

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

STARBUCKS CORP., APPLE, INC., EVENTBRITE, INC., and
STARWOOD HOTELS & RESORTS WORLDWIDE, INC.,
Petitioner

v.

AMERANTH, INC.
Patent Owner

Case CBM2015-00099¹
Patent No. 6,871,325

**PATENT OWNER'S OPPOSITION TO PETITIONER'S
MOTION TO EXCLUDE**

¹ Case CBM2016-00006 has been joined with this proceeding.

I. INTRODUCTION.

In its Motion to Exclude (Paper 26), Petitioner argues that several of Ameranth, Inc.'s ("Ameranth" or "Patent Owner") exhibits should be excluded as inadmissible hearsay, unauthenticated, inadmissible under the "Best Evidence Rule" and irrelevant, and that a portion of Ameranth's expert's declaration should be excluded for lacking the requisite expertise in the hospitality industry.

However, contrary to Petitioner's Motion, the exhibits are highly relevant to Ameranth's Response to the Petition and do not constitute inadmissible hearsay, lack authentication or fail under the Best Evidence Rule, and Ameranth's expert is more than qualified to offer the opinions stated in the challenged portion of his declaration. The challenged exhibits are primarily cited by Ameranth in support of its "secondary considerations" arguments, much 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.

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 an exception to the rule against hearsay such as the residual exception of FRE 807(a). Further, Petitioner has waived any objections to

Ameranth's press release exhibits since *Petitioner itself* has submitted Ameranth's press releases as exhibits, and has also used several exhibits itself that are similar to those Ameranth exhibits it objects to now.

With respect to the exhibits challenged by Petitioner on authentication grounds, many of them have been authenticated by testimonial evidence. Ameranth also 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. AMERANTH'S EXHIBITS ARE NOT HEARSAY.

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

Petitioner argues that Exhibits 2047-48, 2050, 2053, 2059, 2062 and 2077-78 should be excluded on hearsay grounds. 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, similar to the *Medtronic* case discussed above, are primarily used by Ameranth as evidence of “secondary considerations”, such as the existence of industry praise and recognition, commercial success, copying and the state of mind of the declarants or authors. For example, Exhibit 2062, which is a 37 C.F.R. § 1.132 declaration of Keith McNally and accompanying exhibits including press releases, is cited to show the existence of industry praise. (Paper 17, at pg. 71 citing to Exh. 2062 and noting “Microsoft founder Bill Gates personally nominated Ameranth with the praise that ‘Ameranth is one of the leading pioneers of the information age for the betterment of mankind.’”) It is also cited to show the existence of a nexus with the praise/awards/licensing and other “secondary factors” (Paper 17, pgs. 58-59), commercial success (Paper 17, pg. 68) industry praise (Paper 17, pgs. 71, 72) copying (Paper 17, pg. 77) and that companies such as Micros sought to license Ameranth’s technology (Paper 17, pg. 53).

Similarly, Exhibit 2053 (email messages with Microsoft personnel) and Exhibit 2059 (Ameranth presentation to Starbucks) are cited by Ameranth to show copying. (Paper 17, pg. 74.) Exhibits 2077-2078 (annotated brochures) and Exhibit 2047 (21 CR brochure with annotations) are used to show a nexus between

the patent claims and the awards, industry praise, and commercial success of Ameranth's 21CR family of products. (Paper 17, pgs. 59-61.) Exhibit 2050 (Microsoft RAD Awards document) is cited to show the existence of industry acclaim and numerous awards (Paper 17, pg. 70) and Exhibit 2048 (press releases) is also used to show things such as industry praise and recognition (*see e.g.* Paper 17 at pg. 65).

B. Starbucks Has Waived Its Objections To The Press Release Exhibits.

Although Petitioner moves to exclude Ameranth's press release exhibits (Exhibits 2062 and 2048), Petitioner *itself* submitted Ameranth's press releases with its petition as exhibits (Petitioner Exhibits 1040 and 1041). Petitioner also used an Ameranth 21st Century Restaurant Overview brochure (Exhibit 1087) and HostAlert brochure as exhibits. Thus, any objections Petitioner has to the same categories of documents used by Ameranth, such as press releases, should be deemed waived since Petitioner has used essentially the same documents itself.²

² It is also worth noting that Petitioner has submitted numerous exhibits in support of its Petition which are similar in nature to many of the Ameranth exhibits Petitioner challenges in its Motion to Exclude. For example, Petitioner submitted books or excerpts from books (Exhibits 1019-1023, 1032-1036, 1038), technical manuals or excerpts from technical manuals (Exhibits 1024-1031) and articles

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