

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

META PLATFORMS, INC.,
Petitioner,

v.

EIGHT KHZ, LLC,
Patent Owner.

Case IPR2023-01003
Patent 9,226,090

PATENT OWNER'S OBJECTIONS TO PETITIONER'S EVIDENCE
37 C.F.R. §§42.62, and 42.64

Pursuant to 37 C.F.R. §§42.62, and 42.64, and the Federal Rules of Evidence (“Fed. R. Evid.”), Patent Owner, EIGHT KHZ, LLC (“Patent Owner”), submits the following objections to evidence submitted by Petitioner, META PLATFORMS, INC. (“Petitioner”) in connection with Petitioner’s Reply (Paper 22), filed July 16, 2024 in the *Inter Partes* Review of U.S. Patent No. 9,226,090. These objections are timely served within five (5) business days of service of evidence in support of the Reply. The fact that Patent Owner has not objected below to certain pieces of evidence or certain portions of certain evidence provides no indication that Patent Owner agrees to the positions asserted therein. In addition, Patent Owner reserves the right to present further objections to this or additional evidence submitted by Petitioner, as allowed by the applicable rules or other authority.

I. PATENT OWNER’S OBJECTIONS TO EVIDENCE

Exhibit 1055 -- “DECLARATION OF DR. CHRIS KYRIAKAKIS IN SUPPORT OF PETITIONER’S REPLY TO PATENT OWNER’S RESPONSE”

Patent Owner objects to Exhibit 1055 under Fed. R. Evid. 106, 401–403, 702–703, 705, and 37 C.F.R. § 42.65(a), § 42.104(b)(5), and § 42.23(b). Patent Owner specifically objects to:

(1) Paragraphs 8, 11-13, 17-19, 24, 27-28, 30, 33-35, 44, 49, and 53-56 of Exhibit 1055 on the grounds that they are irrelevant, misleading, unduly prejudicial, and confusing under Fed. R. Evid. 401–403;

(2) Paragraphs 7-8, 13, 16, 24, 33, 35, 40, 45, 47, 49, 52-53, 55 of Exhibit 1055 on the grounds that the probative value of the testimony contained therein is outweighed by a danger of prejudice and confusion under Fed. R. Evid. 403 and to the extent that at least some of these paragraphs fail to include all related parts “that in fairness ought to be considered at the same time” under Fed. R. Evid. 106;

(3) Paragraphs 31-38 and 51-57 of Exhibit 1055 on the grounds that they contain purported expert testimony by a Declarant who is not qualified as an expert on these issues in violation of Fed. R. Evid. 702–703;

(4) Paragraphs 4-6, 9-11, 14-16, 18, 20-21, 26, 30-31, 36, 40, 42-43, 50, 53-54, and 57 of Exhibit 1055 on the grounds that they contain “[e]xpert testimony that does not disclose the underlying facts or data on which the opinion is based” in violation of 37 C.F.R. § 42.65(a) and Fed. R. Evid. 702–703, and 705;

(5) All paragraphs of Exhibit 1055 to the extent that they are offered to prove the truth of the matter asserted on the grounds that they contain inadmissible hearsay, specifically paragraphs 7-8, 33, 35, 44, 52, and 55-56;

(6) Paragraphs 8-10, 16, 33, 35, 40-41, 45, 49, 52, and 56 on the grounds that they exceed the proper scope of a Reply in violation of 37 C.F.R. § 42.23(b);

(7) Paragraphs 1-5, 11-16, 17, 21-24, 29, and 42, of Exhibit 1055 on the grounds that they are not cited to or relied upon by the Reply (Paper 22) in violation of 37 C.F.R. §42.104(b)(5).

The fact that Patent Owner has not objected to certain paragraphs of Exhibit 1055 provides no indication that Patent Owner agrees to the positions asserted therein.

Exhibits 1047, 1048, 1049, 1050, 1052, 1053, 1054

Patent Owner objects to these Exhibits under Federal Rule of Evidence 401 as these Exhibits have no bearing on any issue in this proceeding. Furthermore,

Patent Owner objects to these Exhibits under Fed. R. Evid. 402, because they lack relevance and fail to support a patentability challenge. Petitioner does not explain how these Exhibits are relevant to the proceeding (i.e., Petitioner fails to provide the relevance of the evidence to the challenge raised), and the Board may exclude evidence where a party has failed to state its relevance. Further, Patent Owner objects to these Exhibits because they have no bearing on the patentability of any of the claims of the Patent. Accordingly, their probative value is substantially outweighed by a danger of prejudice and confusion pursuant to Fed. R. Evid. 403.

Patent Owner objects to Exhibits 1047, 1048, 1049, 1050, 1053, and 1054 under Fed. R. Evid. 901 as there has not been a sufficient foundation laid for the admission of each exhibit. Petitioner has not submitted required witness testimony or evidence to demonstrate that these documents are authentic.

Further, Patent Owner objects to these Exhibits to the extent that they are offered to supplement an element of patentability absent in the Petition and Asserted Grounds. Patent Owner objects to Exhibit 1050 as a post-priority-date publication offered to prove the state of mind and understanding of a POSITA prior to the priority date.

Further, Patent Owner objects to these Exhibits to the extent that they contain content that exceeds the proper scope of a Reply and are used to advance new arguments that could have been, but were not, raised in the Petition. Notably, Petitioner knew, evidenced by its express assertions in the Petition, that Dr. Begault was Patent Owner's expert at the time of filing the Petition. Accordingly, Petitioner could have utilized, but did not, these Exhibits in the Petition.

Further, Patent Owner objects to these Exhibits to the extent that they are offered to prove the truth of the matter asserted as inadmissible hearsay under FRE 801 and 802 that do not fall under any exceptions, including those of FRE 803, 804, 805, or 807.

Further, Patent Owner objects to Exhibit 1051 for each of the reasons noted in the objections made during the underlying deposition.

Further, Patent Owner objects to any portion of these Exhibits that were not explicitly and clearly relied upon by Petitioner or its expert per 37 C.F.R. §42.104(b)(5).

Date: July 23, 2024

Respectfully Submitted,
BOCHNER PLLC

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CERTIFICATE OF SERVICE

Pursuant to 37 C.F.R. §42.6 the undersigned hereby certifies that the above-captioned Patent Owner's Objections to Petitioner's Evidence was served via electronic mail on July 23, 2024 upon the following parties:

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Date: July 23, 2024

Respectfully Submitted,
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