

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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1964 EARS, LLC,  
Petitioner,

v.

JERRY HARVEY AUDIO HOLDING, LLC,  
Patent Owner.

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Case IPR2017-01091 (Patent 8,925,674 B2)  
Case IPR2017-01092 (Patent 9,197,960 B2)

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Before RAMA ELLURU, and JOHN F. HORVATH,  
*Administrative Patent Judges.*

ELLURU, *Administrative Patent Judge.*

ORDER  
Conduct of Proceeding  
*37 C.F.R. § 42.5(a)*

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Case IPR2017-01092 (Patent 9,197,960 B2)

A teleconference was held on September 13, 2018, between counsel for Petitioner, 1964 Ears, LLC, counsel for Patent Owner, Jerry Harvey Audio Holding, LLC, and Judges Elluru and Horvath. The parties made the following requests.

#### *Patent Owner Requests*

Patent Owner initially requests authorization to file a motion to strike Petitioner's Supplemental Replies to Patent Owner's Supplemental Responses. Paper 58.<sup>1</sup> Patent Owner contends that the replies are out of scope because the Supplemental Responses do not assert any new evidence or raise any new arguments. *See* Papers 20, 57. Thus, contends Patent Owner, there is nothing to which the Supplemental Replies can properly respond. *See* 37 C.F.R. 42.23(b) ("A reply may only respond to . . . patent owner response.").

We deny Patent Owner's requested authorization to file a motion to strike Petitioner's Supplemental Replies to Patent Owner's Supplemental Responses in each of these proceedings. We can discern whether the Supplemental Replies are out of scope upon review, and will give proper weight to the Supplemental Replies based on that determination in our Final Written Decisions.

In the alternative, Patent Owner requests authorization to file Supplemental Sur-Replies to Petitioner's Supplemental Replies to Patent Owner's Supplemental Responses. Petitioner does not generally object to the

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<sup>1</sup> We cite to papers in IPR2017-01091 for convenience. Similar papers are filed in IPR2017-01092.

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filing of Sur-Replies but notes that we have the discretion to deny authorization under the Trial Practice Guide Update.

The August 2018 Update to the Trial Practice Guide<sup>2</sup> (“Trial Practice Guide Update”) states that “[s]ur-replies to principal briefs (i.e., to a reply to a patent owner response or to a reply to an opposition to a motion to amend) normally will be authorized by the scheduling order entered at institution.” Trial Practice Guide Update 14. The Trial Practice Guide Update further states that its “sur-reply practice essentially replaces the previous practice of filing observations on cross-examination testimony.” *Id.* The current Revised Scheduling Orders set Due Date 11 as October 31, 2018. Paper 53. DUE DATE 11 is for “[o]bservations[s] regarding cross-examination of supplemental reply witness.”

We determine Patent Owner’s request is consistent with the Trial Practice Guide Update, and that request is granted in lieu of the filing of observations. Patent Owner’s Supplemental Sur-Replies shall be subject to the limits discussed in the Trial Practice Guide Update, including that the Supplemental Sur-Replies may only respond to arguments made in Petitioner’s Supplemental Reply briefs, comment on Supplemental Reply declaration testimony, or point to cross-examination testimony; and may not be accompanied by new evidence other than deposition transcripts of the cross-examination of any reply witness. Trial Practice Guide Update 14–15. In addition, Patent Owner’s Supplemental Sur-Replies are subject to the same word limit as Petitioner’s Supplemental Replies. *Id.* at 6. Patent

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Owner's Supplemental Sur-Replies shall be filed by Due Date 11.

*Petitioner's Request*

Petitioner requests expungement of Patent Owner's Objections to Admissibility of Evidence submitted by Petitioner. *See* Paper 60. Petitioner argues a motion to exclude based on these objections will lack merit.

Petitioner does not identify any authority for the proposition that Patent Owner requires authorization to file a motion to exclude.

We deny Petitioner's request to expunge Patent Owner's Objections to Admissibility of Evidence submitted by Petitioner. We will resolve any motion to exclude based on the merits if any such motion is filed in these proceedings.

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For the foregoing reasons, it is

ORDERED that Patent Owner's request for authorization to file a motion to strike Petitioner's Supplemental Replies to Patent Owner's Supplemental Responses in each of these proceedings is *denied*;

FURTHER ORDERED that Patent Owner's request to file Supplemental Sur-Replies by Due Date 11 in each of these proceedings, in lieu of the filing of observations, is *granted*;

FURTHER ORDERED that Due Date 12 is revised to include only "Opposition to motion to exclude"; and

FURTHER ORDERED that the Revised Scheduling Orders in these cases are unchanged in all other respects.

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