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, 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.

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

PETITIONERS' REPLY IN SUPPORT OF 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

PO's Opposition fails to identify any legitimate grounds for admitting the challenged exhibits. For example, while PO now contends that certain exhibits were cited for non-hearsay purposes, PO's Response cited the exhibits for the truth of matters asserted, *e.g.* that the '850 patent had been licensed. PO also fails to show that any of the exhibits fall within any hearsay exception, and identifies no evidence showing that the exhibits are authentic. While PO asks the Board exercise its discretion to admit this evidence despite these failings, the Board should decline PO's invitation to ignore the Federal Rules and to excuse its lack of diligence in marshalling evidence that meets the Rules' requirements.

II. RESPONSE TO PATENT OWNER'S OPPOSITION

A. Exhibits 2021, 2023, 2025, 2027, 2030-2035, 2038-2039 and 2054-2056 Should Be Excluded As Inadmissible Hearsay under FRE 801.

1. PO Relies on These Exhibits for Hearsay Purposes

PO contends that "many of the exhibits are not cited for the 'truth of the matter asserted,' but rather, were cited for other non-hearsay purposes." Opp. at 3. But, PO relies upon statements in each of these Exhibits to establish the truth of matters stated therein. Mot. at 6-9. For example, Exhibit 2025 comprises press releases relating to purported patent licenses. While PO contends that it relies upon these press releases as "showing industry praise and the state of mind of the CEOs of the licensees," (Opp. at 4.) PO's Response cites Exhibit 2025 as

purportedly evidencing that the patent has been licensed, the identity of licensees, and that certain statements were made by CEOs of these licensees. POR at 65.

PO's contentions that it relies on the remaining Exhibits for non-hearsay purposes are similarly flawed. Mot. at 7-8. And, contrary to PO's suggestion, evidence is not admissible simply because it is offered as secondary considerations evidence. *See, e.g. Google, Inc. v. Meiresonne*, IPR2014-01188, Paper No. 38 at 10 (excluding secondary considerations evidence as inadmissible hearsay).

2. These Exhibits Do Not Fall Within Any Hearsay Exception

PO fails to show that any hearsay exceptions apply. For example, PO contends that Exhibit 2039 is not hearsay, because it includes statements attributed to a Papa John's employee. Opp. at 5. However, showing that an employee's statement falls within the hearsay exception of FRE 801(d)(2) requires a showing "based on evidence independent of the alleged hearsay" that the declarant is an agent of the party. *United States v. Portsmouth Paving Corp.*, 694 F.2d 312, 321 (4th Cir.1982). PO makes no such showing. Opp. at 5. PO further contends that certain Exhibits fall within the "statement against interest" exception. Opp. at 5-6. Yet, PO fails to show that any such statements were from unavailable declarants, against any party's interests, or otherwise satisfy either sub-clause of FRE 804(b)(3). PO further contends that its press releases fall within the business records exception. Opp. at 7. However, PO fails to show that these press releases

satisfy any of the requirements of FRE 803(6)(a)-(d).

PO's contention that these Exhibits fall within the "residual exception" of FRE 807(a) (Opp. at 6-8.) is also flawed. While PO contends that these Exhibits "are not subject to any reasonable challenge for untrustworthiness" (Opp. at 7-8), many of the Exhibits lack any distinctive characteristics that reasonably suggest trustworthiness. *See, e.g.* Exhibits 2033, 2039, 2055. Nor has PO provided any evidence to confirm their trustworthiness. PO also fails to show the Exhibits are more probative on the points for which they are offered than other evidence obtainable through reasonable efforts. Indeed, PO had, but did not produce, recordings from which the FTSEC transcripts were allegedly transcribed. Opp. at 7 n. 4. Likewise, PO possesses patent license agreements, which are more probative evidence of its licenses than the hearsay press releases upon which PO relies. Admitting evidence with little probative value and questionable trustworthiness does not serve the interests of justice.

B. Exhibits 2024, 2050 and 2051 Should Be Excluded As Inadmissible Hearsay under FRE 801(c)

PO does not dispute that the annotations in these Exhibits are hearsay. Opp. at 9-10. Instead, PO contends that the Exhibits should not be excluded because the annotations are attorney argument. *Id.* However, while attorney argument may be proper in a brief, PO improperly seeks to introduce these annotations as evidence. *Nat'l Air Traffic Controllers Ass'n v. Dep't of Transp.*, 960 F.2d 156 (Fed. Cir.

1992) ("Attorney argument does not constitute evidence.").

PO's waiver argument also should be rejected. PO contends that Petitioner should have originally objected to these Exhibits if there was any doubt about who authored the annotations. Opp. at 10. However, given that PO's expert relied upon the annotations for his opinion that its product practiced the claims, Petitioner reasonably concluded that Dr. Weaver was the author, and not that, *e.g.*, vague language was used to obfuscate authorship. Indeed, an expert's opinion must be based on facts and evidence – not attorney argument. *See* FRE 702(b), (c) (expert testimony must be "based on sufficient facts or data;" and be "the product of reliable principles and methods"). *See also* *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 595 (1993) (expert opinions must be based on facts "of a type reasonably relied upon by experts in the particular field.")

PO further contends that Petitioner should have objected to the Exhibits at Dr. Weaver's deposition or within 5 days thereafter. However, 37 C.F.R. 42.64(a) is not applicable. Exhibits 2024, 2050 and 2051 were submitted with PO's Response, and thus not "deposition evidence." And, by the time Petitioner learned the annotations were hearsay, 5 business days had long since passed. Mot. at 11. Thus, Petitioner requests that the 5 day requirement set forth in 37 C.F.R. 42.64(b) be waived. At a minimum, because PO now admits that the annotations are merely attorney argument, they should be accorded little, if any, weight.

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