

Case IPR2023-01003
Patent No. 9,226,090

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 MOTION TO EXCLUDE

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I. INTRODUCTION

The Board should exclude Exs.1047-50, 1052-54, certain paragraphs of Ex.1055, and certain portions of Ex.1051. Petitioner timely objected to this challenged evidence (Paper 23) but Petitioner failed to cure any of the deficiencies raised by PO in its objections.

II. EXHIBITS 1047-50 AND 1052-54 MUST BE EXCLUDED

A. Exhibits 1047-50 must be excluded per FRE 401-03

PO timely objected to Exs.1047-50 under FRE 401-03. Paper 23; *see also* Ex.1051, 9:12-10:12; 11:12-17; 15:10-16. Petitioner fails to state any relevance that these exhibits may have to this proceeding, other than Dr. Begault is an author of some of these (i.e., Exs.1047-48 and 1050). Specifically, as to Ex.1050, Petitioner cannot establish any relevance, for it was published after the priority date of the '090 Patent.

In its Reply, Petitioner cites these exhibits altogether to support a single sentence, without providing a pinpoint citation. *See* Reply, 13. These exhibits are never cited anywhere else. By failing to provide a pinpoint citation, Petitioner has burdened the Board and PO to review these voluminous exhibits and identify portions that may be probative of the assertion which they are cited to support. This substantially prejudices PO. Further, Petitioner cited these exhibits to support a single conclusory statement. At a minimum, this creates additional confusion and

amounts to “needlessly presenting cumulative evidence” under FRE 403. Given that Petitioner has failed to articulate the relevance of these exhibits to this proceeding with sufficient particularity, any potential relevance is substantially outweighed by the risk of prejudice to PO and confusion.

B. Exhibits 1047-50 and 1053-54 must be excluded per FRE 901-02

PO timely objected to the authenticity of Exs.1047-50 and 1053-54 under FRE 901 (Paper 23), but Petitioner did not address these objections. Under FRE 901(a), “[t]o satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.” Since these exhibits are not self-authenticating under FRE 902, Petitioner was required to provide evidence establishing that these exhibits are as claimed. Petitioner has failed to provide any such authenticating or corroborating evidence regarding the authenticity or public availability of these exhibits. Consequently, Exs.1047-50 and 1053-54 should be excluded under FRE 901.

C. Exhibits 1052-54 must be excluded for being offered for the truth of the matter asserted in violation of FRE 801

PO timely objected to Exs.1052-54 for containing inadmissible hearsay statements not covered by an exception. Paper 23. Petitioner and its expert rely on the following non-exhaustive list of hearsay statements (in bold) within these

Exhibits for the purported truth of the matter asserted, as shown in the examples below:¹

- **“Transaural audio is a three-dimensional sound spatialization technique which is capable of reproducing binaural signals over loudspeakers.”**
Ex.1055 ¶52. Petitioner relies on the purported truth of the matter asserted in the hearsay statement cited in its expert’s supplemental declaration to conclude that “[t]ransaural sound is binaural sound processed and delivered through speakers instead of headphones.” Reply, 22 (citing Ex.1055 ¶52).
- **“For example, U.S. Patent No. 4,136,260 described an ‘out-of-head localized sound reproduction system for headphone[s]’ that utilized a dip filter.”** Reply, 8. Petitioner relies on the purported truth of the matter asserted in the hearsay statement to conclude that Asahi (‘260 Patent) ***in fact*** disclosed an out-of-head localized sound reproduction system for headphones.

These exhibits must be excluded under FRE 801-02.

III. CERTAIN PARAGRAPHS OF EXHIBIT 1055 MUST BE EXCLUDED

PO timely objected to paragraphs 1-5, 11-16, 17, 21-24, 29, and 42 of Ex.1055, for they are not cited to or relied upon by any Paper in violation of 37

¹ By discussing these examples, PO does not adopt Petitioner’s reasoning, mischaracterization, and conclusions.

C.F.R. § 42.104(b)(5). Paper 23. These are irrelevant under FRE 401-02, because they fail to support a patentability challenge as they are not relied upon by any party. To the extent they may be relevant, their probative value is substantially outweighed by a danger of prejudice and confusion per FRE 403.

PO timely objected to paragraphs 8, 13, 16, 24, 33, 35, 40, 45, 47, 49, 52-56 of Exhibit 1055 on the grounds that they are unduly misleading and confusing, which substantially outweighs any relevance under FRE 403. Paper 23. Notably in paragraphs 8 and 35, Dr. Kyriakakis cites Ex.1052 without providing a pinpoint citation or any analysis supporting the conclusory assertion made by him. Similarly, in the same paragraphs, he cites Ex.1053 without providing a pinpoint citation or any analysis supporting the conclusory assertion made by him. Further, he states that Ex.1053 was cited on page 69 of Ex.1026, creating a misleading impression that Dr. Begault agreed with his conclusory assertion. Ex.1053 is not cited by Dr. Begault on page 69 of Ex.1026, nor did Dr. Begault agree with Dr. Kyriakakis's conclusions vis-à-vis Ex.1053 in his book. Furthermore, Ex.1026 is not authored by Dr. Begault.

PO timely objected to paragraphs 7-8, 33, 35, 44, 52, and 55-56 of Exhibit 1055 on the grounds that they contain inadmissible hearsay. Paper 23. Notably, for the reasons discussed above with respect to Exs.1052-54, paragraphs 8, 35, 52 and 55-56 must be excluded.

IV. CERTAIN PORTIONS OF EXHIBIT 1023 MUST BE EXCLUDED

During Dr. Begault's deposition, PO timely and repeatedly objected to testimony being taken based on Exs.1047-50. *See e.g.*, Ex.1051, 9:12-10:12; 11:12-17; 15:10-16. PO moves to exclude testimony taken based on these Exhibits.

V. CONCLUSION

For the preceding reasons, the Board should exclude Exs.1047-50, 1052-54, certain paragraphs of Ex.1055, and certain portions of Ex.1051.

Date: September 19, 2024

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CERTIFICATE OF SERVICE

I hereby certify that on September 19, 2024, I caused a true and correct copy of the foregoing Patent Owner's Motion to Exclude to be served via electronic mail at PH-Meta-Eight-KHZ-IPR@paulhastings.com upon the following attorneys of record for the Petitioner:

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