

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

OTICON MEDICAL AB; OTICON MEDICAL LLC;
WILLIAM DEMANT HOLDING A/S,

Petitioners,

v.

COCHLEAR BONE ANCHORED SOLUTIONS AB,

Patent Owner.

Case No. IPR2017-01018¹

Patent 7,043,040 B2

**PATENT OWNER'S OBJECTIONS TO EVIDENCE SUBMITTED
WITH PETITIONER'S SUPPLEMENTAL BRIEFING PURSUANT TO
37 C.F.R. § 42.64(b)(1)**

¹ Case IPR2017-01019 has been consolidated with the instant proceeding.

Patent Owner objects to the admissibility of the following evidence cited regarding the newly-added challenges to claims 7-10 and submitted by Petitioner with Petitioner's Reply to Patent Owner's Supplemental Response Addressing Claims 7-10 (Paper 40). 37 C.F.R. § 42.64. These objections are made within five (5) business days of service of the evidence (June 26, 2018) to which the objections are directed. 37 C.F.R. § 42.64(b)(1). Patent Owner asks the Patent Trial and Appeal Board to deny the admission and consideration of the following testimony and document on the bases asserted below. Patent Owner also reserves its right to submit a motion to exclude the documents referenced in accordance with the Board's Order of May 8, 2018 (Paper 33).

I. Exhibit 1127 – Transcript of the Deposition of Dr. Jay T. Rubinstein on June 20, 2018

Patent Owner objects to the admissibility of specific opinions included in the transcript of the deposition of Dr. Jay T. Rubinstein on June 20, 2018 (Exhibit 1127) under Fed. R. Evid. 702 and for lack of foundation. Dr. Rubinstein's specific opinions related to the design of transducers for bone-anchored hearing aids are inadmissible because they are speculative and lack proper foundation. (Ex. 1127, 19:16-20:17, 26:13-28:1.) Dr. Rubinstein has not held himself out to be an expert on designing transducers for bone-anchored hearing aids and explicitly indicated that his testimony regarding the design of transducers for bone-anchored

hearing aids was speculative—“[N]ot being someone who designs transducers for bone-anchored hearing aids, I could only speculate about some of them.” (Ex. 1127, 20:9-11.) As such, those specific opinions (Ex. 1127, 19:16-20:17, 26:13-28:1) are inadmissible under Fed. R. Evid. 702 and for lack of foundation.

II. Exhibit 1131 – Stenfelt, Stefan et al., “A bone-anchored hearing aid for patients with pure sensorineural hearing impairment,” *Scandinavian Audiology*, Vol. 29, pp. 175-185 (2000)

Patent Owner objects to the admissibility of Exhibit 1131 as being introduced for the first time in Petitioner’s Reply to Patent Owner’s Supplemental Response Addressing Claims 7-10 (Paper 40), and not in the first instance in the Petition, in violation of 37 C.F.R. § 42.23(b). “[A] reply that raises new issues or belatedly presents evidence will not be considered and may be returned.” Office Patent Trial Guide, 77 Fed. Reg. 48,756, 48,767 (Aug. 14, 2012).

In the Petition, Petitioner asserted that claim 10 of the ‘040 patent is unpatentable under pre-AIA 35 U.S.C. § 103(a) as being obvious over Vaneecloo (Ex. 1003) in view of Carlsson (Ex. 1007), Leysieffer (Ex. 1009) and Lesinski (Ex. 1018). (Paper 1 of IPR2017-01018 at 55.) For the first time in the Petitioner’s Reply to Patent Owner’s Supplemental Response Addressing Claims 7-10 (Paper 40), Petitioner now cites to “earlier disclosure of incorporating a directional microphone in a bone-anchored hearing device. *See, e.g.*, Ex. 1131, including 1131-004.” (Paper 40 at 7.) Exhibit 1131 was not cited or discussed in the petition

addressing claim 10. This exhibit was required to be included in the petition so that Patent Owner would have a full and fair opportunity to respond to it. 37 C.F.R. § 42.104(b)(4) (“The petition must specify where each element of the claim is found in the prior art patents or printed publications relied upon[.]”); 37 C.F.R. § 42.104(b)(5) (“[The petition must] identify[] specific portions of the evidence that support the challenge. The Board may exclude or give no weight to the evidence where a party has failed to state its relevance or to identify specific portions of the evidence that support the challenge.”)

Dated: July 3, 2018

Respectfully submitted,
SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By: /s/Laura M. Burson

Bruce G. Chapman (Registration No. 33,846)

Laura M. Burson (Registration No. 40,929)

Attorneys for Patent Owner

COCHLEAR BONE ANCHORED SOLUTIONS AB

CERTIFICATION OF SERVICE

(37 C.F.R. §§ 42.6(e)(1, 3), 42.105(a))

The undersigned hereby certifies that the above-captioned “*PATENT OWNER’S OBJECTIONS TO EVIDENCE SUBMITTED WITH PETITIONER’S SUPPLEMENTAL BRIEFING PURSUANT TO 37 C.F.R. § 42.64(b)(1)*,” was served in its entirety on July 3, 2018, upon the below-identified counsel for Petitioners Oticon Medical AB, Oticon Medical LLC, William Demant Holding A/S via electronic service:

D. Richard Anderson
BIRCH, STEWART, KOLASCH & BIRCH, LLP
8110 Gatehouse Road, Suite 100E
Falls Church, VA 22042
dra@bskb.com
Mailroom@bskb.com

Date: July 3, 2018

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By: /s/Laura M. Burson

Bruce G. Chapman (Registration No. 33,846)

Laura M. Burson (Registration No. 40,929)

Attorneys for Patent Owner

COCHLEAR BONE ANCHORED SOLUTIONS AB

333 South Hope Street, 43rd Floor
Los Angeles, California, 90071-1422
(213) 620-1780

SMRH:486937811.1