

Filed on behalf of: Meta Platforms, Inc.

Filed: September 30, 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 REPLY TO OPPOSITION TO
MOTION TO EXCLUDE EVIDENCE**

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Other Authorities

Fed. R. Evid. 801(d)(2)(C)	1, 3, 4
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I. INTRODUCTION

The Patent Owner (“PO”) Opposition (Paper 42) fails to sufficiently rebut Petitioner’s arguments regarding its Motion to Exclude (“Motion,” Paper 41).

PO has not, and cannot, overcome Petitioner’s valid objections to PO’s introduction of prior cross-examination testimony of experts on unrelated patents from other IPRs (deposition transcript of Dr. Gregory Welch for IPR2023-01023, Exhibit 2029, and deposition transcript of Dr. Agnieszka Roginska for IPR2023-01019, Exhibit 2030). In context, the testimony of Dr. Welch and Dr. Roginska do not contradict or otherwise undermine Dr. Kyriakakis’s testimony. But Petitioner did not have the opportunity to provide background or foundation for the testimony of both these experts in the current proceeding, nor address PO’s mischaracterization of their testimony. Critically, this lack of opportunity to respond is one of the very reasons why the Board prohibits introducing evidence on sur-reply.

PO argues that it does not rely on these exhibits for the truth of the matter asserted. Not true. This is exactly how PO relies on the exhibits, arguing that the opinions of other experts on unrelated patents are correct, and Dr. Kyriakakis’ opinions are wrong. PO also attempts to rewrite the Federal Rules of Evidence by arguing that these exhibits, which were generated outside the current proceeding, are not hearsay within the meaning of Fed. R. Evid. 801(d)(2)(C).

As discussed below, PO's Opposition only confirms that the Board should exclude the unrelated testimony of Dr. Welch and Dr. Rogniska from this proceeding.

II. PO'S POSITIONS ON ADMISIBILITY OF EXHIBITS 2029-30 FAIL

A. PO relies on Exhibits 2029-30 for the truth of the matter asserted

PO argues that it never relied on Exhibits 2029-30 for the truth of the matter asserted and only cited to Dr. Kyriakakis' deposition transcript (Exhibit 2031) in this proceeding. Opp., 3. This is plainly incorrect. Petitioner points the Board to PO's Sur-Reply (Paper 35) where PO argues that Dr. Kyriakakis' opinions on sound externalization and stereo sound contradicts that of other experts. *See* Sur-Reply, Paper 35, p. 5, lines 14-17; p. 7, lines 5-8; p. 11, lines 10-11; p. 20, lines 8-10; p. 21 lines 3-5.¹ The Board will understand that PO's reliance on the exhibits requires one to compare and contrast opinions between experts. Thus, for PO to compare the opinion of Dr. Kyriakakis with those of Dr. Welch and Dr. Rogniska, PO would have had to substantively understand the opinions of these experts and therefore rely on

¹ Petitioner notes that in relying on Dr. Welch's and Dr. Rogniskai's deposition testimony to contrast with the opinions of Dr. Kyriakakis, PO is assuming that Dr. Welch and Dr. Rogniska disagree with the opinions of Dr. Kyriakakis. However, Dr. Welch and Dr. Rogniska were not actually deposed on Dr. Kyriakakis' opinions.

their deposition transcripts for the truth of the matter asserted.

PO also cites *Sony Corporation v. Yissum Research Development Company of the Hebrew University of Jerusalem*, IPR2013-00218, Paper 53, 44-47 (P.T.A.B. Sep. 22, 2014) where a party was allowed to use a Wikipedia article not in the record to challenge deposition testimony of an expert. Opp., 3. There is a fundamental difference between an article and the testimony of other experts in sworn out-of-court statements. Such testimony is only admissible if all parties have an opportunity to examine or cross-examine the expert in relation to the matters concerning the current proceeding. Dr. Welch's and Dr. Rogniska's testimony were taken in connection with other IPRs concerning unrelated patents. Thus, *Sony* does not apply to the deposition testimony of Dr. Welch and Dr. Rogniska.

B. Exhibits 2029-30 contain hearsay statements

PO argues, citing Fed. R. Evid. 801(d)(2)(C), that a statement is not hearsay if offered against an opposing party and was made by a person authorized by the opposing party to make a statement on the subject. See Opp., 4. However, PO conflates the subject and the subject matter of the current proceeding. The subject of the current proceeding is the '090 Patent while the subject matter includes sound localization, which is much broader. PO attempts to cast an overly broad net in the defining subject as subject matter in order to justify their introduction of Exhibits 2029-30—using PO's logic the testimony of any expert from other proceedings that

opine on similar subject matter in the current IPR proceeding can be relied upon as admissible hearsay. Not true. PO's mistaken interpretation of Fed. R. Evid. 801(d)(2)(C) was certainly not contemplated by the Federal Rules of Evidence. Even if Petitioner authorized Dr. Welch and Dr. Rogniska as expert witnesses, such authorization would only pertain to the other IPRs in the context of other patents and different subject matter. That authority does not extend to this proceeding.

C. Exhibits 2029-30 will prejudice Petitioner if not excluded

PO argues that Petitioner's Motion does not include any portion of Dr. Kyriakakis' deposition testimony regarding Exhibits 2029-30,² and cites *Netflix, Inc. v. DivX, LLC*, IPR2020-00558, Paper 50, 31-32 (P.T.A.B. Aug. 23, 2021) as controlling authority. Opp. pp. 1-2. This is besides the point and PO's reliance is misplaced. In *Netflix*, the exhibits in question were articles submitted with the POR and relied upon by the opposing expert. The Petitioner in that case had an opportunity to extensively cross-examine the opposing expert on his opinions on the exhibits at issue and its own expert on the same exhibits. Here, Petitioner had no opportunity to do that nor examine or cross-examine Dr. Welch and Dr. Rogniska on alleged differing opinions from those of Dr. Kyriakakis as in the current

² Petitioner separately seeks to strike five sentences where PO alleges disagreement among experts.

proceeding.

Further, PO argues that even if Exhibits 2029-30 were hearsay, the exhibits would be admissible under the residual exception of Fed. R. Evid. 807 because (i) the statement is supported by sufficient guarantees of trustworthiness, and (ii) it is more probative on the point for which it is offered than any other evidence. Opp. pp. 8-9. PO has not shown either. Notably, PO has not shown how testimony on entirely unrelated patents in a completely different context are more probative than the testimony of the experts who are opining on the meaning of a term in context and on the same reference.

Lastly, there is significant prejudice on Petitioner by not excluding the exhibits as it would enable PO to maintain arguments of purported disagreement of Petitioner's experts in this proceeding and other proceedings where none exists. This wastes valuable time and resources, forcing the parties and the Board to address irrelevant testimony instead of addressing the real issues in the case.

III. CONCLUSION

For the reasons stated in Petitioner's Motion and this Reply, the challenged evidence—Exhibit 2029 and Exhibit 2030—do not meet the threshold for admissibility and should be excluded from this proceeding.

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of **PETITIONER'S
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