

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 OPPOSITION TO
PETITIONER'S MOTION TO EXCLUDE**

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I. INTRODUCTION

Petitioner moves the Board to exclude Exhibits 2029 and 2030 for containing inadmissible hearsay. Petitioner's Motion to Exclude should be denied for at least three reasons, as discussed in more detail below. First, these Exhibits were introduced during the deposition of Petitioner's expert, Dr. Kyriakakis's, who testified based on these Exhibits. Because Petitioner's Motion to Exclude does not address exclusion of Dr. Kyriakakis's deposition testimony based on these two exhibits, Petitioner has waived or otherwise forfeited any objections it may have to Dr. Kyriakakis's deposition testimony. Thus, Petitioner's Motion to Exclude Exhibits 2029 and 2030 is moot. Second, Patent Owner does not offer the statements in Exhibits 2029 and 2030 for their truth and thus they are not hearsay. Third, the statements in Exhibits 2029 and 2030 are not hearsay because they were made by a person whom the party authorized to make a statement on the subject, as provided in Federal Rule of Evidence 801(d)(2)(C). Fourth, even if these statements are hearsay (they are not), they fall within the residual hearsay exception of Federal Rule of Evidence 807(a).

II. ARGUMENT

A. Petitioner does not move to exclude Dr. Kyriakakis's testimony regarding Exhibits 2029 and 2030

Exhibits 2029 and 2030 were introduced during Dr. Kyriakakis's deposition in August 2024. The transcript of Dr. Kyriakakis's August deposition was filed with

Patent Owner's Sur-Reply as Exhibit 2031. **Petitioner's Motion to Exclude does not include any portions of Dr. Kyriakakis's deposition testimony regarding Exhibits 2029 and 2030.**¹

Thus, even if the Board were to exclude Exhibits 2029 and 2030, Dr. Kyriakakis's deposition testimony on these two exhibits is still before the Board for consideration. As the Board held in *Netflix, Inc. v. DivX, LLC*, IPR2020-00558, Paper 50, 31-32 (PTAB Aug. 23, 2021) on similar facts, Petitioner's failure to move to exclude Dr. Kyriakakis's deposition testimony on the two exhibits moots Petitioner's motion to exclude:

Therefore, for our purposes, there is no substantive difference whether we exclude these exhibits and consider Dr. [Kyriakakis]'s testimony as compared to whether we do not exclude these exhibits while considering Dr. [Kyriakakis]'s testimony. Accordingly, because Dr. [Kyriakakis]'s testimony relying on Exhibits [2029-2030] is unchallenged, Petitioner's motion to exclude these exhibits is dismissed as moot.

For this reason alone, the Board should deny Petitioner's Motion to Exclude.

¹ By failing to move to exclude Dr. Kyriakakis's August deposition (Exhibit 2031), Petitioner has waived or otherwise forfeited any objections it may have made during the deposition. Paper 41, 5. Petitioner cannot cure its waiver or forfeiture in its Reply to its Motion to Exclude.

B. Patent Owner never relied on Exhibits 2029 and 2030 for truth of the matter asserted

In an attempt to rewrite the record, Petitioner falsely accuses Patent Owner of “rel[ying] on these exhibits for the truth of the matter.” Paper 41, 3-4. Not true.

First, **Patent Owner never cited Exhibits 2029 and 2030 in this proceeding.**

Patent Owner cited Dr. Kyriakakis’s August deposition transcript (Ex. 2031), where Dr. Kyriakakis testified regarding his disagreement with certain statements in Exhibits 2029 and 2030 from other experts in the field.

Second, and more important, Patent Owner was entitled to “clarify or challenge” Dr. Kyriakakis’s opinions set forth in his supplemental declaration during the cross-examination. *See Sony Corporation v. Yissum Research Development Company of the Hebrew University of Jerusalem*, IPR2013-00218, Paper 53, 44-47 (PTAB Sep. 22, 2014) (holding that a party is entitled to “clarify or challenge” an expert’s declaration testimony using a Wikipedia article not in the record during cross-examination). Patent Owner did as such.

In his supplemental declaration, Dr. Kyriakakis repeatedly maintained that there are known methods for sound externalization that do not require HRTF-processing and that a PHOSITA necessarily knows that localizing sound at a point away from and proximate to a listener can be achieved without binaural sound or HRTF-processing. *See, e.g.*, Ex.1055, ¶6 (“A POSITA would have understood that

localizing the sound ‘away from and proximate’ would be performed through a number of different known methods[.]”); ¶8 (“Outside of ILDs, ITDs, and HRTFs, there were also many other known ways to provide a sound localization point that is ‘away from and proximate to’ the listener such that the sound localization point simulates an origin of the sound source.”); ¶14 (“[A] POSITA would have known a number of different aspects of sound that can be altered to simulate the origin of sound that is ‘away from and proximate to’ the listener.”); ¶35 (“[T]here are numerous other known ways to implement externalization over headphones.”). Relying on Dr. Kyriakakis’s testimony, Petitioner argued that “externalization without HRTF ... was also known in the industry.” Reply, 8.

Patent Owner used Exhibits 2029 and 2030 to afford Dr. Kyriakakis an opportunity to explain his disagreement with other experts in the field on a subject that he characterized as well-known by PHOSITAs, not for the truth of the matter. Accordingly, Patent Owner’s use of Exhibits 2029 and 2030 was limited to impeachment purposes and are thus relevant for judging Dr. Kyriakakis’s credibility, which is at issue in this case.

C. Exhibits 2029 and 2030 do not contain hearsay statements

A statement is not hearsay if offered against an opposing party and “was made by a person whom the party authorized to make a statement on the subject.” FRE 801(d)(2)(C). The law is clear: “[W]hen an expert is put forward for trial is it

reasonable and fair to presume they have been authorized.” *Glendale Federal Bank, FSB v. United States*, 39 Fed.Cl. 422 (Fed.Cl.1997); *see also In re Hanford Nuclear Reservation Litig.*, 534 F.3d 986, 1016 (9th Cir. 2008) (“[Plaintiff’s expert’s] testimony at the first bellwether trial was an admission of a party opponent under Federal Rule of Evidence 801(d)(2)(C). Plaintiff cannot now exclude at trial testimony that she, herself, proffered.”) (citation omitted)); *Lizotte v. Praxair, Inc.*, 640 F. Supp. 2d 1335, 1338-39 (W.D. Wash. 2009) (finding that “testify[ing] at a deposition” is evidence of being authorized because “[i]f an expert does not testify at trial, then the court assumes the expert is not authorized to reflect the position of the party that retained him or her”).

In its Motion to Exclude, Petitioner admits that Exhibits 2029 and 2030 are deposition transcripts of its experts retained in the -1023 (Dr. Welch) and -1019-20 (Dr. Roginska) parallel IPRs between the parties. Paper 41, 3. The inquiry thus boils down to (1) whether Drs. Welch and Roginska were authorized to make a statement on Petitioner’s behalf, and (2) whether they made a statement on the same subject as that of the ‘090 Patent.

Petitioner authorized Drs. Welch and Roginska to make a statement. As Petitioner correctly notes, “[i]n an IPR, in-court statements are ‘submitted in the form of an affidavit’ or a compliant declaration.” Paper 41, 2 (citing 37 C.F.R. §§ 42.53, 42.2). Accordingly, there is no dispute that Drs. Welch and Roginska were

“put forward for trial,” which means “they have been authorized.” *Glendale*, 39 Fed.Cl. 422 (Fed.Cl.1997); *see also Marceau v. Int’l Broth. of Elec. Workers*, 618 F. Supp. 2d 1127, 1142-43 (D. Ariz. 2009) (holding that submitting an expert report indicates that “a person [is] authorized by the party to make a statement concerning the subject”). They were further deposed in those IPRs, which again supports Patent Owner’s position that Petitioner authorized Drs. Welch and Roginska to make a statement. *See Lizotte*, 640 F. Supp. 2d at 1338-39 (W.D. Wash. 2009).

Drs. Welch and Roginska were authorized to make statements regarding the same subject as Dr. Kyriakakis. The underlying patents in all of the pending IPRs between Petitioner and Patent Owner deal with binaural synthesis and binaural sound. Virtually all of these experts offered opinions in their respective declarations about binaural sound, HRTFs and HRTF-processing, stereo sound, sound localization point, away from and/or proximate to, etc. These terms appear throughout the specification and/or claims of all patents at dispute in these IPRs. More importantly, the patents share similar class codes. For example, the ‘090 Patent’s international class code is H04S 7/00, which is also a primary class code listed for U.S. Patent 10,798,509 (subject of the -1023 IPR) and U.S. Patent 10,368,179 (subject of the -1019 IPR).

Petitioner’s reliance on *Asetek Danmark* is misplaced. Paper 41, 3. There, the Board determined that “Mr. Lyon was not acting as an agent of Patent Owner while

testifying at his deposition [in the district court],” concluding that “Fed. R. Evid. 801(d)(2)(D) does not apply.” IPR2020-00825, Paper 50, 44-45 (Oct. 12, 2021). Here Patent Owner never claimed that Drs. Welch and Roginska were Petitioner’s agents when testified; indeed, Patent Owner does not even rely on FRE 801(d)(2)(D). Instead, Patent Owner invokes FRE 801(d)(2)(C) because Drs. Welch and Roginska were authorized by Petitioner to make a statement on any and all subject matters related respectively to the ‘509 and ‘179 Patents, which greatly overlap with the subject matter of the ‘090 Patent. There is no agency requirement in FRE 801(d)(2)(C): “[s]ubsection (C) of the rule does not require an agency relationship. To the extent that *Kirk* infuses a requirement of a showing of agency in subsection (C), it is not persuasive.” *Vizio, Inc. v. Nichia Corp.*, IPR2017-00556, Paper 9, 22-23 (PTAB July 6, 2017) (rejecting *Kirk v. Raymark Indus. Inc.*, 61 F. 3d 147, 164 (3d Cir. 1995)).

The Board reached this same conclusion in *Apple Inc. v. SmartFlash LLC*, which held that testimony sponsored by a patent owner in earlier CBM proceedings was not hearsay under Rule 801(d)(2)(C) when offered against the patent owner by a petitioner in a subsequent CBM. CBM2015-00124, Paper No. 31 at 35 (PTAB Nov. 7, 2016). As the Board explained, the disputed evidence was “testimony that Patent Owner adopted or believed to be true, and was provided by a person, [the expert], whom Patent Owner authorized to provide testimony on the subject.” *Id.*

The Board’s decision in *Apple* tracked earlier appellate decisions reaching the same result for the same reasons. For example, *In re Hanford Nuclear Reservation Litig.*, the Board cited Rule 801(d)(2)(C) in holding that testimony by a witness for a party in one trial constituted “an admission of a party opponent” when offered by the opposing party in a later trial. 534 F.3d at 1016. Simply put, the party opponent could not “now exclude trial testimony that [it, itself] proffered,” or alternatively claim that the person who gave the testimony was not authorized to testify on the subject. *Id.* Petitioner should not be permitted to dodge testimony it authorized and proffered in a trial setting (*i.e.*, the parallel IPRs) by turning around and claiming that the very same testimony is hearsay.²

D. Statements in Exhibits 2029 and 2030 fall under the residual exception to hearsay under FRE 807

Even if statements made in Exhibits 2029 and 2030 were hearsay (they are not, as provided in Sections B and C above), they would nevertheless be admissible under at least the residual exception established in FRE 807(a), which provides that

² Patent Owner submits to the Board that Petitioner disclosed both Drs. Welch and Roginska as its district court experts after they were deposed in the IPRs. This also proves that Petitioner has “adopted or believed to be true statements” made by Drs. Welch and Roginska. FRE 801(d)(2)(B).

a hearsay statement is not excluded by the rule against hearsay if (1) the statement is supported by sufficient guarantees of trustworthiness and (2) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts.

As to factor (1), Exhibits 2029 and 2030 are “supported by sufficient guarantees of trustworthiness” at least because the deponents, Drs. Welch and Roginska, testified under oath in their depositions. If Petitioner believed the trustworthiness of the statements made by Drs. Welch and Roginska were at issue, it had the opportunity on redirect examination to question them based on Dr. Kyriakakis’s deposition testimony. Moreover, Petitioner introduced Drs. Welch and Roginska as its experts in the IPRs and endorsed their trustworthiness by relying upon their testimony.

As to factor (2), even assuming the statements are offered for their truth (they are not), the statements are offered as evidence of PHOSITA’s understanding of the state of the art, a material fact in this dispute as noted above. The statements offered by Petitioner’s own experts are far more probative on this point, at least because they directly undercut Petitioner’s positions (supported by Dr. Kyriakakis) in this IPR regarding what “was known in the industry,” as well as impeaching Dr. Kyriakakis’s

credibility.³ Reply, 8. As such, admitting Exhibits 2029 and 2030 serves both the purposes of this rule and the interests of justice.

E. Petitioner has waived any argument that Exhibits 2029 and 2030 are not relevant

In the header of Section III of its Motion to Exclude, Petitioner includes “lack [of] relevance” as a basis for exclusion. Paper 41, 2. Petitioner never actually argues exclusion based on lack of relevance. *See id.*, 2-5. In fact, FRE 401-03 are not even cited in Petitioner’s argument. *Id.* Further, Petitioner concludes its argument without any reference to the alleged lack of relevance. *Id.*, 5. By failing to argue the alleged “lack [of] relevance,” Petitioner has forfeited or waived its argument. Patent Owner reserves its right to move the Board to strike Petitioner’s Reply if Petitioner introduces new arguments or theories for excluding Exhibits 2029 and 2030 other than those specifically argued in its Motion to Exclude.

³ Courts have recognized that past expert opinions from different experts could be relevant to impeaching the credibility of the current expert’s testimony. *See, e.g., Apple, Inc. v. Samsung Electronics Co., Ltd.*, 2014 WL 794328, *11-*13 (N.D. Cal. 2014) (denying patentee’s motion seeking to exclude evidence the accused infringer intended to offer of expert testimony from other experts that the patentee had used in prior litigations between the parties).

III. CONCLUSION

For the reasons stated above, Patent Owner respectfully requests that the Board deny Petitioner's Motion to Exclude Exhibits 2029 and 2030.

Date: September 25, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 25, 2024, I caused a true and correct copy of the foregoing Patent Owner's Opposition to Petitioner'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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