

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 REPLY TO PETITIONER'S OPPOSITION TO
PATENT OWNER'S MOTION TO EXCLUDE**

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	EXHIBITS 1047-50 AND 1052-54 MUST BE EXCLUDED.....	1
	A. Petitioner does not rebut or otherwise deny that admitting Exhibits 1047-50 amounts to “needlessly presenting cumulative evidence” under FRE 403	1
	B. Exhibits 1052-54 must be excluded for being offered for the truth of the matter asserted in violation of FRE 801	2
III.	CERTAIN PARAGRAPHS OF EXHIBIT 1055 MUST BE EXCLUDED.....	3
IV.	CERTAIN PORTIONS OF EXHIBIT 1051 MUST BE EXCLUDED	5
V.	CONCLUSION.....	5

TABLE OF AUTHORITIES

Rules	Page(s)
Fed. R. Evid. 401	3
Fed. R. Evid. 402	3
Fed. R. Evid. 403	1, 3, 4
Fed. R. Evid. 801	2
Fed. R. Evid. 802	2
 Regulations	
37 C.F.R. § 42.104	3
37 C.F.R. § 42.65	4

I. INTRODUCTION

In its Opposition to PO's Motion to Exclude (*see* Paper 43), Petitioner failed to rebut many of the arguments Patent Owner raised. These arguments now stand unrebutted, and thus the Board should exclude Exs.1047-50, 1052-54, certain paragraphs of Ex.1055, and certain portions of Ex.1051.

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

A. Petitioner does not rebut or otherwise deny that admitting Exhibits 1047-50 amounts to “needlessly presenting cumulative evidence” under FRE 403

As explained in Patent Owner's Motion to Exclude, Petitioner cites these exhibits altogether without providing a pinpoint to support a single sentence in Reply. *See* Paper 40, 1-2. By doing so, Petitioner has burdened the Board and Patent Owner to review these exhibits and identify portions that may be probative of the assertion which they are cited to support. This substantially prejudices Patent Owner by confusing the issues and causing undue delay and waste of time. *See* FRE 403. Further, admitting Exhibits 1047-50—despite Petitioner's complete lack of analysis or provision of a pinpoint citation—would allow Petitioner to rely on any unspecified portions of these exhibits during oral hearing.

Moreover, Petitioner cited four exhibits, without a pinpoint citation or an analysis, to support a single sentence in the Reply. *See* Reply, 13. At a minimum, this 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, evidenced by Petitioner's failure to provide a pinpoint citation, any potential relevance is substantially outweighed by the risk of prejudice to Patent Owner as discussed.

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

Petitioner alleges that it cited Ex.1052 to provide "an example of out-of-head externalization using stereophonic sound reproduction over headphones." Paper 43, 5. Having failed to provide a pinpoint or an analysis, Petitioner merely relies on the title statement in Ex.1052. In essence, Petitioner accepts the truth of the matter in Ex.1052's title statement and then uses it to support its assertion that stereo sound can be used to create out-of-head externalization. This is classic hearsay and should be excluded under FRE 801-802.

Regarding Ex.1053, Petitioner does not even hide its hearsay use of the Exhibit. Although Petitioner again fails to provide a pinpoint citation for its conclusory assertion, Petitioner explains that Ex.1053 discusses that by "using filters and delays" earphones can be replaced with loudspeakers "without substantial loss of space perspective." *Id.*, 6. Petitioner admits that it accepts the truth of the matter and uses it to advance its Reply arguments. *Id.* This is classic hearsay and should be excluded under FRE 801-802.

Petitioner alleges that it used Ex.1054 as evidence of motivation to combine. *Id.* False. Petitioner relies on the following statement in Ex.1054: “**Transaural audio is a three-dimensional sound spatialization technique which is capable of reproducing binaural signals over loudspeakers.**” Ex.1055, ¶52 (citing Ex.1054, 32). Petitioner relies on the purported truth of the matter asserted in the hearsay statement to conclude that “[t]ransaural sound is binaural sound processed and delivered through speakers instead of headphones.” Reply, 22 (citing Ex.1055 ¶52). This is a classic hearsay use.

III. CERTAIN PARAGRAPHS OF EXHIBIT 1055 MUST BE EXCLUDED

Regarding paragraphs 1-5, 11-16, 17, 21-24, 29, and 42 of Ex.1055, Petitioner uses its Opposition to explain their relevance. Paper 43, 7-8. But Petitioner is time-barred to argue the relevance of the paragraphs; Petitioner should have established the relevance of these paragraphs in the Reply. These paragraphs are irrelevant in part because they are not cited to or relied upon by any Paper in violation of 37 C.F.R. § 42.104(b)(5). When Petitioner itself failed to cite these paragraphs in its Paper, how can they support a patentability challenge? They cannot and must be excluded. FRE 401-02. To the extent they may be relevant, their probative value is substantially outweighed by a danger of prejudice and confusion per FRE 403.

Regarding paragraphs 8 and 35, Petitioner does not deny Kyriakakis never provided any analysis or a pinpoint citation for his conclusory opinions regarding

teachings of Exs.1052 and 1053. But Petitioner alleges that “a general citation is proper.” Paper 43, 9. Not so. “Expert testimony that does not disclose the underlying facts or data on which the opinion is based is entitled to little or no weight.” 37 C.F.R. § 42.65(a). While the Board in its discretion may decide not to assign any weight to these paragraphs, that does not redress the substantial prejudice to Patent Owner if the Board admits expert testimony that does not clearly disclose the basis for the testimony. Patent Owner could not file an expert declaration with its Sur-Reply to properly analyze Exs.1052 and 1053 and rebut Dr. Kyriakakis’s conclusory testimony with evidence.

Further, this testimony is confusing and misleading. Aside from the citation error that Petitioner admits (Paper 43, 9 n.1), both Petitioner and its expert continue to refer to Ex.1026 as Dr. Begault’s book. Ex.1026 is not authored by Dr. Begault. Further, these Exhibits are not even cited in Ex.1026. The reference to Dr. Begault’s book is made to mislead the Board into believing that Dr. Begault in his book agreed with Dr. Kyriakakis. But the citations are wrong twice over. This prejudice substantially outweighs the relevance of these paragraphs. *See* FRE 403.

Patent Owner maintains its objections to paragraphs 8, 35, 52 and 55-56 of Exhibit 1055 on the grounds that they contain inadmissible hearsay 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 1051 MUST BE EXCLUDED

Petitioner does not address Patent Owner's objections properly raised during Dr. Begault's deposition. Patent Owner objected on the basis that Exhibits 1047-50 are "new evidence and outside the scope of Dr. Begault's deposition and declaration." *See, e.g., Ex.1051, 10:5-12.* Contrary to Petitioner's mischaracterization (Paper 43, 10-11), Patent Owner did not object on the bases of authentication or relevance. Petitioner had ample opportunity prior to Dr. Begault's deposition to file Exhibits 1047-50, but chose not to do so. Further, these exhibits were beyond the scope of Dr. Begault's direct testimony in this case.

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: October 1, 2024

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CERTIFICATE OF SERVICE

I hereby certify that on October 1, 2024, I caused a true and correct copy of the foregoing Patent Owner's Reply to Petitioner's Opposition to 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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