

Filed on behalf of: Meta Platforms, Inc.

Filed: September 19, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

META PLATFORMS, INC.
Petitioner,

v.

EIGHT KHZ, LLC
Patent Owner.

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

PETITIONER'S MOTION TO EXCLUDE EVIDENCE

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I. INTRODUCTION

In accordance with 37 C.F.R. §§ 42.62 and 42.64(c), Petitioner Meta Platforms, Inc. (“Petitioner”) hereby submits its Motion to Exclude inadmissible evidence proffered by Patent Owner Eight kHz, LLC (“Patent Owner” or “PO”) based at least on Petitioner’s Objections to Evidence (Paper 36). PO filed Exhibits 2029 and 2030 with the Patent Owner Sur-Reply (Paper 35), which are cross-examination deposition transcripts of other experts in other IPR proceedings concerning unrelated patents. Further, during the deposition of Dr. Kyriakakis on August 23, 2024, Patent Owner improperly attempted to examine Dr. Kyriakakis on Exhibits 2029 and 2030 to which Petitioner promptly objected to the admissibility of these exhibits and the questioning that followed, and Patent Owner did not cure the objections during the deposition. All objections have been preserved for this Motion to Exclude, and Exhibits 2029 and 2030 should be excluded.

II. LEGAL STANDARDS

The Federal Rules of Evidence (“F.R.E.”) generally applies to IPR proceedings. 37 C.F.R. § 42.62. To properly authenticate evidence, a proponent “must produce evidence sufficient to support a finding that the item is what the proponent claims it is.” F.R.E. 901. Out-of-court statements relied upon for the truth of the matter asserted are inadmissible hearsay. F.R.E. 801(c) and 802.

Irrelevant evidence is not admissible. F.R.E. 402. Evidence may be excluded if “its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.” F.R.E. 403.

A non-expert's witness testimony in the form of an opinion is limited to one that is rationally based on the witness's perception and not based on scientific, technical, or other specialized knowledge. F.R.E. 701. A non-expert “witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.” F.R.E. 602.

III. EXHIBITS 2029-2030 CONTAIN INADMISSIBLE HEARSAY AND LACK RELEVANCE

Statements “the declarant does not make while testifying at the current trial or hearing,” offered “to prove the truth of the matter asserted in the statement,” are hearsay. Fed. R. Evid. 801(c). Hearsay is inadmissible absent an exception. Rule 802. The rule against hearsay applies to IPRs. 37 C.F.R. § 42.62(a).

In an IPR, in-court statements are “submitted in the form of an affidavit” or a compliant declaration. 37 C.F.R. §§ 42.53, 42.2. This ensures an opposing party can cross-examine the witness in the IPR. 37 C.F.R. § 42.51(b)(1)(ii); *Vudu v. Ideahub*, IPR2020-01688, Paper 47, 7 (Mar. 16, 2022) (excluding, as hearsay, testimony not subject to cross-examination by the opposing party's IPR counsel).

Prior cross-examination testimony on unrelated patents from another case, which is not subject to cross-examination by the opposing party in this IPR, is hearsay if offered for the truth of the matter. *Asetek Danmark v. CoolIT Sys.*, IPR2020-00825, Paper 50, 43-46 (Oct. 12, 2021) (testimony from district court proceeding excluded from IPR as hearsay).

Exhibit 2029 is a transcript of a cross-examination deposition of Dr. Gregory Welch, the deposition taken for *Eight Khz, LLC v. Meta Platforms, Inc.*, IPR2023-01023 (Ex. 2012, May 3, 2024). Exhibit 2030 is a transcript of a cross-examination deposition of Dr. Agnieszka Roginska, the deposition taken for *Eight Khz, LLC v. Meta Platforms, Inc.*, IPR2023-01019 (Ex. 2014, February 27, 2024). Both depositions concern cross-examination of testimony by experts on different and unrelated patents. Specifically, IPR2023-01023 concerns U.S. Patent 10,798,509 (“’509 Patent”) and IPR2023-01019 concerns U.S. Patent 10,368,179 (“’179 Patent”). Neither patent is part of the ’090 Patent family at issue in this proceeding and are therefore unrelated. *See* Petition at pgs. 2-3 (identifying related family member patents challenged in other IPR proceedings and other unrelated patents, including the ’509 and ’179 Patents, challenged in other IPR proceedings).

PO submitted the Welch transcript and Rogniska transcript as Exhibits 2029 and 2030, respectively, with its Sur-Reply allegedly “only for the limited purpose of allowing the Board to understand the context of the cross-examination” in relation

to the deposition of PO's expert Dr. Kyriakakis. *See* Sur-Reply, Paper 35, pp. v-vi. Not true. PO relied on these exhibits for the truth of the matter and is improper hearsay. *See id.* at pgs. 5 (PO argued that Dr. Kyriakakis' opinion contradicts the testimony of Petitioner's other experts), 7 (PO argued that Petitioner's experts, except Dr. Kyriakakis, all agreed with PO's expert that sound externalization requires binaural synthesis), 11 (PO argued Dr. Kyriakakis offers a conclusory statement without providing specifics, burdening the Board and PO to substantiate his claims by sifting through the exhibits), 20 (PO argued all of Petitioner's experts, except Dr. Kyriakakis disagreeing with other experts, acknowledged the scientific fact that stereo sound cannot simulate the "origin" of sound at an SLP "away from and proximate to" the listener), and 21 (PO argued the inability to designate an SLP was acknowledged by all experts except Dr. Kyriakakis). *See also id.* at pgs. 10, 20 (PO cites to portions of Dr. Kyriakakis' Tr. (Exhibit 2031) where PO questions Dr. Kyriakakis on Exhibit 2029); and pgs. 7, 20, 21-22 (PO cites to portions of Dr. Kyriakakis' Tr. (Exhibit 2031) where PO questions Dr. Kyriakakis on Exhibit 2030). Exhibits 2029-2030 contain out-of-court statements and should therefore be excluded as inadmissible hearsay. F.R.E. 801(c) and 802. None of the statements on cross-examination in the deposition transcripts were made in the current proceeding and further the statements concern testimony on different and unrelated patents. *See* 37 C.F.R. § 42.53.

Further, during deposition of Dr. Kyriakakis on August 23, 2024, Petitioner objected to the admissibility of Exhibits 2029-2030 as improper hearsay and for being outside the scope of the proceeding. *See* Deposition Tr. of Dr. Kyriakakis (Exhibit 2031), p. 45, lines 9-13 and p. 48, line 19 – p. 49, line 2 (making standing objections to Exhibit 2029 as hearsay, for being outside the scope of the deposition, and as new evidence not permitted after replies); p. 70, lines 9-17 (making standing objections to Exhibit 2030 for being outside the scope of the deposition, improper hearsay, for being outside the scope of the proceeding, for being brought in after the reply has been filed where new evidence is not permitted); *see also* Petitioner's Objections to PO's Evidence (Paper 36), pp. 1-2. PO did not cure the objections during the deposition. *See* 37 C.F.R. § 42.64(a).

In summary, PO relies on Exhibits 2029-2030 for the alleged truth of the matters asserted. However, none of the exhibits satisfy an exception to the rule against hearsay, and therefore these exhibits should be excluded.

IV. CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Board exclude Exhibits 2029-2030 from consideration during this proceeding.

Date: September 19, 2024

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of **PETITIONER'S MOTION TO EXCLUDE** was served via electronic email on Patent Owner's counsel of record listed below, pursuant to its Mandatory Notices, on September 19, 2024:

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