

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.

IPR2024-00940

U.S. PATENT NO. 11,991,234

**PATENT OWNER'S OPPOSITION TO PETITIONER'S
MOTION TO EXCLUDE EVIDENCE**

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I. INTRODUCTION

Petitioner Aylo Freesites Ltd (“Aylo”) seeks to exclude two categories of plainly admissible evidence: (1) contemporaneous e-mail statements from executives and senior engineers at Microsoft and Level 3 Communications praising MOVE Networks Inc.’s (“MOVE’s”) ¹ streaming solution that embodied the patented features at issue here; and (2) DISH’s citation to a sworn declaration by Aylo’s own expert, Dr. Henry Houh, in which Dr. Houh applied a materially different approach to an obviousness analysis in another IPR proceeding (where he was hired by a Patent Owner) than the one he advances here, where he was hired by a Petitioner.

First, the MOVE-related communications are not hearsay. They are not offered for their truth, but rather to show how industry players recognized and praised the superior results of MOVE’s player at the time of the invention. *E.g.*, EX2041 at 2. FRE 803 also independently permits their admission because they demonstrate contemporaneous industry views on the state of video streaming and the advancements invented in DISH’s ABR Patents.² For example, Microsoft engineers expressly explored integrating MOVE’s technology into its own media

¹ MOVE was subsequently acquired by EchoStar Advanced Technologies L.L.C., a predecessor entity to Patent Owner DISH Technologies L.L.C. (“DISH” or “PO”).

² “DISH’s ABR Patents” includes U.S. Patent No. 11,991,234 (“the ’234 Patent”).

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player (EX2081), MOVE documented successful demonstrations of its player at trade shows (EX2089), and commentators described MOVE's broadcast of the 2008 Democratic National Convention ("DNC") as the "most awesome ... online video feed." EX2091.

Second, Aylo's objection to DISH's citation to Dr. Houh's sworn declaration in *Microchip Tech. Inc. v. Aptiv Techs. AG*, IPR2024-00228 (EX2001), is misplaced. A Motion to Exclude is not the proper vehicle to challenge such reliance. *See* Consolidated Trial Practice Guide at 79 ("Nor should a motion to exclude address arguments or evidence that a party believes exceeds the proper scope of reply...."). In any event, the prior declaration is proper impeachment evidence. In it, Dr. Houh acknowledged the importance of analyzing known objective indicia of non-obviousness in a Petitioner's opening expert declaration, which directly bears on the credibility of his contrary position here, where he for the first time mentions objective indicia only in his Reply declaration. By ignoring the ITC's findings in his opening declaration here, Dr. Houh failed to meet the correct obviousness standard he acknowledged in *Aptiv*.

At bottom, Aylo has not met its burden to justify exclusion. Both categories of evidence are admissible, probative, and properly before the Board.

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As the movant seeking to exclude DISH's evidence, Aylo bears the burden of proving it is entitled to the relief it requests, namely that the Federal Rules of Evidence ("FRE") prohibit the admissibility of the Challenged Exhibits. *E.g.*, 37 C.F.R. §42.20(c); 37 C.F.R. §42.62.

A. Relevance

All relevant evidence is admissible unless the FRE provides an exclusion otherwise. *See generally* 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 if 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

Out of court statements are admissible if they are not (1) offered for the truth of the matters asserted in the statements, or (2) if they are subject to any applicable exception. *See* FRE 801, 802. The Board repeatedly has overruled hearsay objections to statements that evince objective indicia of non-obviousness (*e.g.*, accolades, awards, present sense impressions, or praise) because they are not hearsay when relied upon 'to show that the statements were made.' *See, e.g., Fox Factory*, IPR2017-00472, Paper 64, at 60. Similarly, a testifying witness' prior inconsistent statement is not hearsay. FRE 801(d)(1)(A).

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C. Expert Analysis

Expert opinions are admissible even if the opinions are based on inadmissible facts or data, provided that it is reasonable for an expert to rely on those kinds of facts or data. FRE 703. And because “there is no jury to be potentially prejudiced in [IPR] proceeding[s],” the Board has found it best to “have a complete record of the evidence to facilitate public access as well as appellate review.” And since the Board is both a “gatekeeper and...weigher of evidence,” the Board often overrules objections to expert analysis and instead “determine[s] the weight that should be given [to] any such evidence.” *Casper Sleep Inc. v. Werner Media Partners, LLC*, IPR2024-00474, Paper 60, at 79 (P.T.A.B. Apr. 24, 2025).

III. ARGUMENT

A. Exhibits 2041-2043, 2067, 2081, 2088-2089, and 2091 (the “Challenged Exhibits”) Are Admissible

1. The Challenged Exhibits Are Not Hearsay Because They Are Offered to Show the Statements Were Made, Not For Their Truth

Aylo acknowledges that all Challenged Exhibits are relied on because of the third-party statements of praise made therein by executives or engineers at industry leaders, such as Microsoft and Level 3 Communications, who were active in the video streaming industry at the time of the invention. Mot. at 2-4. Aylo's sole purported basis for moving to exclude this evidence is hearsay. *Id.* at 4 (*citing* FRE 801 & 802). This is almost identical to the objection made in *Fox Factory, Inc. v.*

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SRAM, LLC, which the Board denied as being “without merit.” IPR2017-00472, Paper 60 at 57 (P.T.A.B. Apr. 18, 2018). As the Board noted, the evidence is not hearsay because it was “not offered for the truth of the matters asserted in them, but to show that the statements were made.” *Id.* Aylo’s motion is without merit for exactly the same reason.

Statements not offered for the truth of the matter asserted are not hearsay. Fed. R. Evid. 801(c)(2). This includes statements whose existence alone is probative. *Fox Factory*, IPR2017-00472, Paper 64, at 60 (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) (rejecting hearsay objection where “the existence of the statements themselves is relevant”)). That is precisely the case with the Challenged Exhibits.

Exhibits 2041-2043 and 2067 are relevant because the statements themselves show the fact that industry executives contemporaneously recognized and praise MOVE’s advances. Whether the prior art streaming protocols were in fact “broken” (EX2041) is irrelevant. What matters is that Microsoft and Level 3 personnel perceived MOVE’s technology as superior. *Id.* The probative value “lies solely in the fact that [the statements] were made.” FRE 801(c), 1997 Adv. Comm. Note.; *see also Fox Factory*, Paper 64 at 60 (finding that “‘courts have properly found that articles showing the receipt of ‘awards and accolades’ are admissible over a hearsay objection.’”); POR at 58-59; Sur-Reply at 23; EX2141 (Jeffay) ¶¶ 216-17.

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Just like in *Fox Factory, Inc. v. SRAM, LLC*, there is no basis to exclude these contemporaneous third-party statements from skilled industry executives providing objective proof of the non-obviousness of the invention. *See also Volvo Penta of the Americas, LLC v. Brunswick Corp.*, 81 F.4th 1202, 1212–13 (Fed. Cir. 2023) (holding objective indicia must always be considered and given appropriate weight.).

2. The Challenged Exhibits Fall Within Established Exceptions

Even if considered for their truth, the Challenged Exhibits are also admissible under at least Fed. R. Evid. 803(1) (present sense impression), 803(6) (records of regularly conducted business activities), and 807 (residual).

a) Present Sense Impressions

The Challenged Exhibits reflect contemporaneous, personal perceptions of industry executives during 2007-2009, shortly after the filing of the ABR Patents. *See, e.g.*, EX2099 ¶7, EX2041-2043, EX2059, EX2067. They describe, in real time, industry challenges with existing streaming and the surprising performance of MOVE's technology, including its powering of the 2008 DNC. EX2091. The documents also include statements such as, "why are the current streaming protocols broken," and "[t]hese are show stoppers for our customers." EX2031; EX2033. In other words, these Challenged Exhibits illustrate that, between 2007-2009, industry executives believed that there needed to be an alternative to traditional streaming technology and that the ABR technology powered by MOVE's invention had

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already became that solution. *E.g.*, EX2091 (describing MOVE's powering of the 2008 DNC as "the most awesome...online video feed").³ As such, the Challenged Exhibits are admissible present sense impressions. *Tracinda Corp. v. DaimlerChrysler AG*, 362 F.Supp.2d 487, 602 (D. Del. 2005).

b) Business Records

As Mr. Smith testified, MOVE "regularly corresponded with other companies via e-mail, and [he] kept the records of [his] e-mails with other companies. Email records were of the type of records that MOVE routinely made and kept in the course of business, in the business's usual practice." EX2099 ¶7. Mr. Smith further explains that these records were "sent or received nearly contemporaneous with [MOVE's] business meetings," including with CBS, FOX, A&E, Akamai, ABC/Disney, Microsoft, and Level 3. *Id.* ¶¶ 7-11, 15.

These e-mails are therefore records of regularly conducted business activities. Aylo acknowledges as much. *See* Mot. at 2, 4 (acknowledging that the Challenged

³ The Board has also admitted these types of present sense impressions where "no reason existed for the [declarants] or representatives to lie about potential problems" that may have existed with then-existing standards. *Samsung Elecs. Co., Ltd., v. M&K Holdings Inc.*, IPR2018-00697, Paper 60, at 112-13 (P.T.A.B. Sept. 11, 2019) (citing FRE 803(1) and 803(3)). Aylo has not advanced any reason to doubt the trustworthiness of these statements and would strain credulity to do so. *See also* EX2141 (Jeffay Decl.) ¶189.

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E-Mails are between individuals with “movenetworks.com” and “Microsoft.com” or “level3.com” e-mail addresses). DISH has proffered sworn declaration testimony from numerous MOVE executives (nearly all of whom Aylo has deposed) that corroborate the substance of—and circumstances surrounding—these Challenged E-Mails. Indeed, DISH has shown (and Aylo has not rebutted) that these e-mails (1) are authentic, (2) were made at or near the time from information being transmitted by someone with knowledge, (3) kept in the court of MOVE's regularly conducted business activities, and (4) were made in the course of those business activities. *See, e.g.,* EX2099 ¶7. As such, these exhibits are admissible pursuant to FRE 803(6).

Petitioner relies only on a misreading of the Board's *Viking Drill & Tool*, IPR2023-00474, 2024 WL 3311903, at *21 (P.T.A.B. July 5, 2024). There, the Board excluded e-mails where a patent owner had simply asserted “*without explanation*” that “several hearsay exceptions apply.” *Id.* That is a far cry from the situation here, where DISH has provided sworn testimony, contemporaneous documentation, and clear evidentiary bases for admissibility.

c) Residual Exception

Further, should the Board find that the statements are hearsay and not subject to any applicable exception under FRE 803, the statements are still admissible under FRE 807. These e-mails have a sufficient guarantee of trustworthiness, and they are more probative than any other evidence that can be reasonably obtained. *Id.*

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First, the statements satisfy Rule 807(a)(1)'s requirement of trustworthiness.

To be sure, not only has Aylo deposed Mr. Smith,⁴ but Mr. Smith has also provided a sworn statement that he “has personal knowledge of the content of the e-mails, either by sending the e-mail and being the author or receiving the e-mail as one of the recipients.” EX2099 ¶ 7. Moreover, Aylo has not offered a single reason to doubt Mr. Smith's testimony.

Second, the probative value of the Challenged Exhibits, taken together with their trustworthiness, is more probative than any other evidence DISH could reasonably obtain. *See* FRE 807(a)(2). Indeed, while Petitioner argues that Dr. Jeffay improperly relies on these e-mails to understand certain technical capabilities of Microsoft's streaming player, Petitioner fails to advance even a single reason to doubt the trustworthiness of these e-mails. Indeed, Microsoft—like Level 3, CBS, Disney/ABC, FOX, BYU.tv, and dozens of other MOVE customers—had no incentive to lie about their technology; they shared MOVE's interest in integrating MOVE's technology into their infrastructure to deliver continuous, high-quality video to consumers across the world.

⁴ *See* Paper 23. Although Petitioner deposed Mr. Smith on May 15, 2025 (at which Mr. Smith corroborated all of his declaration statements), Petitioner did not submit Mr. Smith's deposition transcript as an exhibit in this proceeding.

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And although Petitioner is silent to this point, the disproportionate burden to DISH brought about by seeking the declaration (or deposition) testimony of these former Microsoft and Level 3 executives who corresponded with Mr. Smith is beyond dispute.

Therefore, the Challenged Exhibits are admissible at least under FRE 807.

3. Dr. Jeffay May Rely on the Challenged Exhibits

Even if some Exhibits were inadmissible (they are not), Dr. Jeffay is still permitted to rely on them under FRE 703. The burden rests with Aylo to demonstrate inadmissibility; not DISH. 37 CFR § 42.20(c). DISH has authenticated the Exhibits, and Aylo has not sought their exclusion on that ground. Dr. Jeffay is therefore entitled to rely on them in forming his opinions. *Fox Factory*, Paper 64 at 57 (“Finally, we agree with Patent Owner that Petitioner’s hearsay objection is without merit. *See* Fed. R. Evid. 703 (explaining experts may rely on hearsay in forming their opinions).”)

B. Dr. Houh’s Prior Sworn Testimony Is Highly Probative of His Credibility

As an initial matter, Aylo’s attempt to exclude a citation in DISH’s sur-reply is not a proper basis for a motion to exclude. *See* CPTG, 79 (“Nor should a motion to exclude address arguments or evidence that a party believes exceeds the proper scope of reply or sur-reply.”). That is precisely what Petitioner does here with respect

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to DISH's *citation* to Dr. Houh's sworn declaration in the *Aptiv* case, where Dr. Houh testified on behalf of a patent owner.

Regardless, Dr. Houh's prior sworn inconsistent statement in *Aptiv* is clearly relevant to this proceeding and is properly presented as impeachment. At a minimum, it tends to make a fact of consequence—Dr. Houh's credibility—more or less likely. It objectively highlights the conflicting positions Dr. Houh has taken when representing patent owners versus petitioners with respect to the proper approach to forming an obviousness opinion.

Aylo's argument is also hypocritical, as it submitted a prior declaration by DISH's expert, Dr. Jeffay, presumably in an attempt to impeach. *See* Pet. Reply (Paper 45) at 22-23. And unlike Petitioner, who also tries to use Dr. Jeffay's previous analysis for the first time in its Reply to fill substantive gaps in its incomplete Petition, DISH's mentioning of Dr. Houh's declaration in the *Aptiv* case was solely to show that Dr. Houh lacks credibility and that the Board should ignore his resultingly flawed analysis. PO Sur-Reply (Paper 55) at 21; POR 38-39.

As the Sur-Reply makes clear, "one month prior" to his opening declaration here (EX1003), Dr. Houh testified on behalf of a patent owner that he understood that an obviousness analysis includes taking into account "'secondary considerations' of non-obviousness if they are present." IPR2024-00228, EX2001, ¶ 22; *see* PO Sur-Reply at 21 n.6. But here, Dr. Houh failed to consider (or even

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mention) secondary considerations, or objective indicia, prior to concluding that the '234 Patent was obvious. Indeed, he did so despite expressly relying on the ITC's Initial Determination,⁵ which found similar claims of family member patents non-obvious based upon objective indicia of non-obviousness. POR at 38-39; PO Sur-Reply at 22, Ex. 1009 at 211-217. *Cf. Aardevo N. Am., LLC v. Agventure B.V.*, IPR2025-00136, Paper 9, at 32 (P.T.A.B. May 1, 2025) (“[K]nown objective evidence of secondary considerations should be addressed in the Petition.”). By ignoring the ITC's holding on objective indicia in his opening declaration here, Dr. Houh failed to meet the correct obviousness standard he acknowledged in *Aptiv*.

That Dr. Houh overtly considered *and ignored* the International Trade Commission's finding that “that the objective indicia support a determination of non-obviousness” (Ex. 1009 p. 217) of DISH's ABR Patents is not only indicative of the fatal flaws in Dr. Houh's obviousness analysis, but it is also highly relevant to Dr. Houh's credibility. Thus, the Board should deny Petitioner's Motion to Exclude DISH's citation.

IV. CONCLUSION

For the foregoing reasons, DISH respectfully requests that the Board deny Aylo's Motion to Exclude.

⁵ See EX1003 (Houh Opening Decl.) ¶¶21, 45.

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Respectfully Submitted,

Date: August 08, 2025

/Eliot D. Williams/

Eliot D. Williams (Reg. No. 50,822)

Andrew Wilson (Reg. No. 74,093)

Jamie R. Lynn (Reg. No. 63,666)

BAKER BOTTS L.L.P.

700 K Street, N.W.

Washington, D.C. 20001

202.639.1334

G. Hopkins Guy III (Reg. No. 35,886)

BAKER BOTTS L.L.P.

1001 Page Mill Road, Bldg. 1, Suite 200

Palo Alto, California 94304-1007

650.739.7500

Ali Dhanani (Reg. No. 66,233)

Thomas B. Carter Jr. (Reg. No. 76,040)

Zacharias E. Shepard (Reg. No. 83,358)

BAKER BOTTS L.L.P.

910 Louisiana St.

Houston, TX 77002

713.229.1108

Attorneys for Patent Owner, DISH
Technologies L.L.C.

CERTIFICATE OF SERVICE

Pursuant to 37 C.F.R. §§ 42.6(e), we certify that an electronic copy of the foregoing PATENT OWNER'S OPPOSITION TO PETITIONER'S MOTION TO EXCLUDE EVIDENCE was served on Petitioner's counsel of record at the following address:

FMGasparo@venable.com

IGPaquette@Venable.com

PTSheng@Venable.com

PGZimmerman@Venable.com

Date: August 08, 2025

/Eliot D. Williams/

Eliot D. Williams (Reg. No. 50,822)

Andrew Wilson (Reg. No. 74,093)

Jamie R. Lynn (Reg. No. 63,666)

G. Hopkins Guy III (Reg. No. 35,886)

Ali Dhanani (Reg. No. 66,233)

Thomas B. Carter Jr. (Reg. No. 76,040)

Zacharias E. Shepard (Reg. No. 83,358)

BAKER BOTTS L.L.P.

*Attorneys for Patent Owner, DISH
Technologies L.L.C.*

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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 Patent Owner's Opposition to Petitioner's Motion to Exclude Evidence totals 13 pages, within the fifteen (15) page limit allowed under § 42.24(a)(1)(v) and § 42.24(b)(3).

Date: August 08, 2025

/ Eliot D. Williams /

Eliot D. Williams (Reg. No. 50,822)

Andrew Wilson (Reg. No. 74,093)

Jamie R. Lynn (Reg. No. 63,666)

BAKER BOTTS L.L.P.

700 K Street, N.W.

Washington, D.C. 20001

202.639.1334

G. Hopkins Guy III (Reg. No. 35,886)

BAKER BOTTS L.L.P.

1001 Page Mill Road, Bldg. 1, Suite 200

Palo Alto, California 94304-1007

650.739.7500

Ali Dhanani (Reg. No. 66,233)

Thomas B. Carter Jr. (Reg. No. 76,040)

Zacharias E. Shepard (Reg. No. 83,358)

BAKER BOTTS L.L.P.

910 Louisiana St.

Houston, TX 77002

713.229.1108

*Attorneys for Patent Owner, DISH
Technologies L.L.C.*