036 cited in DISH's POR. Paper 21. Because Aylo is not moving to exclude Exhibit 2036, DISH's supplemental evidence is moot. *See* Consolidated Trial Practice Guide at 79 ("Supplemental evidence is not filed at the time of the objection, but simply served, and is filed only in support of an opposition to a motion to exclude."). To the extent DISH nonetheless attempts to file its supplemental evidence, Aylo moves to exclude it for the reasons stated in its objections (Paper 23), including under Fed. R. Evid. 401-403 as being irrelevant and a waste of time since DISH does not rely on the supplemental evidence in any of its papers and served it for the sole purpose of supporting Exhibit 2036.

A. The Board Should Exclude Exhibits 2031-2033, 2049, 2057, 2071, 2078, 2079, and 2081, which Are Email Chains Between Non-Declarants and Third Parties

Aylo moves to exclude Exhibits 2031-2033, 2049, 2057, 2071, 2078, 2079, and 2081, which are a collection of unauthenticated and out-of-court email chains.

1. Exhibits 2031-2033 and 2057

Exhibit 2031 is an email chain between individuals with a "movenetworks.com" email address and an individual with a "Level3.com" email address. EX2031. Exhibits 2032, 2033, and 2057 are email chains between individuals with a "movenetworks.com" email address and individuals with a "microsoft.com" email address. EX2032-2033, EX2057. None of the individuals included in these email chains are declarants in this proceeding.

These exhibits should all be excluded under Fed. R. Evid. 801 and 802 because they are out-of-court statements being offered as evidence to prove the truth of the matter asserted. For example, DISH quotes from Exhibit 2031 to support its claim that competing technologies allegedly could not achieve the same results as the MOVE player. POR at 56-57; Sur-Reply at 26-27. And DISH cites to Exhibits 2032 and 2033 to support its assertions that (i) Microsoft integrated MOVE's ABR technology into its Silverlight product and (ii) Microsoft created "Smooth Streaming" after closely collaborating with MOVE and gaining access to its patented technology. POR at 57, 63. These exhibits constitute hearsay under Fed. R. Evid.

801(c) and are inadmissible under Fed. R. Evid. 802 because none of the individuals responsible for the statements in these exhibits submitted a declaration in this proceeding or were made available for cross-examination, and no hearsay exception applies. *Viking Drill & Tool, Inc. v. Wang*, No. IPR2023-00474, 2024 WL 3311903, at *21 (P.T.A.B. July 5, 2024) (excluding emails "directed towards the out-of-court statements of a third party").

Exhibits 2031-2033 and 2057 should further be excluded under Fed. R. Evid. 602 because they lack proper foundation. They also lack authentication under Fed. R. Evid. 901 and are not self-authenticating under Fed. R. Evid. 902. "To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." Fed. R. Evid. 901(a). DISH has not produced any such evidence. It has not, for example, proffered any witness, via declaration or deposition, to authenticate these exhibits or any of the statements contained therein. *Ingenico Inc. v. IOENGINE, LLC*, IPR2019-00416, Paper 60 at 80 (P.T.A.B. July 13, 2020) (excluding exhibit purporting to be a company letter on company letterhead because "[i]n the absence of any supporting testimony, Patent Owner has not met its burden of showing that [the exhibit] is what the Patent Owner claims it is"). None of DISH's declarants were included in any of the email communications reflected in Exhibits 2031-2033 and 2057.

In view of the foregoing, the Board should exclude Exhibits 2031-2033 and 2057 and disregard any portions of DISH's POR, Sur-Reply, and Declaration of Dr. Jeffay that attempt to rely on them. *See* POR at 56-57 (citing EX2031- EX2033), 63 (citing EX2057), EX2006 at ¶¶ 184, 197, 203, 218, 219, 234 (citing EX2031-2033, EX2057), Sur-Reply at 26-27 (citing EX2031).

2. Exhibits 2049, 2071, 2078, 2079, and 2081

Exhibits 2049, 2071, 2078, 2079, and 2081 are additional email chains between individuals with "movenetworks.com" and "microsoft.com" email addresses. DISH cites in passing to exhibit EX2049 on page 61 of its POR and does not cite to Exhibits 2071, 2078, 2079 or 2081 at all. However, DISH relies on the testimony of Dr. Jeffay, who in turn relies on these exhibits in his declaration. *See* POR at 61; EX2006 at ¶¶ 219, 221. For the same reasons discussed above with respect to Exhibits 2031-2033 and 2057, these exhibits should all be excluded as inadmissible hearsay under Fed. R. Evid. 801 and 802, and also as lacking foundation and proper authentication under Fed. R. Evid. 602 and 901. *See* Section II.A.1.

With respect to Fed. R. Evid. 801 and 802, Dr. Jeffay relies on these exhibits as evidence to prove the truth of the matters asserted. *See* EX2006 at ¶¶ 219, 221 (citing EX2071, EX2033, and EX2078). For example, Dr. Jeffay cites to these exhibits as evidence of certain technical capabilities of Microsoft's streaming player

and that Microsoft integrated MOVE's technology. EX2006 at ¶¶ 219, 221. And DISH, in turn, relies on Dr. Jeffay's statements to support its factual assertion that companies "adopted [MOVE's] technology after it was made commercially available." POR at 61 Although Fed. R. Evid. 703 permits experts to base opinions on "facts or data" that are not admissible in evidence, DISH has failed to show that these unauthenticated private emails—as opposed to, for example, technical documents or product testing—are the type of information that experts in the field of video streaming would reasonably rely on to form opinions about a streaming player's technical capabilities. Fed. R. Evid. 703. Regardless, even if Dr. Jeffay's underlying opinions are deemed admissible, the exhibits themselves are not. *See* Fed. R. Evid. 703 Committee Notes (2000 Amendment) ("Rule 703 has been amended to emphasize that when an expert reasonably relies on inadmissible information to form an opinion or inference, the underlying information is not admissible simply because the opinion or inference is admitted.").

In view of the foregoing, the Board should exclude Exhibits 2071, 2078, 2079, and 2081 and disregard any portions of DISH's POR and Dr. Jeffay's declaration that attempt to rely on them. *See* POR at 61; EX2006 at ¶¶ 219, 221.

B. The Board Should Exclude Portions of Exhibit 2091 That Merely Reflect DISH's Counsel Reading from Unadmitted Documents During Dr. Houh's Deposition

Aylo moves to exclude specific portions of Exhibit 2091, which is the cross-examination deposition transcript of Dr. Houh, that merely reflect DISH's counsel reading from or paraphrasing documents that were identified for the first time by DISH during Dr. Houh's deposition.

1. Exhibit 2091 at 21:16-24:4, which Reflects DISH's Counsel Reading from a Document Purporting to Describe the M.Show Commercial Product

DISH's Sur-Reply quotes from Exhibit 2091 at 21:16-24:4 to assert that a commercial product called "M.Show" "provided 'Internet-delivered ***Microsoft PowerPoint slides***.'" Sur-Reply at 8-9 (quoting EX2091 at 21:16-24:4 (emphasis in original)). But the portions of Exhibit 2091 cited by DISH are just quotes by its own counsel reading from an unadmitted document during Dr. Houh's deposition while asking Dr. Houh repeatedly, "[d]o you see that?" EX2091 at 22:16-24:4. Dr. Houh had never seen the document prior to his deposition (EX2091 at 109:17-25), and it was never filed as an exhibit in this proceeding nor identified until Dr. Houh's deposition.

DISH is aware that submitting a document as new evidence with its Sur-Reply would violate 37 C.F.R. § 42.23(b), which expressly states that a sur-reply "may not be accompanied by new evidence other than deposition transcripts of the cross-

examination of any reply witness." Thus, instead of submitting a document as new evidence, DISH attempts to skirt 37 C.F.R. § 42.23(b) by citing its counsel reading from the document during Dr. Houh's deposition. This is improper, and the Board should exclude Exhibit 2091 at 21:16-24:4 and disregard all portions of DISH's Sur-Reply that rely on this improper evidence under 37 C.F.R. § 42.23(b). *See* Sur-Reply at 8-9 (citing EX2091 at 21:16-24:4).

In addition, the Board should exclude Exhibit 2091 at 21:16-24:4 under Fed. R. Evid. 401 and 402 because the statements being read by DISH's counsel concerning a commercial product are not relevant to what is disclosed in the prior-art references in this proceeding. *Sherwin-Williams Co. v. PPG Indus., Inc.*, 2021 WL 5648019, at *4 (W.D. Pa. 2021) ("It is improper to limit the teachings of a prior art reference by focusing on . . . commercial embodiments."). Similarly, the Board should exclude Exhibit 2091 at 21:16-24:4 under Fed. R. Evid. 403 because DISH attempts to conflate statements concerning a commercial product with the teachings from prior-art references, and any probative value is substantially outweighed by the danger of unfair prejudice, confusion, and misleading the Board. The Board should also exclude Exhibit 2091 at 21:16-24 under Fed. R. Evid. 602 and 901 because no witness has laid foundation for or authenticated the underlying document from which DISH's counsel is reading from. Furthermore, the Board should exclude Exhibit 2091 at 21:16-24 under Fed. R. Evid. 801 and 802 because the out-of-court

statements being read by DISH's counsel are being offered as evidence to prove the truth of the matter asserted, and no hearsay exception applies.

Finally, the Board should exclude Exhibit 2091 at 21:16-24:4 under Fed. R. Evid. 106 because other portions of Exhibit 2091, which DISH conveniently omits from its Sur-Reply, confirm that the "M.Show" commercial product integrated streaming IP video—***contrary to DISH's central argument that Ogdon teaches away from streaming video***—and support Aylo's argument that a person of skill in the art would understand "slide show format" and "slide show alternative" to refer to a low framerate video. Paper 37 ("Reply") at 7-9. Specifically, to the extent the Board allows DISH to rely on Exhibit 2091 at 21:16-24:4, the Board must also consider the following portions of Exhibit 2091 for completeness and fairness under Fed. R. Evid. 106:

- 110:10-111:25 ("M.Show.com enables instructor-led online training by ***integrating streaming video and audio*** with rich media content to create a synchronous, highly interactive delivery method.")

- 112:6-112:25 ("M.Show.com provides ***integration and synchronization of IP video and audio streaming***, telephony and graphics, plus extensive content services to ensure ***high quality presentations***.")

- 113:2-114:14 ("M.Show.com recognizes Akamai's large-scale edge content delivery network as key to ensuring high-quality ***delivery of rich media on the Internet, especially streaming audio and video***.")

- 114:15-115:12 ("***M.Show integrates IP video and audio streaming***, telephony and rich media with a ***patented*** pre-caching technology,

Togetherware, that synchronizes audio and video regardless of each individual end user's bandwidth.")

2. Exhibit 2091 at 91:9-94:21 and 104:23-106:14, which Reflect DISH's Counsel Reading from a Document About ABC's Purported Emmy

DISH's Sur-Reply cites to Exhibit 2091 at 91:9-94:21 and 104:23-106:14 to assert that ABC received an Emmy Award in 2006 (Sur-Reply at 22-23 (citing EX2091 at 105:16-106:14, 94:8-21) and that "ABC's use of MOVE's technology resulted in an Emmy Award in 2006, shortly after the priority date of the challenged patent" (Sur-Reply at 24 (citing EX2091 at 104:23-106:10)). But again, DISH is just citing to its own counsel paraphrasing and quoting from an unadmitted document into the record. Dr. Houh had never seen the document before (EX2091 at 92:13-95:17), nor did he rely on it in any of his declarations.

DISH is again trying to skirt 37 C.F.R. § 42.23(b) by citing its own counsel reading from a document during Dr. Houh's deposition. The Board should exclude Exhibit 2091 at 91:9-94:21 and 104:23-106:14 and disregard any portions of DISH's Sur-Reply that attempt to rely on this improper evidence under 37 C.F.R. § 42.23(b). *See* Sur-Reply at 22-23 (citing EX2091 at 105:16-106:14, 94:8-21).

In addition, the Board should exclude Exhibit 2091 at 91:9-94:21 and 104:23-106:14 under Fed. R. Evid. 401 and 402 because if ABC did in fact win an Emmy in 2006, as DISH alleges (Sur-Reply at 24), this cannot be relevant to any issue in

this case because DISH's own evidence indicates that ABC did not start using MOVE's technology until 2007. EX2034 (dated ***April 4, 2007***) ("***Adobe's Flash*** . . . has been the backbone of the video player that TV network ABC used on its web site. . . ***Earlier this week***, ABC.com unveiled a new broadband video player . . . the new player relies on a technology developed by privately-held Move Networks."). Similarly, the Board should exclude Exhibit 2091 at 91:9-94:21 and 104:23-106:14 under Fed. R. Evid. 403 since any probative value is substantially outweighed by the danger of unfair prejudice, confusion, and misleading the Board, especially where DISH's own evidence indicates that ABC was not using MOVE's technology at the time the Emmy was awarded.

Finally, the Board should exclude Exhibit 2091 at 91:9-94:21 and 104:23-106:14 under Fed. R. Evid. 801 and 802 because the statements being read by DISH's counsel during Dr. Houh's deposition are being offered as evidence to prove the truth of the matter asserted, i.e., that ABC received an Emmy Award in 2006 (Sur-Reply at 22-23 (citing EX2091 at 105:16-106:14, 94:8-21)) and that "ABC's use of MOVE's technology resulted in an Emmy Award in 2006" (Sur-Reply at 24 (citing EX2091 at 104:23-106:10)).

C. The Board Should Exclude DISH's Improper Citation to the Emmy Website

DISH's Sur-Reply cites to the Emmy Website in support of DISH's assertion that "ABC's use of MOVE's technology resulted in an Emmy Award in 2006, shortly after the priority date of the challenged patent." Sur-Reply at 24; *id.* n.7. This website was never identified previously or filed as an exhibit in this proceeding, and DISH is again trying to skirt the requirements of 37 C.F.R. § 42.23(b). The Board should exclude the Emmy Website and disregard all portions of DISH's Sur-Reply that attempt to rely on it under 37 C.F.R. § 42.23(b). *See* Sur-Reply at 24; *id.* n.7.

In addition, the Board should exclude the Emmy Website under Fed. R. Evid. 401, 402, and 403 for the same reasons the Board should exclude the exhibits above that relate to ABC's purported Emmy. *See* Section II.B.2. The Board should further exclude the Emmy Website under Fed. R. Evid. 602 and 901 because no witness has laid foundation for or authenticated the Emmy Website. Finally, the Board should exclude the Emmy Website under Fed. R. Evid. 801 and 802 because the website is being offered as evidence to prove the truth of the matter asserted, i.e., that "ABC's use of MOVE's technology resulted in an Emmy Award in 2006." Sur-Reply at 24.

III. CONCLUSION

For the reasons set forth above, the Board should grant Aylo's motion to exclude.

DATED: December 20, 2024

Respectfully submitted,

By: /Frank M. Gasparo/

Frank M. Gasparo (Reg. No. 44,700)
Attorney for Petitioner
VENABLE LLP
151 W. 42nd Street, 49th Floor
New York, NY 10036
T 212-370-6273
F 212-307-5598
fmgasparo@Venable.com

CERTIFICATE OF SERVICE

I hereby certify that on December 20, 2024, I caused a true and correct copy of the foregoing Petitioner's Motion to Exclude Evidence to be served via email to the counsel of record:

Lead Counsel:	Backup Counsel:
Eliot D. Williams (Reg. No. 50,822) BAKER BOTTS L.L.P. 700 K Street, N.W. Washington, D.C. 20001 T: 202.639.1334 F:202.639.1167 eliot.williams@bakerbotts.com DishvMindGeek@BakerBotts.com	G. Hopkins Guy III (Reg. No. 35,866) BAKER BOTTS L.L.P. 1001 Page Mill Road, Bldg. 1, Suite 200 Palo Alto, California 94304-1007 T: 650.739.7500 F: 650.739.7610 hop.guy@bakerbotts.com DishvMindGeek@BakerBotts.com Ali Dhanani (Reg. No. 66,233) BAKER BOTTS L.L.P. 910 Louisiana St. Houston, TX 77002 T: 713.229.1108 F:713.229.2808 ali.dhanani@bakerbotts.com DishvMindGeek@BakerBotts.com Thomas B. Carter Jr. (Reg. No. 76,040) BAKER BOTTS L.L.P. 910 Louisiana St. Houston, TX 77002 T: 713.229.1505 F: 713.229.7805 thomas.carter@bakerbotts.com DishvMindGeek@BakerBotts.com Andrew Wilson (Reg. No. 74,093) BAKER BOTTS L.L.P. 700 K Street, N.W.

	Washington, D.C. 20001 T: 202.639.1312 F: 202.508-9336 andrew.wilson@bakerbotts.com DishvMindGeek@BakerBotts.com Jamie R. Lynn (Reg. No. 63,666) BAKER BOTTS L.L.P. 700 K Street, N.W. Washington, D.C. 20001 T: 202.639.7786 F: 202.585.1026 jamie.lynn@bakerbotts.com DishvMindGeek@BakerBotts.com

DATED: December 20, 2024

Respectfully submitted,

By: /Frank M. Gasparo/
Frank M. Gasparo (Reg. No. 44,700)
Attorney for Petitioner
VENABLE LLP
151 W. 42nd Street, 49th Floor
New York, NY 10036
T 212-370-6273
F 212-307-5598
fmgasparo@Venable.com