

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 REPLY BRIEF IN SUPPORT OF PATENT  
OWNER'S MOTION TO EXCLUDE PURSUANT TO 37 C.F.R. § 42.64(c)**

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

**I. THE UNCITED PARAGRAPHS OF EXHIBIT 1070 AND  
PETITIONER’S UNCITED EXHIBITS SHOULD BE EXCLUDED.**

As discussed in Ameranth’s Motion, paragraphs 1-4, 18, 19, 22-24, 33, 37, 38, 41-51, 55, 60-63, 65, 67-70, 78-93 and 95 of Exhibit 1070 (Dr. Turnbull’s reply declaration) should be excluded as irrelevant and improper under 37 C.F.R. § 42.6(a)(3) because they are not discussed *or even cited to* in the Reply Brief. Exhibits 1078-1082 are irrelevant for the same reason. Petitioner responds by arguing that “there is no requirement in this proceeding... that Petitioner must cite to each and every paragraph in an expert declaration to satisfy the relevance requirements of the Federal Rules of Evidence” and makes essentially the same argument with respect to its uncited exhibits. (Pap. 35, pp. 2, 9-11, 13.)

However, Petitioner not only ignores the fact that it completely failed to establish any relevancy of the uncited paragraphs and exhibits in its Reply Brief, but Petitioner ignores 37 C.F.R. § 42.23(b), which provides in part that “[a]ll arguments for the relief requested in a motion must be made in the motion.” Petitioner further fails to address cases cited in Ameranth’s Motion, such as *Conopco, Inc. dba Unilever v. The Procter & Gamble Company*, IPR2013-00510 (Pap. 9, pp. 8-9, declining to consider information presented in a supporting declaration, but not discussed in a petition). In so doing, Petitioner takes the untenable position that the uncited paragraphs of Exhibit 1070 could not have been

incorporated by reference because they “were *not* cited in the Reply.” [Emphasis original] (Pap. 35, p. 4.) Petitioner argues that citing to Dr. Turnbull’s supplemental declaration in a “narrowly tailored” fashion (*i.e.*, Petitioner only cites to a few paragraphs and leaves numerous paragraphs completely undiscussed and uncited) does not violate any rules but somehow the completely undiscussed and uncited portions of the declaration remain relevant.

But clearly *not* citing the paragraphs *at all* is a more egregious violation of the intent of the rule against incorporation by reference (37 C.F.R. § 42.6(a)(3)) than simply citing to the paragraphs without sufficient discussion. Further, if Petitioner’s position is that the uncited paragraphs are not incorporated by reference, then Petitioner has completely failed to establish their relevance as the paragraphs would not even be incorporated into the Reply Brief at all.

Petitioner also makes a similarly nonsensical argument with respect to the uncited exhibits - conceding that they were not cited in the Reply Brief but arguing that they are relevant because they are cited in Dr. Turnbull’s reply declaration. However, Petitioner’s position is nothing more than an additional attempt to improperly incorporate by reference even more material via the declaration.

Further demonstrating Petitioner’s nonsensical position, Petitioner made the *exact same* challenge to several of Ameranth’s exhibits. (Pap. 31, pp. 12-13.) In its Motion to Exclude, Petitioner argued “Patent Owner’s Corrected Response does

not cite or mention these Exhibits”... “[t]hus, [the exhibits] are inadmissible as irrelevant under FRE 401 and 402.” (Pap. 31, pg. 13.) Plainly, Petitioner is trying to “have its cake and eat it too.”

As predicted by Ameranth in its Motion (Pap. 33, p. 4), Petitioner only now belatedly attempts to explain the relevance of the uncited paragraphs<sup>2</sup> and uncited exhibits in its Opposition. But, again, if Petitioner believed the evidence to be relevant, Petitioner should have included any discussion or argument pertaining to the evidence it wanted to make in its Reply Brief. *See* 37 C.F.R. § 42.23(b).

## **II. EXHIBITS 1071-1073 and 1080-1082 ARE HEARSAY.**

Petitioner argues it “does not rely on [Exhibits 1071-1073] for the truth of the statements asserted therein”, but rather “as evidence of what they would describe to a POSITA.” (Pap. 35, p. 7.) Petitioner claims it relies upon the exhibits “for the fact that hospitality industry publications have used the term ‘hospitality’ in a particular manner.” (*Id.*) Likewise, Petitioner argues Exhibits 1080-1081 are “relied upon by Dr. Turnbull as evidence that ‘push’ technology

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<sup>2</sup> Petitioner cites to numerous paragraphs of Dr. Turnbull’s declaration to argue relevance, but nearly half of the paragraphs it now cites to are paragraphs that were cited in the Reply and not challenged by Ameranth. (Pap. 35, p. 2.) This further underscores the lack of relevance of the *uncited* paragraphs.

was known, and that a POSITA would have found it obvious to add such functionality to DeLorme's system." (Pap. 35, p. 12.)

However, Petitioner cites to Exhibits 1071-1073 to support its assertion that WCU exchanged data is "hospitality data under the proper BRI construction." (Pap. 24, p. 8.) The exhibits are cited for what the documents state regarding the scope of the hospitality industry, *i.e.*, that the hospitality industry is defined as Petitioner asserts. Similarly, Exhibits 1080-1081 are cited in Dr. Turnbull's supplemental reply declaration<sup>3</sup> to support an argument that certain "push technology" was available at a certain timeframe. (*See, e.g.*, Exh. 1070 ¶ 76.) Thus, the exhibits are used for the truth of the matters asserted therein, and are inadmissible hearsay.

Petitioner also argues that the exhibits meet the residual hearsay exception, but Petitioner does little more than just repeat the elements of FRE 807 without providing any real analysis as to *why* or specifically *how* the exhibits would meet the exception. (*See, e.g.*, Pap. 35, pp. 7-8, 14-15.)

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<sup>3</sup> As discussed above, Exhibits 1080-1081 are not even cited in the Reply Brief and are therefore irrelevant. They are also irrelevant because they are used to support Petitioner's new argument, improperly introduced on reply, via the declaration.

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