UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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AYLO FREESITES LTD and FUBOTV MEDIA INC.,
*Petitioners*
v.

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

U.S. Patent 10,469,554
Issue Date: November 5, 2019
Title: APPARATUS, SYSTEM, AND METHOD FOR MULTI-BITRATE CONTENT STREAMING

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*Inter Partes* Review No. IPR2024-00045

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**PETITIONER AYLO FREESITES LTD'S**
**REPLY IN SUPPORT OF ITS**
**MOTION TO EXCLUDE EVIDENCE**

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

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## I. EX2091 at 21:16-24:4 (M.Show)

DISH's improper M.Show evidence consists solely of its counsel reading an unadmitted document during Dr. Houh's deposition. Paper 48 ("Mot.") at 7-10. DISH can cite to no authority that this is proper and fails to rebut Aylo's arguments that: (1) this violates 37 C.F.R. § 42.23(b); (2) the commercial M.Show product is irrelevant; (3) no witness laid foundation for or authenticated the underlying document; and (4) this is hearsay where no exception applies.

Nonetheless, DISH argues the evidence is allowable because Dr. Houh "raised M.Show" in his supplemental declaration. Paper 49 ("Opp.") at 10-11. Not so. Dr. Houh did not rely on M.Show. He relied on and quoted from Ogdon's Provisional, which is ***part of Ogdon's intrinsic record***, to explain how a POSITA would understand Ogdon's disclosures of streaming to include deleting cached data. EX1028 ¶44 (quoting EX1014, 15). It was indisputably proper for Dr. Houh to consult Ogdon's intrinsic record. *Arthrocare Corp. v. Smith & Nephew, Inc.*, 406 F.3d 1365, 1371 (Fed. Cir. 2005) (consulting the intrinsic record of a prior art reference to determine scope of the reference's disclosures). The commercial M.Show product is irrelevant to Dr. Houh's opinions, and to the extent there is any doubt, Aylo has no problem with DISH's suggestion of striking the lone reference to M.Show from Dr. Houh's supplemental declaration so that it reads: "Indeed, the

Ogdon Provisional states: 'The data used during the show and ***cached*** by the . . . software is ***deleted*** at the end of the show.'" EX1028 ¶44 (emphases in original).

DISH's only other argument is that, since "M.Show is discussed in Ogdon's provisional," the underlying unadmitted document that DISH's counsel parroted from is somehow "entirely covered as a public record under Rule 803." Opp. at 11. This is meritless. While Ogdon's intrinsic record is a public record, the underlying document is certainly not. Notably, DISH realizes that its argument contradicts its sur-reply argument that the Ogdon Provisional is not a prior art publication. Opp. at 11 n.6; Paper 46 at 11. But whether the Ogdon Provisional is a prior art publication is beside the point. The Provisional is part of Ogdon's intrinsic record, and it was proper for Dr. Houh to consult the intrinsic record to confirm his understanding of how a POSITA would understand Ogdon's disclosure. *Arthrocare*, 406 F.3d at 1371.

If the Board chooses to consider DISH's improper M.Show evidence, Aylo reiterates that the Board should, in fairness under Fed. R. Evid. 106, consider the portions of Dr. Houh's deposition showing that the commercial M.Show product streamed video over IP at different qualities depending on available bandwidth. Mot. at 9-10. DISH has repeatedly argued that Ogdon does not disclose and in fact teaches away from streaming video. *E.g.*, Paper 18 at 17, 24-29, 32-34. To the extent the commercial M.Show product is relevant, the repeated disclosures of streaming video over IP undermines a central part of DISH's argument. Mot. at 9-10.

## II. EX2091 at 91:9-94:21, 104:23-106:14; Website (2006 ABC Emmy)

As a threshold matter, DISH does not dispute that the David Ericson transcript (unadmitted EX2092) and the Emmy Website are not in the evidentiary record. Opp. at 12-14. This should end the inquiry, and the Board should exclude EX2091 at 91:9-94:21 and 104:23-106:14 (as well as unadmitted EX2090 and EX2092), and the Emmy Website for this reason alone or for the other reasons included in Aylo's Motion. Mot. at 10-12.

It is troubling that, despite its duty of candor under 37 C.F.R. § 42.11(a), DISH continues to make statements such as, "the 2006 Emmy Award exemplifies how the *MOVE-powered* player used by ABC.com won an engineering Emmy for its technology." Opp. at 2 (emphasis added), 4-5 (similar). Aylo showed via DISH's own exhibits that the 2006 Emmy to ABC.com could not have been "MOVE-powered" since ABC.com did not start using MOVE technology until the spring of 2007. Mot. at 10-11; *see also* EX2034, EX2040, EX2072. DISH's exhibits are confirmed by other sources: "ABC gains the [Emmy] award for new delivery platforms for its streaming player on ABC.com. The ***Flash-based*** broadband web site provided access to full-length episodes of shows."[1]

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[1] https://informitv.com/2006/07/26/interactive-emmy-award-winners-announced-in-hollywood (emphasis added).

DISH's only evidence that the 2006 ABC Emmy was related to MOVE's technology is the unadmitted testimony of Mr. Ericson. Even if the Board were to consider that testimony, it is incredibly unreliable. Indeed, Mr. Ericson initially testified that he could not remember what the 2006 ABC Emmy was for: "I recall that ABC won an Emmy – I can't remember what exactly it was for." It was only after Aylo's counsel passed the witness and DISH's counsel was able to consult with Mr. Ericson that he testified on re-direct that he was "[a]bsolutely unequivocally" sure that the ABC.com player used MOVE's technology. EX2092 (unadmitted) at 171:6-24. Tellingly, Mr. Ericson testified during direct examination that ABC did not start using MOVE's technology until "late 2006" or "early 2007"—well after the 2006 Emmy was awarded in July 2006. *Id.* at 92:21-93:21.

DISH has questioned Aylo's decision not to cite to Mr. Ericson's deposition claiming that the Board should "infer that Mr. Ericson's testimony is unfavorable to Aylo." Opp. at 13 n.7; *see also* Paper 46 at 22 n.6. Aylo did not cite Mr. Ericson's deposition because it did not advance any of the issues in dispute and because he repeatedly contradicted himself as shown above. Mr. Ericson was simply a mouthpiece and not a reliable witness. Indeed, Mr. Ericson confirmed that he did not prepare the declaration that was submitted on his behalf but instead just signed what DISH's attorneys handed to him with no substantive edits. EX 2092 (unadmitted) at 21:1-18; 22:13-24:6. He also confirmed that he did not review any cited exhibits or

even the full transcript of his ITC testimony from which EX2063 is excerpted. *Id*. at 25:18-20, 129:9-17.

## III. Exhibits 2031-2033, 2049, 2057, 2071, 2078, 2079, and 2081 (emails)

DISH does not dispute that it failed to authenticate or lay foundation for the emails in dispute. Instead, DISH argues that Aylo deposed two MOVE executives, Mr. Major and Mr. Ericson. Opp. at 8-10. But neither of them was on any of the emails or has personal knowledge of them. Mr. Major himself admitted that he was not copied on any of the emails and "wasn't involved" in negotiations with Microsoft or even "involved operationally with Move." EX1021 at 134:20-137:9, 156:19-157:6. That DISH may have provided witnesses to authenticate these emails in the ITC does not cure the fact that DISH did not to do so here. Opp. at 5.

Additionally, these emails are hearsay for which no exception applies. They are not "business records" as DISH contends (Opp. at 7) because DISH did not satisfy the requirements under at least Fed. R. Evid. 803(6)(D). Neither are they present sense impressions. They are simply emails reflecting "conversations during the course of business." *Viking Drill & Tool, Inc. v. Hongjia Wang*, IPR2023-00474 Paper 89 at 53 (P.T.A.B. July 5, 2024). And to the extent Dr. Jeffay relied on these emails in forming his opinions, this was improper at least because the emails do not reflect "facts or data" nor are they the type of information that experts in the field of video streaming would reasonably rely upon. Mot. at 6.

DATED: January 7, 2025

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## CERTIFICATE OF SERVICE

I hereby certify that on January 7, 2025, 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:

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

I hereby certify that the foregoing Reply in support of Petitioner Aylo Freesites Ltd's Motion to Exclude Evidence is within the five (5) page limit allowed under § 42.24(c)(2).

DATED: January 7, 2025

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