

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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

v.

AMERANTH, INC.  
Patent Owner

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Case CBM2015-00099<sup>1</sup>  
U.S. Patent No. 6,871,325

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**PATENT OWNER'S REPLY BRIEF IN SUPPORT OF**  
**PATENT OWNER'S MOTION TO EXCLUDE**

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<sup>1</sup> Case CBM2016-00006 has been joined with this proceeding.

**I. THE UNCITED EVIDENCE SHOULD BE EXCLUDED.**

As discussed in Ameranth's Motion, paragraphs 1-30, 45, 57, 79-82, 91-93, 107-114, 134-135, 140, 149-160, 164-188, 203, 222-231 and 270-271 of Exhibit 1063 (the reply declaration of Dr. Helal) 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 1068-1070, 1074, 1083-1085, 1095, 1096-1099, 1101, 1102 and 1106 are irrelevant for the same reason. Petitioner first tries to justify the uncited evidence by complaining that Ameranth provided "new" expert testimony along with its Response to the Petition.<sup>2</sup> (Pap. 31, p. 1.) However, *Ameranth's* evidence is not at issue here and Petitioner's conflation of the issues ignores the fact that Petitioner completely failed to establish any relevancy of the uncited paragraphs and exhibits in its Reply Brief.

Also, Petitioner belatedly argues that the uncited evidence is "highly relevant" because it rebuts Dr. Weaver's declaration and Ameranth's Response. (Pap. 31, p. 2.) In doing so, 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 should have included any discussion pertaining to

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<sup>2</sup> Obviously, Ameranth's Response was the first opportunity to submit the "new" evidence and raise issues Petitioner claims Ameranth "inserted" into the case.

the uncited paragraphs and exhibits it wanted to make *in its Reply Brief*.

Admitting that it merely cited to “170 out of 271 paragraphs of Dr. Helal’s supplemental declaration” (Pap. 31, p. 7), Petitioner claims that it did not violate 37 C.F. R. § 42.6(a)(3). But *not* citing the paragraphs *at all* is a more egregious violation of the intent of the rule than not sufficiently discussing them. Also, if Petitioner’s position is that the uncited paragraphs are not incorporated by reference, then Petitioner has clearly failed to establish their relevance as the paragraphs would not even be incorporated into the Reply Brief at all.

Petitioner also makes a nonsensical argument with respect to the uncited exhibits – conceding they were not cited in the Reply Brief but arguing that many of the uncited exhibits “were actually cited in certain paragraphs of Dr. Helal’s supplemental declaration, which were then referenced in the Reply.” (Pap. 31, p. 2, FN 2.) However, Petitioner’s position is nothing more than an attempt to improperly incorporate by reference *even more* material via the declaration.

Moreover, Petitioner made the *exact same* challenge to several of Ameranth’s exhibits by arguing that they “were never cited or otherwise relied on”, and that Ameranth had “failed to establish how these exhibits are relevant.” (*E.g.*, Pap. 26, p. 13.)<sup>3</sup> Plainly, Petitioner is trying to “have its cake and eat it too.”

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<sup>3</sup> Petitioner incorrectly claims its objection is different because it objected only to

Finally, in arguing it didn't violate 37 C.F.R. § 42.6(a)(3), Petitioner incorrectly claims cases cited by Ameranth presented "distinguishable factual scenarios." (Pap. 31, p. 6.) For example, Petitioner tries to distinguish the *Conopco, Inc.* case stating Petitioner's experts are "rebutting the Patent Owner's own expert who asserted new evidence into the case." (Pap. 31, p. 6.) But the relevant aspect of the *Conopco, Inc.* case was the Board's decision to not consider information presented in a supporting declaration that was not discussed in a petition. IPR2013-00510, Pap. 9, pp. 8-9. Similarly, here Petitioner failed to discuss *or even cite* the identified evidence in its Reply Brief.

## II. THE INCOMPLETE EXHIBITS SHOULD BE EXCLUDED.

Petitioner argues providing complete references, instead of excerpts, would have "swamped" the Board. (Pap. 31, p. 8.) But clearly the Board is not obligated to read every word of an exhibit if it is unnecessary to do so. By failing to provide the complete references, however, Petitioner has denied the Board the option of reviewing other portions of the references to determine whether other portions clarify or contradict the excerpts provided.

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exhibits that were not discussed "anywhere" by Ameranth. (Pap. 31, p. 5, FN 4.)

But Petitioner objected to exhibits that *were* cited in Dr. Weaver's declaration (*e.g.*

Exhs. 2012 and 2059). (*See* Pap. 26, p. 13; Exh. 2041, ¶¶ 43, 147 and FN 58.)

Moreover, contrary to Petitioner's assertion (Pap. 31, p. 9), Ameranth's argument is not inconsistent with its objection to uncited exhibits. Parties often properly cite to portions of an exhibit that they contend are relevant. Not even citing an exhibit at all (and failing to establish its relevance) is a different issue than providing incomplete references which, whether or not they are relevant, is improper for the reasons discussed above and in the Motion.

### **III. THE IDENTIFIED EXHIBITS ARE NOT AUTHENTICATED.**

Petitioner's primary argument that Exhibits 1065, 1067, 1069-75, 1081, 1095, 1097-99 and 1106 are authenticated is that "Dr. Helal and Dr. Khan provided witness testimony authenticating the... exhibits as what they are claimed to be." (Pap. 31, p. 11.) However, an examination of Dr. Helal's and Dr. Khan's declarations shows that, while they may cite to the exhibits, they do not "authenticate" them. For example, Dr. Helal cites to Exhibit 1075 for support of an argument, but does not authenticate the document. (Exh. 1063, ¶¶ 86, 146.) The other exhibits at issue are treated similarly in the declarations. (*See* Exh. 1063, ¶¶ 62, 63, 146, 212, 213, 216, 217; Exh. 1064, ¶¶ 13, 16, 17, 18, 24, 25.)

The cases cited by Petitioner do not support its arguments. In the *SAP America, Inc.* case, the Board cited FRE 901(b)(4) in commenting that a party may authenticate evidence using circumstantial evidence in conjunction with distinctive characteristics of the evidence. CBM2013-00013, Pap. 61, pgs. 27-28. Yet

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