

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 11,991,234

Issue Date: May 21, 2024

Title: APPARATUS, SYSTEM, AND METHOD FOR MULTI-BITRATE
CONTENT STREAMING

Inter Partes Review No. IPR2024-00940

**PETITIONER AYLO FREESITES LTD'S
MOTION TO EXCLUDE EVIDENCE**

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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. 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 2041-2043, 2059, 2067, 2081, 2088, 2089, and 2091, which are email chains from non-declarants and third parties. Aylo timely objected to these exhibits on March 7, 2025. *See* Paper 23.

2. DISH’s reliance on an exhibit from *Microchip Tech. Inc. v. Aptive Techs. AG*, IPR2024-00228, which is a prior declaration by Aylo’s expert, Dr. Henry Houh, filed in an unrelated proceeding on behalf of an unrelated party and addressing unrelated technology.¹ DISH raised this exhibit for the first time in its Sur-Reply (Paper 55). *See* Sur-Reply at 21 n.6.

3. Any portions of DISH’s Patent Owner Response (Paper 20, “POR”), Sur-Reply, and DISH’s expert Dr. Kevin Jeffay’s declaration (EX2141) that cite, quote, or otherwise rely upon the aforementioned evidence. *E.g.*, POR at 43, 45-46, 49, 53-57; EX2141 ¶¶ 212, 214, 219, 224, 228-29, 236, 252-53, 255-56, 268; Sur-Reply at 21 n.6.

¹ DISH did not file this declaration as an exhibit in this IPR proceeding but instead provided a citation to it in its Sur-Reply, which is still improper. *See* 37 C.F.R. § 42.23(b); Consolidated Trial Practice Guide (“CTPG”) at 73.

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. *Supra* Section I.

A. The Board Should Exclude Exhibits 2041-2043, 2059, 2067, 2081, 2088, 2089, and 2091, which are Out-of-Court Email Chains

Aylo moves to exclude Exhibits 2041-2043, 2059, 2067, 2081, 2088, 2089, and 2091, which are out-of-court email chains. Aylo previously moved to exclude these same emails in IPRs challenging related DISH patents in view of the “Ogdon” reference. *See, e.g.*, EX1030 at 93-94. The Board did not reach Aylo’s motion to exclude these emails in the Ogdon IPRs because the Board determined certain of DISH’s claims unpatentable regardless. *Id.* at 94. To the extent the Board reaches the issue here, DISH did not cure the objectionable nature of these emails.

1. Exhibits 2041-2043 and 2067

Exhibit 2041 is an email chain between individuals with a “movenetworks.com” email address and an individual with a “Level3.com” email address. EX2041. Exhibits 2042, 2043, and 2067 are email chains between individuals with a “movenetworks.com” email address and individuals with a “microsoft.com” email address. EX2042-2043, EX2067. Although DISH’s declarant, Gregory Smith, is on some, but not all, of these emails, DISH does not rely on any of the emails from Mr. Smith. Rather, DISH relies on statements made by non-declarant, third parties

for the truth of the matter asserted. *E.g.*, POR at 43 (repeatedly quoting and citing statements in EX2041 made by Mark Taylor of Level 3), 48 (citing statements in EX2041 made by Mark Taylor of Level 3), 49 (quoting a statement in EX2041 made by “a senior vice president at Level 3,” citing bloggers, and citing statements in EX2042 and EX2043 made by Microsoft), 59 (quoting a statement in EX2041 made by Mark Taylor of Level 3).

DISH’s expert similarly relies on statements by non-declarant, third parties contained in these emails. *E.g.*, EX2141 ¶¶ 212 (citing statements in EX2043 made by Joe Stegman of Microsoft), 214 (quoting statements in EX2041 made by Mark Taylor of Level 3), 219 (same),² 224 (relying on statements in EX2041 made by Mark Taylor of Level 3), 229 (quoting statements in EX2041 made by Mark Taylor of Level 3), 236 (quoting statements in EX2041 made by Mark Taylor of Level 3), 252 (citing statements in EX2042 made by Tom Damico at Microsoft and citing statements in EX2043 made by Joe Stegman and Chris Carpenter of Microsoft), 253 (citing emails in EX2043 made by Joe Stegman and Chris Carpenter of Microsoft), 268 (quoting statements in EX2042 made by Tom Damico at Microsoft and quoting statements in EX2067 made by Chris Carpenter of Microsoft).

² Dr. Jeffay alleges these are “internal emails at Move Networks,” EX2141 ¶ 219, but the statements he quotes are actually from Mark Taylor of Level 3. EX2041.

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. None of the individuals responsible for the statements relied upon by DISH 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”). Thus, the Board should exclude Exhibits 2041-2043 and 2067 and disregard any portions of DISH’s POR and Declaration of Dr. Jeffay that rely on them. *See* POR at 43, 49, 57 (citing EX2041-EX2043), 57 (citing EX2067); EX2141 ¶¶ 212, 214, 219, 224, 228-29, 236, 252-53, 268 (citing EX2041-2043, EX2067).

2. Exhibits 2059, 2081, 2088, 2089, and 2091

Exhibits 2059, 2081, 2088, 2089, and 2091 are additional email chains between individuals with “movenetworks.com” and “microsoft.com” email addresses. DISH cites in passing to exhibit EX2059 on page 55 of its POR and does not cite to Exhibits 2081, 2088, 2089 or 2091 at all. However, DISH relies on the testimony of Dr. Jeffay, who in turn relies on these exhibits in his declaration. *See* POR at 45-46, 53-54, 56-57; EX2141 ¶¶ 219, 253, 255-56, 268.

For the same reasons discussed above with respect to Exhibits 2041-2043 and 2067, these exhibits should be excluded as inadmissible hearsay under Fed. R. Evid.

801 and 802 because DISH and Dr. Jeffay rely on statements made by non-declarant, third parties as evidence to prove the truth of the matter asserted. *See* Section II.A.1. For example, Dr. Jeffay cites to these exhibits to argue certain technical capabilities of Microsoft’s streaming player and that Microsoft integrated MOVE’s technology. EX2141 ¶¶ 253, 255-56, 268. 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 54.

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 opinions are deemed admissible, the underlying 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 2059, 2081, 2088, 2089, and 2091 and disregard any portions of DISH’s POR and Dr. Jeffay’s

declaration that attempt to rely on them. *See* POR at 45-46, 53-54, 56-57; EX2141 ¶¶ 219, 253, 255-56, 268.

B. The Board Should Exclude DISH’s Improper Citation to and Reliance on an Exhibit Filed in an Unrelated IPR

DISH’s Sur-Reply cites to a declaration by Dr. Houh in an unrelated matter (Sur-Reply at 21 n.6) to argue that the ITC Investigation is relevant to secondary considerations here, which the Board has already rejected multiple times. *E.g.*, EX1030 at 43 n.9 (finding that DISH had failed to show a nexus notwithstanding the ITC Investigation because “the ITC’s finding of a presumption of nexus was premised on the Respondents’ concession about an invalidating public use of the MOVE Media Player” and the Board has “no way of knowing what . . . similarities and differences exist between the records of the ITC investigation and the instant case”), 44 n.11 (“We decline to credit the ITC Investigation in the absence of any developed argument in Patent Owner’s papers.”).

The cited declaration, which is an exhibit from *Microchip Tech. Inc. v. Aptive Techs. AG*, IPR2024-00228, was never identified previously by DISH or filed as an exhibit in this proceeding and is therefore improper sur-reply evidence. The fact that DISH did not file this declaration as an exhibit in this proceeding but instead provides a citation to it is still improper. 37 C.F.R. § 42.23(b) (“A sur-reply . . . may not be accompanied by new evidence other than deposition transcripts of the cross-

examination of any reply witness.”); CTPG at 73. Notably, DISH tried to do the same thing in the Ogdon IPRs by providing a citation to improper evidence, and the Board granted Aylo’s motion to exclude. EX1030 at 92 (excluding DISH’s citation to and reliance on an “Emmy website” as “improper sur-reply argument”).

Excluding DISH’s reliance on the declaration is particularly appropriate because Aylo cannot respond to and correct DISH’s mischaracterization of it. For example, DISH claims in its Sur-Reply that “Dr. Houh testified that he understood secondary considerations *were required to be considered and did so.*” Sur-Reply at 21 n.6 (emphasis added). However, this is not true at all. Dr. Houh’s declaration in the *Microchip* matter actually says that secondary considerations “*may be* taken into account . . . *if they are present*” and, contrary to DISH’s assertion, Dr. Houh did *not* analyze secondary considerations because they were *not* present. Indeed, just like the Board made clear in its institution decision in the present IPR proceeding, Patent Owner must first put forth evidence of secondary considerations before Petitioner and its expert respond. Paper 12 at 9 n.3 (“Patent Owner does not present evidence of secondary considerations of nonobviousness for the challenged claims of the ’234 patent at this juncture.”). Thus, whether Dr. Houh addressed secondary considerations in his opening declaration is completely irrelevant.

In view of the forgoing, the Board should disregard all portions of DISH's Sur-Reply that attempt to rely on the *Microchip* exhibit under 37 C.F.R. § 42.23(b).
See Sur-Reply at 21 n.6.

III. CONCLUSION

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

DATED: August 1, 2025

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CERTIFICATE OF SERVICE

I hereby certify that on August 1, 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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