

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
REPLY IN SUPPORT OF
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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1. The Email Exhibits Are Hearsay and Should Be Excluded

DISH's attempts to rely on a single out-of-context statement in *Fox Factory* are misguided. As an initial matter, DISH makes no attempt to show that the Email Exhibits here are the type of exhibits the Board in *Fox Factory* found permissible. Paper 58 ("Opp.") at 5 (citing *Fox Factory, Inc. v. SRAM, LLC*, IPR2017-00472, Paper 64 at 60 (P.T.A.B. April 18, 2018)).¹ Nor can it. The exhibits in *Fox Factory* involved articles, not emails, and were used to show industry praise, not long felt need or failure of others as DISH tries to show here. *Fox Factory*, IPR2017-00472, Paper 56 at 13.

The importance of this distinction is underscored by the *Fox Factory* panel's only cited authority, *Asetek*, in support of its holding. The court in *Asetek* explained that "articles showing the receipt of 'awards and accolades' are admissible over a hearsay objection" because the statements "commemorate awards/praise." *Asetek Danmark A/S v. CMI USA, Inc.*, No. 3:13-cv-00457-JST, 2014 WL 12644295, at *2 (N.D. Cal. 2014). Here, DISH's cited emails simply make statements about the sender's beliefs of MOVE's product and the industry generally.

¹ DISH also cites to Paper 60 from *Fox Factory*; however, it is unclear what DISH is relying on. Paper 60 is "Patent Owner's Exhibit List," and page 57 of Paper 64 is considering objections to an expert report, which is not relevant here.

In fact, DISH’s exact argument against hearsay has repeatedly been rejected by the Board. *See, e.g., Geotab USA, Inc. v. Omega Patents, LLC*, IPR2023-00504, Paper 45 at 63 (P.T.A.B. July 18, 2024) (rejecting that hearsay evidence is broadly permitted to support secondary considerations and explaining that relying on such evidence to show “that the products were worthy of praise” is still hearsay); *Viking Drill & Tool, Inc. v. Hongjia Wang*, IPR2023-00474, Paper 89 at 52 (P.T.A.B. July 5, 2024) (rejecting patent owner’s reliance on *Asetek* (*see id.*, Paper 68 at 3) and finding that emails are hearsay when they are relied on to show “a third party . . . had a positive view of” the practicing product).

Just as was the case in both *Geotab* and *Viking Tools*, DISH does not offer these emails “merely for showing the third party’s awareness of the [product] but rather their subjective opinion about them.” *Id.* DISH does not even rely on these emails for “industry praise.”² Rather, DISH relies on these exhibits for categories of secondary considerations such as long felt need and failure of others or purporting to tie evidence to specific features—precisely what the Board in *Geotab* and *Viking Tools* said constitute improper hearsay. POR at 43 (citing EX2041 for the truth that “MOVE’s success *is the result of* the unique characteristics of the claimed invention,

² While Dr. Jeffay cites to Exhibits 2041 and 2043 in his section on industry praise, he clearly intended to cite to Exhibits 2051 and 2053, which contain the quotes Dr. Jeffay includes in his declaration.

and not the result of other parallel advances” and that there were in fact “struggles other content providers suffered”) (emphasis added), 48-49 (citing EX2041 for the truth that “[c]ompeting technologies attempted but failed to meet this same need” and that other “streaming protocols [are] broken”),³ 59 (citing EX2041 for the truth that John Edwards praised MOVE “*due to* the ability of MOVE’s Media-Player to ‘automatically upshift[] and downshift[]’”) (emphasis added); EX2141 ¶¶ 214, 219, 224, 229. The same is true for the remainder of the email exhibits. *See, e.g.*, POR at 49 (citing EX2042 and EX2043 for the truth of Microsoft “investing heavily in sophisticated streaming solutions for years . . .”), 57 (citing EX2042, EX2043, and EX2067 for evidence of copying, not industry praise)⁴; EX2141 ¶¶ 212, 219, 220, 224 228, 236, 252, 253, 255, 256, 268.

DISH’s arguments that the emails “fall within established exceptions” are just wrong. First, DISH argues that the emails “reflect contemporaneous, personal perceptions of industry executives *during 2007-2009.*” Opp. at 6 (emphasis added). DISH provides no corroborating evidence that these statements were “made while or immediately after the declarant perceived [the event or condition]” as required by

³ DISH’s claim that whether the prior art streaming protocols were in fact “broken” is irrelevant, Opp. at 5, is belied by the fact that DISH relies on this statement specifically for “Long-Felt but Unmet Need and Failure of Others,” POR at 45, 49.

⁴ DISH’s additional citations to these exhibits all appear to be miscitations.

FRE 803(1). Indeed, the exhibits facially appear to be statements made after the fact. *See, e.g.*, EX2041.

Second, DISH argues that the emails are business records, but that exact argument was rejected in *Viking*, where the Board found that “although emails are common in the course of business, we do not understand this hearsay exception to be directed towards email conversations.” *Viking*, IPR2023-00474, Paper 89 at 53. And DISH’s claim that Aylo misreads *Viking* because the patent owner there simply asserted exceptions apply “without explanation” is incorrect. Even had the patent owner in *Viking* adequately supported its arguments, this does not change the fact that emails are *not* business records, as the Board held.

Third, DISH makes a last-ditch effort by relying on the residual exception. But “[t]he residual hearsay exception is to be used only rarely, *in truly exceptional cases.*” *Pozen Inc. v. Par Pharm., Inc.*, 696 F.3d 1151, 1161 n.6 (Fed. Cir. 2012) (citation omitted) (emphasis added). Thus, even if DISH had adequately shown the “e-mails have a sufficient guarantee of trustworthiness, and they are more probative than any other evidence that can be reasonably obtained,” *Opp.* at 8, (it did not) DISH has failed to show that this case is a “truly exceptional” one warranting application of the residual hearsay exception. *Pozen*, 696 F.3d at 1161 n.6.

Finally, 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” (Fed. R.

Civ. P. 26(a)(2)(B)(ii)) nor are they the type of information that experts in the field of video streaming would reasonably rely upon.

2. The *Microchip v. Aptiv* Exhibit Should Be Excluded

As a threshold matter, DISH does not dispute that the prior declaration in the *Aptiv* case is not in the evidentiary record here. Opp. at 10-12. This should end the inquiry, and the Board should exclude the declaration for this reason alone or for any of the other reasons included in Aylo's Motion. Mot. at 6-7. DISH could have raised this exhibit earlier in these proceedings, and doing so in its Sur-Reply is far too late.

DISH's only true basis for opposing exclusion of the declaration is alleged inconsistencies between Dr. Houh's statements there and his approach to secondary considerations here. But impeachment requires that the prior statement actually be inconsistent and contradictory. *See* FRE 801(d)(1)(A); FRE 613. The only basis for Dr. Houh's prior testimony being "inconsistent" is DISH's mischaracterization of his statements. *See* Mot. at 7. DISH does not even attempt to rebut that Dr. Houh's prior testimony does *not* say what DISH says it does, and it is troubling that DISH doubles down on its mischaracterizations. Accordingly, Petitioners motion should be granted.

DATED: August 15, 2025

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 15, 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).

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