

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

MICROSOFT CORPORATION,

Petitioner,

v.

STERLING COMPUTERS CORPORATION

Patent Owner.

Case IPR2025-00270

U.S. Patent No. 8,073,911

PATENT OWNER'S MOTION TO EXCLUDE EVIDENCE

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EXHIBIT LIST

Patent Owner's Exhibit No.	Exhibit Description
2001	Declaration of Britta Loftus, Feb. 7, 2025
2002	Declaration of Latifur Khan, June 24, 2025
2003	Curriculum vitae of Latifur Khan
2004	Ramez Elmasri & Shamkant B. Navathe, FUNDAMENTALS OF DATABASE SYSTEMS, 195-201 (Chapter 7) & 941-949 (Appendix D) (3d ed. 2000)
2005	Declaration of Latifur Khan, December 16, 2025
2006	Oehlberg, T. (July 1998), <i>Informal PC-based Databases</i> , PM NETWORK, 12(8), 35-38.
2007	U.S. Patent No. 5,452,450 ("Delory")
2008	U.S. Patent Application No. 09/881,353 ("Mohit")
2009	U.S. Patent No. 7,542,979 ("Gupta")
2010	U.S. Patent Application No. 10/789,461 ("461 Application")
2011	Ramez Elmasri & Shamkant B. Navathe, FUNDAMENTALS OF DATABASE SYSTEMS, 195-241 (Chapter 7) (3d ed. 2000)

Pursuant to 37 CFR § 42.64(a) & (c) and Federal Rule of Evidence 611, Patent Owner respectfully seeks to exclude certain cross-examination testimony of Patent Owner's expert (EX1022, 68:9-70:10). The line of questioning that Patent Owner seeks to exclude relates to an incomplete, counsel-created hypothetical about what would happen if a user were to reply to the COPPA email example in the Schiavone reference. Petitioner's Reply then misuses this testimony to argue that PO's expert "conceded that Schiavone would apply '*different rules of the compliance policy*' to each subsequent message (i.e., '*submessage*')." Reply,13. The basis for Patent Owner's motion to exclude is that the hypothetical at the center of the questioning (1) assumes facts not in evidence (i.e., facts not present in any prior art reference) and, consequently, called for the witness to speculate; (2) is an incomplete hypothetical and, consequently, is not effective for determining the truth; and (3) is outside the scope of direct. *See* Fed. R. Evid. 611(a) & (b). Patent Owner preserved the objection during the deposition and, therefore, respectfully requests the Board exclude the testimony or, alternatively, give it no weight.

I. The Cross-Examination Testimony at Issue.

The cross-examination testimony that Patent Owner seeks to exclude discussed an incomplete, counsel-created hypothetical in which a user hypothetically replies to Schiavone's COPPA email example. Reply,13 (describing the questioning as a hypothetical about what "would" happen "if a message was

replied to”). Petitioner cites this testimony to argue that PO’s expert “conceded that Schiavone would apply ‘*different rules of the compliance policy*’ to each subsequent message (i.e., ‘*submessage*’).” Reply, 13.¹ The scenario, however, is an incomplete hypothetical that assumes facts not in evidence, calls for speculation, and goes beyond the scope of direct. For all of these reasons, it should be excluded pursuant to Rule 611.

Counsel for Patent Owner objected to the testimony during the deposition. *See* EX1022, at 68:8 (“Object to Rule 611”); *id.* at 69:16 (“Objection to Rule 611”). Therefore, Patent Owner preserved the objection. 37 CFR § 42.64(a).

II. ARGUMENT.

A. Standard of Review: Fed. R. Evid. 611.

Federal Rule of Evidence 611 provides: “The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to: (1) make those procedures effective for determining the truth; (2) avoid wasting time; and (3) protect witnesses from harassment or undue embarrassment.” Fed. R. Evid. 611(a).

¹ As explained in the Sur-Reply, even if the cross-examination testimony about the hypothetical were not excluded (which it should be), the testimony still does not supply the missing limitation. *See* Sur-Reply, at 4-5. This is because, in the hypothetical, **the same rule (i.e., COPPA) applies** to both the initial message **and** the hypothetical reply. *Id.* (citing EX1022, 69:1-4 (COPPA “rule would be applied” to the reply as well)). Indeed, the hypothetical **does not even contemplate some other, “different rule”** applying to either message.

The Rule permits the Board “to preclude questions that obscure truth because they are ambiguous, confusing, misleading, argumentative, compound, or assume facts not in evidence.” *United States v. Fields*, 761 F.3d 443, 471–72 (5th Cir. 2014), *as revised* (Sept. 2, 2014) (quoting 28 Charles Alan Wright, et al., *Federal Practice & Procedure* § 6164 (2d ed.2014)).

“Subdivision (a) also provides a basis for controlling questions that waste time because they ... call for speculation.” *Id.*

B. The Line of Questioning Should Be Excluded Because the Hypothetical Assumes Facts Not in Evidence and Calls for Speculation.

One reason the cross-examination should be excluded is because the hypothetical assumes facts not in evidence. In particular, the questioning asked the witness to speculate about what would happen were a user to **hypothetically** reply to Schiavone's COPPA email example. But **Schiavone does not discuss that scenario**. EX1022,68:24-25 (“In case of Schiavone, they don't talk about what would happen in this case, what rule would be applied.”); *see generally* EX1006 (not discussing any user replying to its COPPA example). By assuming what **would** happen **if** a user were to respond to Schiavone's COPA example email – a scenario that Schiavone itself does not address – the hypothetical improperly requires assuming facts not in evidence. The cross-examination should be excluded on this basis. *See, e.g., Harris v. Smith*, 372 F.2d 806, 812 (8th Cir. 1967) (“A question

which assumes any material fact not supported by the evidence is inadmissible.” (internal quotation omitted)); *In re USA Promlite Tech. Inc.*, No. 18-36893, 2020 WL 4384218, at *8 (Bankr. S.D. Tex. July 30, 2020) (sustaining objections under Rule 611 on the basis that questions “assume[d] facts not in evidence”).

Additionally, because Schiavone itself does not address this scenario – i.e., what would happen were a user to hypothetically reply to Schiavone's COPPA email example – the question required the witness to speculate, which is improper. Therefore, the line of questioning also should be excluded because it calls for speculation. *See Interstate Restoration, LLC v. Marriott Int'l, Inc.*, No. 21-CV-01380-NYW-SKC, 2023 WL 7162917, at *6 (D. Colo. Oct. 31, 2023) (sustaining objection on the basis that questioning “call[ed] for speculation” pursuant to Fed. R. Evid. 611(a)); *Promlite*, 2020 WL 4384218, at *9 (sustaining objections under Rule 611 where questions “call[ed] for speculation”).

C. The Line of Questioning Should Be Excluded Because It Is an Incomplete Hypothetical.

Another reason the cross-examination should be excluded is because the hypothetical created by counsel is incomplete. The questioning asked the witness to speculate what would happen were a user to hypothetically reply to Schiavone's COPPA email example. But many critical facts – i.e., facts necessary to answer the questions about the hypothetical – were missing. For example, the hypothetical did not identify whether there were other recipients to the original email or whether the

user replying to the e-mail hit “reply all,” replied only to the original sender, or replied to the original sender and additional recipients not included on the original email. Given the incomplete nature of the hypothetical (and the fact that Schiavone does not address the scenario), it is impossible to know how Schiavone would apply rules in the hypothetical. The cross-examination should be excluded on this basis. *Dickerson v. Shepard Warner Elevator Co.*, 287 F.2d 255, 260 (6th Cir. 1961) (“Where a hypothetical question leaves out facts in evidence which so qualify the facts included that an answer to the question would be misleading and based upon inadequate premises, objection to the question should be sustained.”); *Harris v. Smith*, 372 F.2d at 812 (“A question which omits any material fact essential to the formation of a rational opinion is likewise incompetent.”).

D. The Line of Questioning Should Be Excluded Because It Goes Beyond the Scope of Direct.

A final reason this line of cross-examination should be excluded is because Patent Owner's expert did not address it in his direct. The hypothetical was made up during the deposition for the first time by counsel for Petitioner. As a result, Patent Owner's expert, of course, did not address the hypothetical on direct. *See generally* EX2002. Therefore, the cross-examination falls outside the scope of direct. It should be excluded on that basis. Fed.R.Evid.611(b) (“Cross-examination should not go beyond the subject matter of the direct examination...”); 37 C.F.R. § 42.53(d)(5)(ii) (“For cross-examination testimony, the scope of the examination is limited to the

scope of the direct testimony.”). In particular, the cross-examination posed questions to Patent Owner's expert, Dr. Khan, regarding an incomplete, counsel-created hypothetical, but the hypothetical was **not** addressed in Patent Owner's expert's declaration (i.e., during his direct examination). Therefore, the entire line of questioning was outside the scope of direct.

The Board regularly excludes cross-examination testimony that is outside the scope of direct. *See, e.g., Eli Lilly and Company v. Teva Pharmaceuticals International GmbH*, No. IPR2018-01710, 2020 WL 1540364, at *67 (P.T.A.B. Mar. 31, 2020) (granting motion to exclude cross-examination testimony that was not in expert's direct/declaration); *1964 Ears, LLC v. Jerry Harvey Audio Holding, LLC*, No. IPR2016-00494, 2017 WL 3088112, at *9 (P.T.A.B. July 19, 2017) (granting motion to exclude where questioning went “beyond the proper scope of cross-examination” (citing Fed. R. Evid. 611(b) & 37 C.F.R. §§ 42.53(d)(5)(ii), 42.62(a)); *see also Corning v. DSM IP Assets B.V.*, No. IPR2013-00043 (PATEN, 2013 WL 11254595, at *2 (P.T.A.B. July 8, 2013) (explaining that questions “that are clearly outside the scope of direct are not permitted”).

For the reasons set forth herein, and pursuant to Rule 611 of the Federal Rules of Evidence, Patent Owner respectfully requests the Board exclude the testimony cited on pages 13 of Petitioner's Reply (EX1022, 68:9-70:10). Alternatively, Patent Owner requests that the Board give this cross-examination testimony no weight. *See*

Rpx Corp. v. Collision Avoidance Techs. Inc., No. IPR2017-01336, 2018 WL 5960792, at *5 (P.T.A.B. Nov. 13, 2018) (denying motion to exclude but giving the cross-examination “testimony, and all reliance on it in this proceeding, no probative weight”); *Fanduel, Inc. v. Cg Tech. Dev., LLC*, No. IPR2017-00902, 2018 WL 5269266, at *30 (P.T.A.B. Oct. 4, 2018) (“[T]he Board ... is well positioned to determine and assign appropriate weight to evidence presented, including giving it no weight.”).

Respectfully submitted,

Dated: June 2, 2026

By: /s/Devan V. Padmanabhan

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CERTIFICATE OF SERVICE

Pursuant to 37 C.F.R. 42.6(e), I certify that on this 2nd day of June, 2026, a true and correct copy of the foregoing **Patent Owner's Motion to Exclude Evidence** was served by electronic mail on Petitioner's lead and backup counsel at the following addresses:

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