

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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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, HILTON 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

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Case CBM2015-00080<sup>1</sup>  
Patent No. 6,384,850

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

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<sup>1</sup> CBM2015-00096 has been consolidated with this proceeding.

## I. INTRODUCTION.

In its Motion to Exclude Patent Owner's Evidence (Paper 31; "Motion to Exclude"), Petitioner argues that several of Ameranth, Inc.'s ("Ameranth" or "Patent Owner") exhibits should be excluded as "hearsay, lacking authentication, and irrelevant." (Paper 31, pg. 1.) The exhibits are primarily cited to by Ameranth in support of its "secondary considerations" arguments, and consist of documents such as press releases and announcements, awards, FSTEC meeting transcripts, emails, presentation documents and annotated brochures. Much of the secondary considerations evidence is from long ago, and considering the tight timelines and limited discovery available under the AIA, the Board has recognized the vital importance of considering such contemporaneous objective evidence as part of the *Graham* factors analysis, especially when all the evidence appears to be what it is claimed to be.

Further, contrary to Petitioner's Motion, the exhibits are highly relevant to Ameranth's Response to the Petition and do not lack authentication or constitute inadmissible hearsay. As discussed herein, the exhibits are used for *non*-hearsay purposes, such as showing the existence of industry praise and recognition, and also are either non-hearsay or meet several exceptions to the rule against hearsay such as the statements against interest exception of Federal Rules of Evidence ("FRE") 804(b)(3) and the residual exception of FRE 807(a). Petitioner has long-

since waived any objections to the annotated brochures by failing to timely object to the exhibits. And, in any event, the annotations complained of by Petitioner constitute nothing more than attorney argument and are not subject to a hearsay objection.

Additionally, Petitioner itself has used exhibits in this proceeding very similar to those Ameranth exhibits it objects to now, including documents such as Ameranth press releases, and apparently forgets that Petitioner itself had reviewed all of the existing 37 C.F.R. §1.131 and 1.132 declarations on record (containing much of the evidence that Petitioner now objects to) and discussed the same in the Petition, thus waiving all objections to it.

With respect to the exhibits challenged by Petitioner on authentication grounds, Ameranth demonstrates below that there is at least a “reasonable probability” that the exhibits are what Ameranth claims them to be, and thereby enables the Board to conclude that the documents have been authenticated.

Therefore, the Board should deny the Motion to Exclude in its entirety.

## **II. THE CHALLENGED EXHIBITS ARE *NOT* HEARSAY.**

### **A. The Exhibits Are Used For Non-Hearsay Purposes.**

Petitioner argues that “**Exhibits 2021, 2023, 2025, 2027, 2030-2035, 2038-2039 and 2054-2056** each include written statements by declarants not testifying in this proceeding, which are relied upon by Patent Owner for the truth of the matter

asserted.” [Emphasis original] Paper 31, Pg. 6. However, contrary to Petitioner’s cursory analysis, many of the exhibits are not cited for the “truth of the matter asserted,” but, rather, were cited for other non-hearsay purposes.

If the exhibits are cited for non-hearsay purposes, then they do not fall within the rule against hearsay. In *Medtronic, Inc. v. Nuvasive, Inc.*, IPR2014-00073, Petitioner had brought a motion to exclude certain website printout exhibits and financial industry documents as hearsay. *Medtronic, Inc. v. Nuvasive, Inc.*, IPR2014-00073, Paper 48, pg. 33. Patent Owner argued that the exhibits were presented for the non-hearsay purposes of showing praise and recognition by the industry and the states of mind of the documents’ authors. *Id.* The Board agreed and denied the motion to exclude as to those exhibits. *Id.* at pgs. 33-34.

The exhibits at issue here are cited in the “Objective Evidence Of Non-Obviousness” section of Ameranth’s Corrected Patent Owner’s Response and, similar to the *Medtronic* case discussed above, are generally used as evidence of “secondary considerations.” (Paper 21, pgs. 50-80.) Many of these exhibits are used for non-hearsay purposes, such as showing industry praise and the states of mind of the declarant, rather than the truth of the matter asserted. For example, Exhibit 2023 is a May 14, 2012 press release regarding Skywire with a statement by the CEO of Skywire recognizing the “extraordinary value of Ameranth’s breakthrough patents” and stating that he has “worked together with Keith

McNally... since the late 1990's." Exh. 2023. Ameranth cites to this press release as part of its "secondary considerations" evidence. (Paper 21, pg. 58, FN 39.) But the document is cited to for purposes of showing the existence of industry praise and the state of mind of the CEO of Skywire, not for the truth of the matters asserted.

Similarly, Exhibit 2025 (various press releases and announcements of numerous other Ameranth patent licenses and alliances) is cited to in part because of "praise from the CEOs of the licensees" found in the documents. (Paper 21, pg. 63.) This exhibit is cited to for showing industry praise and the state of mind of the CEOs of the licensees and the inclusion of their statements confirmed that these were **'joint'** releases. Likewise, Exhibit 2027 (Microsoft RAD Award), is cited as additional evidence of praise and recognition by the industry. (Paper 21, pg. 69.)

Other exhibits are used to show copying and/or the state of mind of the authors or declarants, but not the truth of the matters asserted. Exhibits such as Exhibit 2030 (email messages between Microsoft and Starbucks personnel) (cited at Paper 21, pgs. 73-73), Exhibit 2031 (Scott Maw remarks, Nov. 18, 2015 Starbucks investor conference) (cited at Paper 21, pgs. 73-74), Exhibit 2032 (May 2006 Ameranth presentation to Pizza Hut) (cited at Paper 21, pgs. 75, 79), Exhibit 2033 (Transcript of Micros remarks, 2008 FSTEC meeting) (cited at Paper 21, pg. 77), Exhibit 2034 (Micros announcement of Symphony product) (cited at Paper 21,

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