

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 IPR2017-01092  
Patent 9,197,960 B2

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

HORVATH, *Administrative Patent Judge*.

REVISED EXTENDED SCHEDULING ORDER  
*37 C.F.R. § 42.5(a)*

## A. DUE DATES

This order sets due dates for the parties to take action during the supplemental briefing period of the previously non-instituted ground in this proceeding.<sup>1</sup> The due dates set forth in this Order cannot be changed without prior authorization from the Board.

The parties are reminded that the Testimony Guidelines appended to the Office Patent Trial Practice Guide, 77 Fed. Reg. 48,756, 48,772 (Aug. 14, 2012) (Appendix D), apply to this proceeding. The Board may impose an appropriate sanction for failure to adhere to the Testimony Guidelines. 37 C.F.R. § 42.12. For example, reasonable expenses and attorneys' fees incurred by any party may be levied on a person who impedes, delays, or frustrates the fair examination of a witness.

### 1. DUE DATE 7

The patent owner may file—

a. A supplemental response to the petition (37 C.F.R. § 42.120), limited to the merits of the previously non-instituted ground, and to 5000 words.

b. A supplemental motion to amend the patent (37 C.F.R. § 42.121), limited to 3 pages and claim 12

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<sup>1</sup> Claim 12 as obvious over Saggio and von Dombrowski; and, claim 12 as obvious over Harvey '806 and von Dombrowski. *See* Paper 51 (determining that Petitioner has not shown, by a preponderance of evidence, that claim 8 of the '960 patent is unpatentable as anticipated by Harvey '806; claims 6, 7, and 9–18 of the '960 patent are unpatentable as obvious over Saggio & Dahlquist; and, claim 9 of the '960 patent is unpatentable as anticipated by Dombrowski).

The patent owner must file any such supplemental response or supplemental motion to amend by DUE DATE 7. The patent owner is cautioned that any arguments for patentability not raised in the supplemental response will be deemed waived.

2. DUE DATE 8

The petitioner must file any reply to the patent owner's supplemental response, limited to 5000 words, and any opposition to the supplemental motion to amend, limited to 3 pages, by DUE DATE 8.

3. DUE DATE 9

The patent owner must file any reply to the petitioner's opposition to the supplemental motion to amend, limited to 2 pages, by DUE DATE 9.

4. DUE DATE 10

The petitioner must file any sur-reply to the patent owner's reply to the opposition to the supplemental motion to amend, limited to 2 pages, by DUE DATE 10.

5. DUE DATE 11

a. Each party must file any motion for an observation on the cross-examination testimony of a supplemental reply witness (*see* section B, below) by DUE DATE 11.

b. Each party must file any motion to exclude evidence in connection with the previously non-instituted ground (37 C.F.R. § 42.64(c)) and any request for oral argument (37 C.F.R. § 42.70(a)) by DUE DATE 11.

6. DUE DATE 12

a. Each party must file any response to an observation on cross-examination testimony of a supplemental reply witness by DUE DATE 12.

b. Each party must file any opposition to a motion to exclude evidence in connection with the previously non-instituted ground by DUE DATE 12.

7. DUE DATE 13

Each party must file any reply for a motion to exclude evidence in connection with the previously non-instituted ground by DUE DATE 13.

8. DUE DATE 14

Oral argument (if requested by either party) is set for DUE DATE 14.

B. CROSS-EXAMINATION

Except as the parties might otherwise agree, for each due date—

1. Cross-examination begins after any supplemental evidence is due. 37 C.F.R. § 42.53(d)(2).

2. Cross-examination ends no later than a week before the filing date for any paper in which the cross-examination testimony is expected to be used. *Id.*

C. MOTION FOR OBSERVATION ON CROSS-EXAMINATION

A motion for observation on cross-examination provides the parties with a mechanism to draw the Board's attention to relevant cross-examination testimony of a reply witness because no further substantive paper is permitted after the reply. *See* Office Patent Trial Practice Guide, 77 Fed. Reg. at 48,756. The observation must be a concise statement of the

IPR2017-01092  
Patent 9,197,960 B2

relevance of precisely identified testimony to a precisely identified argument or portion of an exhibit. Each observation should not exceed a single, short paragraph. The opposing party may respond to the observation. Any response must be equally concise and specific.

#### D: MOTION TO EXCLUDE

A Motion to Exclude should only be used to address admissibility issues under the Federal Rules of Evidence. If a party contends the scope of any paper is beyond its proper scope (e.g., a reply that raises issues not raised in an opposition, or a sur-reply that raises issues not raised in a reply), the party shall initiate a conference call with the Board within 5 business days of the date the paper was filed.

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