

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

PEAG LLC (d/b/a JLab Audio), AUDIO PARTNERSHIP LLC and
AUDIO PARTNERSHIP PLC (d/b/a Cambridge Audio),
Petitioner,

v.

VARTA MICROBATTERY GMBH,
Patent Owner.

Case No. IPR2020-01212
U.S. Patent No. 9,153,835 B2

**PATENT OWNER'S MOTION TO EXCLUDE EVIDENCE
UNDER 37 C.F.R. § 42.64(c)**

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I. INTRODUCTION

Petitioner's Supplemental Declaration of William H. Gardner (Ex. 1041, "Gardner's Supplemental Declaration") presents new opinions and theories that were not provided in the Petition. Pursuant to 37 C.F.R. §§ 42.23(b), 42.61, 42.62, and 42.64(c) and Federal Rules of Evidence 401–403, Patent Owner respectfully moves to exclude Sections III–VI of Mr. Gardner's Supplemental Declaration.

Mr. Gardner's Supplemental Declaration is not a reply declaration. He did not cite or even indicate that he reviewed the Declaration of Patent Owner's expert, Dr. Peckerar, (Ex. 2043). *See* Ex. 1041, ¶ 4; Ex. 2051, 31:5–32:5. Mr. Gardner's Supplemental Declaration attempts to fill gaps in Petitioner's obviousness grounds set forth in the Petition. He provides new opinions and theories that a POSA would have been motivated to combine Kaun (Ex. 1005) and Kobayashi (Ex. 1006) and would have expected success in making the combination. This new evidence could have been presented in his original declaration and should be excluded. *See Belden Inc. v. Berk-Tek LLC*, 805 F.3d 1064, 1081 (Fed. Cir. 2015) (“[A] party may move to exclude evidence, whether as improper under the response-only regulation, under the Trial Practice Guide's advice, or on other grounds.”).

II. MR. GARDNER'S SUPPLEMENTAL DECLARATION (EXHIBIT 1041) SHOULD BE EXCLUDED

Mr. Gardner's Supplemental Declaration was submitted in reply to Patent Owner's Response. Petitioner relied on the Supplemental Declaration to support new arguments that should have been made in the Petition, not for the first time in Petitioner's Reply. *See* 37 C.F.R. § 42.23(b); P.T.A.B. Consolidated Trial Practice Guide, at 74–5 (Nov. 2019), (“Trial Practice Guide”); *Intelligent Bio-Sys., Inc. v. Illumina Cambridge Ltd.*, 821 F. 3d 1359, 1370 (Fed. Cir. 2016). Those portions of the Reply and supporting Supplemental Declaration (Sections III–VI) are not relevant to the instituted grounds of review. FED. R. EVID. 401, 402. The belatedly presented evidence and arguments should also be excluded as unfairly prejudicial, *see* FED. R. EVID. 403, at least because the undue delay prevented Patent Owner from fully responding to them prior to the institution decision and significantly truncated the amount of time available to Patent Owner to address the belated evidence and arguments in its Sur-Reply.

A. New Opinions Concerning Motivation to Combine Kaun With Kobayashi's Separator—Dendrites

The Petition (supported by Mr. Gardner's original Declaration, Ex. 1003) argued that a POSA would have understood the z-shaped separator in Kaun's battery design to have overlapping edges. Pet. (Paper 1) at 34–37; Ex. 1003, ¶¶ 135–138. Petitioner argued that a POSA would have been motivated to

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