

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 MOTION TO STRIKE

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I. PO IMPROPERLY PRESENTS NEW THEORIES BASED ON TESTIMONY IN OTHER UNRELATED IPR PROCEEDINGS

PO's (incorrect) argument in the Sur-Reply (Paper 35) that Petitioner's expert, Dr. Kyriakakis, does not agree with "Petitioner's other experts" or "all of Petitioner's [other] experts" must be stricken as new theories. *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.

PO premises its new theories on questioning of Dr. Kyriakakis concerning deposition transcripts of Dr. Gregory Welch (for IPR2023-01023) and Dr. Agnieszka Roginska (for IPR2023-01019) that PO belatedly submitted with its Sur-Reply. These new theories are an end run around the Board's rules that prohibit new evidence on sur-reply.¹ Dr. Kyriakakis' opinions have not changed. But rather than raise these theories or introduce evidence in its POR (giving Petitioner an opportunity to respond), PO improperly attempts to include the Welch and Roginska transcripts (on unrelated patents) by citing to Dr. Kyriakakis' transcript where these exhibits are "discussed" (without context or foundation), not the exhibits themselves.

Indeed, the very fact that PO does not cite to the Welch and Roginska transcripts in its Sur-Reply confirms that PO knows the inclusion of these transcripts in the record is improper. Notably, Dr. Kyriakakis' cited transcript itself does not

¹ Petitioner separately seeks to exclude these transcripts (EX2029, 2030). Paper 41.

support these new theories, and is merely a means to include these belated exhibits.

Cited Testimony at Sur-Reply, 7: “I would disagree...that this is the only way to externalize. But I doubt that’s what she’s saying. I don’t know the context.”

Cited Testimony at *id.*, 10: “I just don’t want to make it sound like the HRTFs is the only way to do that. But I do agree with what he’s saying.”

Cited Testimony at *id.*, 20: “I disagree with that particular sentence...But the whole paragraph, when read together, seems to match what I said before.”

Cited Testimony at *id.*, 21: “I’m reading it out of context, so I’m not sure what she means by three-dimensional space.”

II. NEW THEORIES SIGNIFICANTLY PREJUDICE PETITIONER

Presenting a new theory in the Sur-Reply is prohibited. “Sur-replies should only respond to arguments made in reply briefs, comment on reply declaration testimony, or point to cross-examination testimony.” Consolidated Trial Practice Guide (CTPG) at 14-15. Indeed, “where a reply clearly relies on a new theory not included in prior briefing, and where addressing this new theory during oral hearing would prejudice the opposing party,” are grounds to strike. CTPG at 81.

A. PO’s belated new theories are based on expert testimony on other unrelated patents that were not raised in prior merits briefing

PO’s new theories concern testimony on unrelated patents in other proceedings. IPR2023-01019 and -01023 concern patents 10,368,179 and

10,798,509 and are not part of the '090 Patent family. *See* Petition, 2-3 (identifying unrelated patents, including the '509 and '179 Patents, challenged in other IPRs). PO did not address any relationship in prior merits-briefing despite the new theory presuming there is a relationship. *See* Petition, POR, and Reply, *passim*.

B. PO's belated new theories prejudice Petitioner requiring a response at the oral hearing

Despite having ample opportunity to advance these theories previously, PO waited until its last round of briefing—when Petitioner cannot submit an expert declaration or respond to the Sur-Reply—to raise these theories. To allow PO to advance these new theories now would substantially prejudice Petitioner. It deprives Petitioner of the opportunity to respond in briefing and introduces into the record the wholly unfounded perception that all other experts disagree with Dr. Kyriakakis. This is not true. Petitioner's only recourse is to respond to PO's new theories at the oral hearing. This would undoubtedly burden Petitioner with preparing counters to irrelevant arguments and addressing deposition testimony of the other experts in other IPRs concerning unrelated patents, and waste valuable time at hearing.

III. CONCLUSION

Petitioner respectfully requests that the Board strike five sentences from the Sur-Reply (Paper 35 at p. 5, lines 14-17, p. 7, lines 5-8, p. 11, lines 10-11, p. 20, lines 8-10, and p. 21, lines 3-5).

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of **PETITIONER'S MOTION TO STRIKE** was served via electronic email on Patent Owner's counsel of record listed below, pursuant to its Mandatory Notices, on September 30, 2024:

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