UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

APPLE INC., EVENTBRITE INC., STARWOOD HOTELS & RESORTS WORLDWIDE, INC., EXPEDIA, INC., FANDANGO, LLC, HOTELS.COM, L.P., HOTEL TONIGHT, INC., HOTWIRE, INC., KAYAK SOFTWARE CORP., OPENTABLE, INC., ORBITZ, LLC, PAPA JOHN'S USA, INC., STUBHUB, INC., TICKETMASTER, LLC, LIVE NATION ENTERTAINMENT, INC., TRAVELOCITY.COM LP, WANDERSPOT LLC, AGILYSYS, INC., DOMINO'S PIZZA, INC., DOMINO'S PIZZA, LLC, HILKTON RESORTS CORPORATION, HILTON WORLDWIDE, INC., HILTON INTERNATIONAL CO., MOBO SYSTEMS, INC., PIZZA HUT OF AMERICA, INC., PIZZA HUT, INC., and USABLENET, INC.,
Petitioner,

v.

AMERANTH, INC.,

Patent Owner.

Case CBM CBM2015-00080[1]
Patent 6,384,850

PETITIONERS' MOTION TO EXCLUDE PATENT OWNER'S EVIDENCE UNDER 37 C.F.R. § 42.64

[1] CBM2015-00096 has been consolidated with this proceeding.

I. INTRODUCTION

Patent Owner's Response was accompanied by a number of exhibits mostly relied on to support Patent Owner's argument that secondary considerations indicate non-obviousness of the challenged claims of the '850 patent. Many of these exhibits should be excluded as hearsay, lacking authentication, and irrelevant. For example, rather than submitting copies of alleged licenses for the '850 patent, or a declaration from someone with knowledge of the alleged licenses, Patent Owner submitted copies of its own press releases as proof of these licenses. These press releases are hearsay that do not fit within any exception to the hearsay rule. Patent Owner also relied on exhibits containing later-added claim element annotations to brochures of its products as proof that the products include the annotated claim elements, but has not produced any witness who knows who created the annotations, who had ever seen the product depicted in the brochure, or who had performed any independent investigation to determine whether the annotations accurately reflect the product. These exhibits and the others mentioned in this motion should be excluded for the reasons discussed herein.

II. RELIEF REQUESTED

Pursuant to 37 C.F.R. § 42.64(c), Petitioner hereby moves to exclude Exhibits 2021, 2023, 2025, 2027, 2030-2051 and 2053-2056 in their entirety, along with the annotated portions of Exhibit 2024. Petitioner's motion is based on the

Federal Rules of Evidence ("FRE"), which are applicable to this proceeding. *See* 37 C.F.R. § 42.62.

III. AUTHORIZATION FOR THIS MOTION

A "motion to exclude evidence" "may be filed without prior authorization from the Board." 37 C.F.R. § 42.64(c). Further, the Scheduling Order that governs this proceeding specifically authorizes a motion to exclude evidence under Due Date 4.[2] Paper No. 14 at 3.

IV. STATEMENT OF MATERIAL FACTS

On January 6, 2016, Patent Owner filed its Patent Owner Response with Exhibits 2019-2056. Paper No. 17. Petitioner timely filed Objections to certain exhibits submitted with Patent Owner's Response, including Exhibits 2021, 2023, 2025, 2027, 2030-2049 and 2053-2056 on January 13, 2016. Paper No. 18. Patent Owner served a Response to Petitioner's Objections on January 26, 2016, attached hereto as Exhibit 1083. Patent Owner filed its Corrected Response ("PO Corrected Response") on Feb. 1, 2016. Paper No. 21.

Exhibits 2024, 2050 and 2051 are documents purporting to describe Patent Owner's 21st Century Restaurant ("21CR") product. Each of these Exhibits includes numerous red annotations. The annotated portions of these Exhibits were

[2] The parties stipulated to amend the deadline for Due Date 4 to April 8, 2016. Paper No. 16 at 1.

reproduced in full in the declaration of Patent Owner's expert, Dr. Weaver. Exhibit 2019 (Weaver Declaration) at ¶ 103 (reproducing annotated portions of Exhibit 2024), ¶ 106 (reproducing Exhibits 2050 and 2051).

On February 26, 2016, Petitioner took Dr. Weaver's deposition. Dr. Weaver admitted that he did not create the annotations in Exhibits 2024, 2050 and 2051 reproduced in his declaration, and did not know who created them. Exhibit 1076 at 207:5-208:18; 230:2-24; 234:5-235:13.

V. STATEMENT OF THE REASONS FOR THE REQUESTED RELIEF

Petitioner timely objected to Exhibits 2021, 2023, 2025, 2027, 2030-2049 and 2053-2056 on the grounds that these Exhibits are inadmissible hearsay under FRE 801(c), irrelevant under FRE 401-403, and/or unauthenticated under FRE 901(a). Paper No. 18 at 1-9. Petitioner explained with particularly the basis for each ground of objection. *Id.*

Petitioner further objects to Exhibits 2024, 2050 and 2051 on the ground that these documents include annotations that are inadmissible hearsay under FRE 801(c). On a teleconference with the parties on March 31, 2016, the Board authorized Petitioner to include these objections in this Motion and to seek waiver of the deadline for evidentiary objections, because the Exhibits were reproduced in the declaration of Patent Owner's expert, Dr. Alfred Weaver, and Petitioner only learned that the annotations were not created by Dr. Weaver at the time of his

deposition.

The chart below summarizes Petitioner's objections to Exhibits 2021, 2023-2025, 2027, 2030-2051 and 2053-2056, identifies when the objections were originally made, and identifies where the evidence sought to be excluded is relied upon by Patent Owner. The objections shown in bold are the grounds for exclusion addressed by this motion. Petitioner addresses each Exhibit in numerical order. Petitioner respectfully requests that the Board preclude Patent Owner from using these Exhibits at any hearing or in any paper in this proceeding.

Exhibit	Objections	PO Corrected Response
2021	FRE 901(a), **801(c)**. Paper No. 18 at 1.	51-52.
2023	FRE 901(a), **801(c)**. Paper No. 18 at 1.	57-58.
2024	**FRE 801(c)**. March 31, 2016 conference.	58-61.
2025	FRE 901(a), **801(c)**. Paper No. 18 at 1-2.	63-65.
2027	FRE 901(a), **801(c)**. Paper No. 18 at 2.	69.
2030	FRE 901(a), **801(c)**. Paper No. 18 at 3.	73-74.
2031	**FRE 801(c)**. Paper No. 18 at 3.	74-75.
2032	**FRE 901(a), 801(c)**. Paper No. 18 at 3.	74-75.
2033	**FRE 901(a), 801(c)**. Paper No. 18 at 3-4.	77.
2034	FRE 901(a), **801(c)**. Paper No. 18 at 4.	77.

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